In The House of Lords

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

(ENGLAND AND WALES)

BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

(1) WAYOKA LIMBUELA

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

(2) BINYAM TEFERA TESEMA

Respondent

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

(3) YUSIF ADAM

Respondent

WRITTEN INTERVENTION ON BEHALF OF THE INTERVENERS (JUSTICE AND LIBERTY)

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1. INTRODUCTION

1. The Interveners are grateful to Your Lordships for granting permission to intervene in writing in this important appeal, which has ramifications for the law generally going well beyond the particular context.

2. This appeal concerns the meaning and application of section 55 of the Nationality, Immigration and Asylum Act 2002 ("NIA"). That section has the following effect:

    a. First, under section 55(1), it disables the Secretary of State from providing, or arranging the provision of *any* support if a person (essentially an able-bodied adult)

        > "(a) … makes a *claim for asylum* which is recorded by the Secretary of State, and
        >
        > (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom." (emphasis supplied)

    This provision is not live in this appeal. None of the respondents challenge the Secretary of State's refusal of support on this basis. Its meaning, and in particular the interpretation of the phrase "as soon as reasonably practicable" was the subject of authoritative decision by the Court of Appeal in *R (Q) v SSHD* [2004] QB 36[1] (which was not appealed by the Secretary of State) and that interpretation is not under challenge by the Secretary of State in the present appeal.

    b. Secondly, for the purposes of the section, a "claim for asylum" is defined by section 55(9)[2] in the following terms:

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[1] at paras 37, 40 and 69

[2] By reference to section 18 NIA

> "… a claim by a person that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under –
>
> (a) the (Refugee Convention) (hereafter "CSR"); *or*
>
> (b) *Article 3 of the (European Convention on Human Rights) (hereafter "ECHR"*)." (emphasis supplied)

c. Thirdly, and critically, by section 55(5), the Secretary of State is not prevented from exercising a power (such as the provision of support):

> "to the extent necessary for the purpose of *avoiding* a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998" (emphasis supplied)

d. In accordance with section 6 of the Human Rights Act 1998, this apparent power would in truth have to be exercised in any case where it *is* necessary to avoid a person's Convention rights, since otherwise there would be a breach of the duty in that section.

The Court of Appeal's judgment

3. In this case, the Court of Appeal unanimously held that Article 3 ECHR protects a person against a spectrum of risks, from the paradigm case of unlawful state violence (which admitted of no justification), to executive decisions made pursuant to lawful policy objectives (which fell to be justified)[3].

4. By majority (Laws LJ. dissenting) the Court of Appeal dismissed the Secretary of State's appeals, holding that it was not necessary for a claimant to show the onset of severe illness or suffering, where the evidence established (a) that charitable support in practice was not available, and (b) that he had no other means of fending for himself. In those circumstances, the presumption would

[3] Laws LJ at paras 59-77; Carnwath LJ at para 118; Jacob LJ at para 140

be that suffering of the requisite severity would imminently follow[4]. Laws LJ said that the Secretary of State would not violate Article 3 by declining to act under section 55(5) NIA with the result that a claimant, who was without means of support, but in whose case there were no special considerations, such as age, infirmity, or any other special vulnerability, was put on the streets. In Laws LJ's view, any other approach would emasculate the section[5].

5. Carnwath LJ considered that fairness and consistency required the Secretary of State to formulate policies defining the criteria by which decisions under section 55(5) would be made[6].

6. Carnwath LJ doubted, contrary to earlier Court of Appeal authority, that the enactment and operation of section 55, which forbade the provision of social support (in circumstances where claimants were both forbidden the opportunity to work, and denied recourse to mainstream welfare benefits from local authorities as well as from central government), amounted to "treatment" for the purposes of Article 3[7].

7. Carnwath LJ further considered, again contrary to earlier Court of Appeal authority, that the primary role of the Courts remained one of review, and was essentially limited to clarifying the legal standard required by Article 3, and requiring the Secretary of State to put in place measures designed to ensure that the standard was generally met[8].

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[4] at paras 95, 142

[5] at paras 78, 80

[6] at para 127

[7] at para 116, 117

[8] at para 130

The issues

8. The Interveners propose to focus upon the following issues:

    a. The correctness of Laws LJ's spectrum analysis (endorsed by Carnwath and Jacob LJJ), of risks protected by Article 3, and in particular whether it is appropriate to erect hierarchies of harm protected by Article 3, some of which admit of justification. This issue has potential implications going beyond the immediate context of state support for asylum claimants: it is relevant to the scope of Article 3 generally.

    b. Whether the regime enacted by s.55 NIA – read in its full context – constitutes the subjection of asylum claimants to "treatment" for the purposes of Article 3 ECHR so as to engage the negative obligation in that Article[9];

    c. The proper role of the Courts in relation to decisions of the Secretary of State concerning Article 3[10];

    d. The correctness of a 'wait and see' approach contended for by the Secretary of State and endorsed by Laws LJ, on the basis that any other approach would emasculate the section[11].

9. However, these questions cannot be considered in a vacuum. Accordingly, before the Interveners develop submissions on them, they propose (1) to outline the legislative history of section 55, so as to explain how the present position has been reached; and (2) to examine the context in which section 55 operates. Both the legislative history and the context are relevant to the

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[9] paras 1(a)-(c) Agreed Statement of Facts and Issues ("SFI")

[10] Para 1(h) SFI

[11] Para 1(g) SFI

question of the engagement of Article 3 and its potential breach; discussion of both is, with respect, conspicuously absent in the Secretary of State's printed Case.

