Case No: CO/105/2001

Neutral Citation Number: [2001] EWHC Admin 852
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Friday 5 October 2001

B e f o r e :

THE HONOURABLE MR JUSTICE STANLEY BURNTON

- -

The Queen on the application of

HAMID ALI HUSAIN	**Claimant**
- and -	
ASYLUM SUPPORT ADJUDICATOR	**Defendant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Andrew Nicol QC and **Mark Henderson** (instructed by **Law Direct**) for the Claimant
Rhodri Thompson (instructed by the **Treasury Solicitor**) for the Defendant
Dinah Rose (instructed by the **Treasury Solicitor**)

- -

Judgment
As Approved by the Court

MR JUSTICE STANLEY BURNTON:

Introduction

1. This case raises the issue of the constitutionality of the office of asylum support adjudicators introduced by the Immigration and Asylum Act 1999 ("the Act") and the Asylum Support Regulations 2000 ("the Regulations").

2. In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, the Court of Appeal held that Regulations made under the Social Security Contributions and Benefits Act 1992 were *ultra vires*. The Regulations provided that even destitute asylum-seekers might in certain circumstances be deprived of social security support. Simon Brown LJ, at 292, considered that the Regulations "necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it".

3. Following that judgment, Parliament enacted the Immigration and Asylum Act 1999. Part VI of the Act deals with support for asylum-seekers. Section 95(1) empowered the Home Secretary to provide, or to arrange for the provision of, support for asylum-seekers and their dependants who appear to him to be destitute or likely to become so. However, section 95(2) provides that:

> "In prescribed circumstances a person who would otherwise fall within subsection (1) (i.e., a destitute asylum-seeker) is excluded."

4. Part VI of the 1999 Act contains provisions dealing with ways in which support may be provided to asylum-seekers, including accommodation, and confers wide powers on the Home Secretary to make regulations supplementing those provisions. The Regulations were made under those powers.

5. Section 103 of the Act entitles an asylum-seeker aggrieved by a decision of the Secretary of State that he does not qualify for support, or by a decision to stop providing support, to appeal to an asylum support adjudicator. Schedule 10 of the Act contains provisions concerning asylum support adjudicators. Pursuant to its provisions, they are appointed by the Home Secretary, who determines their terms of appointment, their remuneration, what expenses may be paid to them, and certain other financial matters, and they must sit at such times and at such places as he directs.

6. The Claimant's principal contention is that asylum support adjudicators determine the civil rights and obligations of asylum-seekers within the meaning of Article 6 of the European Convention on Human Rights ("the Convention"); and that an asylum

support adjudicator appointed by the Home Secretary is not an independent an impartial tribunal satisfying the requirements of Article 6. The Secretary of State is a party to all appeals determined by asylum support adjudicators, yet under Schedule 10 to the 1999 Act he has considerable powers over their appointments. Mr Nicol QC on behalf of the Claimant further submitted that Article 6 requires that the independence of a tribunal must be established by law; and that it is therefore irrelevant that there might be factors outside the legislation tending to establish their independence. He seeks, pursuant to section 4 of the Human Rights Act 1998, a declaration that Schedule 10 to the 1999 Act is incompatible with Article 6 of the Convention.

7. He also contends that the decision, to which I refer below, of the Chief Asylum Support Adjudicator, Mrs Sehba Storey, rejecting the Claimant's appeal against the decision of the Secretary of State to stop providing him with support under the 1999 Act, ought to be set aside for error of law, in that the Adjudicator misconstrued the terms of the licence agreement under which the Claimant occupied his accommodation provided by the Secretary of State, and failed properly to take into account the rights of the Claimant under Articles 3 and 8 of the Convention.

8. The Claim Form filed on behalf of the Claimant made no reference to Article 3 or to Article 8 of the Convention. However, at the hearing of this application Mr Nicol QC sought permission to contend that the decision to stop providing the Claimant with support amounts to inhuman and degrading treatment or punishment and was therefore in breach of Article 3; and that the decision also infringed the Claimant's rights under Article 8. I heard argument on these contentions *de bene esse*, and reserved my decision on whether to permit them to be included in this application. Because these allegations were made late, and for reasons appearing below, I refuse permission to the Claimant to introduce these allegations in relation to the decision of the Chief Asylum Support Adjudicator. I have, however, taken Articles 3 and 8 into account in interpreting the Act and the Regulations: indeed, the Court must do so.

9. The Secretary of State contends that:

(a) The matters determined by the asylum support adjudicators are not "civil rights and obligations" within the meaning of Article 6, because the provision of support to asylum-seekers under the 1999 Act is discretionary, not mandatory.

(b) If, contrary to its primary case, asylum support adjudicators do determine civil rights and obligations:

(i) In determining whether a tribunal is independent for the purposes of Article 6 the Court is not confined to examining the terms of the relevant legislation: the tribunal must be established by law, but its independence need not be.

(ii) The asylum support adjudicators are an independent tribunal established by law complying with the requirements of Article 6.

(iii) If the asylum support adjudicators are not themselves an independent tribunal, the availability of judicial review by the High Court means that the system of adjudication as a whole complies with Article 6.

(c) Since the alleged infringements of Articles 3 and 8 were not included in the Claim Form, and have not been addressed in evidence, the Claimant should not be permitted to raise them.

(d) In any event, there was no unlawful infringement of the Claimant's rights under either of those Articles.

10. Mr Thompson, on behalf of the Chief Asylum Support Adjudicator, submitted that she had correctly construed the terms of the licence agreement signed by the Claimant and that she had appropriately taken into account the Claimant's Convention rights.

11. As will be seen, these Articles, and Article 3 in particular are integral to consideration of Part VI of the Act and the Regulations.

The Leggatt Report

12. When this case was argued, it was well known that Sir Andrew Leggatt, the retired Lord Justice of the Court of Appeal, had been asked to report on administrative tribunals, including the asylum support adjudicators. In addition, the Claimant's solicitors learned that the Chief Asylum Support Adjudicator had made a speech to last year's Immigration Law Practitioners' Association Annual Conference in which, in the context of Sir Andrew's review, she commented on the powers of the Home Secretary in relation to asylum support adjudicators. Mr Nicol suggested that I should see Sir Andrew's report and the text of the Chief Asylum Support Adjudicator's speech.

13. I was informed that there was no written text of the Chief Asylum Support Adjudicator's statements at the ILPA's Annual Conference. It is reasonably clear, however, from Mr Thompson's remarks and the text of her Annual Report that she herself has reservations as to the present constitutional position of the asylum support adjudicators.

14. The Leggatt Report was commissioned by the Lord Chancellor. Sir Andrew was due to report to the Lord Chancellor by 31 March 2001, and during the hearing I was told

that he had submitted his report to the Lord Chancellor, but that the Home Office do not have a copy. Sir Andrew's terms of reference were, so far as relevant, as follows:

> "To review the delivery of justice through tribunals other than ordinary courts of law, constituted under an Act of Parliament by a Minister of the Crown or for purposes of a Minister's functions; in resolving disputes, whether between citizens and the state, or between other parties, so as to ensure that:
>
> - There are fair, timely, proportionate and effective arrangements for handling those disputes, within an effective framework for decision-making which encourages the systematic development of the area of law concerned, and which forms a coherent structure, together with the superior courts, for the delivery of administrative justice;
>
> - The administrative and practical arrangements for supporting those decision-making procedures meet the requirements of the European Convention on Human Rights for independence and impartiality;
>
> - ….
>
> - Tribunals overall constitute a coherent structure for the delivery of administrative justice."

15. It can be seen that Sir Andrew was asked to consider the very question that I have to consider, namely the compatibility of the system of asylum support adjudicators with the Convention. I was not asked to make an order for the production of Sir Andrew's report, which as far as I am aware contains no facts that are not before me, but only his opinion on them. Nonetheless, I made it clear that it would be regrettable if I were to come to a decision in this case in ignorance of any relevant views he had expressed

16. By letter dated 10 July 2001, I was informed that the Lord Chancellor considered that it would be undesirable to produce the Leggatt Report for the purposes of legal proceedings prior to its publication. In addition, I was informed that the Report does not refer to asylum support adjudicators. In these circumstances, it cannot be said that production of the Report is necessary for the determination of the issues before me, and there is no basis for an order for its disclosure. However, when my judgment was an advanced draft, I was informed that the Report had been published, and I was sent a copy. As already mentioned, it does not consider specifically the constitutional position of the asylum support adjudicators. It makes important recommendations as to the organisation and administration of tribunals generally. The recommendations would result in the independence of tribunals generally becoming indisputable and established by law. If the recommendations of the Report are accepted and

implemented, as I hope they will be, the constitutional issues considered in this judgment will become obsolete.

The facts

17. The Claimant is an Iraqi asylum-seeker. He has lost his right arm and his right leg below the knee. He applied for support under Part VI of the 1999 Act. By letter dated 14 August 2000, the Secretary of State informed him that his application for accommodation and subsistence had been approved, and that accommodation would be provided for him in Plymouth. He was also to be provided with vouchers for his subsistence. He took up the offered accommodation, and signed an occupancy agreement with Asylum-seekers Management Ltd under which he was given a licence to occupy his room. Clause 1 of the Agreement was as follows:

> "The Landlord agrees to allow the licensee to occupy Room No. 14 of 9 Hillsborough Plymouth PL4 7AR (hereinafter called 'The Premises') together with the furniture and household effects now in the Premises. The licensee is required as part of this agreement to ensure that any requirements of the Secretary of State for the Home Department acting through the Immigration and Nationality Directorate such as daily signing of registers are complied with."

