COURT OF APPEAL, CIVIL DIVISION

R (on the application of Q and others)

v.

Secretary of State for the Home Department

[2003] EWCA Civ 364, [2003] 2 All ER 905

Lord Phillips Of Worth Matravers Mr, Clarke And Sedley LJJ

18 March 2003.

COUNSEL: Nicholas Blake QC, Stephen Knafler, Simon Cox and Benjamin Hawkin (instructed by Clore & Co, Refugee Legal Centre, Ben Hoare Bell, Sunderland and Asghar & Co, Slough) for the claimants.
Lord Goldsmith QC, A-G, David Pannick QC, Clive Lewis and Samantha Broadfoot (instructed by the Treasury Solicitor) for the Secretary of State.
Rabinder Singh QC and Raza Husain (instructed by the Joint Council for the Welfare of Immigrants and Liberty) as intervenors.

The following judgment of the court was delivered.

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LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION

[1] This is an appeal from the judgment of Collins J dated 19 February 2003 ([2003] EWHC 195 (Admin), [2003] All ER (D) 251 (Feb)). The issues that it raises all relate, in one way or another, to the efficacy of s 55 of the Nationality, Immigration and Asylum Act 2002, which came into force on 8 January of this year. Before that date, any asylum-seeker who had no means of obtaining adequate accommodation or who could not meet his other essential living needs was likely to look to the Secretary of State for assistance. Under the legislative scheme, as it had developed, he and he alone had the power to provide such persons with assistance. Section 55 of the 2002 Act now provides that the Secretary of State 'may not provide or arrange for the provision of support' to a person making a claim for asylum where he 'is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United [*908] Kingdom'. Collins J had before him applications for judicial review by six asylum-seekers whose claims for support had been refused on the ground that they had failed to satisfy the Secretary of State that they had advanced their claims for asylum as soon as reasonably practicable. Collins J allowed those applications and quashed the decisions, primarily on the grounds that the procedure adopted in each case was not fair. The Secretary of State appeals against his decision. We have permitted the Joint Council for the Welfare of Immigrants and Liberty to make a joint intervention by short oral and written submissions. The cases have been treated as test cases.

[2] Had the provision of s 55 of the 2002 Act gone no further than that which we have quoted above, it would have raised two of the issues with which Collins J had to grapple: (i) what is meant by reasonably practicable; and (ii) what procedural safeguards does the section require? The issue might, however, have arisen of whether the provision was compatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as applied by the Human Rights Act 1998. In the event that issue does not arise for s 55(5) of the 2002 Act provides that the section shall not prevent 'the exercise of a power by the Secretary of State to the extent that this is necessary for the purpose of avoiding a breach of a person's Convention rights (within the meaning of the Human Rights Act 1998)'.

[3] This raises the following conundrum. On the one hand s 55(1) prohibits the Secretary of State from providing support to persons who are destitute, but on the other hand s 55(5)

permits him to provide support in so far as this is necessary to prevent a breach of an applicant's convention rights. Article 3 of the convention provides that no one shall be subjected to 'inhuman or degrading treatment' and s 6 of the 1998 Act forbids the Secretary of State to act incompatibly with the convention rights. Can the Secretary of State refuse support to the destitute without thereby subjecting them to inhuman treatment? If there are some circumstances in which he can do so, how are they to be defined and what procedure is required to make sure that he does not stray outside them? A similar issue arises in relation to art 8, which provides that everyone has the right to his private and family life and his home. Will refusal of assistance to the destitute infringe this right? Collins J held that there was a potential tension between s 55(1) and both art 3 and art 8.

[4] The task of any court when faced with issues of statutory construction, such as those which arise in this case, is to deduce and give effect to the intention of Parliament. The judge has no discretion of his own. Rules of law prescribe what can and what cannot be considered when seeking to interpret a statute. The starting point must always be the words of the statute itself, but where there is any uncertainty there is other material to which it is legitimate to have regard and principles of construction which fall to be applied.

[5] This appeal, which is concerned with the meaning and application of a single section of a statute, raises difficult and important issues, as is demonstrated by the fact that the argument before us, of the Attorney General and Mr Pannick QC on the one hand and Mr Nicholas Blake QC and Mr Rabinder Singh QC on the other, lasted three-and-a-half days. The judgment of Collins J covered 34 pages of transcript. The approach of Collins J to his task cannot be faulted and we commend the care with which, in his lengthy judgment, he addressed the difficult issues before him. [*909]

LEGISLATIVE HISTORY

[6] In 1986 the Social Security Act introduced a regime under which income support could be claimed by those with no or minimal income. Under this regime, asylum-seekers who were awaiting the determination of their claims were entitled to income support. In 1993 the Asylum and Immigration Appeals Act first provided express statutory protection for asylum-seekers, including protection against refoulement pending the determination of their claims. In 1996 regulations were introduced which purported to restrict entitlement to income support to those asylum-seekers who claimed asylum on entry into the United Kingdom (see the Social Security (Persons From Abroad) Miscellaneous Amendments Regulations 1996, SI 1996/30). In R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants, R v Secretary of State for Social Security, ex p B [1996] 4 All ER 385, [1997] 1 WLR 275 the majority of the Court of Appeal held that the regulations were ultra vires in that they rendered nugatory the rights conferred by the 1993 Act on 'in-country' applicants for asylum. Simon Brown LJ commented ([1996] 4 All ER 385 at 401, [1997] 1 WLR 275 at 292):

'After all, the 1993 Act confers on asylum seekers fuller rights than they had ever previously enjoyed, the right of appeal in particular. And yet these regulations for some genuine asylum seekers at least, must now be regarded as rendering these rights nugatory. Either that, or the 1996 regulations necessarily contemplate for some a life so destitute that, to my mind, no civilised nation can tolerate it. So basic are the human rights here at issue, that it cannot be necessary to resort to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) to take note of their

violation. Nearly 200 years ago Lord Ellenborough CJ in R v Eastbourne (Inhabitants) (1803) 4 East 103 at 107, 102 ER 769 at 770 said:

"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"

‘True, no obligation arises under art 24 of the 1951 convention until asylum seekers are recognised as refugees. But that is not to say that up to that point their fundamental needs can properly be ignored. I do not accept they can. Rather, I would hold it unlawful to alter the benefit regime so drastically as must inevitably not merely prejudice, but on occasion defeat, the statutory right of asylum seekers to claim refugee status. If and when that status is recognised, refugees become entitled under art 24 to benefit rights equivalent to nationals. Not for one moment would I suggest that prior to that time their rights are remotely the same; only that some basic provision should be made, sufficient for genuine claimants to survive and pursue their claims.’

He concluded his judgment ([1996] 4 All ER 385 at 402, [1997] 1 WLR 275 at 293):

‘Parliament cannot have intended a significant number of genuine asylum seekers to be impaled on the horns of so intolerable a dilemma: the need either to abandon their claims to refugee status or alternatively to maintain them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs.’ [*910]

[7] In response to this judgment, s 11 of the Asylum and Immigration Act 1996 expressly conferred the power to make regulations excluding asylum-seekers from entitlement to income support. Under the provisions of that Act, or of subordinate legislation made under it, asylum-seekers who did not claim asylum at the point of entry lost all assistance to public housing benefit or social security benefits. In R v Westminster City Council, ex p M (1997) 1 CCLR 85 the Court of Appeal held that asylum-seekers thus deprived of the right to benefits were still entitled to relief under s 21(1)(a) of the National Assistance Act 1948, as amended. This section provided that local authorities could provide residential accommodation for persons ‘who by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them'. Giving the judgment of the court, Lord Woolf MR held (at 94):

‘The destitute condition to which asylum seekers can be reduced as a result of the 1996 Act coupled with the period of time which, despite the Secretary of State’s best efforts, elapses before their applications are disposed of means inevitably that they can fall within a class who local authorities can properly regard as being persons whose needs they have a responsibility to meet by the provision of accommodation under s 21(1)(a). The longer the asylum seekers remain in this condition the more compelling their case becomes to receive assistance under the subsection.’

Lord Woolf added (at 95):

‘Asylum seekers are not entitled merely because they lack money and accommodation to claim they automatically qualify under s 21(1)(a). What they are entitled to claim (and this is the result of the 1996 Act) is that they can as a result of their predicament after they arrive in

this country reach a state where they qualify under the subsection because of the effect upon them of the problems under which they are labouring. In addition to the lack of food and accommodation is to be added their inability to speak the language, their ignorance of this country and the fact they have been subject to the stress of coming to this country in circumstances which at least involve their contending to be refugees. Inevitably the combined effect of these factors with the passage of time will produce one or more of the conditions specifically referred to in s 21(1)(a). It is for the authority to decide whether they qualify. In making their decision, they can bear in mind the wide terms of the Direction to which reference has already been made, as contrary to Mr Beloff's submission the direction is not ultra vires and gives a useful introduction to the application of the subsection. In particular the authorities can anticipate the deterioration which would otherwise take place in the asylum seekers condition by providing assistance under the section. They do not need to wait until the health of the asylum seeker has been damaged.'

This passage has particular relevance to one of the issues with which we have to grapple—is it compatible with art 3 of the convention to provide no assistance to those who are destitute on the basis that art 3 will not be engaged unless and until that destitution results in ill-health or some other similarly severe adverse consequence?