2. THE LEGISLATIVE HISTORY

10. The legislative genesis of section 55, which has the effect of depriving certain members of a vulnerable minority class of asylum claimants of all state benefits, may be traced to 1996. Then, in *R v Secretary of State ex p. JCWI* [1997] 1 WLR 275 the Court of Appeal quashed regulations made by the Secretary of State[12] removing entitlement to urgent cases support from those seeking asylum otherwise than immediately on arrival and from all claimants pending appeal from an adverse determination by the Secretary of State. The Court held that the effect of the regulations was to render the rights of this class of asylum claimants to pursue their claims nugatory – they would either be forced to abandon their claims to refugee status or alternatively to maintain them in a state of utter destitution.

11. The Government responded by promoting primary legislation which had the effect which the quashed 1996 regulations had sought to achieve[13]. However, in *R v Westminster City Council ex p. M and Others* (1997) 1 CCLR 85, the Court of Appeal held that a safety net was available: adult asylum claimants without children were able to claim "care and attention" under section 21 of the National Assistance Act 1948 if they would be otherwise destitute, even though they were not entitled to welfare benefits. The Court also held that the local authority could *anticipate* the deterioration that would otherwise ensue in deciding whether to grant support.

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[12] The Social Security (Persons From Abroad) Miscellaneous Amendments Regulations 1996, SI 1996/30, made under ss.135, 137 and 175 Social Security Contributions and Benefits Act 1992

[13] Section 11 Asylum and Immigration Act 1996

12. In 1999, the regime was again changed by the amendment of section 21 National Assistance Act 1948[14]: persons subject to immigration control whose need for care and attention arose solely because they were destitute or because of the effects or anticipated effects of being destitute were excluded. Such persons, however, were provided with a replacement safety net under a regime of support set up by section 95 of the Immigration and Asylum Act 1999, which enabled the Secretary of State, through the National Asylum Support Service ("NASS"), to provide support to a person who appeared to him to be or to be *likely to become* destitute (s.95(1)). By regulation 6(4) of the Asylum Support Regulations 2000 (SI 20000/704) the Secretary of State was required to take into account "any other support which is available ..".

13. The present provision in section 55 of the 2002 Act thus marks the final chapter in the removal of certain classes of asylum claimants from the mainstream benefits regime in 1996, the removal from the safety net provisions of the 1948 Act, and now, the removal from the safety net provision under section 95 administered by NASS.

14. It is, however, plain that Parliament in enacting these ostensibly draconian provisions contemplated that the power to deprive a certain class of asylum claimant from all benefits was to be construed and implemented in a manner that was compatible with human rights: section 55(5) 2002 Act. This feature of the legislation is important as regards (1) the test to be applied under Article 3 and its relationship to the disabling provision in section 55(1); and (2) to the role of the courts in adjudicating upon Article 3 breaches.

3. THE CONTEXT

15. Section 55 needs to be considered in its proper context. First, asylum claimants under the CSR, and claimants under Article 3 ECHR, are exercising

[14] section 116 Immigration and Asylum Act 1999

rights recognised in international instruments[15], and domestic law[16]. Under the CSR, asylum claimants are refugees as soon as they satisfy the definition of that term: a decision on their status does not confer that status, it simply recognises it[17]. In that sense asylum claimants can be said to enjoy rights set out in the CSR presumptively, such as the prohibition on refoulement in Article 33. Equally, Article 3 claimants may not be removed pending a decision on their claims: see *Cruz Varas v. Sweden* (1991) 14 EHRR 1*; Mamatkulov v. Turkey* (Application No. 46827/99, Judgment 4 February 2005) because otherwise irreparable harm may flow.

16. Secondly, international law requires there to be access to reasonably efficacious procedures of asylum determination for refugees[18]. Equally Article 13 ECHR requires the Article 3 claimant to have an effective remedy[19]. However, the CSR imposes no procedural regime for refugee status determination upon States Parties. The refugee claimant thus has no control over the time taken for a determination of his status, and no control over the location and timing of interviews. Equally, since Article 6 does not in general apply to decisions concerning immigration (see *Maaouia v. France* (2001) 33 EHRR 42), the Article 3 claimant cannot claim a right to a prompt hearing under Article 6 ECHR.

17. Thirdly, asylum claimants (both under the CSR and the ECHR) in the United Kingdom are prevented by legislation from being employed unless they have written permission to work from the Home Office: section 8(1) Asylum and

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[15] eg. under Article 14 Universal Declaration of Human Rights

[16] Sections 77, 78, 82 and 84 NIA 2002.

[17] UNHCR Handbook, para. 28.

[18] *Saad, Diriye and Osorio v. SSHD* [2002] INLR 34, at 38, para. 12 (Lord Phillips MR). It is a principle of legal policy that municipal law should conform to public international law, and Parliament is presumed to have observed this principle: ibid., at 39, para. 15.

[19] The justification for omitting to schedule Article 13 as a Convention right for the purposes of the Human Rights Act 1998 was that the Act itself was intended to provide that which Article 13 seeks to guarantee.

Immigration Act 1996 and Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225). Therefore, they cannot work to support themselves.

18. Fourthly, as the Court of Appeal noted in *R v. Secretary of State for Social Security, ex p. JCWI* [1997] 1 WLR 275, the asylum claimant is likely to be without family, friends or contacts. As the Court of Appeal recognised in *R v. Westminster CC, ex p. M and Others* (1997) 1 CCLR 85, the asylum claimant is also likely to be unable to speak English as a first language, and will be subject to the stress of flight, and the inexperience of life in the United Kingdom.

19. Exclusion from eligibility for all state support in this context is bound to lead to rights to effective determination of their claims to protection under the CSR and ECHR being "overborne".[20]

20. It is against this background that the legal issues fall to be determined. The background demonstrates (1) a sustained and active legislative programme culminating in an Act intending (at first sight) to deprive a certain class of asylum claimant from *all* state benefit; (2) in a context where that class is exercising a fundamental human right recognised in international and domestic law, and where the courts have repeatedly observed that such deprivation will interfere with the exercise of that right.