Clause 3(17) provided:

> "3. The Licensee agrees as follows:
>
> (17) Not to allow persons of improper character to reside in or frequent the demised Premises or any part thereof and not to use or permit or suffer the same to be used for any illegal or immoral purpose or for any purpose which shall be or tend to be a nuisance or annoyance or inconvenience to the Landlord or the owners tenants or occupiers of any of the other flats or of any other part of the Entire Building or of any Premises in the neighbourhood."

18. On 12 September 2000, there were two altercations at Hillsborough involving the Claimant and an Iraqi Kurd named Nadem Alabdalla. The Claimant was accused of assault occasioning actual bodily harm. He was arrested by the police and taken into custody. By letter dated 21 September 2000, the Immigration and Nationality Directorate of the Home Office informed the Claimant that the Secretary of State had decided to discontinue his support as required by regulation 20 (1) (a) of the Asylum Support Regulations 2000. The letter stated that the Secretary of State had received

information concerning two assaults by the Claimant on Mr Alabdalla, in the course of the first which the Claimant had verbally abused, spat at and made threats towards Mr Alabdalla, who also a NASS applicant and was acting as an interpreter on behalf of other asylum-seekers. It stated that the Claimant was alleged to have gone on to strike Mr Alabdalla on the right ear with a teapot containing hot tea. It continued:

> "The Secretary of State understands that later on that day, at about 20:00 hrs, when Mr Alabdalla returned to the same address, you came into the room carrying a 1.50m long metal pole, which you swung around in an aggressive manner before bringing the pole down and striking Mr Alabdalla across the back ….. ASM. staff found it necessary to surround you to keep you from attacking the Kurds, and keep the Kurds from you. You continued to wave the pole aggressively and smashed a hole in one of the walls of the room. You were eventually persuaded to leave the room and the pole recovered."

19. The letter referred to the Occupancy Agreement signed by the Claimant, set out clause 3 (17), and continued:

> "The Secretary of State has considered the extent to which you have breached the relevant conditions, as required by regulation 19 of the Asylum Support Regulations 2000. Having carefully considered the facts and circumstances in this case, the Secretary of State is satisfied that you have breached your conditions of support by your actions. He has accordingly decided to discontinue your support as required by regulation 20(1)(a) of the Asylum Support Regulations 2000. Under section 103(2) of the Immigration and Asylum Act 1999, you have a right of appeal against this decision."

20. The claimant exercised his right of appeal. His appeal was heard by the Chief Asylum Support Adjudicator on 9 October 2000, and on 11 October 2000 she gave her decision dismissing his appeal and her written reasons for her decision. At those dates the Claimant was still in custody. He had been remanded in custody because, in the absence of accommodation provided by the Secretary of State, he had no fixed abode.

21. In paragraphs 7 to 13 of her decision, she set out her reasons for refusing an application for the adjournment of the appeal that had been made on behalf of the Claimant by his solicitors. In those paragraphs she referred to Article 6 of the European Convention on Human Rights. She stated:

> "10. It is a matter for the determination of higher courts whether the Article 6 right to a fair hearing applies to decisions made by Asylum Support Adjudicator. Section 95 of the

> Immigration and Asylum Act 1999 provides for discretion rather than an obligation upon the Secretary of State to provide asylum support. Decisions relating to discretionary welfare benefits have been considered to be outside the scope of Article 6 as not determining civil rights and obligations. Accordingly, Article 6 may not apply to this jurisdiction.
>
> 11. However, whether or not Article 6 (1) applies to Asylum Support Adjudicators, I take the view that it contains minimum standards of fairness which should be applied to Asylum Support Adjudicators' decision making process to ensure the best possible procedural safeguards for a most vulnerable group of individuals. This applies equally to other Convention rights."

The Adjudicator also referred to regulations 19(1) and 20 of the Regulations, and to Article 8 of the European Convention.

22. The Adjudicator considered the first alleged incident between the Claimant and Mr Alabdalla, noted that there was a conflict of evidence between the Claimant and Mr Alabdalla, and stated:

> "…. I leave the Magistrates Court to determine whether or not the appellant acted in self defence by throwing the tea pot at the victim."

23. She then considered the second incident involving the alleged wielding by the Claimant of a metal bar and repeated threats by him of the lives of the other people present. She found the Claimant not to be a credible witness and accepted that he had assaulted Mr Alabdalla. Her reasons for her decision continued:

> "34. I am satisfied that the Appellant was permitted to occupy his accommodation for the sole purpose of peaceful enjoyment in a manner unlikely to cause a nuisance, damage, annoyance or inconvenience to the landlord or other occupants of the premises. By his aggressive behaviour of 12th September 2000 and in attacking a fellow asylum-seeker, the appellant was in breach of condition 3(17) of his occupancy agreement. I am satisfied that the appellant did not have reasonable excuse for behaving in the manner the manner the manner that he did which was clearly considered as a threat and danger to all persons present in the room.
>
> 35. Notwithstanding that the appellant has not been tried in a criminal court in respect of the charges brought against him, I am satisfied that the Secretary of State has reasonable grounds on the evidence before to suspect that the appellant has failed

> without reasonable excuse to comply with the conditions subject to which the asylum support was provided.
>
> 36. Finally, I have a duty to consider whether the Secretary of States' decision is in accordance with Article 8 of the Convention and whether the appellant's right to respect of his private life, his home and physical integrity were in any way breached. The rights contained in Article 8 (1) are qualified by Article 8 (2) in that a public authority may justify its interference with the right to question Article 8 (1) for reasons stated in Article 8 (2). In this case I have found that the appellant was involved in an act of violence against another asylum-seeker and put at risk the victim's right to physical integrity as well as the physical integrity of other persons present in the room at the time. Even if I were to accept that there has been interference with the appellant's private life, I am satisfied that the respondent pursued a legitimate aim in refusing support to the appellant and that the refusal was a proportionate measure in the light of the seriousness of the appellant's aggression against other vulnerable persons.
>
> 37. On the totality of the evidence before me, I am satisfied on the balance of probabilities that the decision of the Secretary of State is in accordance with the law and I uphold the decision.
>
> 38. In the event that the appellant is found not guilty in the criminal proceedings it is open to him to reapply for support from the Secretary of State."

24. Subsequently, the Claimant pleaded guilty to the charge of assault occasioning actual bodily harm. He received a non-custodial sentence. Where he has lived since his release was not in evidence before me.

Civil rights and obligations under Article 6

25. It was common ground before me that rights to social security payments and the like are civil rights for the purposes of Article 6, even though the rights exist under public law rather than private law. The Convention has undergone development in this respect. Originally, the European Court of Human Rights held that such rights were outside the scope of Article 6. Its interpretation of Article 6 changed with its decisions in *Feldbrugge v Netherlands* (1986) 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448 (both judgments given on the same day), and the application of Article 6 to rights to social security was confirmed in *Salesi v Italy* (1993) 26 EHRR 187.

26. However, Article 6 does not apply to the exercise by public authorities of their discretion, as distinguished from their compliance with their obligations owed to citizens. Obligations give rise to rights; discretionary payments and discretionary support do not. Furthermore, the decision of the public authority in question must directly affect and be decisive of the relevant right of the citizen: see *Beaumartin v France* (1994) 19 EHRR 485.

27. The principle behind the distinction between decisions determinative of rights and those made in the exercise of a discretion is not hard to see. Not all decisions made by governmental bodies involve objectively definable rights and obligations. Decisions as to the enactment and content of legislation and the making and content of delegated legislation, to take obvious and extreme examples, are wholly unsuitable to independent tribunals. The exercise of a truly unfettered discretion may be inappropriate for a judicial or quasi-judicial tribunal, particularly if the decision involves considerations of political policy or choices as to the use of scarce public resources. A line has to be drawn between those decisions which, in a democratic society, must be given to an independent tribunal and those which need not. Article 6 draws this line by restricting the requirement to the determination of criminal charges and of civil rights and obligations. A right by definition is something to which the citizen is entitled, to which he has an enforceable claim. A discretionary benefit, one that a government may give or refuse as it wishes, cannot be the subject of a right.

28. The line between a discretionary benefit and one to which the citizen may be entitled may not be an easy one. In England, court orders for costs, equitable relief and remedies on judicial review are all said to be discretionary, but the decisions relating to them are made by courts of law on well-established principles, and are unquestionably judicial decisions. A successful litigant in civil proceedings against an unassisted opponent may claim to have a "right" to an award of his legal costs, notwithstanding the discretionary nature of the court's power.

29. *Salesi* concerned a claim for payment of a disability allowance. The Court said, at paragraph 19 of its judgment:

> "As in (*Feldbrugge v Netherlands* and *Deumeland v Germany*), other considerations argue in favour of the applicability of Article 6(1) in the instant case. The most important of these lies in the fact that despite the public law features pointed out by the Government, Mrs Salesi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers: she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution.
>
> The protection of this basic right is, moreover, organised in such a way that at the judicial stage disputes over it come

within the jurisdiction of the ordinary court, the labour magistrates court."