[8] The effect of Ex p M was set at nought by s 116 of the Immigration and Asylum Act 1999. This amended s 21 of the 1948 Act by adding sub-s 1A, which provides: [*911]

'A person [subject to immigration control (which includes asylum seekers)] may not be provided with residential accommodation under sub-s 1(a) if his need for care and attention has arisen solely—(a) because he is destitute, or (b) because of the physical effects, or anticipated physical effects, of being destitute …'

[9] However, the 1999 Act introduced a new regime under which the Secretary of State undertook responsibility for the provision of support to asylum-seekers. Section 95 of the 1999 Act provides:

'Persons for whom support may be provided.—(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 period 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.'

[10] The Secretary of State set up the National Asylum Support Service (NASS) to administer this regime.

[11] The numbers of those who manage, in one way or another, to enter this country and who then or subsequently claim asylum has grown significantly in recent years and the annual cost of providing support to asylum-seekers has grown to £1bn together with the considerable

additional cost of providing them with legal aid. Section 55 of the 2002 Act is a measure by which Parliament has sought to reduce that cost. The relevant provisions of that section read as follows:

'Late claim for asylum: refusal of support.—(1) The Secretary of State may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (2) if—(a) the person makes a claim for asylum which is recorded by the Secretary of State, and (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.

'(2) The provisions are—(a) sections 4, 95 and 98 of the Immigration & Asylum Act 1999 (c 33) (support for asylum-seeker &c), and (b) sections 17 and 24 of this Act (accommodation centre).

'(3) An authority may not provide or arrange for the provision of support to a person under a provision mentioned in subsection (4) if—(a) the person has made a claim for asylum, and (b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.

'(4) The provisions are—(a) section 29(1)(b) of the Housing (Scotland) Act 1987 (c 26) (accommodation pending review), (b) section 188(3) or 204(4) of the Housing Act 1996 (c 52) (accommodation pending review or appeal), and (c) section 2 of the Local Government Act 2000 (c 22) (promotion of well-being).

'(5) This section shall not prevent—(a) the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a [*912] breach of a person's Convention rights (within the meaning of the Human Rights Act 1998), (b) the provision of support under section 95 of the Immigration and Asylum Act 1999 (c 33) or section 17 of this Act in accordance with section 122 of that Act (children), or (c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part.

'(9) For the purposes of this section "claim for asylum" has the same meaning as in section 18.

'(10) A decision of the Secretary of State that this section prevents him from providing or arranging for the provision of support to a person is not a decision that the person does not qualify for support for the purpose of section 103 of the Immigration and Asylum Act 1999 (appeals).'

[12] The effect of sub-s (10) is to preclude the right of appeal against the Secretary of State's decision to an asylum support adjudicator. Thus an application for judicial review was the only remedy open to the asylum applicants in this case.

THE ISSUES RAISED BY SECTION 55

[13] Section 55 of the 2002 Act requires the Secretary of State, when faced with a request for support from an asylum-seeker, to decide through his officials the following matters. (i) Is he satisfied that the asylum-seeker claimed asylum 'as soon as reasonably practicable'? If not: (ii) is it necessary to afford the asylum-seeker support in order to avoid a breach of his

convention rights? The immediate issue raised by this appeal is whether the Secretary of State followed a fair procedure in order to decide these matters. Collins J decided that he did not. If he was correct that was sufficient reason to quash the decisions.

[14] Collins J further considered the test of what is 'reasonably practicable' in the context of s 55. He also considered how to resolve the tension which he identified between arts 3 and 8 of the convention and the refusal of support to asylum-seekers who are destitute. We have to consider whether the conclusions that he reached on these issues were correct.

[15] The last issue that arises is whether the absence of any right of appeal against the decision of the Secretary of State under s 55 is in conflict with the requirements of art 6 of the convention.

[16] Before one can consider the requirements of procedural fairness in relation to s 55 of the 2002 Act, it is necessary to identify the nature and ambit of the factual enquiry that the Secretary of State has to carry out when faced with an application for support by an asylum-seeker. As we understand it, such an application is usually made, expressly or by implication, at the same time as the claim to asylum itself. Two questions arise. The first is the nature of the test of whether the Secretary of State is satisfied that the asylum-seeker has claimed asylum 'as soon as reasonably practicable' after arrival in the United Kingdom. The second is as to the circumstances in which, if at all, it is 'necessary' for the Secretary of State to provide or arrange for the provision of support to an asylum-seeker 'for the purpose of avoiding a breach of [that] person's convention rights'.

'AS SOON AS REASONABLY PRACTICABLE'

[17] The first issue of statutory interpretation raised by this appeal is the precise meaning to be attached to the phrase 'as soon as reasonably practicable'. [*913]

The Attorney General's primary submission was that the meaning of this phrase was perfectly clear and that there was no need to look beyond the natural meaning of the words in order to interpret them. 'Practicable' meant 'possible'. For those arriving at an airport it would almost always be practicable to claim asylum at the point of entry, the airport itself. In the vast majority of such arrivals it would be 'reasonably practicable' to claim asylum at the airport. The addition of the adverb 'reasonably' catered for the exceptional case where, by reason of special circumstances, it was reasonable for an asylum-seeker not to claim asylum immediately upon arrival. By way of example, he accepted that an asylum-seeker who was too traumatised to think clearly, or whose will was overborne by threats, might fall into this exceptional category. The test of whether there was good reason not to claim asylum as soon as practicable was an objective one.

[18] Mr Blake QC, for the respondents, submitted that the test of what was reasonable had to take account of the subjective state of mind of the asylum-seeker. An asylum-seeker would often rely utterly upon the agent who had made arrangements to get him or her into the United Kingdom. Such arrangements usually involved false documents and infringed our criminal law. Agents were concerned to get their charges through immigration without detection, so that by the time a claim for asylum was made, the agent could make himself scarce. If an agent told an asylum-seeker not to claim asylum at the port of entry, and the asylum-seeker complied with that instruction, it could not normally be said to have been 'reasonably practicable' for the asylum-seeker to claim asylum at the airport.

[19] Mr Singh QC, for the intervenors, also submitted that it was necessary to have regard to any advice given by the agent when deciding whether it had been 'reasonably practicable' for an asylum-seeker to claim asylum at an earlier point in time. He advanced the following test: in all the circumstances of the case, could the individual asylum-seeker reasonably have been expected to claim asylum any earlier than he or she did?

[20] The Attorney General, for the appellant, responded to these submissions by arguing that, if they were correct, they would effectively defeat the object of s 55. Agents would instruct asylum-seekers not to claim asylum until after they had cleared immigration in the confident knowledge that this would cause them no prejudice.

[21] The qualification of 'practicable' by 'reasonably' undoubtedly raises a problem of construction. The problem can be illustrated by the following somewhat confusing guidance issued to caseworkers by NASS:

'4.1 The burden of proof is on the applicant for support to show that it was not reasonably practicable to have made their asylum claim sooner. Those who apply for asylum immediately on arrival to an Immigration Officer will be able to access asylum support, provided they otherwise qualify. If the person fails, without good reason, to make an asylum claim immediately at the port of arrival then the expectation is that support will be refused.

'4.2 There may however be a number of cases where a person has been given temporary admission by an Immigration Officer and then subsequently applies for asylum to the Immigration Officer at a port. In such circumstances NASS must consider whether the individual had good reason for not applying as soon as reasonably practicable.

'4.3 Those who claim asylum in country following a significant change in circumstances in their country of origin (such as a military coup) will be supported by NASS provided they make their asylum claim at the earliest [*914] possible opportunity following that change of circumstance. Case-workers must decide whether a reason put forward for the timing of an asylum application is indeed a significant change of circumstance.'

[22] It seems to us that in relation to this issue of construction it is relevant to consider the object or objects of s 55. The meaning of 'as soon as reasonably practicable' must have regard to the context. For this reason it is particularly relevant to consider the extent to which a failure to claim asylum at the earliest possible opportunity is likely to be detrimental to the objects of the section.

[23] Collins J recorded that a considerable amount of evidence was put before him about the background leading to, the reasons for and the purpose of s 55. He commented that some of this had been deployed to explain the mischief which the section was designed to remedy and some to try to influence the construction of the section. Section 55 was introduced, by amendment, in the House of Lords. Some of the material to which Collins J referred consisted of statements by Lord Filkin, who introduced the amendment in the House of Lords, subsequent statements by the Secretary of State in the House of Commons, briefing notes, a written statement by the minister, Ms Beverley Hughes, following the Royal Assent to the 2002 Act and a witness statement by Mr Christopher Mace, the deputy director general in the Immigration and Nationality Directorate of the Home Office (IND).

[24] No point appears to have been taken before Collins J as to the admissibility of this material. We do not believe that most of this was admissible on the correct application of Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593 or otherwise—see the remarks of Lord Bingham of Cornhill in R v Environment Secretary, ex p Spath Holme Ltd [2001] 2 WLR 15 at 35–36, [2001] 2 AC 349 at 391–392 and of Lord Hoffmann in Robinson v Secretary of State for Northern Ireland [2002] UKHL 32 at [39]–[40], [2002] NI 390 at [39]–[40].

[25] Before us statistical data were relied upon by way of background. In so far as figures have been agreed, we can properly draw from them such inferences as logically flow from them. Unfortunately there was not agreement as to the accuracy of all the figures. There was no dispute, however, as to the broad overall picture. This is reflected by the figures given to us by the Attorney General in his final speech. In 2002 19% of applicants were granted indefinite leave to remain on grounds which included recognition of refugee status under the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmnd 9171). A further 27% were granted exceptional leave to remain on various grounds. There was not agreement as to the comparative success of port of entry asylum applications and in-country applications for asylum, but the statistics did not suggest that the difference was significant. They further demonstrated that, numerically, in-country appeals significantly exceeded port of entry applications.