4. ARTICLE 3: A SPECTRUM ANALYSIS OR POSITIVE AND NEGATIVE OBLIGATIONS?

Summary

21. The Interveners would respectfully submit that it is neither helpful nor appropriate to erect hierarchies of species of harm within Article 3, and to

[20] *JCWI* at p.293C

reason that while in the paradigm case of State sponsored violence, no justification is permitted, in other cases, a justification may be advanced.

22. This approach is unwarranted in principle and unsupported by authority. The jurisprudence establishes that where harm may result from positive acts of the State, a negative obligation is engaged. As the Court of Appeal said in the first of the three cases to reach it on section 55, *R (Q) v SSHD* [2004] QB 36, at [54], this obligation is absolute and "*constant*" in the sense that it is not amenable to justification. This is the "clear and constant jurisprudence" of the Court of Human Rights, and any departure from that jurisprudence must be justified by "special circumstances": *R (Alconbury Developments Ltd.) v. SSHD* [2003] 2 AC 295, 313 at paragraph 26 (Lord Slynn). Or, as Lord Bingham put it in *R (Ullah) v. Special Adjudicator* [2004] 2 AC 323 at paragraph 20:

> " .. a national court subject to a duty such as that imposed by section 2 (Human Rights Act 1998) should not without strong reason dilute or weaken the effect of the Strasbourg case law."[21]

The consequence of Laws LJ's reasoning is to dilute the effect of that jurisprudence, without strong reason to do so.

23. Where the harm results from acts of third parties or conditions obtaining generally against which the state is required to take protective action, a positive obligation may arise, and considerations of proportionality will be relevant. Contrary, with respect, to some indications in the domestic case-law[22], proportionality will be relevant to determine the scope of the positive obligation, rather than to justify what would otherwise be a breach of it. In strict terms, a breach of Article 3, whether in its positive or negative manifestation, may never be justified.

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[21] This was followed in *N v. SSHD* [2005] 2 WLR 1124 by Lord Hope at [24]

[22] See eg. Lord Bingham in *Pretty* (below) at p. 817, para 15 "… the steps appropriate or necessary to *discharge* .. a positive obligation will be more judgmental …" (emphasis supplied)

24. In the Interveners' submission, the fact that treatment results from lawful policy objectives is irrelevant, provided that the threshold of severity is crossed. While an unlawful (say, racially discriminatory) policy objective may be *sufficient* to constitute a violation of Article 3, it is not necessary, and its absence cannot be used to heighten the (already demanding) threshold that is required to be met. Any other approach yields a margin of toleration for serious harm arising from executive policy that has the result, but not the exclusive design, of causing that harm. Again, this dilutes the effect of the Strasbourg jurisprudence and is not permissible. Moreover, if the policy objective were unlawful, it would be quashed on ordinary public law grounds; there would be no need for reliance upon human rights.

25. In the Interveners' respectful submission, the threshold varies not with the kind and source of harm visited upon the individual, but rather with the personal features of the individual against the objective circumstances of the case. And once the threshold is reached, there is, in a negative obligation case, no room for balancing, whatever the State's motive.

26. Finally, as the courts have long recognised, the foreseeable result of the policy in issue here is to interfere with fundamental rights, including Article 3. The Court of Human Rights has frequently implied rights into the substance of ECHR Articles to render their protection practical and effective, to promote future compliance and to deter potential breaches. All three considerations here point towards an expansive approach to Article 3 in the context of section 55(5). All three considerations tend against the approach of Laws LJ, namely that Article 3 would only operate to provide support in an extreme or exceptional case.

Violence, lawful policies and interference with Article 3

27. In *Pretty v United Kingdom* (2002) 35 EHRR 1, 32-33, the European Court of Human Rights reasoned:

> "49. Article 3 of the Convention, together with Article 2, must be

> regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe. In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under Article 15 of the Convention.
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> 50. An examination of the court's case law indicates that *Article 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of state agents or public authorities.* It may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise.
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> 51. In particular, the court has held that the obligation on the high contracting parties under Article 1 of the Convention to secure to everyone within the jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals. A positive obligation on the state to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example, the above-cited *A v United Kingdom* (1998) 27 EHRR 611, 629, para 22 where the child applicant had been caned by his stepfather, and *Z v United Kingdom* (2001) 34 EHRR 97, where four child applicants were severely abused and neglected by their parents. It also imposes requirements on state authorities to protect the health of persons deprived of liberty." (emphasis supplied).

28. The Interveners would observe that in the italicized passage at para. 50 of *Pretty* above, the reference made by the Court was to “intentionally inflicted acts of state agents”, not to violence. The Interveners would submit that the present context precisely concerns ‘intentionally inflicted acts of state agents’ albeit pursuant to state policy.

29. In a passage which supports the proposition that the touchstone for the legality of executive policy is governed by the doctrine of negative and positive obligations, rather than the derivation and nature of the harm, the Court of

Appeal in *R (Q) v SSHD* [2004] QB 36 observed at [55] that:

> **"**The distance between positive and negative obligation is thus not necessarily great. But the distinction is still real, not least because of its potential consequences for state policy."

30. This is in contrast with the approach of Laws LJ at para 68:

> "Whereas state violence (other than in the limited and specific cases allowed by the law, which I have described) is always unjustified, acts or omissions of the state which expose persons to suffering other than violence (at anyone's hands), even suffering which may in some instances be as grave from the victim's point of view as acts of violence which would breach article 3, are not categorically unjustifiable. They may be capable of justification if they arise in the administration or execution of lawful government policy; and if they do not so arise, they are liable to be struck down by the courts on conventional judicial review grounds irrespective of the impact of the Convention. But even if the act or omission happens in the pursuance of lawful policy, article 3 still offers protection against suffering, albeit not occasioned by violence, where the suffering is sufficiently extreme."