30. *Jacobsson v Sweden* (1989) 12 EHRR 56 was a planning case. The applicant complained that he had not received a planning permit allowing him to build on certain land. He contended that he had a right to such a permit and that his right to build on his land, and that these were civil rights to which Article 6 applied. The relevant legislation required an examination of whether the property was suitable from a general point of view. However, it appears to have been the position that if an intended building would not run counter to a confirmed development plan, to the regulations for non-planned areas, or to a building prohibition, a permit was required to be granted: see paragraph 38 of the judgment. The Court stated:

> "69. In view of the wide discretion left by the Swedish Parliament to the administrative authorities in these matters, the Government further maintained that the applicant could not claim any 'right' to build before a permit had been granted.
>
> The Court considers however that, subject to meeting the requirements laid down in the 1974 Act and the 1959 Ordinance, he could arguably have claimed to have a 'right' to such a permit. True, the issue of a permit under these circumstances would have involved the exercise of a certain discretion by the authorities, but their discretion would not have been unfettered: they would have been bound by generally recognised legal and administrative principles.
>
> 70. Pointing out that the prohibitions at issue affected the rights of a great number of other property owners, the Government alleged that the dispute in the applicant's case thus came to have connections with his 'right' to build that were so remote and tenuous as to make Article 6 inapplicable.
>
> There can, however, be no doubt that the prohibitions severely restricted the said 'right' and that the outcome of the proceedings whereby he challenged their lawfulness was directly decisive for his exercise thereof.
>
> 71. There was thus, as was also maintained by the Delegate of the Commission, a dispute over a 'right.'"

31. The decision in *Salesi* may be contrasted with that in *Masson v The Netherlands* (1996) 21 EHRR 491. *Masson* concerned a claim for compensation under sections 89 and 90 of the Dutch Code of Criminal Procedure that could be paid to persons who were prosecuted and acquitted. Sections 89 and 90 provided, so far as is relevant:

> "89. If a case ends without the imposition of punishment … the court may, at the request of the former suspect, grant him

> compensation at the expense of the State for the damage he has suffered as a result of police custody or detention on remand.
> …
>
> 90. Compensation shall be awarded in each case if and to the extent that the court, taking all circumstances into account, is of the opinion thought there are reasons in equity to do so."

32. To an English eye, these provisions are not very different to the English Law on the award of costs in civil proceedings, and as suggested above, we certainly expect awards of costs to be dealt with judicially, and would regard a successful litigant as having a right to an order for his costs, other things being equal. However, the European Court of Human Rights held that these provisions of Netherlands law did not create a civil right within the meaning of Article 6. At paragraph 51 of its judgment the Court stated:

> "…. Sections 89(1) and 591(a)(2) do not require the competent court to hold the State liable to pay even if the conditions set out therein are met. Moreover, section 90(1) CCP makes the award of compensation contingent on the competent court being of the opinion 'that reasons in equity' exist therefor … The grant to a public authority of such a measure of discretion indicates that no actual right is recognised in law."

33. Similarly, in *Machatova v Slovak Republic* (1997) 24 EHRR CD44, the Commission considered whether a claim for payment of a hardship allowance under section 174 of the Slovak Social Security Act concerned a civil right within the meaning of Article 6. The Commission stated:

> "Section 174 of the Social Security Act empowered the Minister of Labour, Social Affairs and Family to grant relief from hardship in matters within his or her competence. …. Section 174 did not lay down any binding requirements or obligations for a claim for relief from hardship to be granted, nor did it confer any entitlement in this respect. In fact the question whether the applicant's request for relief could be granted was wholly dependent on whether the Slovak Social Security Administration accepted it.
>
> In these circumstances, the Commission considers that the determination of the applicant's claim for education allowance and a supplement thereto under section 174 of the Social Security Act, to which she had not formal entitlement under Slovak law, was within the discretionary power of the administrative authorities. The right claimed by the applicant cannot, therefore, be considered as a civil right within the

meaning of Article 6(1) of the Convention. Consequently, Article 6(1) does not apply in the present case."

34. It is apparent from these authorities that the question whether legislation confers a right or merely confers a discretion on a public authority to confer a benefit depends on the terms of the legislation in question. Indeed, this proposition should not require any authority.

Support for asylum-seekers

35. I turn to consider the provisions of Part VI of the 1999 Act and the Regulations in the light of these authorities.

36. Unusually, if not uniquely, Part VI is clearly drafted so as to authorise, but not to oblige, the Secretary of State to provide, or to arrange for the provision of, support for destitute asylum-seekers. Section 95(1), (2) and (3) are as follows:

> "(1) The Secretary of State may provide, or arrange for the provision of, support for-
>
> (a) asylum-seekers, or
>
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such periods as may be prescribed.
>
> (2) In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded.
>
> (3) For the purposes of this section, a person is destitute if-
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
>
> (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

The effect of the use of the word "may" in section 95, instead of the usual "shall", is obvious. Nowhere in Part VI is there a reference to any obligation imposed on the Secretary of State to provide support. Thus, section 97 refers to his "power" under section 95 to provide support; and asylum-seekers are referred to as qualifying for support (section 103(1)) rather than being entitled to it, and as being excluded (section

95(2)) rather than disentitled or ceasing to be entitled. The contrast between Part VI of the 1999 Act and the equivalent provisions of, for example, the Social Security Contributions and Benefits Act 1992 could not be clearer: see, for example, section 30A of the 1992 Act (with added italics):

> "Subject to the following provisions of this section, a person who satisfies either of the following conditions *is entitled to* short-term incapacity benefit ..."

37. The Regulations follow the pattern of the Act. Regulation 4 refers to persons "excluded from support", who "may not be provided with asylum support". Regulation 10 provides (with added italics):

> "(1) This regulation applies where *the Secretary of State has decided* that asylum support should be provided in respect of the essential living needs of a person.
>
> (2) As a general rule, asylum support in respect of the essential living needs of that person *may be expected to be provided* in the form of vouchers redeemable for goods, services and cash …"

38. This mode of drafting is clearly deliberate. Ms Rose submitted that it was for Parliament to decide whether a benefit should be discretionary or mandatory, and that the Courts must give effect to its decision as expressed in legislation. She invoked the principle of Parliamentary sovereignty. There can be no quarrel with these submissions. I enquired why Parliament had chosen to legislate in the form it adopted in Part VI of the 1999 Act. No answer could be given. The inference I draw is that the purpose of the Government in drafting Part VI and the Regulations as they are was to take asylum-seekers' benefit outside the scope of Article 6. It was open to Parliament under the Convention, by making the provision of asylum support truly discretionary, to exclude it from the scope of Article 6, and if Parliament has so decided, the Courts must accept its decision. The question remains whether, on the basis of the terms of Part VI of the 1999 Act and the Regulations, the provision of asylum support is to be regarded as discretionary.

39. There is, I think, a degree of unreality in regarding support for asylum-seekers as in any real sense discretionary. Anyone reading the Act would assume that eligible asylum-seekers, or at least those who had done nothing to forfeit support, would receive support. It is not surprising to find, for example, that in *The Queen, on the application of Westminster City Council, v National Asylum Support Service* Simon Brown LJ said, at paragraph 29 (with my italics):

> "The 1999 Act at one and the same time took the *duty* to support certain asylum-seekers away from local authorities under the National Assistance Act and *placed it* instead upon the Secretary of State."

(But compare Mance LJ at paragraph 53.) Similarly, the Explanatory Note to the Regulations (which is not however part of the Regulations) states:

> "These Regulations make provisions supplementing Part VI of the Immigration and Asylum Act 1999. They have the effect that support *is to be available* to asylum-seekers and their dependants who apply in accordance with the Regulations and appear to the Secretary of State to be destitute, or to be likely to become destitute within 14 days of the application being considered. …"

The italics are mine. The Secretary of State is under no obligation under the Act to support destitute asylum-seekers, but if he supports any, it is difficult, if not impossible, to see on what basis the Secretary of State could lawfully discriminate between asylum-seekers who fulfil the conditions for eligibility laid down in the Act and in the Regulations. By definition, all are destitute, and by definition they are asylum-seekers whose claims to asylum have not been rejected, and may be genuine. If there were an untrammelled discretion whether to provide support to asylum-seekers, he could lawfully discriminate between asylum seekers: some would receive support, and others would not.

40. The decisions to be made by the Secretary of State in the present context do not appear to be decisions made on the basis of expediency or application of public policy of a kind that excludes the application of Article 6. I refer to the conclusion of the Commission in *ISKCON v United Kingdom* (1994) 18 EHRR COULD 133, 145:

> "It is not the role of article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities on questions of expediency …"

See too Lord Hoffman in *Alconbury* [2001] 2 WLR 1389, 1412D:

> "Apart from authority, I would have said that a decision as to what the public interest requires is not a 'determination' of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as article 6 has in contemplation. The reason is not simply that it involves the exercise of a discretion, taking many factors into account, which does not give any person affected by the decision the right to any particular outcome. There are many such decisions made by courts (especially in family law) of which the same can be said. Such decisions may nevertheless be determinations of an individual's civil rights (such as access to his child: compare *W v United Kingdom* (1987) 10 EHRR 29) and should be made by independent and impartial tribunals. But a decision as to the public interest (what I shall call for

> short a 'policy decision') is quite different from a determination of right. The administrator may have a duty, in accordance with the rule of law, to behave fairly ('quasi-judicially') in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires."

41. Ms Rose accepted that a decision to refuse support to an eligible asylum-seeker could be challenged by judicial review, on the basis that an eligible asylum-seeker would have a substantive legitimate expectation of support. She referred to *R v Home Secretary, ex parte Khan* [1984] 1 WLR 1337. It seems to me that if an eligible asylum-seeker is able to enforce his claim for support by legal proceedings of this kind, there is precious little practical difference between his claim for support and a right to support of the kind that would be within the scope of Article 6.