[26] Mr Mace's statement set out a number of reasons for the introduction of s 55. The Attorney General accepted that this was not a legitimate way of proving the objects of the legislation, but relied upon them by way of submission. In so far as the statement reflected what can be legitimately deduced from the wording of s 55 and the background statistics, we consider that this course was legitimate. Neither Mr Blake nor Mr Singh objected to it. On this basis, we consider that the primary object of s 55 can properly be treated as preventing (1) those who are not genuine asylum-seekers and (2) those who are not in fact in need of state support from obtaining assistance. The section assumes that genuine asylum-seekers can be expected to seek asylum on arriving in this country, not to go off and do something else before seeking support. [*915] Furthermore, those who do not claim asylum and support on arrival, but do so later, will ordinarily have demonstrated an ability to subsist without support in the interim. Section 55 is designed to ensure that the circumstances in which support is sought will be circumstances in which support is likely to be needed.

[27] While the considerations set out above demonstrate good reason to restrict support to those who apply for asylum reasonably promptly upon arrival, they do not demonstrate a necessity for the application to be made at the first possible opportunity. In this context the decision in R v Uxbridge Magistrates' Court, ex p Adimi [1999] 4 All ER 520, [2001] QB 667 has some relevance. That case involved an asylum-seeker who had entered the country on a false passport. This fact was discovered at the point of entry and he was detained. Only then did he claim asylum. Charged with a criminal offence involving the use of false documents he sought to rely on art 31 of the Refugee Convention. This provided protection for refugees who presented themselves 'without delay to the authorities'. In considering whether he qualified for such protection, Simon Brown LJ quoted ([1999] 4 All ER 520 at 529, [2001] QB 667 at 679) as demonstrating the mischief against which this requirement was aimed, the following passage from Grahl-Madsen The Status of Refugees in International Law (1972) vol II, p 219:

'… exemption from penalties according to art 31(1) may not be claimed if the refugee has chosen to stay in a country of refuge for a protracted period without presenting himself to the authorities. If he eventually learns that he is about to be discovered and for that reason gives himself up, he cannot rely on the provisions of art 31(1).'

He went on to quote from the previous page:

'A person crossing the frontier illegally may have reasons for not giving himself up at the nearest frontier control point or to a local authority in the border zone. If he succeeds in finding his way to the capital or to another major city and presents himself to the authorities there, he must be deemed to have complied with the requirement, and the same ought to apply if he was unsuccessful, but could show that such was his intention.'

Simon Brown LJ went on to conclude:

'If Mr Adimi's intention was to claim asylum within a short time of his arrival even had he successfully secured entry on his false documents, then I would not think it right to regard him as having breached this condition.'

[28] The Attorney General rightly submitted that this decision had no direct bearing on the issue of construction in the present case. It does, however, demonstrate the degree of delay in claiming asylum that may be acceptable where the object of the exercise is to distinguish between the person who enters this country bent on seeking asylum and the person who intends to remain without doing so.

[29] Mr Mace's statement advances the proposition that, by requiring asylum-seekers to claim asylum at the port of entry, s 55 makes it less easy for facilitators who accompany them to escape detection and that this will deter them from bringing asylum-seekers to the United Kingdom. We are not aware of any admissible material which advances this proposition as an explanation of s 55 and it is not a point that the Attorney General advanced with any vigour, if he advanced it at all. There is no valid basis for approaching the construction of s 55 on the premise that this was one of the objects of that section. [*916]

[30] The Attorney General did, however, advance a reason why it was desirable that asylum-seekers should claim asylum at the port of entry, which we are able to accept, for it is self-evident. Those who claim at the port of entry demonstrate beyond doubt that they have just arrived. If, instead, they present themselves at asylum centres in, say, Croydon or Newcastle, the problem of determining whether they are, indeed, genuine newly arrived asylum-seekers will impose a significant additional administrative burden on the immigration service.

[31] In the context of these considerations of background, we turn to consider whether previous authority provides any guidance in interpreting the phrase 'as soon as reasonably practicable'. In Slivak v Lurgi (Aust) Pty Ltd (2001) 177 ALR 585 at 599 (para 53) Gaudron J remarked:

'The words "reasonably practicable" have, somewhat surprisingly, been the subject of much judicial consideration. It is surprising because the words "reasonably practicable" are ordinary words bearing their ordinary meaning. And the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value

judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:

‘• the phrase “reasonably practicable” means something narrower than “physically possible” or “feasible";

‘• what is “reasonably practicable” is to be judged on the basis of what was known at the relevant time;

‘• to determine what is “reasonably practicable” it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.’

[32] The last proposition reflects the fact that most of the authorities referred to relate to statutory duties imposed on employers to take such steps as are reasonably practicable to protect their employees. There the relevant test of proportionality involves weighing what is physically involved in taking a precaution against the risk that it will guard against—see, for instance, Edwards v National Coal Board [1949] 1 All ER 743, [1949] 1 KB 704. There is no scope for such an exercise in the present context. The Secretary of State argued convincingly that it was always ‘practicable’ for an asylum-seeker to claim asylum at a British airport. He might have argued that, at an airport, the qualification ‘reasonably’ adds nothing in contradistinction to the position where asylum-seekers are disgorged from a lorry far from the point of entry. He conceded, however, that in extreme circumstances—mental trauma or the imposition of threats—it was relevant to consider the mental state of the asylum-seeker when deciding whether it was reasonably practicable for him or her to claim asylum at the airport. Two questions fall for consideration. (1) Was the Attorney General right to make that concession? If so, (2) why should one not have regard to the asylum-seeker’s state of mind resulting from the information or instructions given by the agent who is facilitating his or her entry?

[33] As to the first question, a strict interpretation of what is ‘reasonably practicable’ might focus objectively and exclusively on what, if any, physical obstructions existed to claiming asylum, so that the knowledge or state of mind of the asylum-seeker would have no relevance. We consider that the Attorney General was right not to advance such an extreme interpretation in the present context. To deprive an asylum-seeker of support regardless of his reason [*917] for failing to claim asylum at the airport would, in some cases, be extremely harsh. It is possible, where the context so requires, to interpret ‘as soon as reasonably practicable’ so as to mean ‘as soon as could reasonably be expected having regard to what was physically possible', and this opens the door to having regard to the mental state of the asylum-seeker in question. As an illustration of that proposition and for no other reason we will quote two statements in relation to the manner of operation of s 55.

[34] The Secretary of State on 5 November 2002 when the amendment came before the Commons said this (392 HC Official Report (6th series) col 199, 5 November 2002):

‘The question is how reasonable we are regarding people who come here but do not claim asylum at the port of entry. We need to be reasonable and to take into account the trauma that people experience.’

The written statement on s 55 issued by Ms Beverley Hughes on 28 November 2002 included the following passage (Hansard (HC Debates), 28 November 2002, written ministerial statements, col 58WS):

'It will not be acceptable for an asylum seeker wanting NASS support to postpone making an asylum claim unless there is a very good reason for doing so. And even if there is a good reason for not claiming asylum immediately on arrival at the port, the person must claim asylum as soon as possible thereafter.'

[35] Perhaps more pertinent is a decision upon which the Attorney General himself relied. In Wall's Meat Co Ltd v Khan [1979] ICR 52 the issue was whether it had been 'reasonably practicable' for an employee to present to an industrial tribunal, within the three months required by the relevant statute, a complaint that he had been unfairly dismissed. The employee had failed to do so because he mistakenly, but reasonably, believed that he had satisfied this requirement by making a claim for unemployment benefit to a different tribunal. The Attorney General relied upon passages in the judgments of each of the three members of the Court of Appeal. Lord Denning MR said (at 56):

'I would venture to take the simple test given by the majority in Dedman's case ([1974] 1 All ER 520 at 525-526, [1974] 1 WLR 171 at 177). It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights—or ignorance of the time limit—is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. That was the view adopted by the Employment Appeal Tribunal in Scotland in House of Clydesdale Ltd v Foy [1976] IRLR 391 and in England in Times Newspapers Ltd v O'Regan [1977] IRLR 101—decisions with which I agree.

'The present case is not one where the man was ignorant of his rights or of the time limit. He was aware of them, but he thought quite naturally that his claim was already lodged and was being processed before the appropriate tribunal. He continued in that state of mind until he was told on December 9, 1976—after the three months had expired—by the local insurance tribunal that he had to lodge a complaint with the industrial tribunal. That seems to me to afford just cause or excuse: such that it was open to the industrial [*918] tribunal to hold that it was not "reasonably practicable" to present it within the three months.'

Shaw LJ said (at 59):

'I turn to the situation where a dismissed employee does know of his right to present his claim but does not realise that there is a time limit and delays his attempt to claim until that time limit is passed. I do not regard this situation as being one which of itself makes it not reasonably practicable to present a claim before the limitation has expired. There may be other factors which effectively impede the presentation of the claim in time. Some have been adverted to, such as illness; but in this context mere ignorance is not among them. Apart from extraneous considerations, such as illness or incapacity, once an ex-employee is aware of his rights it is practicable for him to pursue them from the day that he becomes aware of them.'

Finally Brandon LJ added (at 60–61):

‘Looking at the matter first without reference to the authorities, I should have thought that the meaning of the expression concerned, in the context in which it is used, was fairly clear. The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, it itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him.’