31. An act or omission which (1) emanates from the state and (2) exposes the victim to non-violent suffering and which, from the victim's point of view is so grave as to amount to a breach of Article 3, is categorically unjustifiable. What may be justifiable, by reference to the principle of proportionality, is (a) the legislative steps which the state may have failed to take to prevent breaches of the Article; (b) the operational steps which the state authorities may have failed to take to prevent a breach. But those failures do not touch on the primary engagement of the Article, which speaks to the causal connection between the state's act and its consequence of exposing the individual to sufficiently severe suffering. If the causal connection is made out, the breach may not be justified.

32. Moreover, where the impact of the lawful policy is to intrude on the pursuit of fundamental rights, such as the right to claim asylum under the CSR or protection under Article 3 ECHR, it is with respect difficult to imagine that the Court of Human Rights would sanction an approach which yields protection

only in a minority of "extreme" cases. The approach of the Court has been to imply into Article 3 rights so as to render the protection granted by Article 3 more effective and to promote future compliance with its terms[23]. The very obligation not to expel a non-national where there is a real risk that Article 3 ill treatment may eventuate was implied (as a negative obligation) into Article 3 in *Soering v. United Kingdom* (1989) 11 EHRR 439 to render its protection practical and effective (see para 87). It would be anomalous for the court to imply the *Soering* right into Article 3 on this basis, but then to permit its exercise to become theoretical and illusory by allowing significant freedom of action to a State to adopt legislative policies which undermined its pursuit, especially when the State had entered the arena by disenabling the Article 3 claimant from both employment and all state support.

33. The position is *a fortiori* that as regards Article 6, where the Court has implied a right of access to court[24], and a right to funding for vindication of that right[25] because (1) Article 3 is regarded as more fundamental than Article 6 (for example, unlike Article 6, it may not be derogated from under Article 15); and (2) there was no question of the putative Article 6 litigant being barred from both employment and all support.

34. Moreover, expulsions are carried out pursuant to lawful government policy in respect of which the State enjoys, under public international law, a long standing right and considerable latitude. The relevant act, for ECHR purposes, is the intra-territorial expelling act. There will (save in a *de minimis* minority of cases) be no violence associated with that act. Yet the Court of Human Rights has (1) since 1989 applied a real risk test, which (2) since 1996[26] has been recognised to be absolute, in order to assess whether the otherwise lawful

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[23] *Assenov v. Bulgaria* (1998) 28 EHRR 652 (investigative duty); *A v. UK* (1998) 27 EHRR 611 (duty to promote laws) *Z v. United Kingdom* (2002) 34 EHRR 3 (operational measures)

[24] *Golder v. United Kingdom* (1979-80) 1 EHRR 525

[25] *Airey v. Ireland* (1979-80) 2 EHRR 305

[26] *Chahal v. United Kingdom* (1996) 23 EHRR 413 paras 80-81

act of removal is prohibited. No margin of appreciation is granted to the State, in recognition of its lawful immigration policy objective, in an Article 3 expulsion case.

35. Further, no special rule may be applied to immigrants, still less asylum claimants. The engagement of the ECHR does not even depend on lawful presence (*D v. United Kingdom*), and since 1986[27] it has not been, and could not be, argued that immigrants are outwith the protection of the ECHR.

36. Policy considerations may also arise in the context where a court requires a witness to attend to give evidence. This was the position in *R (A) v Lord Saville of Newdigate* [2002] 1 WLR 1249. In that case, the Court of Appeal considered the legality of the 'Bloody Sunday' Inquiry's decision that soldier witnesses should give evidence in Northern Ireland rather than (as they wished) in London. The soldiers relied on Article 2 of the ECHR. One of the tests which was canvassed was that taken from *Osman v UK* (1998) 29 EHRR 245 where the European Court had recognised that there was implicit in Article 2 a positive obligation on a state to take measures to protect someone where there was a 'real and immediate' risk to life of which it had actual or constructive knowledge. In *Lord Saville* the Court of Appeal said at [28],

> "Of one thing we are quite clear. The degree of risk described as "real and immediate" in *Osman v. United Kingdom* 29 EHRR 245, as used in that case, was a very high degree of risk calling for positive action from the authorities to protect life. It was "a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party" which was, or ought to have been, known to the authorities: p 305, para 116. Such a degree of risk is well above the threshold that will engage Article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. It was not an appropriate test to invoke in the present context."

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[27] *Abdulaziz and Ors. v. United Kingdom* (1985) 7 EHRR 471

37. The context is, of course, different from the present case but the Interveners submit that the case shows that the obligations of a Contracting State under Articles 2 and 3 where the state takes positive action (and where, therefore, the negative obligations in the Convention are in issue) are more demanding than where the risk arises independently of any action which it takes (and where the only Convention obligations are implied positive obligations). The crucial distinction is State activity, in contrast to passivity, rather than State violence in contrast to private actor violence.

38. This principle is perhaps more clearly demonstrated in two prison cases where there are obvious policy imperatives engaged.

39. First, *Keenan* is powerful support for the proposition that the Strasbourg Court regards the distinction between positive and negative obligations as determinative of the approach to be adopted, and the result which follows. In that case, when dealing with the Article 2 issue, namely the failure to protect Mark Keenan from violence from himself (presumably a 'third party' in Laws LJ's terminology since it was not the State), the Court is clear that this involves a positive obligation, and therefore the State's conduct must be judged 'in a way which does not impose an impossible or disproportionate burden on the authorities' (para 90), asking only whether the prison authorities did all that could "reasonably" be expected of them (para 97), and finding that 'on the whole, the authorities responded in a reasonable way to Mark Keenan's conduct' and dismissing the links between the authorities' reaction and his death as 'speculative' (para 101).