42. However, the present case is concerned not with a decision not to provide support to an asylum-seeker, but a decision to withdraw support from an asylum-seeker to whom the Secretary of State had previously decided to provide support. Such decisions are the subject of paragraph 8 of Schedule 8 to the Act and regulation 20 of the Regulations. The relationship between the Act and the Regulations is unusual because section 95(12) provides that Schedule 8 gives the Secretary of State power to make regulations supplementing that section. It follows that the Regulations may lawfully and validly go beyond the provisions of the Act. Schedule 8 provides, in paragraph 8:

> "(1) The regulations may make provision for the suspension or discontinuance of support under section 95 in prescribed circumstances (including circumstances in which the Secretary of State would otherwise be under a duty to provide support).
>
> (2) The circumstances which may be prescribed include the cessation of residence -
>
> (a) in accommodation provided under section 95; or
>
> (b) at an address notified to the Secretary of State in accordance with the regulations."

43. The words in parentheses indicate that the Secretary of State may in certain circumstances be under a duty to provide support. Be that as it may, I do not read paragraph 8(1) as authorising the Secretary of State to make regulations for the suspension or discontinuance of support otherwise than in prescribed circumstances. The Regulations themselves are consistent with this interpretation. The circumstances in which support may be withdrawn from an asylum-seeker are the subject of

regulation 20 of the Regulations, headed "Suspension or withdrawal of support". It is as follows:

> "(1) Asylum support for a supported person and his dependants (if any), or for one or more dependants of a supported person, may be suspended or discontinued if –
>
> (a) the Secretary of State has reasonable grounds to suspect that the supported person or any dependant of his failed without reasonable excuse to comply with any condition subject to which the asylum support is provided;
>
> (b) the Secretary of State has reasonable grounds to suspect that the supported person or any dependant of his has committed an offence under part VI of the Act;
>
> (c) the Secretary of State has reasonable grounds to suspect that the supported person has intentionally made himself and his dependants (if any) destitute;
>
> (d) the supported person or any dependant of his for who asylum support is being provided is absent from the authorised address; or
>
> (e) the supported person or any dependant of his for who asylum support is being provided is absent from the authorised address –
>
> (i) for more than seven consecutive days and nights, or
>
> (ii) for a total of more than 14 days and nights in any six month period,
>
> without the permission of the Secretary of State."

44. In my judgment this regulation precludes the Secretary of State from suspending or withdrawing support otherwise than in the 5 cases specified in paragraph (1). Of course, the circumstances in which support may be withdrawn cast light on the question whether the continuation of support is discretionary or a duty, giving rise to a concomitant right. Where what is in question is as important as support for the destitute, it is regrettable to find that it may be terminated on the basis of suspicion alone. However, while the expression in paragraphs (a), (b) and (c) "the Secretary of State has reasonable grounds to suspect" give some latitude, or margin of

appreciation, to the Secretary of State, it nonetheless contains a requirement that must be objectively satisfied. The matters referred to in paragraphs (d) and (e) are entirely objective. These paragraphs do not give the Secretary of State any discretion to withdraw support if none of the specified grounds exist. On the face of it, therefore, an asylum-seeker who is a supported person has a right to support which may be defeated if there exist circumstances specified in regulation 20(1), but not otherwise. Furthermore, in considering what constitute "reasonable grounds" it is necessary to take into account the context, and the seriousness for the individual of the withdrawal of support. Reasonable grounds must be more substantial in the present context than in cases where the consequences for the individual are less drastic.

45. Ms Rose disputed that the restricted power to suspend or to discontinue support meant that an asylum-seeker to whom the Secretary of State has decided to provide support has a defeasible right to the continuation of that support. She submitted that the provisions of regulation 20 must be read in the context of the Act, and that they could do no more than found a legitimate expectation of the continuation of support, but not a right to support. If it did create a right to the continuation of support, she argued, the Regulations would go beyond the powers conferred by the enabling Act, and, she implied to that extent would be *ultra vires*. It is therefore impermissible to interpret the Regulations as creating a right rather than regulating the exercise of a discretion. I consider that this submission does not take sufficiently into account paragraph 8 of Schedule 8 to the Act or the context of this legislation.

46. The provisions of the 1999 Act as to the jurisdiction and powers of asylum support adjudicators take this analysis little further. Section 102 provides that there shall be adjudicators to hear appeals under Part VI. Section 103 provides, in so far as is relevant:

> "(1) If, on an application for support under section 95, the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to an adjudicator.
>
> (2) If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to an adjudicator.
>
> (3) On appeal under this section, the adjudicator may-
>
> (a) require the Secretary of State to reconsider the matter;
>
> (b) substitute his decision for the decision appealed against; or
>
> (c) dismiss the appeal.

(4) The adjudicator must give his reasons in writing.

(5) The decision of the adjudicator is final."

47. It is tempting to conclude that, because there is an appeal to an adjudicator, who can substitute his decision for that of the Secretary of State, the subject of the proceedings must be a right rather than the exercise of a discretion. I do not consider it would be right to come to this conclusion. If what is involved is the exercise of a discretion, there is no reason why Parliament should not have authorised someone other than the Secretary of State, namely an adjudicator, to exercise that discretion by way of appeal against his decision. However, I cannot refrain from quoting what was said on behalf of the Government about their function during the debate on the Immigration and Asylum Bill on 11 May 1999, in Special Standing Committee, at column 1411 (italics added):

> "They will handle one simple issue: *whether a person is entitled to the support being provided*. That will be subject to definition, and holders of the appointments will have to justify their decisions. "

48. In interpreting paragraph 8 of Schedule 8 to the Act and regulation 20 of the Regulations, I bear in mind the context in which this part of the Act operates. The asylum-seekers who are eligible for support are by definition destitute. They are not permitted to work. Genuine asylum-seekers who are destitute and do not receive support cannot be expected to return to their homeland. If support is withdrawn, they can only turn to friends and to charities for support. In *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, the Court of Appeal held that regulations that excluded certain asylum-seekers from entitlement to income support were *ultra vires.* I have already referred to the judgment of Simon Brown LJ at 292. I also refer to his citation from the judgment of Lord Ellenborough C.J. in *Reg. v. Inhabitants of Eastbourne* (1803) 4 East 103, 107:

> "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving; ..."

See too the judgment of Waite LJ at 293:

> "The class of asylum-seeker comprehended by the Regulations is a wide one - embracing all those who have made their application after arrival or who are awaiting the determination of an appeal against refusal of an application. They are not permitted to work for reward. Among their number there may be a few - but it can only be a very few - who are able to benefit from the efforts of the charities who work devotedly but

> with severely limited resources to house and help asylum-seekers. But the effect of the Regulations upon the vast majority will be to leave them without even the most basic means of subsistence. The stark question that has therefore to be answered is whether Regulations which deprive a very large number of asylum-seekers of the basic means of sustaining life itself have the effect of rendering their ostensible statutory right to a proper consideration of their claims in this country valueless in practice by making it not merely difficult but totally impossible for them to remain here to pursue those claims."

49. To similar effect, in *R v London Borough of Hammersmith and Fulham and others ex parte M* (1996) 1 CCLR 69, Collins J held that section 21(1)(a) of the National Assistance Act 1948 (subsequently amended by the 1999 Act) imposed an obligation on local authorities to provide for asylum-seekers who were destitute. He said, at page 84C:

> "I find it impossible to believe that Parliament intended that an asylum-seeker, who because of s6 of the 1993 Act was lawfully here and who could not lawfully be removed from the country, should be left destitute, starving and at risk of grave illness and even death because he could find no one to provide him with the bare necessities of life. Clearly Parliament intended that, unless they applied on entry, asylum-seekers should find it very difficult to exist in this country. No doubt, it was hoped that the bogus would thereby be deterred from coming or forced to return whence they came. But if an entrant faced the dilemma and decided that he had to stay, because to return would be to court persecution, I am sure that Parliament would not have intended that he must nonetheless be left to starve. It is after all likely that genuine claimants will stay here since they have real fears of persecution if they return. But if Parliament really did, intend that in no circumstances should any assistance (other than hospital care) be available to these asylum-seekers, it must say so in terms. If it did, it would almost certainly put itself in breach of the European Convention on Human Rights and of the Geneva Convention and that is another reason why I find it unlikely that the safety net has been removed."

Collins J's judgment was upheld by the Court of Appeal, whose judgment is reported at (1997) 1 CCLR 85.

50. It is at this point that I must consider Article 3 of the Convention, which as I mentioned above was relied upon by the Claimant only at a late stage in these proceedings. Mr Nicol argues that a failure to support a destitute asylum-seeker

would necessarily constitute a breach of Article 3. The Court must if possible construe the Act and the Regulations in a way that is compatible with Convention rights: section 3 of the Human Rights Act. It follows, he submitted, that the provisions of the Act on destitute asylum-seekers must be construed as imposing an obligation on the Secretary of State to support them.

51. The statement of Collins J in *ex parte M*, cited above, supports the submission that a failure to support destitute asylum-seekers infringes Article 3. Article 3 provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The failure of a state to provide social support for a class of persons in need is clearly not either "torture" or "punishment". It is capable of being "treatment", and may be said to be inhuman or degrading. However, the context, between "torture" and "punishment", and the fact that the Convention is in general a Convention for the protection of freedoms rather than one establishing social security rights, suggest that such a failure of a state does not come within Article 3. The context suggests that some positive act is required for there to be "treatment". The furthest the European Court of Human Rights has gone in construing Article 3 is its decision in *D v United* Kingdom. In that case, the Court held that the deportation to St Kitts of a man convicted of fraudulently evading the prohibition against the importation of a Class A drug, who had never been granted the right to enter or to remain in the UK, would violate Article 3, because he was suffering from AIDS, his condition was terminal, and he could receive appropriate treatment for it in this country, but could not in St Kitts, so that his deportation would shorten his life expectancy. Deportation would clearly be a positive act. Incidentally, I note that at the oral hearing before the Court the UK Government accepted that a denial of health care to the applicant while he was in prison would probably have given rise to a responsibility under the Convention and to a violation: see paragraph 56 of the judgment. However, the Court did not consider that the lack of appropriate medical treatment in St Kitts would constitute a violation of Article 3 by its Government. The Court stated, at paragraph 49:

> "It is true that this principle has so far been applied by the Court in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanates from intentionally inflicted acts of the public authorities in the receiving country or from those non-State bodies in that country when the authorities there are unable to afford him appropriate protection.
>
> Aside from these situations and given the fundamental importance of Article 3 in the convention system, the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise. It is not therefore prevented from scrutinising an applicant's claim under Article 3 where the source of the risk of proscribed

> treatment in the receiving country stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities of that country, or which, taken alone, do not in themselves infringe the standards of that Article. To limit the application of Article 3 in this manner would be to undermine the absolute character of its protection. In any such contexts, however, the Court must subject all the circumstances surrounding the case to a rigorous scrutiny, especially the applicant's personal situation in the expelling State."