[36] The context of the Wall’s Meat case was very different from the present, but we consider that it fairly demonstrates that, in determining what is reasonably practicable, the state of mind of the person concerned can have relevance. Particularly relevant will be the knowledge of the asylum-seeker as to where, how and to whom to claim asylum. As to this, the position may differ markedly depending upon whether the asylum-seeker arrives by air or is smuggled in by lorry.

THE TEST

[37] In the light of the considerations discussed above, we would define the test of whether an asylum-seeker has claimed asylum ‘as soon as reasonably practicable’ as follows:

‘On the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity for claiming asylum and to the asylum seeker’s personal circumstances, could the asylum seeker reasonably have been expected to claim asylum earlier than he or she did?’ [*919]

[38] The Attorney General relied upon the Wall’s Meat case for the proposition that an individual cannot contend that he has acted reasonably where he has been misled or misinformed by a professional adviser. This principle, so he submitted, precluded any asylum-seeker from relying upon information, advice or instructions given by the agent facilitating his or her entry as rendering it not ‘reasonably practicable’ for the asylum-seeker to claim asylum at the port of entry.

[39] The reason why an individual cannot normally contend that conduct based on bad advice from a solicitor or other professional adviser was reasonable was not stated in the Wall’s Meat case nor explored before us. It may be by reason of principles of the law of agency, or considerations of policy, or a combination of the two. Before us the Attorney General relied heavily on considerations of policy and practicality. He argued that if asylum-seekers were entitled to pray in aid what they have been told by facilitators in order to justify failure to seek asylum at the port of entry, s 55 would become a dead letter. He also contended that it would be quite wrong to permit an asylum-seeker to rely upon instructions given by a facilitator who is committing a serious criminal offence and who is motivated by the need to avoid apprehension.

[40] We do not consider that an agent who arranges by generally fraudulent means for an asylum-seeker to come to this country is, as a matter of legal principle, to be equated with a solicitor or professional adviser so as to preclude the asylum-seeker from relying upon inaccurate or self-interested advice or information given by agents when claiming that it was not reasonably practicable to claim asylum at the port of entry. Mr Alexander Buchan, the chief executive of Refugee Action, put in evidence Home Office research which demonstrates the degree of control that some facilitators have over their charges. The Attorney General recognised the possibility of duress by threats against the families of asylum-seekers, and this phenomenon is recorded in the Home Office research. It is also clear that some asylum-seekers are so much under the influence of the agents who are shepherding them into the country that they cannot be criticised for accepting implicitly what they are told by them. There is no valid comparison between agents of this kind, whose interests at the point of entry may well be in serious conflict with those of the asylum-seekers, and professional advisers. To disregard the effect that they may have on their charges would be both unrealistic and unjust.

[41] Nor can we accept that to have regard to the effect of information provided to asylum-seekers by facilitators will rob s 55 of effect. We have had evidence of the steps that the Home Office is taking to draw to the attention of passengers arriving at United Kingdom airports that asylum must be claimed at the airport. Notices to this effect have been posted in a variety of languages. These steps, and possibly others, will make it increasingly difficult for an asylum-seeker credibly to claim ignorance of the requirement to claim asylum at the airport. There is a conflict of evidence, and the evidence continued to proliferate during the hearing before us, as to how easily an asylum-seeker can pass through immigration without being subjected to any questions. We cannot resolve that issue, but if evidence advanced on behalf of the respondents is correct, there is scope for the immigration service to tighten up entry formalities. It seems to us that it is likely to become increasingly difficult for asylum-seekers to allege, credibly, that they have been led to believe that asylum cannot or should not be claimed at the airport. At the same time the risks posed by s 55 to those who do not claim at the airport are likely to become more widely appreciated. [*920]

[42] There is one final, and important point. Later in this judgment we comment upon the nature of the factual inquiry that must, in fairness, be carried out when an asylum-seeker claims assistance. When appropriate procedures are in place, we consider that it will be very difficult for an asylum-seeker who is not very recently arrived to discharge the burden of proving that it was not reasonably practicable for him or her to claim asylum any earlier. Thus, in so far as the object of s 55 is to draw a distinction between genuine asylum-seekers who have recently arrived in this country and others who claim asylum only after they have been living here for a period as illegal immigrants, the section is likely to meet that objective.

[43] For these reasons we agree with Collins J's conclusion that, when deciding whether an asylum-seeker claimed asylum as soon as reasonably practicable, it is right to have regard to the effect of anything that the asylum-seeker may have been told by his or her facilitator.

ARTICLE 3 OF THE CONVENTION

[44] Section 6 of the 1998 Act forbids the Secretary of State from acting in a way which is incompatible with the convention rights scheduled to that Act. Section 55(5) of the 2002 Act permits the Secretary of State to provide support where s 55(1) would otherwise prohibit it where this is necessary in order to avoid a breach of the asylum-seeker's convention rights.

At issue in this appeal is whether, and in what circumstances, he will be required to provide support to an asylum-seeker who has fallen foul of s 55(1) in order to avoid a breach of art 3 or art 8 of the convention. We shall consider first art 3.

[45] Article 3 of the convention provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[46] Two issues arise. (1) Can failure to provide support ever constitute subjecting an asylum-seeker to inhuman or degrading treatment? If yes, (2) in what circumstances will the failure constitute such treatment?

[47] Collins J answered the first question in the affirmative, although the basis upon which he did so is a little opaque. He referred to the decision of Stanley Burnton J in R (on the application of Husain) v Asylum Support Adjudicator [2001] EWHC Admin 852, [2001] All ER (D) 107 (Oct), in which the issue was whether the withdrawal of support from destitute asylum-seekers violated art 3. As to this Stanley Burnton J held (at [53]):

'I find the question whether a failure to support destitute asylum seekers constitutes a violation of art 3 a difficult one. I do not think it is 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 essential living needs, in consequence of their misconduct, may constitute inhuman punishment or treatment and so violate art 3. The judgment of the Court of Appeal in R v Secretary of State for Social Security, ex p Joint Council for the Welfare of Immigrants, R v Secretary of State for Social Security, ex p B [1996] 4 All ER 385, [1997] 1 WLR 275 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 art 3.'

[48] Collins J's conclusion appears from the following passage of his judgment: [*921]

'It is clear that there is no duty on a state to provide a home. It may even be that there is no duty to provide any form of social security. But the situation here is different since asylum seekers are forbidden to work and so cannot provide for themselves. Unless they can find friends or charitable bodies or persons, they will indeed be destitute. They will suffer at least damage to their health. I therefore agree with Stanley Burnton J.'

[49] The inference from this passage is that Collins J concluded that the Secretary of State would be in breach of art 3 if he failed to provide support to an asylum-seeker in circumstances where he would not receive assistance from friends or charity. Later he held that art 3 would be violated if—

'a state puts into effect a measure which results in treatment which can properly be described as inhuman or degrading … by adversely affecting his mental or physical health to a sufficiently serious extent …'

He added: 'It is not necessary to wait until damage of a sufficient severity occurs provided there is a real risk that it will occur.'

[50] This last comment resolved an issue raised earlier in his judgment as to whether the 'real risk' test that has been applied by the Strasbourg Court in relation to intended removal was applicable in the present context.

[51] Collins J went on to hold that there will normally be a real risk that to leave someone destitute will violate art 3, observing that he was not persuaded that charity offered a real chance of providing support. However, he held that in none of the six cases before him could it be said whether there had been a breach of art 3 because insufficient consideration had been given by the decision makers to this question. This formed part of his reason for quashing the decisions.

POSITIVE AND NEGATIVE OBLIGATIONS

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

[53] The European Court of Human Rights has been asked on more than one occasion to draw a positive right out of arts 3 and 8. It has occasionally done so in fields far removed from the present one; but even in those cases where it has declined to do so, it has reiterated that at some point positive obligations do arise under these articles. A single citation will make the point:

'49. Article 3 of the Convention, together with art 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe ☐ In contrast to the other provisions in the Convention, it is cast in absolute terms, without exception or proviso, or the possibility of derogation under art 15 of the Convention. [*922]

'50. An examination of the court's case law indicates that art 3 has been most commonly applied in contexts in which the risk to the individual of being subjected to any of the proscribed forms of treatment emanated from intentionally inflicted acts of state agents or public authorities … It may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of art 3, the court has reserved to itself sufficient flexibility to address the application of that article in other situations that might arise …

'51. In particular, the court has held that the obligation on the high contracting parties under art 1 of the Convention to secure to everyone within jurisdiction the rights and freedoms defined in the Convention, taken together with art 3, requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and

degrading treatment or punishment, including such treatment administered by private individuals. A positive obligation on the state to provide protection against inhuman or degrading treatment has been found to arise in a number of cases: see, for example, A v UK [1998] 3 FCR 597 at 602 (para 22) where the child applicant had been caned by his stepfather, and Z v UK [2001] 2 FCR 246, where four child applicants were severely abused and neglected by their parents. It also imposes requirements on state authorities to protect the health of persons deprived of liberty.' (See Pretty v UK [2002] 2 FCR 97 at 130.)

[54] As the Attorney General pointed out, decisions of the European Court of Human Rights, typically O'Rourke v UK App No 39022/97 (26 June 2001, unreported), make it clear that the state's failure to provide shelter does not by itself amount to inhuman or degrading treatment. But, as he himself accepted, it does not follow that in a case of sufficiently acute individual need—perhaps, as suggested in argument, that of a person who is not only destitute but blind—no positive obligation can arise; and such cases as D v UK (1997) 24 EHRR 423 clearly establish that a breach of the constant negative obligation can occur where an affirmative act of the state is such as to result, indirectly, in inhuman or degrading consequences for the individual.