40. However, when going on to consider, under Article 3, the conditions of his detention and the imposition of a punishment of further segregation and detention, the Court's tone changes considerably. Although the Court speaks of "an obligation to protect the health of persons deprived of liberty" (para 111), it is clear that where detention is concerned, the act of the State in

detaining constitutes 'treatment' and makes the obligation a negative one.[28] When dealing with the Article 3 complaint, therefore, there is no reference by the Court to burdens on the authorities or what could 'reasonably be expected'. The Court is extremely critical of the lack of full and detailed medical notes and failure to refer to a psychiatrist, with no acknowledgment of the problems of resources or administration or the difficulties of assessing the mentally ill (paras 114-5). Problems of causation (it being unclear to what extent Mr. Keenan's distress was caused by conditions of detention rather than his underlying mental condition) are rebuffed on the grounds that Article 3 protects the fundamental human dignity of the mentally ill even without the showing of specific ill-effects (para 113). The imposition of further detention and segregation in the light of Mr. Keenan's condition and the lack of effective monitoring and informed psychiatric input breached Article 3, even though punishment was plainly a legitimate policy objective, and in many other cases it would no doubt have been quite acceptable. No 'balancing' or 'reasonableness' tests applied. The distinction between the approach to positive and negative obligations is illustrated most starkly in the concurring opinion of Judge Costa:

> "In my opinion, and however delicate the assessment which the prison authorities had to make, the confinement of the applicant and the sentence to a further four weeks in prison when he had only days left before the expected date of his release constituted treatment and punishment contrary to Article 3, having regard to Keenan's personality…..

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[28] See also *Price v United Kingdom* (2002) 34 EHRR 53 (para 30), *McGlinchey v United Kingdom* (2003) 37 EHRR 41 (paras 57-58). In *Pretty v UK*, the Court speaks of the requirement to protect the health of persons deprived of liberty in its paragraph on positive obligations (para 51), citing *Keenan*. This, however, simply tracks its (correct) citation of *Keenan* as a positive obligation case in the comparable paragraph dealing with a2 (para 38), and also reflects the Government's submissions (para 38). It is therefore perhaps a less reliable guide as to the Court's approach than the prison cases themselves. In *McGlinchey*, the Court speaks of the 'failure' to meet required standards and provide medical care and take effective steps (para 57), but then concludes that "the prison authorities' *treatment* of Judith McGlinchey *contravened the prohibition* against inhuman or degrading treatment contained in Article 3 of the Convention" - clearly the language of negative obligations. Contrast this with the findings in the paradigm positive obligation cases of *A v United Kingdom* (above) and *Z v United Kingdom* (above) where the failure to protect led to findings that "there has been a violation of Article 3" (*Z v UK*) and "the failure to provide adequate protection constitutes a violation of Article 3 of the Convention" (*A v UK*).

> ….I would, personally, have reached the same conclusion if the young man had attempted to kill himself without success or if he had manifested his desperation in other ways….. It is not, in my view, Keenan's death which revealed the inhuman nature of what he had endured. The two things are distinct.
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> ….[T]here has not been a violation of Article 2. The positive obligation on the States to take appropriate steps to protect life…..does not appear to me to have been violated in the present case. Mark Keenan was regularly monitored and was given medical treatment in prison. He was also put on 'fifteen minute watches'…..it was impossible to keep him under observation twenty-four hours a day."

41. The case further shows that it is the particular circumstances of the individual, and not the type and source of harm, which dictates whether Article 3 is violated. There was no 'violence' or even "grave ill-treatment" akin to violence used on Mark Keenan, by State agents or anyone else, up to the point where he committed suicide. The violation of Article 3 came before the suicide and would have occurred even if he had 'manifested his desperation in other ways' (Judge Costa) and even though it could not be shown that specific ill-effects were caused (Court, para 113). The violence of the suicide was not determinative, or even relevant, to the breach of Article 3. Furthermore, the actual treatment of the State, namely the imposition of an additional 28 days' sentence and 7 days' segregation, was not objectionable of itself. Rather, it was the *circumstances* that took the case over the Article 3 threshold – the fact that Mark Keenan was suffering from paranoid schizophrenia and reacted very badly to incarceration, the fact he had been inadequately monitored and treated, the fact he had only nine days until his release, and the fact that the punishment was imposed belatedly. Once over that threshold, the justification offered by the Government was irrelevant, as there had been a breach of a negative obligation.

42. However, Laws LJ's spectrum analysis would yield the opposite outcome. The Article 2 aspect of the case, clearly involving violence, would fall close to category (a) (see para 64 *Limbuela*), and thus leave little scope for State discretion or justification. Yet the Court was deferential to the State in its analysis of Article 2, excusing flaws in the authorities' care and

permitting reliance on causation to avoid liability. On Laws LJ's spectrum, the Article 3 aspect of the case would be close to "Point Z". An act of the State exposed the claimant to suffering from circumstances. It was not, when analysed, a case of Article 3 'violence'. The violence Mark Keenan inflicted on himself was not a necessary part of the Article 3 breach. The treatment was not particularly 'degrading' as there was no physical violence used by the State (see para 71 *Limbuela*). The State was not directly responsible for the suffering, which was caused in part by Mark Keenan's own personality. Thus, on Laws LJ's analysis, one might have expected the Article 3 analysis in *Keenan* to have given considerable deference to the State's difficulties in assessing, monitoring and treating mentally ill prisoners and its legitimate objective of consistent punishment for those who breached prison discipline. This, with respect, could not be further from the Court's approach.