52. *D* was narrowly interpreted by the Court of Appeal in *K v Secretary of State for the Home Department* [2001] Imm AR 11. Like *D*, that case concerned an AIDS sufferer. He was to be returned to Uganda. The Court of Appeal held that his return would not violate Article 3. *D* was distinguished on the ground that in that case there were no relevant medical facilities in ST Kitts, whereas there were such facilities in Uganda. Some of the required treatment might be beyond the financial resources of the applicant, but that did not mean that his return would violate Article 3.

53. I find the question whether a failure to support destitute asylum-seekers constitutes a violation of Article 3 a difficult one. I do not think it necessary for me to answer it and I do not propose to do so. The question in the present case is whether the withdrawal of support from destitute asylum-seekers, who by definition lack the means of obtaining adequate accommodation or cannot meet their other essential living needs, in consequence of their misconduct, may constitute inhuman punishment or treatment and so violate Article 3. The judgment of the Court of Appeal in the *NCWI* case indicates that other means of support, principally by charities, are scarce. In my judgment, unless other means of support are available when support is withdrawn, there will be a violation of Article 3.

54. The above considerations fortify my view that the Secretary of State may only terminate support to destitute asylum-seekers in the circumstances specified in regulation 20; and lead me to conclude that a destitute asylum-seeker who is receiving support under Part VI of the Act has a right, which is a civil right within the meaning of Article 6, to the continuation of support subject to regulation 20. In my judgment, regulation 20, in creating this right, may be said to be supplementing the Act, and it is therefore within the power conferred by section 95(12).

55. It follows that the Claimant had a right to have his appeal against the decision of the Secretary of State to discontinue support heard by an independent and impartial tribunal established by law.

56. This conclusion makes it unnecessary to consider Article 8 under this heading.

57. For the sake of completeness, I should mention that Mr Nicol submitted that the Act conferred on the Secretary of State a discretion to establish a scheme for the support of asylum-seekers; and that once a scheme was established, as it was by the Regulations and the provision of support under them, asylum-seekers had a right to support. In view of my above conclusion, I need not reach a conclusion on this submission, the practical effect of which may not be very different from my above conclusion.

The asylum support adjudicators: an independent tribunal?

58. The submissions in this case considered separately the question whether the asylum support adjudicators constituted an independent tribunal complying with the requirements of Article 6 and the question whether any want of independence is redressed by the availability of judicial review. The most recent authority indicates that this may not be the correct approach in relation to administrative tribunals. The whole of the adjudication system, including the appeal to the adjudicator and the right to judicial review, must be considered in order to decide whether the individual's civil rights have been determined by an independent and impartial tribunal established by law as required by the Convention: see *Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] IRLR 208, especially at paragraphs 55 and 59 to 61.

59. In any event, the Claimant's case concerns a moving target. A right of appeal or to judicial review must be interpreted so as to avoid any infringement of Article 6. It follows that the more important the civil right in question, and the greater the doubt as to the independence of the administrative tribunal, the wider must be the scope of review by the Courts.

60. It is not suggested that the Chief Asylum Support Adjudicator was not impartial. As mentioned above, the Claimant's case is that she is not independent of the other party to the dispute before her, namely the Secretary of State for the Home Department. Since the jurisdiction of the asylum support adjudicators is to hear appeals from decisions of the Secretary of State, he is always a party to the disputes before them. Mr Nicol submitted that since they are appointed by the Secretary of State, they cannot be independent. He accepted that if they were appointed by the Lord Chancellor, he could not complain about the identity of their appointing authority.

61. It is unclear why the 1999 Act gave to the Secretary of State the responsibility for appointing asylum support adjudicators. No good reason was offered in the course of argument. In 1987 responsibility for the appointment of immigration adjudicators was transferred from the Home Secretary to the Lord Chancellor precisely to meet objections to their apparent lack of independence. In the course of the debates on the Bill that became the 1999 Act, the question was asked why the adjudicators were to be appointed by the Home Secretary rather than the Lord Chancellor, who appoints not only immigration adjudicators but also the National Insurance Commissioner.

The Government gave assurances as to the independence of the asylum support adjudicators, but no good reason for their being appointed by the Home Secretary. Mr O'Brien, for the Government, referred to the fact that the Home Secretary appoints the Police Complaints Authority (see Hansard, 11 May 1999, column 1411), but that is not an appropriate comparison, since the Police Complaints Authority is not a tribunal; it does not determine disciplinary charges against police officers (which are referred to a tribunal on which the members of the Authority who were concerned with the case cannot sit); and it does not even arguably determine any civil rights or obligations. Moreover, the Home Secretary is not primarily responsible for police forces other than the Metropolitan Police: those forces are the responsibility of local Police Authorities. The Government error is not encouraging.

62. Two preliminary questions arise under this heading:

(a) Does Article 6 require that the independence of the tribunal be guaranteed by law?

(b) What facts may be taken into account when deciding whether a tribunal is independent? Specifically, does Article 6 require that the facts that assure the independence of the tribunal should be publicly available?

63. The matters relevant to the question of the independence of the asylum support adjudicators are the following:

(1) Statutory Provisions

(a) The asylum support adjudicators are appointed by the Home Secretary: paragraph 1 of Schedule 10 to the Act.

(b) The asylum support adjudicators exercise their functions under the direction of the Chief Asylum Support Adjudicator. She may have additional functions as the Home Secretary may determine.

(c) The Secretary of State determines their salary and expenses, pensions, allowances and gratuities: paragraph 3 of Schedule 10.

(d) The Secretary of State may determine to make a payment of compensation to a person who ceases to be an adjudicator during his term of office if he considers there are special circumstances justifying such a payment: paragraph 4 of Schedule 10.

(e) The Secretary of State determines the staffing of the adjudicators: paragraph 6 of Schedule 10.

(f) The adjudicators are requirement to sit at such times and in such places as the Secretary of State may direct: paragraph 7 of Schedule 10.

(g) By paragraphs 94 and 95 of Schedule 14 to the Act, the asylum support adjudicators are placed under the supervision of the Council on Tribunals, and are listed in Schedule 1 to the Tribunals and Inquiries Act 1992. The Council on Tribunals is an independent body which keeps under review their constitution and working, and gives advice to the Government. According to their reports, one of the Council's principal concerns is to seek to promote the "openness, fairness and impartiality" of tribunals.

(h) By virtue of section 7 of the Tribunals and Inquiries Act 1992, the consent of the Lord Chancellor is required to the exercise of the Home Secretary's power to terminate the appointment of an asylum support adjudicator.

(2) Non-statutory provisions

(i) The posts are publicly advertised.

(j) Appointments are made by the Secretary of State on the recommendation of an independent panel, following open competition. The panel operates by reference to the Commissioner for Public Appointments' Guidance on Appointments to Public Bodies. Members of the panel have included the Director of JUSTICE and a Judge from Birmingham Crown Court. The Secretary of State exercises the final choice as to the successful candidate from a limited selection of persons who have been endorsed as suitable by the independent panel.

(k) The Chief Adjudicator and Deputy Chief Adjudicator are appointed for a 5-year fixed term that is automatically renewable for a further five years. Other adjudicators are appointed for three years, automatically renewable for five years.

(l) The terms of appointment of the adjudicators provide that they can only be removed from office on specified grounds (misbehaviour, incapacity, or sustained failure to observe the standards reasonably expected) or if they reach the retirement age. Removal from office or non-renewal can take place only following an investigation conducted by a judge nominated by the Lord Chief Justice. Any decision to remove an Adjudicator, or not to renew their appointment, must be concurred in by the Lord Chief Justice.

(m) The salary of the Chief Asylum Support Adjudicator is set at the equivalent to salaries paid to the holders of posts within Group 6.1 of the Senior Salaries Review Board judicial salary structure. Her terms of appointment provide that any increase will be "analogous with" Grade 6.1, an expression criticised by Mr Nicol as vague. In its context, I accept that it means "equivalent to". It is therefore fixed independently of the Home Secretary. Pay increases for all of the asylum support adjudicators depend on the recommendations of the Review Body on Senior Salaries.

(n) The terms of appointment of the Chief Asylum Support Adjudicator provide that she has "overall responsibility to the Secretary of State for the delivery of an economic, efficient and effective adjudication system". They require her to provide an annual report to the Secretary of State including details of expenditure and outcomes and outputs of the adjudications system,, and that publication of the report is in the discretion of the Secretary of State.

(o) The Home Secretary would consider it improper to differentiate between the salaries paid to individual asylum support adjudicators on the basis of their decisions.