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

[56] In our judgment the regime that is imposed on asylum-seekers who are denied support by reason of s 55(1) constitutes 'treatment' within the meaning of art 3. Our reasoning is as follows. Treatment, as the Attorney-General has pointed out, implies something more than passivity on the part of the state; but here, it seems to us, there is more than passivity. Asylum-seekers who are here without a right or leave to enter cannot lawfully be removed until their claims have been determined because, in accordance with the United Kingdom's obligations under art 33 of the Refugee Convention, Parliament has expressly forbidden their removal by what is now s 15 of the 1999 Act. But while they remain here, as they must do if they are to press their claims, asylum-seekers cannot work (Asylum and Immigration Act 1996, s 8) unless the Home Secretary gives them special permission to do so (Immigration (Restrictions on Employment) Order 1996, SI 1996/3225).

[57] The imposition by the legislature of a regime which prohibits asylum-seekers from working and further prohibits the grant to them, when they [*923] are destitute, of support amounts to positive action directed against asylum-seekers and not to mere inaction.

[58] At what point then does such treatment become inhuman or degrading?

[59] Destitution is an emotive word, and it might be argued that denying support to the destitute is necessarily inhuman and degrading treatment. Such an argument has not been advanced before us, and for good reason. Mr Blake has accepted that there is a margin between the condition that renders an asylum-seeker destitute for the purposes of the Asylum Support Regulations, and s 95 of the 1999 Act, and the condition to which an individual must sink before he can contend that he is a victim of a breach of art 3. As to the former, an individual will, by virtue of s 95(3), be deemed to be destitute if his living accommodation is not adequate and the regulations provide for a minimum sum of money or money's worth which must be provided by way of subsistence. The degree of degradation that must be demonstrated to engage art 3 falls significantly below this definition of destitution. This can be illustrated by reference to the decision of the Strasbourg Court in O'Rourke v UK. The

applicant was evicted from temporary accommodation provided for him when he came out of prison. He lived on the streets, to the detriment of an asthmatic condition and a chest infection from which he suffered. The Strasbourg Court held that this experience did not attain the requisite level of severity to engage art 3.

[60] It is quite impossible by a simple definition to embrace all human conditions that will engage art 3. In Pretty v UK [2002] 2 FCR 97 at 131 the Strasbourg Court provided the following guidance:

'52. As regards the types of "treatment" which fall within the scope of art 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of art 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by art 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'

[61] The passages from the judgment of Collins J to which we have referred above suggest that he considered that there will be a breach of art 3 if the Secretary of State refuses permission to an asylum-seeker where there is a real risk that, because he will receive no support from any alternative source, he will decline into the kind of state described in Pretty v UK. The 'real risk' test is one that Strasbourg has applied in the case of removal to a country in circumstances where the removing state will no longer be in a position to influence events. We do not believe that it is an appropriate test in the present context.

[62] Some who apply for asylum may already be in a condition which verges on the degree of severity capable of engaging art 3 described in Pretty v UK. For those s 55(5) of the 2002 Act will permit and s 6 of the 1998 Act will oblige the Secretary of State to provide or arrange for the provision of support. What of the others? Their fate will be uncertain. Those who have been in-country long enough to demonstrate that they have found other means of subsistence may be able to fend for themselves. But it is manifest that some recent arrivals who have [*924] no recourse to work, to funds or to help may also be caught by s 55(1). The Attorney General submitted that one cannot discount the possibility that charitable bodies or individuals will come to their assistance. This must be a possibility. But equally there must be a possibility that some will be brought so low that they will be driven to resort to crime or to prostitution in order to survive.

[63] Unlike Collins J we do not consider that the fact that there is a real risk that an individual asylum-seeker will be reduced to this state of degradation of itself engages art 3. It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself. That is what s 55(1) requires him to do. He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves. The Attorney General indicated that is always open to asylum-seekers who have been refused support to re-apply for this.

ARTICLE 8

[64] Article 8 provides that ‘everyone has a right to respect for his private and family life, his home and his correspondence'. Similar considerations apply in relation to this right to those that we have discussed in relation to art 3. If the denial of support to an asylum-seeker impacts sufficiently on the asylum-seeker’s private and family life, which extends to the individual’s physical and mental integrity and autonomy—see X v Netherlands (1985) 8 EHRR 235, the Secretary of State will be in breach of the negative obligation imposed by art 8, unless he can justify his conduct under art 8(2)—as to which there was little debate before us. In the context of this case we think that art 8 adds little. Certainly art 8 without more does not entitle the applicant to a roof over his head—see Marzari v Italy (1999) 28 EHRR CD 175. On the facts of this case, we find it easier to envisage the risk of infringement of art 3 rights than of art 8 rights. In the light of our overall conclusions we do not consider there is any need to consider art 8 at greater length.

PROCEDURE

The questions

[65] As we understand it, in cases of the kind with which we are concerned, the asylum-seeker is treated as making a claim for support, either expressly or by implication, when he claims asylum. Each such application requires the Secretary of State or his agent to consider a number of questions.

[66] The first question arises under s 55(1) and is whether the Secretary of State is satisfied that the applicant has claimed asylum as soon as reasonably practicable after his arrival in the United Kingdom. We have discussed the relevant test above. If the answer to that question is Yes, the Secretary of State will consider whether the applicant should receive benefit under s 95 of the 1999 Act. This appeal is not concerned with that further question and we therefore say nothing about it save that, so far as we are aware, it has not given rise to particular difficulty.

[67] The second and third questions, with which we are concerned, assume that the answer to the first question is No. The second question is then whether the applicant appears to the Secretary of State to be or likely to become destitute within the meaning of s 95(1) of the 1999 Act. For that purpose, a person is [*925] defined by s 95(3) as destitute if he does not have adequate accommodation or any means of obtaining it or he has adequate accommodation or the means of obtaining it but cannot meet his other essential living needs.

[68] If the answer to the second question is No, that is the end of the matter and no question of providing support will arise. However, if the answer to the second question is yes, the third question arises. It is the question posed by s 55(5), namely whether it is necessary to provide support for the purpose of avoiding a breach of the applicant’s convention rights. We have already expressed the view that that is a high threshold but that it will be necessary to provide the applicant with benefit for that purpose where he or she is so patently vulnerable that to refuse support carries a high risk of an almost immediate breach of art 3 or 8.

THE PRINCIPLE OF FAIRNESS

[69] It is common ground that under s 55(1) of the Act the burden of satisfying the Secretary of State that the claim for asylum was made as soon as reasonably practicable after arrival in the United Kingdom is on the applicant. Equally, it is not we think in dispute that the burden of satisfying the Secretary of State of the answers to the second and third questions posed above is also on the applicant. It is further common ground that in deciding whether the applicant has so satisfied him the Secretary of State must act fairly, which means both that he must set up a fair system to enable the decisions to be made and that he must operate the system fairly: see eg Gaima v Secretary of State for the Home Dept [1989] Imm AR 205, applying Re K (H) (an infant) [1967] 1 All ER 226 at 231, [1967] 2 QB 617 at 630.

[70] What fairness requires of course depends upon the circumstances of the case. The underlying principles were stated thus in a well-known passage in the speech of Lord Mustill in Doody v Secretary of State for the Home Dept [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560:

'What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.' [*926]

[71] The importance of ensuring that the system is fair to applicants, as well of course as to the public interest, seems to us to be of particular importance in the circumstances with which s 55 is concerned. Section 55(1) is or is potentially of draconian effect because, subject to s 55(5), it prevents the Secretary of State from providing benefit to applicants who are destitute, since its whole purpose is to disapply s 95 of the 1999 Act, which of course only applies to applicants who are destitute as defined in that section.

[72] Further, and importantly, s 55(1) involves a determination of a question of fact in circumstances in which s 55(10) expressly provides that an adverse decision under s 55 is not appealable under s 103 of the 1999 Act. Although, as discussed below in connection with art 6, that determination is subject to judicial review, the nature of that review is necessarily limited so far as conclusions of fact are concerned so that it is of particular importance to ensure that the Secretary of State follows a fair procedure in reaching his conclusion about the facts.

[73] Finally, where the Secretary of State is not satisfied that the applicant has claimed asylum as soon as reasonably practicable, the most careful consideration will be called for as to whether refusing support will violate the applicant's convention rights, at any rate where there is any possibility that they may be engaged.

THE SYSTEM

[74] The system which was operated by the Secretary of State and which was relevant to the initial decisions in the six cases with which we were concerned was described by Collins J ([2003] All ER (D) 251 (Feb) at [18]–[22]). It may be summarised in this way.

[75] A person applying for asylum was interviewed by an administrative officer (an AO), who was given a screening form to help him decide what questions to ask. Before the interview began the preamble on the form was read to the applicant. As originally drafted it contained no explicit reference to the fact that the question for decision was whether the applicant could show that he had applied for asylum as soon as reasonably practicable after arrival. It included the following:

'I will write down what you tell me and this form will then be passed to officers in the Asylum Directorate of the Home Office. This form will also be passed to officers in the National Asylum Support Service (NASS) if you are a person to whom s 55 of the Nationality, Immigration and Asylum Act 2002 applies, so that a decision can be made on whether or not you are eligible to be considered for NASS support. NASS officers may also request to interview you in respect of the information you have supplied on this form.'