43. Secondly, *Price v United Kingdom* (2002) 34 EHRR 53 illustrates the same mismatch in approach between Laws LJ and the Strasbourg Court. The Court held that for a State to take the action of detaining a severely disabled person in conditions where she was dangerously cold, risked developing sores, and was unable to go to the toilet or keep clean without the greatest of difficulty "constituted degrading treatment contrary to Article 3" – and clearly, from the Court's reasoning, in breach of the negative obligation inherent in Article 3 rather than any positive obligation to take steps to protect her.

44. Here, even more clearly than in *Keenan* there was no violence or 'grave ill treatment' meted out to Mrs Price. The 'treatment' given to her by the State was simply to place her in detention, in a cell which would not have caused concern in most cases. It was her personal circumstances that led to her suffering and the Article 3 threshold being crossed. The State's act of detaining her was made in the exercise of a lawful policy of punishing those in contempt of court, and simply exposed her to suffering inflicted by circumstance. Thus on Laws LJ's analysis, the case falls within category 'b', and a considerable way down the scale. The treatment would thus be capable of justification, even if the suffering was as grave as from acts of violence.

The threshold of harm would be high, extreme suffering would be required, and the proffered justification and lawful policy objectives of the State could be expected to be given some considerable deference.

45. Therefore, on Laws LJ's analysis, it would be unlikely that a violation would be found, given the fairly short duration of the suffering (four days, in which Mrs. Price was moved to a *more* suitable, if not suitable, location after the first night), the fact that it was not degrading in a 'telling' sense (see para 71 *Limbuela*), the lack of any intention to humiliate, and the considerations raised by the Government (namely that it was not appropriate for judges to dictate where the applicant should be detained, there were no more suitable cells, there was only one female nurse available, and hospitals would not take Mrs. Price as she had no particular medical complaint). However, the Court found a breach, and made no reference to the lawful objectives of punishing those in contempt of court and protecting judicial discretion and the administration of justice, nor to the difficulties in accommodating the particular needs of Mrs. Price. The fact that the authorities were 'unable to cope' was a fact that contributed to the violation, not a justification that prevented it (see para 26). The approach of the Court was no doubt dictated by the fact that this was a breach of an (absolute) negative obligation, not a (qualified) positive one.

46. The positive obligation case of *Z v. UK* (referred to above in *Pretty)* further illustrates the distinction in theCourt's approach to negative and positive obligation cases. The children involved were subject to horrific neglect from their parents – living for several years without proper food and clothing and in rooms smeared with faeces, forced to pick food from bins and frequently locked out of the house. Their suffering was of a different order to that of Mrs. Price, yet the Court, while finding a clear breach of Article 3, "acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life" in reaching that verdict (para 74). No such balancing exercise is carried out in the negative obligation cases.

47. Furthermore, while the fact that there was a finding of violence

from the parents (paras 49, 74) puts this case somewhere in the middle of Laws LJ's spectrum, it perhaps shows the problems involved in the violence/non-violence distinction to think that, had this finding not been made, the case would slide down to the very bottom of the scale, where the greatest degree of State discretion would be found.

48. In the Interveners' respectful submission, Laws LJ's approach does not accord with that of the ECtHR, in that it places too great an emphasis on the nature and source of the harm, too little emphasis on the distinction between positive and negative obligations, and, crucially, contemplates justification in situations where the ECtHR sees Article 3 as absolute.

49. There are however, some passages in the Strasbourg caselaw which lend some support to Laws LJ's approach, for example recognition that the nature of the harm (*Keenan* para 113 – physical force against those deprived of liberty is in principle a breach of Article 3), the motive of the harmers (*Ivansczuk v Poland* para 52), and the degree of State responsibility (*Bensaid v UK* para 40) can be a factors in assessing whether the Article 3 threshold is crossed, even in negative obligation cases. It could be argued that there is only a semantic difference between viewing these factors as contributing to the assessment of the severity of the harm and viewing them as allowing the potential for justification: if in a case with no physical force, no motive to harm, and no direct State responsibility, the threshold will be lower, that is little different from saying that it is easier for the State to escape liability, and thus easier for the State to in effect 'justify' its actions.

50. However, in the Interveners' submission, the better approach is to see the European Court's use of these factors in assessing the impact of the State action in the light of the personal circumstances of the individual (i.e. deliberate infliction of violence with a close connection to the State is likely to be felt as more degrading) while at no point removing the flexibility of Article 3 to respond to situations where the personal circumstances of the individual are such that despite there being no violence, only good motives, or no direct State responsibility, the impact of the harm on the individual in

Article 3 terms, given their personal circumstances, is the same as if such factors were present. In such situations, where there is a negative obligation, the prohibition in Article 3 is absolute and there is no scope for consideration of the lawful and even compelling objectives of the State. The ECtHR's consideration of 'motive' in negative obligation cases asks only whether there was an intention to humiliate and debase, as this may make easier the assessment of the treatment as 'degrading'. If there is no such intention, the Court does not proceed to examine what the intention was and how legitimate the objective pursued. This is entirely irrelevant, because if the State is engaging in treatment, and that treatment is (for whatever reason) inhuman or degrading, then the absolute prohibition in Article 3 is breached, and the matter ends there. Laws LJ's analysis is inconsistent with this result, and in this way clearly departs from the Strasbourg jurisprudence.