(p) The Adjudicators have dedicated accommodation: the Secretary of State does not decide where appeals are held;

(q) Particular appeals are allocated to particular Adjudicators by the Chief or Deputy Chief Adjudicator. The Secretary of State has no involvement in such decisions.

(r) The Adjudicators' Code of Conduct, made by the Chief Asylum Support Adjudicator and the Deputy Chief Asylum Support Adjudicator with the approval of the Home Secretary, stresses their obligation to conduct hearings fairly, independently, and in accordance with the Convention.

Must the independence of a tribunal be established by law?

64. In the absence of authority, and untrammelled by the wording of the Convention, I should have thought that the independence of a tribunal should be established by law. If its independence is grounded in the law, then, since that the law is publicly available, the second question does not arise. If the independence of a tribunal may properly be assured by other provisions, then the matters which go to establish that a tribunal is independent should be publicly available. It is important that justice be seen to be done, and that requires that the tribunal that is responsible for doing justice is seen to be independent. Of course, any facts, publicly known or not, which go to show that a tribunal is not in fact independent, must be taken into account in

determining whether there has been a violation of Article 6. In other words, legally established independence should be a necessary, but not a sufficient, qualification for a tribunal that determines civil rights and obligations or criminal charges.

65. However, this view is not supported by the wording of Article 6 or by authority. The wording of Article 6 indicates that the tribunal must be established by law, as the asylum support adjudicators clearly are, but that their independence need not be. This interpretation receives support from the judgment of the European Court of Human Rights in *Sramek v Austria* (1984) 7 EHRR 351, which considered under separate headings the requirements that the determination of a civil right or obligation should be by a "tribunal established by law" and that there should be an "Independent and impartial tribunal": see paragraphs 36 and 37 ff. of the judgment. More explicitly, in *Campbell and Fell v UK* (1984) 7 EHRR 165 the Court said, at paragraph 80:

> "It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6.1. However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present."

66. It follows that Article 6 does not require that the independence of a tribunal that determines civil rights and obligations be guaranteed by statute.

Must the facts establishing the independence of a tribunal be publicly available?

67. The European Court has held that the requirement of independence involves an appearance of independence: see *Campbell and Fell v UK* (cited above); *Bryan v UK* (1995) 21 EHRR 165 at paragraph 37.

68. Mr Nicol's submissions placed emphasis on the lack of an appearance of independence. He was compelled to accept that the security of tenure of the asylum support adjudicators in fact satisfies the requirements of Article 6. However, some of the most important of the provisions assuring the security of tenure of the asylum support adjudicators are not public knowledge (though they may become such when this judgment is published), since they are to be found in the terms of appointment of the asylum support adjudicators, which have not been published. If they are not taken into account, the independence of the asylum support adjudicators may be seen as questionable. A crucial question, therefore, is the extent to which unpublished facts may be taken into account in determining whether a tribunal is independent.

69. Mr Nicol submitted that a more stringent requirement of public knowledge of the independence of asylum support adjudicators was appropriate than might be the case

in relation to other tribunals on the ground that they persons appealing to them were likely to be persons with limited knowledge of English. Carried to its logical extreme, this argument would mean that a tribunal would not be independent unless the provisions assuring its independence were made easily available in the languages of the persons whose right and obligations it determines. While it is good practice to make such information available in the language of such persons, in my judgment the requirements of independence and the appearance of independence imposed by Article 6 do not vary from tribunal to tribunal depending on the level of education and the language abilities of those who appear before them.

70. The question whether the matters establishing independence must be public knowledge was considered by the Courts-Martial Appeal Court in *R v Spear* [2001] 2 WLR 1692. (Incidentally, on 20 June 2001, the House of Lords gave the defendants leave to appeal from the decision of the Courts-Martial Appeal Court.) That case concerned the permanent president of courts-martial and a part-time judge advocate. The Court held that it was sufficient if a reasonable man, apprised of all the relevant facts (and, therefore, presumably not only those publicly available) and the general practice, would conclude that there was no real doubt as to the independence of the tribunal. In a trenchant passage, Laws LJ, giving the judgment of the Court, said, at 1707:

> "The principles of Article 6 are of vital importance in the constitutional advance in our law which the Human Rights Act 1 1998 re[resents. But to find those principles unfulfilled upon facts where, on a proper consideration of all the material, they can only be found wanting if the court adopts an undue formalism – or even something approaching a neurotic distrust – would be gravely damaging: to the objectivity of the law in general, and to the values of the Human Rights Act in particular.
>
> 35. There is as we understand it no jurisprudence to show that the "guarantee" referred to in *Findlay's* case 24 EHRR 211, 244 and elsewhere must as a matter of law be formal, in some way cast in stone. Indeed the terms of paragraph 67 of the judgment in *Incal's* case 29 EHRR 449, 485-486, which we have earlier cited, clearly imply the contrary. This is with respect no surprise; were it otherwise, the benign and flexible *principles* underlying article 6 would be turned into constricting inflexible *rules*, and the doing of justice would be ill served. We consider that in the context of our domestic jurisdiction, a useful but by no means exclusive approach to the objective requirements of article 6 may be to invoke the common law's reasonable man. Would the reasonable man, *apprised of all the relevant facts about the particular case and the general practice*, conclude that there existed any real doubt as to the court's impartiality or independence?"

71. I do not find it easy to reconcile a test that takes account of *all* the relevant facts (including, presumably, those that are not available to the public) with the requirement of an appearance of independence.

72. In *Bird v Secretary of State for the Department of Trade and Industry*, commonly referred to as the *Scanfuture* case, (a judgment given on 23 March 2001, unreported) the present question was considered by the Employment Appeal Tribunal. The judgment of the Tribunal was given by the President, Lindsay J. He reviewed the authorities comprehensively, and stated:

> "These references to an 'informed' observer (the **Director General** case) or " a fully informed layman" (**McGonnell**) and 'a reasonable man apprised of the all the relevant facts about the particular case and the general practice' (**Spear**) do raise difficulties about the reasonable man's sources of information. There is no difficulty, it seems to us, in ascribing to him all information which can be said to be in the public domain even if only a persistent busy-body would be likely to have learned of it but if he is to have ascribed to him information only available to anyone through the exercise of the powers of the Court in the case being examined or otherwise available by reason only of those proceedings then a problem does, as it seems to us, arise. The problem would be that one would then be ascribing to the reasonable observer information not available to the public yet doing so as part of an exercise which was intended to ensure that it was the public that was to be procured to remain confident in the administration of justice. If, on truly publicly available information, there would be a real doubt as to the Court's impartiality or independence, that view would be likely to remain the view of the informed public-at-large even if a party to the proceedings or a confidant of a party might have special knowledge which would have dissipated that real doubt. We shall for the time being therefore ascribe to our construct, the fair-minded and informed observer, only such information as could be acquired by a persistent, even dogged, inquirer as a member of the public and not such information as would take him out of that class – the public – whose confidence in the administration of justice was being sought to be preserved."

73. It seems to me that good constitutional practice requires that the relevant facts should be publicly known, and that it should not require a dogged inquirer to discover them. I am not formally bound by the judgments of either the Courts-Martial Appeal Court or the EAT. They do however merit considerable respect. Furthermore, I do not think that a third formulation of the relevant test, by a puisne judge, would be helpful. I prefer Lindsay J's formulation to that of the Courts-Martial Appeal Court, and I propose to adopt it.

74. Of the provisions summarised in paragraph [63] above, the most important are those relating to the security of tenure of the asylum support adjudicators. In practice, they enjoy considerable security of tenure: I refer to paragraphs (h), (k) and (l) above. According to Mr Wrench's second witness statement, filed on behalf of the Secretary of State, the terms and conditions of employment of the asylum support adjudicators "can be made available in answer to specific enquiries". Mr Nicol understandably criticised the vagueness of this statement. The inference I draw is that they would be made available at least if the enquirer made known that he was concerned to ascertain whether the asylum support adjudicators are independent for the purposes of compliance with the Convention, as they were in the present case. I do not think that any of the information summarised in paragraph [63] can be regarded as unavailable to the public. It would be available to a concerned and active inquirer.

75. On the basis of that information, in my judgment the asylum support adjudicators fulfil the requirements of independence under Article 6. A reasonable person in possession of that information would not have any justifiable concern as to their lack of independence. I accept Ms Rose's submission that the status of the asylum support adjudicators cannot sensibly be distinguished from the lay members of the Employment Tribunals considered in *Scanfuture*. I do not regard the matters referred to in sub-paragraphs (d), (e) and (f), which were particularly relied upon by Mr Nicol, as justifying a reasonable concern as to their independence. Similarly, the managerial responsibilities of the Chief Asylum Support Adjudicator and the Deputy Chief Asylum Support Adjudicator do not justify any such concern. Their security of tenure and the practical independence of their remuneration from any decisions of the Home Secretary are the most important factors establishing their independence.

76. Having said that, it would clearly be preferable for the Home Secretary's responsibilities in relation to the appointment, terms of office and termination of appointment of asylum support adjudicators to be transferred to the Lord Chancellor, as was done in the case of immigration adjudicators. No distinction between the two offices justifying the difference in ministerial powers has been suggested, and the only inference I can draw is that there is none. In addition, I was told by Ms Rose that the terms of appointment of the asylum support adjudicators are to be published on the internet. This would clearly be an improvement over the current position, since it would make public the provisions as to their security of tenure. Lastly, as mentioned above, the implementation of the recommendations of the Leggatt Report would make their independence clear.

77. My conclusion as to the independence of asylum support adjudicators makes it strictly unnecessary for me to consider whether judicial review can cure the lack of independence by subjecting them to control by a judicial body with what has been termed "full jurisdiction". For the sake of completeness, however, I shall summarise my conclusions on this question.