[76] After a short time the preamble was redrafted and a new form was substituted on 17 January. It was used for interviews after that date and was thus used in cases where the respondents were interviewed afresh. As Collins J observed, the only difference of significance is in the preamble which now includes these sentences:

'It is VITAL that all relevant information you possess in connection with when, how and where you arrived in the UK, and how you travelled here today is given to us today even if you are not directly asked a question about it. Otherwise you may be refused support on the basis that you have given inadequate information to satisfy the Secretary of State that you made your [*927] asylum claim as soon as practicable after arrival in the UK. Do you understand?' (Record answer.)

[77] The remainder of the form, which is filled in by the AO, has remained much the same throughout. It contains a number of printed questions with spaces for answers. The initial questions are concerned with personal and family details. There then comes a request to state the current address in the United Kingdom followed by a number of questions asking how and when he arrived, how he travelled to the interview, why there was a delay (if there was any) and what evidence could be produced to support his account of when and how he arrived.

[78] Although there are a large number of questions on the form, very few of them seem to us to be related directly to the key question under s 55(1), namely whether the applicant applied for asylum as soon as reasonably practicable after arrival. The only such questions seem to us to be these:

‘1.25a Explain why you did not immediately apply for asylum to an [IO] at the port of entry?

‘1.25b What evidence do you have to support your previous answer?

‘1.25c [If there is a delay between the date the interviewee arrived in the United Kingdom and the date of his/her application for asylum]. Explain why there is a delay between the date you arrived in the United Kingdom and the date you applied for asylum

‘1.25d What evidence do you have to support your previous answer?

‘1.26 Country of embark.

‘1.26a What evidence do you have to show when you were last in the country you claim to have arrived from?’

[79] There are then questions about means and assets which complete the first part of the form. There follows what is described as a level two form, of which there are two types. They are a long version and a shorter version which is used at Croydon, where the pressure of work is much greater than elsewhere. The shorter version asks whether the interviewee passed through immigration control when he reached the United Kingdom and, if so, what reasons he gave the IO for his visit, how long he said he planned to stay and on what conditions he entered the United Kingdom, and, if not, how he entered the United Kingdom. If the interviewee entered by lorry it further asks what type of lorry, what its cargo was, how long he was in the lorry and where in the United Kingdom he was dropped off. Finally it asks what evidence he has to support the statements made in the interview and whether he has anything else to add. The longer form asks one or two more questions, including what documentation the interviewee has and concludes with this warning:

‘It is vital that you tell us everything you know which is relevant to the questions I have asked you or to which you think you should tell us. It may affect your entitlement to support if you fail to provide full details.’

Once filled in the form is passed to NASS where it is considered by an executive officer (an ‘EO’) or an IO and a decision made.

IS THE SYSTEM FAIR?

[80] Collins J held that that system was not fair to the applicants. His conclusions are set out as follows ([2003] All ER (D) 251 (Feb)): [*928]

‘[19] It is an unfortunate element of the system, although I understand why it is considered necessary, that the person at NASS who decides whether to refuse or allow support under s 55 relies entirely on the answers recorded on the form. He does not see nor does he question the claimant. This means that it is important that all necessary information is obtained so that a fair decision can be made and all relevant circumstances can be taken into account. It is to be noted that there is no guidance provided as to how human rights issues should be investigated and no questions in the form give much, if any, assistance in that respect.

‘[20] The decision is not appealable. Steps must be taken to ensure that the decision-making process is fair; so much will always be implied. In the circumstances, it is the more important that the claimant should have a reasonable opportunity to deal with and to explain any matter, which is to be relied on against him. I recognise that Mr Garnham has stated that the Secretary of State will always be prepared to reconsider an adverse decision if further representations are made or evidence produced. That is to be welcomed. But it is not a substitute for proper and fair primary decision-making. I am satisfied that in port arrivals cases further detail must be asked about reliance on advice and, if an account of what happened at the airport is considered incredible, an opportunity should be given for further explanation. In lorry cases, vagueness about the nature of the lorry or the journey should again be investigated, particularly if, as has been the case in these and I gather in many claims, it is to be said that such vagueness means that the Secretary of State is not satisfied that the claimant arrived when he said he did. I do not suggest any extra questioning need be at all lengthy. What is needed will depend on the circumstances, but the reasonableness of the delay in claiming asylum can only be properly decided on if sufficient information is provided. At the very least, the claimant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can. All that may be needed is a warning that the account is too vague or is incredible having regard to known practices at ports or it was not reasonable to rely on advice or to obey instructions. In those latter cases, it is not uncommon that threats are made that the claimant’s family will be made to suffer if instructions are not obeyed. Equally, I am well aware from my position as President of the Immigration Appeal Tribunal (the “IAT") that in some countries to claim asylum at a port will result in immediate refusal to enter and removal by the police. This has led some to believe that it is essential to gain entry before claiming asylum.

‘[21] It is accepted that reasons should be given for an adverse decision … Suffice it to say that they [ie the reasons] need not be at all lengthy but they must enable the claimant to know why his claim has been refused.’

[81] The Attorney General submits that this reasoning is unsound. We do not agree. The system as it has been operated to date seems to us to have some curious and unsatisfactory features.

[82] The Attorney General stresses on behalf of the Secretary of State that the burden of proving that he claimed asylum as soon as reasonably practicable after arrival is on the applicant and submits that that is entirely reasonable because only the applicant knows the true facts, which of course include when and where he entered the United Kingdom and what, if any, explanation he gave to the immigration officer. We entirely accept that that is so, although the question remains whether the system is a fair one which is fairly operated. [*929]

[83] As already explained, on applying for asylum, whether or not any claim for benefit is made, the applicant is interviewed as part of a general screening process. It appears to us that the interview is carried out without any clear statement that one purpose of the interview is to determine the questions identified above. In our view fairness requires that the purpose of the interview should be more clearly explained to the applicant. In its first incarnation the preamble contained no reference to the reasonable practicability test and was inadequate on that ground. In its second incarnation it was significantly improved, but it seems to us that the purpose of the interview should be spelled out still more clearly to the applicant.

[84] As we understand it, the decisions as to whether the applicant claimed asylum as soon as reasonably practicable and as to whether it is necessary to provide support in order to avoid an infringement of the applicant's convention rights are taken (at least in the first instance) on the basis of the answers given as part of the general screening process described above. In these circumstances fairness requires that the applicant be told what the purpose of the interview is in clear terms. Further thought should be given to an appropriate formulation. It might include a statement that an important purpose of the interview is to enable the Secretary of State to decide whether he is eligible for support; that he may not be eligible unless he persuades the Secretary of State that he had good reason for not applying for asylum earlier (the s 55(1) issue); and that he will otherwise be eligible only for such support as is necessary to prevent his treatment by the authorities here from becoming inhuman or degrading (the s 55(5) issue).

[85] Quite apart from the adequacy or otherwise of the information given to the applicant before the interview begins, we have reached the conclusion that the system operated to date by or (more accurately) on behalf of the Secretary of State is not fair in a number of respects.

[86] First it seems to us to be important that the interviewer and the decision maker should be properly instructed as to what is meant by 'reasonably practicable' in s 55(1). Otherwise the issue is most unlikely to be properly investigated on the facts. We set out in [21], above the somewhat confusing guidance at present issued to caseworkers by NASS. It is confusing because of the different expressions used in para 4.1 and 4.2. The guidance includes a number of examples, but the guidance given in these examples is not wholly consistent with the conclusions we have reached above. We also note that there is no example in relation to an applicant who says that he arrived by air.

[87] We have already expressed our view that in order to decide whether the applicant applied for asylum 'as soon as reasonably practicable after [his] arrival in the United Kingdom' the Secretary of State should ask himself the question: on the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity for claiming asylum and to the asylum-seeker's personal circumstances, could the asylum-seeker reasonably have been expected to claim asylum earlier? We have also expressed the view that in answering that question the Secretary of State should have in mind the asylum-seeker's state of mind including his state of mind resulting from any information or instructions given by the agent who facilitated his entry.

[88] It is clear that the decision-makers were not given instructions to that effect. If they had been, we have no doubt that the questions asked in interview would have been more extensive than there were in fact. This brings us to the second reason for our conclusion that the system operated to date is not fair.

[89] It is this. It seems to us to be important for the interviewer to probe the facts of each case in order to ensure that he has a reasonably full picture so that [*930] the Secretary of State's decision can be properly informed. Few, if any, asylum-seekers have advice at the time of the interview, so that (at any rate without a much clearer explanation of the purpose of the interview) it is insufficient for the Secretary of State to contend that the burden of proof is on the applicant and that he has only himself to blame if he does not provide the interviewer with the whole picture.

[90] We do not think that the questions asked at present enable the interviewer (let alone the decision-maker) to have a sufficiently full picture for a fair decision to be made. In the light of the conclusions set out above, fairness requires the interviewer to try to ascertain the precise reason that the applicant did not claim asylum, say, at the airport or immediately after being let out of a lorry. This calls for interviewing skills and a more flexible approach than simply completing a standard form questionnaire. For example, depending upon the circumstances, it may well involve the need to ask at least some questions relating to the state of mind of the applicant. That may in turn involve asking him what advice or instructions he was given by his agent or facilitator, although it is fair to say that in only one of the four cases of applicants who said that they arrived by air did the applicant say that he had been told by the agent not to claim asylum at the airport but later. We recognise in this regard that it is not for the court to say what questions should be asked in any particular case or how interviews should be conducted. Suffice it to say that we are in no doubt that the system at present in place does not satisfy the test of fairness.