5. TREATMENT

51. The question of whether the enactment of section 55 amounted to the subjection of asylum claimants to treatment, for the purposes of Article 3, was addressed in *Q*. The Court of Appeal reasoned as follows:

> "*Positive and negative obligations*
>
> 52 Before us there was an interesting debate as to whether the regime imposed on asylum seekers who are deprived of assistance by virtue of section 55(1) constitutes *treatment* within the meaning of Article 3. Mr Blake and Mr Singh submitted that it did and that, if those deprived of support reached a sufficient level of degradation, the state would be in breach of the negative obligation to refrain from inhuman or degrading treatment. The Attorney General submitted that failure to provide support could never constitute *treatment* and thus breach of a negative obligation. He accepted, however, that in extreme circumstances Article 3 could impose a positive obligation on the state to provide support for an asylum seeker. By way of example, he cited the predicament of a heavily pregnant woman. It seemed to us that the distance between the parties was in practice fairly narrow, albeit that the argument covered what is at present the cutting edge of human rights jurisprudence.

…

> 56 In our judgment the regime that is imposed on asylum seekers who are denied support by reason of section 55(1) constitutes "treatment" within the meaning of Article 3. Our reasoning is as follows. Treatment, as the Attorney General has pointed out, implies something more than passivity on the part of the state; but here, it seems to us, there is more than passivity. Asylum seekers who are here without a right or leave to enter cannot lawfully be removed until their claims have been determined because, in accordance with the UK's obligations under Article 33 of the Refugee Convention, Parliament has expressly forbidden their removal by what is now section 15 of the 1999 Act. But while they remain here, as they must do if they are to press their claims, asylum seekers cannot work (section 8 of the Asylum and Immigration Act 1996) unless the Secretary of State gives them special permission to do so: see the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225).
>
> 57 The imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the grant to them, when they are destitute, of support amounts to positive action directed against asylum seekers and not to mere inaction."

52. The Interveners respectfully endorse this approach. Carnwath LJ with respect misunderstood the argument at [117], in considering that because Article 3 suffering was not the "inevitable result" of the Secretary of State's action under s.55, there was a doubt as to whether it amounted to treatment for the purposes of Article 3. His reasoning derived from the following observation of Lord Bingham in *R(Pretty) v. DPP* [2002] 1 AC 800, 816 at [14]:

> "In (*D*) the state was proposing to take direct action against the applicant, the inevitable effect of which would be a severe increase in his suffering and a shortening of his life. The proposed deportation could fairly be regarded as treatment."

53. But, in the Interveners' submission, central to Lord Bingham's reasoning was not the inevitability of the result (that was a factual matter and only relevant to making good the complaint), but rather the agency of the state in taking positive action.

54. The matter is put beyond doubt by the judgment of the Court of Human Rights

in *Pretty v UK* (2002) 35 EHRR 1 at [53] itself, when it endorsed Lord Bingham's dicta and stated

> "The responsibility of the State would have been engaged by its act ('treatment') of removing him in those circumstances."

55. In *Q* the Court of Appeal endorsed this analysis, describing the negative obligation engaged in Article 3 as a "constant" [54]:

> "such cases as *D v. United Kingdom* .. clearly establish that a breach of the constant negative obligation can occur where an affirmative act of the state is such as to result, indirectly, in inhuman or degrading consequences for the individual."

56. In sum, the Interveners submit that the imposition of a legislative regime (s.55 Nationality and Immigration Act) which deprives asylum claimants of access to support, in circumstances where they are simultaneously denied *by law* the ability to work or to receive mainstream welfare benefits, and when they seek to pursue a fundamental right, amounts to something "more than passivity" on the part of the State, which constitutes "treatment" so as to engage the State's negative obligation not to expose asylum claimants to Article 3 risks.

6. ARTICLE 3 AND THE ROLE OF THE COURTS

57. The Interveners submit that on judicial review and thereafter on appeal to the Court of Appeal, the question of whether an individual's condition has crossed the threshold of Article 3 is one on which the executive enjoys no "constitutional prerogative" or latitude: see *SSHD v. Rehman* [2003] 1 AC 153, 193 at [54] (Lord Hoffman), and falls to be answered by the Courts. See further, on the constitutional role of the courts in the context of a human rights challenge *A and Others v. SSHD* [2005] 2 WLR 87, 113H-114C at [42] (Lord Bingham); 138B-E at [107]-[108] (Lord Hope).

58. This approach is supported by the second of the three cases to reach the Court of Appeal on section 55, *R (T) v SSHD* [2003] EWCA Civ 1285; (2003) 7

CCLR 53 where Kennedy LJ at [19] reasoned as follows:

> "The question whether the effect of the State's treatment of an asylum-seeker is inhuman or degrading is a mixed question of fact and law. The element of law is complex because it depends on the meaning and effect of Article 3. Once the facts are known, the question of whether they bring the applicant actually or imminently within the protection of Article 3 is one which Mr Eadie [for the Secretary of State] accepts can be answered by the Court - assuming that viable grounds of challenge have been shown - without deference to the initial decision-maker. Equally, he submits and we would accept, this court is as well placed as the Judge at first instance to answer the question."

59. Carnwath LJ had difficulty at [130] with the approach in *T* set above because (a) Parliament had not provided for a right of appeal to an Asylum Support Adjudicator and (b) it would be a misuse of resources for courts to decide the Article 3 issue for themselves. This meant that the Court's task was to (a) clarify the legal standard and thereafter (b) to ensure that adequate measures were in place to see that the standard was *generally* met.

60. The Interveners submit that neither of the concerns identified by Carnwath LJ warrant the adoption of an approach which merely ensures that standards *generally* are met. In the first place, the courts' role remains one of review, but since the executive enjoys no latitude on the question, since the gravity of the issue demands the most intensive scrutiny, and since the question is one of mixed fact and law, it is perfectly appropriate for the courts to take the decision for themselves. Procedure is the servant, not the master, of substantive law: under section 7 of the Human Rights Act a victim or potential victim of a violation of Convention rights is entitled to bring proceedings in a court; under section 8, that court may grant such remedy within its powers as is just and appropriate. The fact that often claims under section 7 will (properly) be brought as claims for judicial review should not detract from the court's responsibility to give full protection to human rights.