The effect of judicial review

78. The question whether judicial review may cure any want of independence of an administrative tribunal should depend on the nature of the issues determined by that tribunal, and the extent to which the tribunal lacks the qualities of independence required by Article 6. Where the issues do not, or are unlikely to, involve disputed questions of fact, or where a large element of the application of policy is involved, and the extent to which the tribunal lacks independence is minor, judicial review may well suffice. In *Bryan v UK* (1995) 21 EHRR 342, there was no dispute as to the primary or the secondary facts (i.e. the inferences drawn from the primary facts), and the Court considered that the procedure before the inspector was governed by many of the safeguards required by Article 6(1): see paragraph 47 of the judgment. I refer in particular to the concurring opinion of Mr Nicholas Bratza, as he then was, as a member of the Commission, at 354. Mr Bratza's opinion was approved by Lord Hoffman in *Alconbury* [2001] 2 WLR 1389 at paragraphs 106 to 111, who at paragraph 117 of his speech also referred to the importance of policy questions, or questions of expediency, which are not appropriate for judicial or quasi-judicial determination. On the other hand, where the decisions of a tribunal are likely to depend to a substantial extent on disputed questions of primary fact, and the tribunal is clearly not independent, judicial review should not suffice to produce compliance with Article 6. The scope for review of findings of primary facts is too narrow to be considered a "full jurisdiction" in such a context. Fact-dependent decisions must be made by fully independent tribunals: the scope for judicial review of primary findings of fact, and particularly of findings as to the credibility of witnesses, is generally too narrow to cure a want of independence at the lower level.

79. I think that the Courts should lean against accepting judicial review as a substitute for the independence of tribunals. If the availability of judicial review is too easily regarded as curing a want of independence on the part of administrative tribunals, the incentive for the executive and the legislature to ensure the independence of tribunals is considerably weakened.

80. Having said that, in the case of asylum support the relevant decisions made by the Home Secretary under the Act and the Regulations involve a large element of subjectivity. Under section 95, the principal question is whether an asylum-seeker "appears to the Secretary of State to be destitute or likely to become destitute" within the prescribed period. Section 103(1) provides for an appeal from a decision of the Secretary of State that an applicant does not qualify for support, but presumably the qualification in question is that the applicant "appears to the Secretary of State to be destitute" or likely to be so, rather than that he is in fact destitute or likely to be so. The issue before an adjudicator is likely to be whether the Secretary of State had reasonable grounds to come to his decision, rather than a dispute as to primary facts. In relation to the cessation of support, and the jurisdiction under section 103(2), Regulation 20(1) refers in paragraphs (a), (b) and (c) to the Secretary of State having "reasonable grounds to suspect" that the supported person or any dependant has committed the specified acts. In these cases too the issue is likely to be the

reasonableness of the grounds rather than, as would normally be the case, the primary facts alleged. The matters to be considered under paragraphs (d) and (e) are objective facts.

81. In these circumstances judicial review of the decision may be more made to closely resemble a full appeal. If it is considered appropriate, the court would be able to apply a stringent test to the question whether the grounds relied upon by the Secretary of State were indeed reasonable and sufficient to justify his conclusion, and to test the decision of the adjudicator on that basis. There is no element of policy or expediency in the decisions to be made by the Secretary of State that are the subject of appeal to the adjudicators.

82. Accordingly, if the asylum support adjudicators lacked important elements of independence, and in particular if they did not enjoy security of tenure, by reason of the subjectivity of most of the bases for the decisions of the Secretary of State I should have held that the availability of judicial review results in compliance with Article 6.

83. Lastly under this head, I should mention the submission of Mr Nicol that judicial review cannot be regarded as a cure for any want of independence on the part of asylum support adjudicators because it is not a remedy that is available in practice. Asylum support adjudicators are required to hear appeals to them very expeditiously, as the sequence of events in this case shows. The effects of an appeal being rejected are immediate and can be disastrous for the asylum-seeker, who may be deprived of accommodation and support and rendered destitute. They cannot wait for the weeks or longer that can elapse before an effective judicial review hearing can be held.

84. I do not consider this submission to be well-founded. If an effective and practical remedy by way of judicial review were necessary in order to produce compliance with Article 6, the Administrative Court Office and the judiciary would have to ensure that it is available, by expediting hearings or granting interim relief. Indeed, even without the obligations imposed by the Human Rights Act, in the absence of suitable interim undertakings on the part of the Home Secretary, expedition and/or interim relief would be necessary in a meritorious case.

The decision of the Chief Asylum Support Adjudicator in this case

85. The National Asylum Support Service agreement relating to the Claimant, which contained the terms on which he was given support, stated:

> "If you break the occupancy agreement, we may suspend or end the support we give you."

Observance of the terms of the occupancy agreement was therefore a condition subject to which asylum support was provided within the meaning of regulations 19 and 20(1)(a). As mentioned above, the term of the occupancy agreement of which the Claimant was said to have been in breach was clause 3(17).

86. I am impressed by the care given by the Chief Asylum Support Adjudicator to her decision in this case, and I have considerable sympathy for her decision. She was not assisted by the fact that the point now taken on behalf of the Claimant as to the interpretation of clause 3(17) of the occupancy agreement had not been taken in the letters from the Claimant's solicitors.

87. However, I have come to the conclusion that she misinterpreted clause 3(17) of the occupancy agreement. The occupancy agreement is a badly-drafted document. It is, and is intended to be, a licence agreement. It is not intended to create the relationship of landlord and tenant, and it was not suggested that it did. Yet clause 3(17) refers to "the demised Premises". This provision was clearly taken from a residential lease, in which the demised premises were probably intended to be the entirety of a flat. However, in the occupancy agreement, "the Premises" as defined are Room No. 14, the Claimant's room. "The demised Premises" cannot mean the whole of the building at 9 Hillsborough, which is presumably what is referred to in Clause 3(17) as "the Entire Building".

88. The incident referred to in paragraph 32 of the Chief Asylum Support Adjudicator's Reasons Statement did not take place in the Claimant's room. It therefore could not have constituted a use of that room.

89. In addition, a single incident of assault by the occupier of premises will not normally constitute the use of premises "a purpose which shall be or tend to be a nuisance or annoyance or inconvenience". In S *Schneiders & Sons Ltd v Abrahams* [1925] 1 KB 301, a tenant had been convicted of receiving stolen property in his dwelling-house. It was held that he had "used the premises … for an immoral or illegal purpose" within the meaning of section 4 of the Rent and Mortgage Interest Restrictions Act 1923, the then Rent Act, on the basis that he had made use of the premises in order to commit the crime of which he had been convicted. The case was decided by that classic and most eminent Court of Appeal of Bankes, Scrutton and Atkin LJJ. Bankes LJ, said, at 307:

> "It may be that the mere fact of a crime being committed on the premises would not constitute a user of the premises by the tenant for an illegal purpose; for example, if the tenant was convicted of an assault upon some one who happened to be on the premises in the occupation of the tenant, and if that were the only evidence, I doubt whether the tenant could be said to have been convicted of "using the premises for an .... illegal purpose" within the meaning of s. 4. But if the tenant uses the premises as a coiner's den or as a deposit for stolen goods, a

> single instance of such user seems to me quite enough to satisfy the language of the statute."

Scrutton LJ summarised the position as follows:

> "I come to the conclusion that the conviction need not be for using the premises for one or another immoral or illegal purpose, and that it is enough if there is a conviction of a crime which has been committed on the premises and for the purpose of committing which the premises have been used; but that it is not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission."

Atkin LJ said, at 311:

> "This leads to the conclusion that the words of s. 4 must be used in a less technical sense. In my opinion they cover a case where the tenant has been convicted of a criminal offence, and in the course of the trial it has been proved that he used the premises for an immoral or illegal purpose. "Using" the premises in this section does not necessarily involve a continuous or repeated user. If the tenant formed the deliberate purpose of robbing a man, allured him into the premises and so used them for the purpose, it would be sufficient for the section if they were once so used. On the other hand if the premises are once used for an immoral or illegal purpose, it does not necessarily follow that they have been used for such a purpose within the section; for example a casual assault may be committed in the course of an innocent user."

90. More recently, in *Abrahams v Wilson* [1971] 2 QB 88, the Court of Appeal considered the case of a tenant who had been convicted of being in possession of cannabis in his home. Possession was sought under the provision of the Rent Act 1968 which was equivalent, and identically-worded, to the provision considered in S *Schneiders & Sons Ltd v Abrahams*. The County Court judge had held that the tenant had not used the premises for an illegal purpose. Widgery LJ referred to the earlier case, and said:

> "Applying Scrutton L.J.'s test, the position in regard to the finding of dangerous drugs on the demised premises I think is simply this: If the drugs are on the demised premises merely because the defendant is there and has them in his or her immediate custody, such as a pocket or a handbag, then I would say without hesitation that that does not involve a "using" of the premises in connection with the offence. On the other hand, if the premises are employed as a storage place or hiding place for dangerous drugs, a conviction for possession of such

> drugs, when the conviction is illuminated by further evidence to show the manner in which the drugs themselves were located, would I think be sufficient to satisfy the section and come within Case 2."

91. Applying these authorities, and indeed the natural meaning of clause 3(17) of the occupancy agreement, in my judgment the incident referred to in paragraph 32 of the Chief Asylum Support Adjudicator's Reasons Statement did not constitute a use of premises within the meaning of that provision.

92. It was not argued before me that there was any implied term of the occupancy agreement of which the Claimant was in breach. I should not be taken to have decided that there was no relevant implied term.