[91] That is in our view so, even though we recognise that an applicant can always ask the Secretary of State to reconsider his first view and that the Secretary of State has indicated that he will always be prepared to reconsider an adverse decision where (as Collins J put it [2003] All ER (D) 251 (Feb) at [20]) further representations are made or evidence produced. We agree with the judge that, although that is to be welcomed, it is not a substitute for proper and fair primary decision-making.

[92] Once a reasonably full picture is available so that a decision can be properly informed, the decision maker may of course accept the facts stated by the applicant and, having correctly directed himself as to the appropriate test, reach a conclusion as to whether he is satisfied that the applicant applied for asylum as soon as reasonably practicable after arrival. If he concludes that he is not, he must of course notify the applicant to that effect and give appropriate (albeit short) reasons.

[93] He must then consider whether it is necessary to provide support in order to avoid an infringement of the applicant's rights under the convention. Such a consideration is necessary in order for the Secretary of State to decide whether the case is taken outside s 55(1) by reason of s 55(5)(a). This will involve a consideration of the applicant's physical state and, depending upon the circumstances of the particular case, may involve asking appropriate questions in that regard.

[94] That brings us to the third point. It does not seem to us that the present screening form has sufficient regard to the nature of the enquiries that may be necessary under this head in order to satisfy the requirement of fairness. As Collins J put it ([2003] All ER (D) 251 (Feb) at [19]), quoted above, it is to be noted that there is no guidance provided as to how human rights issues should be investigated and no questions in the form give much, if any, assistance in that respect.

[95] All will of course depend upon the applicant's individual circumstances. There is a considerable difference between a person who has recently arrived and [*931] a person who has been subsisting in this country for an appreciable period (and has for example claimed asylum after being caught working illegally). Thus the number and extent of the questions which it will be appropriate to ask will depend upon the circumstances of the particular case. It will be a matter for the interviewer in each case to decide.

[96] We should stress that we are not persuaded that the further questioning which we anticipate will be required to ensure that the system is a fair one will have to be extensive. The areas of investigation remain in a narrow compass.

[97] There is a further important aspect of fairness. As we understand it, the initial decision in five of the six cases with which the applications for judicial review were concerned assumed that the account given by the applicant was true and was to the effect that the applicant had not satisfied the Secretary of State that he had applied for asylum as soon as reasonably practicable after arrival. However, in some cases it was argued on behalf of the Secretary of State before the judge that, even if the Secretary of State would have been so satisfied on the assumption that the applicant's account was true, he was not satisfied of the truth of the account given by the applicant.

[98] This has highlighted what, in our opinion, are two further serious defects in the system adopted by the Secretary of State, at any rate until now. The first is that the decision-maker is not in the ordinary course of events the same person as the interviewer. This means that a view has to be formed as to the credibility of the applicant's account by a person who has not seen the applicant but only read the answers noted on the screening form by someone else. We understand from the Attorney General that that aspect of the system is to be changed and that the interviewer and the decision maker will be the same person. In our view that will be a most welcome change for the future.

[99] The second defect is not unconnected with the first and was identified by the judge (at [20]). He stressed that it was important that the applicant should be given a reasonable opportunity to deal with and to explain any matter which was to be relied on against him. We agree. Before the decision-maker concludes that the applicant is not telling the truth he must be given the opportunity of meeting any concerns or, as Lord Mustill put it in Doody's case, he should be informed of the gist of the case against him. We should add that we also agree with the judge that at the very least the applicant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can. As the judge put it (at [20]): 'All that may be needed is a warning that the account is too vague or is incredible having regard to known practices at ports or it was not reasonable to rely on advice or to obey instructions.' The fact that the burden rests on the applicant makes such a warning more, not less, necessary.

[100] The system as operated to date does not afford the applicant such an opportunity, although it will no doubt be much easier for it to do so once the interviewer and the decision taker are the same person. In this context it is, in our opinion, important that the credibility of each account should be considered individually. Thus far, as we understand it, that has not been the approach of the Secretary of State. Before the judge the Secretary of State relied upon a statement of Mr Dave Roberts, who is the Head of UK Border Control Operations for the Immigration Service, which suggested that no-one could by-pass questioning by the IO at the airport as some of the applicants said in their statements that they had done so that the credibility of their account was rejected out of hand. Since then the respondents have sought to rely upon counter-evidence of practice at airports and Mr Roberts has made a further statement which to some extent qualifies his previous evidence. [*932]

[101] As stated earlier we cannot resolve these issues of fact. They persuade us, however, that it was not fair to dismiss applicants' statements as incredible without a more rigorous interview process involving a consideration of the account given in the particular case. On the

other hand we reject Mr Blake's submission that, whenever it is concluded that the statement of an applicant is capable of belief because asylum-seekers have sometimes entered the country in the same way before, the applicant must be treated as telling the truth. Whether the particular applicant is telling the truth must be judged having regard to all the circumstances of his particular case.

[102] Thus, for example, the Attorney General drew our attention to the fact that some of the applicants had given differing accounts of their arrival in different statements. That fact is plainly of considerable potential importance in deciding whether the Secretary of State is satisfied that the applicant is telling the truth, although whether or not it is conclusive will again depend upon all the circumstances. These are all matters for the interviewer/decision-maker to weigh up before reaching a decision in a particular case.

THE INDIVIDUAL CASES

[103] There were six applicants before Collins J. There is no need for us to say anything about the cases of J and Q, both of whom claimed to have arrived by lorry, save this. J was initially refused support, but he was re-interviewed and the Secretary of State was satisfied that he claimed asylum as soon as reasonably practicable. Q was also refused support but the Secretary of State offered to reconsider his case and to re-interview him. He initially declined to be re- interviewed but later agreed and he was re-interviewed on the first day of the hearing before Collins J. A decision has been deferred pending the outcome of the appeal. The Secretary of State will no doubt consider his case in the light of the contents of the re-interview and the conclusions reached in this appeal, in so far as they may be relevant in his case.

[104] The remaining applicants and respondents to this appeal, namely F, M, D and B, all claimed to have arrived by air. Their individual cases are discussed ([2003] All ER (D) 251 (Feb) at [26]–[29], [30]–[34], [35]–[43] and [44]–[52]) and the judge's conclusions are summarised in respect of s 55(1) (at [56] and [57]) and in respect of s 55(5) (at [72] and [73]).

[105] In essence his conclusions were that, in respect of s 55(1), the interviewing process was flawed substantially for the same reasons as we have set out above. As to s 55(5) he held, as stated above, that there will normally be a real risk that to leave someone destitute will violate arts 3 and 8(1) and that the standard form of rejection of any application of s 55(5) in all the refusal letters demonstrated that insufficient consideration had been given to the issue.

[106] The grounds upon which the Secretary of State seeks to impugn the judge's decision in each case are much the same. They are that his approach was wrong in these main respects. (i) Absent duress or some other exceptional circumstance, the Secretary of State is entitled to take the approach that the person could claim asylum at the airport and, by failing to do so, he failed to make his claim as soon as reasonably practicable. (ii) In particular, simply relying on the statements of the agent does not generally offer any reasonable explanation as to why it was not reasonably practicable to make the claim. (iii) The Secretary of State did make enquires because he asked the person why he did not claim asylum at the airport so that he had every opportunity to explain why it was not reasonably practicable to do so. (iv) On the basis of Mr Roberts' first statement the story that an applicant was able to bypass the IO at the airport was not [*933] credible. (v) In the case of some applicants, notably M, several different accounts have been advanced which shows that the applicant's story is not credible. (vi) In the case of s 55(5) the judge applied the wrong test.

[107] The conclusions which we have set out in some detail above show that points (i)–(iii) cannot succeed. Point (iv) cannot succeed on a blanket basis. Each case must be considered on its own facts. As to point (v), the fact that different accounts have been given is plainly of considerable potential importance in deciding whether the applicant is telling the truth or not, although whether or not it is conclusive will again depend upon all the circumstances. These are all matters for the interviewer/decision-maker to weigh up before reaching a decision in a particular case.

[108] As to point (vi), we agree that Collins J applied the wrong test but, for the reasons we have given, we are of the opinion that arts 3 and 8 may potentially be engaged, albeit on a different basis from that suggested by Collins J. However, we agree with him that the process adopted to date has not been intrinsically fair.

[109] In these circumstances we do not think that it is necessary for us further to discuss the facts of the individual cases. The Secretary of State will no doubt reconsider them as appropriate in the light of the conclusions which we have reached. However, the appeals in the individual cases must be dismissed.

SECTION 55(10) AND ARTICLE 6

[110] Section 55(10) is unequivocal in blocking access to the appeal mechanism for asylum support. Mr Blake submits that in so providing Parliament has acted incompatibly with art 6 of the convention, which begins by providing:

'In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time before an independent and impartial tribunal.'

[111] It is common ground that the officials who take the material decisions are not independent. The Attorney General is willing that we should assume, without his conceding it, that the right in issue is a civil right within the meaning of art 6. But the Home Secretary's answer to the charge of incompatibility is that recourse to judicial review, which the statute does not modify in any way, affords convention-compliant access to an independent and impartial tribunal.

[112] The common law of judicial review in England and Wales has not stood still in recent years. Starting from the received checklist of justiciable errors set out by Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, the courts (as Lord Diplock himself anticipated they would) have developed an issue-sensitive scale of intervention to enable them to perform their constitutional function in an increasingly complex polity. They continue to abstain from merits review—in effect, retaking the decision on the facts—but in appropriate classes of case they will today look very closely at the process by which facts have been ascertained and at the logic of the inferences drawn from them. Beyond this, courts of judicial review have been competent since the decision in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208, [1969] 2 AC 147 to correct any error of law whether or not it goes to jurisdiction; and since the coming into effect of the Human Rights Act 1998, errors of law have included failures by the state to act compatibly with the convention.