61. Secondly, a plea to inadequate resources is an inappropriate basis upon which to hold – as a matter of judicial policy – that the court as a public authority will scrutinise a first instance decision no more than to provide that the

requisite standards have *generally* been met. This is reinforced by the point that under the Human Rights Act only an individual victim or potential victim can bring proceedings: that person has to be directly and personally affected by the decision, act or failure to act under challenge. It is no answer to say to a victim whose human rights have been or are about to be violated that others have had their rights respected.

7. THE PROPER TEST: WAIT AND SEE?

62. Laws LJ concluded that the decision of the Court of Appeal in *Q* meant that the Courts were fixed with a 'wait and see' approach to whether an individual's circumstances were such as to require the Secretary of State to provide support. In *Q* the Court of Appeal rejected the view of Collins J at first instance that the test was whether there was a "real risk" that the individual's circumstances would cross the Article 3 threshold, and held at [119] that it was when "the condition of an applicant *verges on* the degree of severity described in *Pretty* [that] the Secretary of State must act" (emphasis supplied). More profoundly, Laws LJ held at [78] that the contrary approach would "emasculate" the effect of the section.

63. The Interveners would submit that it is precisely where legislative provisions (a) intrude on human rights but are (b) expressly subject to human rights that the Court is perfectly entitled, if not obliged, to be vigilant and ensure that there is no breach of the right in question. Here in particular, Your Petitioner would submit that Laws LJ's concerns that any approach other than "wait and see" would emasculate another sub-section of the provision (s.55(1)) was predicated upon a failure to read the entire section in context. Moreover if there was a question of which sub-section is to assume primacy, sections 3 and 6 HRA provide the answer, especially where the wait and see approach is "abhorrent, illogical and very expensive" (Jacob LJ at [142]); "distasteful" (Collins J in *Limbuela* [2004] EWHC 219 (Admin) at [32]); and "contrary to any reasonable concept of

justice" (Gibbs J. in *Tesema* [2004] EWHC 295 (Admin) at [59]).

64. The correct approach is that of Maurice Kay J in *R(S) v SSHD* [2003] EWHC 1941 (Admin); 7 CCR 32 at [33], endorsed by Carnwath LJ. at [96]:

> "It is not inevitable that anyone refused asylum support will be able to rely on Article 3. For one thing, they may have access to private or charitable funds or support such that Article 3 will simply not arise. Some are more resilient or resourceful than others. However, when a person without such access is refused asylum support and must wait for a protracted but indefinite period of time for the determination of his asylum application it will often happen that, denied access to employment and other benefits, he will soon be reduced to a state of destitution (not in the section 95 sense). Without accommodation, food or the means to obtain them, he will have little alternative but to beg or resort to crime. Many, like the claimants in the present case, will have little choice but to beg and sleep rough. In those circumstances and with uncertainty as to the duration of their predicament, the humiliation and diminution of their human dignity with the consequences referred to in *Pretty* will often follow within a short period of time."

65. Further, as a matter of plain language, section 55(5) envisages the Secretary of State exercising powers in anticipation to prevent ("avoid") a future breach, rather than to cure or remedy an established breach. The anticipatory nature of the power to grant support to comply with human rights is:

    i. in harmony with the anticipatory power under s.21 of the 1948 Act and that under s.95(1) of the 1999 Act to provide support where the individual is *likely* to become destitute without it;

    ii. entirely sensible, since if the Secretary of State were required to wait until there was an actual breach of Articles 3 or 8, it may be too late or too difficult for the individual to actually bring his case to the Secretary of State's attention.

66. Having regard to the well-established approach to the interpretation of human rights provisions, whose protection should be real and practical, not theoretical and illusory, the Interveners submit that a real risk of destitution is sufficient

to create a real risk of a breach of Article 3. This submission is supported by the view of the Parliamentary Joint Committee on Human Rights.[29]

CONCLUSIONS

67. For the reasons set out above, the Interveners would invite this House to endorse the following propositions of law.

    a. The spectrum analysis of Article 3 risks, which regards state sponsored harm as a paradigm case, and permits other kinds of harm to be subject to justification, is unwarranted in principle and unsupported by authority.

    b. The enactment of a legislative regime which prohibits support to an individual, who is at the same time prevented by law from working and receiving mainstream welfare benefits, amounts to more than mere passivity and constitutes 'treatment' within the meaning of Article 3. The Court of Appeal had previously so held, and was correct to do so.

    c. Once the facts have been found, the question of whether the condition crosses the threshold of Article 3 is one on which the Courts are in as good a position as the decision-maker to adjudicate, and no latitude or deference is attracted to the first-instance decision.

    d. It is abhorrent, illogical and very expensive to adopt a "wait and see" approach which requires the onset of severe suffering. The contrary approach does not emasculate the section: the section is itself expressly subject to prevention of human rights breaches, and its harshness

[29] See the JCHR, Twenty-third Report of Session 2001-02, HL Paper 176, HC 1255, para. 8: "We find it difficult to envisage a case where a person could be destitute .. without giving rise to a threat of a violation of Articles 3 and/or 8 of the ECHR."

requires the Court as a public authority to be more, rather than less, vigilant in its protection of human rights.

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September 2005

IN THE HOUSE OF LORDS
ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

WAYOKA LIMBUELA

Respondent

AND BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

BINYAM TEFERA TESEMA

Respondent

AND BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-v-

YUSIF ADAM

WRITTEN INTERVENTION ON BEHALF OF THE INTERVENERS (JUSTICE AND LIBERTY)

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