93. For the above reasons, I find that the decision of the Chief Asylum Support Adjudicator in this case is liable to be quashed for error of law. In my judgment, both she and the Secretary of State misinterpreted clause 3(17) of the occupancy agreement, and the Secretary of State therefore did not have reasonable grounds to suspect that the Claimant had not complied with the relevant condition subject to which asylum support had been provided to him.

94. This conclusion renders it unnecessary for me to determine whether the Chief Asylum Support Adjudicator's decision infringed the rights of the Claimant under Articles 3 and 8. Her decision was not an easy one, particularly since when the matter came before her the Claimant was in custody, so that her decision did not immediately result in his being on the streets. However, I was informed that the withdrawal of support, and in particular of accommodation, resulted in his being refused bail pending his trial, because he had no fixed abode. When in due course he pleaded guilty to assault occasioning bodily harm, he was not given a custodial sentence, which indicates that the magistrates did not consider him to constitute a threat to society. The Secretary of State could, and should, have considered whether the incidents in question were the result of difficulties in the relationship between the Claimant and Kurds that could have been avoided if he had been moved to other accommodation. Generally, unless some alternative accommodation and support is available to an asylum-seeker, withdrawal of support is likely to constitute inhuman treatment or punishment in breach of Article 3. Rights under Article 3, unlike those under Article 8, are unqualified, and their infringement cannot be justified by matters of the kind referred to in Article 8.2.

95. In the circumstances, it is unnecessary for me to consider whether the decision of the Chief Asylum Support Adjudicator infringed Article 8.

Conclusion

96. The decision of the Chief Asylum Support Adjudicator will be quashed. The claim for a declaration of incompatibility fails.

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MR JUSTICE STANLEY BURNTON: In this case I am grateful to counsel for their corrections to the draft judgment. There is now an approved judgment which I hope incorporates those corrections and sets out my decision.

MR NICOL: My Lord, I am grateful. I take it then that your Lordship will quash the decision and remit it for further hearing.

MR JUSTICE STANLEY BURNTON: That is right.

MR NICOL: May I make an application as to costs. On the overall result we were successful. I recognise, of course, that the argument as to the independence of the Special Adjudicator was not ultimately successful. My Lord, if one counts up the issues that your Lordship had to deal with, they were as follows: whether or not Article 6.1 applied - we were successful on that; whether or not the Special Adjudicator was in fact satisfying the criteria of independence and impartiality - we were unsuccessful on that; whether or not judicial review would have been an adequate alternative - we were successful on that; the housing occupancy agreement - we were successful on that. In terms of Article 3 of the Convention, although your Lordship did not find it necessary to decide that as a discrete issue, your Lordship indicated that he was in favour of the arguments that we were advancing rather than those which were put forward in resistance. So, my Lord, of the five issues in all we were successful on four. I would not expect your Lordship to give us all our costs, but in our submission there ought to be an order that we have at least a proportion.

In terms of who should pay the costs, in our submission this is a completely artificial question. The money, one way or another, is going to come out of the pocket of the Secretary of State for the Home Department, he funds the Special Adjudicator and funded his own representation. The order could either be against the respondents without distinguishing between them or simply against the Secretary of State. My Lord, that is my submission.

MISS ROSE: My Lord, I represent both the Home Secretary and the Asylum Support Adjudicator today. Your Lordship will not be surprised to hear that I have a slightly different perception than that put forward by Mr Nicol of what were the issues and what were the results.

MR JUSTICE STANLEY BURNTON: I am interrupting you because at a late stage I revised the section on judicial review and this looks to me like the pre-revised section. I am looking at paragraph 78 to 83 of the judgment. This looks like it could have arisen because my clerk is away, he was mugged last week, so my cases are being dealt with by another clerk.

MISS ROSE: Does it alter the result?

MR JUSTICE STANLEY BURNTON: It does not alter the final result, but what I remember saying is -- this comes from leaving everything to one's clerk and not re-reading it oneself -- there is a connection between the extent of judicial review and the matter which is being reviewed, and it seems to me the Human Rights Act requires the court to extend judicial review where the matter being reviewed -- the greater the concerns under Article 6 in relation to the matter being reviewed, the more extensive must be judicial review so that the whole package does comply with Article 6, and I am not sure that this says that for the moment. I will go over that. I do not think that affects costs at all.

MISS ROSE: My Lord, the way we see it is like this. There were two issues before the court. The first was whether or not the Asylum Support Adjudicator was an independent and impartial adjudicator. That was an issue to which the Home Secretary addressed all his submissions. The second issue related to the question of whether the individual decision of the Asylum Support Adjudicator was or was not flawed. So far as the first issue was concerned, the application was unsuccessful. So far as the second was concerned, it was successful. Technically, in my submission, the right order ought to be that the costs of the Secretary of State ought to be paid by the claimant because I was successful in my defence of the independence and impartiality of the Asylum Support Adjudicator. The costs relating to argument in relation to the actual decision of the adjudicator ought to be paid by the Asylum Support Adjudicator. Now, I recognise --

MR JUSTICE STANLEY BURNTON: But this is a legal aid case, I take it.

MISS ROSE: It is, my Lord, and I recognise that there is a degree of artificiality about it, but that is the technically correct analysis. Then, in my submission, one looks at it overall. Overall we spent, I would say, 80 per cent of the court's time at least arguing about independence and impartiality.

MR JUSTICE STANLEY BURNTON: The argument on the narrow point would have taken about three minutes because, frankly, I was with Mr Nicol from the moment he stood up, if not before.

MISS ROSE: The argument in relation to the occupancy agreement I think took about 30/40 minutes in total.

MR JUSTICE STANLEY BURNTON: Yes. I did not ask Mr Nicol to address it first time round, did I?

MISS ROSE: Of course there would have been some costs incurred in his skeleton argument. If anything, the balance of the costs ought to be mine because the great majority --

MR JUSTICE STANLEY BURNTON: But you have no-one to pay your costs.

MISS ROSE: Indeed, my Lord. The suggestion I was about to make is that overall there ought to be no order as to costs, the costs ought to lie where they fall. The reality is that the State is going to pick up the bill on both sides. What I submit is inappropriate is that a costs order ought to be made against the Secretary of State or against the Asylum Support Adjudicator in circumstances where we have, in effect, won 90 per cent of what was argued.

MR JUSTICE STANLEY BURNTON: Is the Asylum Support Adjudicator represented? By you?

MISS ROSE: Yes. I do. I accept what Mr Nicol says that costs that are awarded against the Asylum Support Adjudicator will of course be paid by the Home Secretary, because the Home Secretary funds the Asylum Support Adjudicator.

MR JUSTICE STANLEY BURNTON: Why should I not make an order against the Asylum Support Adjudicator? I know there is public funding on both sides but I am sure that the legal aid fund would be very grateful for every contribution it receives from the Home Secretary.

MISS ROSE: The reason, my Lord, is that if your Lordship was going to do that, it would be only fair to make an order in my favour in relation to the balance of the claim, and the two would have to be set off against each other.

MR JUSTICE STANLEY BURNTON: Why would they have to be set off?

MISS ROSE: Because it is unfair if, in effect, the same party, the Home Secretary, has to pay costs arising out of the small part of the claim in which we were successful but has no redress for recovering costs in relation to the very large part of the claim in which we were

successful. That is why I am suggesting no order as to costs is the overall fairest way of disposing of the action.

MR NICOL: My Lord, the claimant was legally aided and in those circumstances your Lordship cannot make an order for costs against him. In terms of the significance of legal aid for an order of costs in favour of the claimant, as your Lordship has said, the Legal Services Commission is anxious about its budget and these orders do make a difference.

My Lord, as far as the points made by my learned friend about her being successful on one of the issues --

MR JUSTICE STANLEY BURNTON: On the constitutional issue she was successful.

MR NICOL: Overall, yes, but the courts are now being encouraged to take a more discrete attitude to the question of costs. The policy behind that is to encourage a more economic use of court time. That is why I break it down into what actually were the matters that took up the time in front of your Lordship. If one breaks it down in that way, as I say, whilst overall we were unsuccessful on the question of independence, if one looks at the issues of those which your Lordship was engaged with we were successful on four out of the five. I cannot say any more.

MR JUSTICE STANLEY BURNTON: It seems to me that looking at the matter broadly, on the constitutional issues the Secretary of State succeeded. As a whole, I do not think it is right in this case to break out the issues too nicely. The claimant succeeded on the issue that mattered to him personally but the costs on that were relatively small. Given the connection between the pockets of the defendant and the interested party, I propose to make no order as to costs.

MISS ROSE: I am grateful.

MR JUSTICE STANLEY BURNTON: Any other applications?

MR NICOL: No.

My Lord, it happens that one of my colleagues in chambers has a permission application today which raises some of the same questions on Article 3. I am conscious that your Lordship may not feel that the text that has been handed down is the absolutely correct one, but in terms of the Article 3 issue, does that vary at all from what your Lordship intended? Would your Lordship allow me to pass that to my colleague?

MR JUSTICE STANLEY BURNTON: Certainly.

MR NICOL: With the caveat that it may not be the final word in terms of the impact of judicial review.

MR JUSTICE STANLEY BURNTON: What I can say about judicial review is that it seems to me that a person in the position of the claimant has a moving target, because the greater the concern as to the independence of the inferior tribunal, the more extensive must be the review by judicial review.

MR NICOL: Yes.

MR JUSTICE STANLEY BURNTON: On a quick look that does not appear in this text.

MR NICOL: I will add the caveat that that may not be the reliable text as far that part is concerned, but as far as Article 3 is concerned your Lordship is content.

MR JUSTICE STANLEY BURNTON: Yes.