[113] The European Court of Human Rights concluded in Bryan v UK (1995) 21 EHRR 342 that merits review was not a necessary element of the full jurisdiction which art 6 requires to be vested in an independent tribunal. What is [*934] needed, as Lord Hoffmann said in R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 at [87], [2001] 2 All ER 929 at [87], [2001] 2 WLR 1389 is jurisdiction to deal with the case as the nature of the decision requires.

[114] Very recently, in Runa Begum v Tower Hamlets London BC [2003] UKHL 5, [2003] 1 All ER 731, their Lordships' House has considered the application of art 6 to the county court's appellate jurisdiction under s 204 of the Housing Act 1996 in relation to local authority decisions on homelessness. Making the same assumption as we are making that a civil right within art 6 was at issue, Lord Hoffmann said:

'[35] … An English lawyer can view with equanimity the extension of the scope of art. 6 because the English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts … But this breadth of scope is accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament. As will appear, I think that the Strasbourg jurisprudence gives adequate recognition to all three of these factors …

'[47] … In any case, the gap between judicial review and a full right of appeal is seldom in practice very wide. Even with a full right of appeal it is not easy for an appellate tribunal which has not itself seen the witnesses to differ from the decision-maker on questions of primary fact and, more especially relevant to this case, on questions of credibility.

'[48] Mr Sales drew attention to the expanding scope of judicial review which, he said, may in a suitable case allow a court to quash a decision on the grounds of misunderstanding or ignorance of an established and relevant fact … or, at least in cases in which convention rights were engaged, on the ground of lack of proportionality … He said that this should be taken into account in deciding whether the jurisdiction of the county court was adequate.

'[49] I do not think that it is necessary to discuss the implications of these developments. No doubt it is open to a court exercising the review jurisdiction under s 204 to adopt a more intensive scrutiny of the rationality of the reviewing officer's conclusions of fact, but this is not the occasion to enter into the question of when it should do so. When one is dealing with a welfare scheme which, in the particular case, does not engage human rights (does not, for example, require consideration of art 8) then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme …'

[115] Lord Hoffmann will have had in mind, in the last part of this passage, the well-known acceptance by this court in R v Ministry of Defence, ex p Smith [1996] 1 All ER 257 at 263, [1996] QB 517 at 554, that 'The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable [ie within the range of responses open to a reasonable decision-maker].' Given this, and given the range of other powers instanced by Mr Sales for the Secretary of State in the Runa Begum case (see above), we consider that judicial review today is capable of affording to an asylum-seeker who is denied support under s 55 recourse to an independent and impartial tribunal which has, in the Strasbourg sense, full jurisdiction to determine whether the refusal is lawful. Were it not for the [*935] amplitude of modern judicial review

we would have had some difficulty in holding that recourse to it was sufficient to satisfy art 6. This is because of the gravity, which we have discussed above in its several human rights aspects, of the implications of a s 55 decision for the individual concerned. We should make it clear in this connection that we do not regard the Smith proposition as confined to rights set out in the European Convention on Human Rights. In view especially of its date, it is apt in our judgment to apply to the right to seek asylum, which is not only the subject of a separate international convention but is expressly recognised by art 14 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226).

[116] The Strasbourg jurisprudence establishes that where the initial decision as to civil rights is taken by a person or persons who cannot be described as 'an independent and impartial tribunal', the fact that the decision is subject to judicial review can satisfy art 6. At the end of the day, however, the process as a whole must be capable of fairly determining the civil rights that are in play. The inadequacies of the procedure, which we and Collins J have identified, rendered it impossible for the officials of the Secretary of State to make an informed determination of matters central to the asylum-seekers' civil rights. The consequence of this is that the court conducting the judicial review was equally unable to do so. All that the court could do was to quash the decisions. In these circumstances Collins J held that the requirements of art 6 were not satisfied. We agree with his conclusion.

[117] If the Secretary of State takes the appropriate steps to remedy the deficiencies in his procedure, it will be possible for the combination of his decision-making process and judicial review of the decision reached by that process to satisfy the requirements of art 6. It is for this reason that we agree with Collins J that the provisions of s 55(10) are not incompatible with the convention.

CONCLUSIONS

[118] We have reached our conclusions essentially by the application of two processes. The first is a process of interpretation of s 55 of the 2002 Act, especially s 55(1) and (5), applying ordinary principles of interpretation or construction. In this connection it is important to appreciate that by s 55(5), s 55 expressly preserves the asylum-seeker's rights under the European Convention on Human Rights. The second process is the application of the important principle, which was expressly accepted by the Attorney General on behalf of the Secretary of State, that in considering applications for support the Secretary of State must act fairly.

[119] Our conclusions may be summarised as follows.

(i) The test whether an asylum-seeker has claimed asylum 'as soon as reasonably practicable' under s 55(1) may be framed in this way: 'On the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity of claiming asylum and to the asylum-seeker's personal circumstances, could the asylum-seeker reasonably have been expected to claim asylum earlier than he or she did?'

(ii) The burden of satisfying the Secretary of State that he or she claimed asylum as soon as reasonably practicable after his or her arrival in the United Kingdom, applying the above test, is on the applicant.

(iii) If the Secretary of State is not so satisfied, it remains open to the applicant to claim support on the basis that it is necessary for the purpose of avoiding a breach of his or her convention rights under arts 3 or 8 of the convention. [*936]

(iv) The burden of satisfying the Secretary of State that such support is necessary is on the applicant. Under art 3 the applicant must satisfy the Secretary of State that such support is necessary to avoid his or her being subjected to 'inhuman or degrading treatment'. The threshold is a high one.

(v) The regime imposed on asylum-seekers who are denied support by reason of s 55(1) constitutes 'treatment' within art 3 because, although treatment implies something more than passivity on the part of the state, there is here more than passivity. Asylum-seekers cannot lawfully be removed but, while they remain, which they must do if they are to press their claims, they cannot lawfully work unless the Secretary of State gives them special permission to do so.

(vi) The threshold is a high one but the European Court of Human Rights said in para 52 of its judgment in Pretty v UK [2002] 2 FCR 97 at 131:

'[52] As regards the types of "treatment" which fall within the scope of art 3 of the Convention, the court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of art 3. The suffering which flows from naturally occurring illness, physical or mental, may be treatment, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.'

(vii) Where the condition of an applicant verges on that described in Pretty v UK, s 55(5) permits and s 6 of the 1998 Act obliges the Secretary of State to arrange for the provision of support.

(viii) We do not agree with Collins J that the fact that there is a 'real risk' that an asylum-seeker will be reduced to this state of degradation of itself engages art 3. It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself such that his condition verges on the degree of severity described in Pretty v UK.

(ix) Article 8 is capable of being engaged but adds little to art 3.

(x) It is common ground that the burden of proof throughout is on the applicant.

(xi) In deciding whether the applicant has discharged the burden of proof the Secretary of State must act fairly. He must lay down a fair system and operate it fairly.

(xii) The system was not fair or fairly operated. In essence: (a) the purpose of the interview was not explained to the applicant in clear terms; (b) the caseworkers were not properly directed as to the relevant test, with regard either to 'reasonably practicable' or art 3; (c) the

Secretary of State should have had regard to the applicants' state of mind on arrival; (d) fairness required the interviewer to try to ascertain the precise reason that the applicant did not claim asylum on arrival, which called for interviewing skills and a more flexible approach than simply completing a standard form questionnaire. The questions to ask will vary from case to case and be a matter for the interviewer; (e) since it is likely that the credibility of the individual applicant will or may be important, it is desirable that the interviewer and the decision-maker should be the same [*937] person (which we understand is to happen in the future); (f) where the decision maker concludes that the applicant is not telling the truth the applicant should be given the opportunity of rebutting the suggestion of incredibility and of explaining himself if he can; the system which has operated to date does not provide that opportunity.

(xiii) The judge was right to hold that in each of the individual cases the applicant had been treated unfairly initially, although the case of J has now been resolved and Q awaits a decision.

(xiv) The appeals should be dismissed.

(xv) Article 6 was not satisfied by the right to apply for judicial review given the system which was operated by the Secretary of State. If the Secretary of State takes the appropriate steps to remedy the deficiencies in procedure the combination of his decision-making process and judicial review of the decision reached by that process will satisfy the requirements of art 6. It follows that the provisions of s 55(10) are not incompatible with art 6.

POSTSCRIPT

[120] We dismiss these appeals because Collins J was correct to conclude that each of the six decisions under consideration was vitiated as a result of deficiencies in the procedure. We were told by the Attorney General that these procedures are being radically overhauled. When they have been put in order we can see no reason why s 55 should not operate effectively. The sanction that it imposes may cause the proportion of asylum-seekers who claim asylum at the port of entry to rise significantly. Those who claim in country will be at risk of being denied support. This will almost certainly be the fate of those who remain in this country for an appreciable period without claiming asylum. We consider that with careful questioning and appropriate fact-checking it should be possible to distinguish these from those who have recently arrived in this country. Where the latter have come by air they will first have to satisfy the Secretary of State's officials that they had good reason not to claim asylum at the port of arrival. If they do so they will be likely to receive support. If they do not, the Secretary of State will have to consider whether their vulnerability is such that that it is necessary to grant them support in order to avoid the infringement of their rights under arts 3 and 8.

Appeals dismissed.