Case No: CO/0113/2003
CO/0117/2003
CO/0150/2003
CO/0151/2003
CO/0221/2003
CO/0254/2003

[2003EWHC 195 (Admin)]

**IN THE HIGH COURT OF JUSTICE**
**QUEENS BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 February 2003

Before :

**The H$^{on}$ Mr Justice COLLINS**

**R(Q) v Secretary of State for the Home Department**
**R(D) v Secretary of State for the Home Department**
**R(J) v Secretary of State for the Home Department**
**R(M) v Secretary of State for the Home Department**
**R(F) v Secretary of State for the Home Department**
**R(B) v Secretary of State for the Home Department**

**Mr Keir Starmer Q.C. & Mr Simon Cox**
(1)(instructed by Ben Hoare Bell, Solicitors) for the Claimants "J" & "F"
(2) (instructed by The Refugee Legal Centre) for Claimant "M".
**Mr Keir Starmer Q.C. & Mr Stephen Knafler**
(instructed by Clore & Co, Solicitors) for the Claimants "D" & "B"
**Mr Ben Hawkins** (instructed by Ashgar & Co, Solicitors) for the Claimant "Q".

**Mr Neil Garnham Q.C. & Mr Clive Lewis & Ms Samantha Broadfoot**
(instructed by the Treasury Solicitor) for the Defendant

Hearing dates : 10 & 11 February 2003

**JUDGMENT: Approved by the court for handing down**
**(subject to editorial corrections)**

**Mr Justice Collins:**

1. These six claims all concern the application of Section 55 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) which came into force on 8 January 2003. It requires the Secretary of State to refuse to provide or to arrange for the provision of support to an asylum seeker if he is not satisfied that the claim was made as soon as reasonably practicable after the Claimant's arrival in the United Kingdom. All these claims challenge refusals under s.55 broadly on the grounds that there has been a failure to reach a lawful decision that the asylum claim was not made as soon as reasonably practicable and that there has been a breach of the Claimants' human rights because of the effect of the refusal which has meant and will mean that they have no shelter or food nor any means of obtaining them. They have to exist on the streets unless they can find some charitable body or person prepared to look after them. These claims have been listed together because they raise the main issues which have been or are likely to be relied on and it is important that there is some judicial consideration of the statutory provisions as soon as possible to try to give some guidance on how they should be applied and what is their true construction. The need for such consideration has resulted from the enormous number of claims, most of them commencing as applications to the duty judge. I was told that some 150 claims had already been lodged by the commencement of the hearing and I am aware that the unfortunate judge who was on duty over the weekend of the 8/9 February has had to deal with 20 more applications.

2. I should first set out the relevant provisions of the legislation. The Immigration & Asylum Act 1999 ("the 1999 Act") introduced a regime whereby an asylum seeker who appeared to the Secretary of State to be or to be likely to become destitute could be provided with support (s.95(1)). An asylum seeker was defined as a person who claimed that it would be contrary either to the Refugee Convention or to Article 3 of the European Convention on Human Rights (ECHR) to remove him from or to require him to leave the United Kingdom (s.94(1)).

> Section 95(2) provided:-
>
> "In prescribed circumstances, a person who would otherwise fall within subsection (1) is excluded".

Destitution is defined in s.95(3) as follows:-

> "… a person is destitute if –
>
> (a) he does not have adequate accommodation or any means of obtaining it (whether or not his 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."

Prior to the coming into force of the 1999 Act adult asylum seekers without children had been able to obtain support by being given accommodation if they would otherwise be destitute by virtue of s.21 of the National Assistance Act 1948. This resulted from the decision of the Court of Appeal upholding a decision of mine in *R v Westminster City council ex p. M and Others* (1997) 1 CCLR 85. Section 116 of the 1999 Act amended s.21 of the 1948 Act by adding a subsection (1A) which reads:-

> "A person [subject to immigration control (which includes asylum seekers)] may not be provided with residential accommodation under subsection 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".

Such persons would in future be subject to the regime set up by s.95 of the 1999 Act.

3. The Secretary of State set up the National Asylum Support service (NASS), itself a part of the Home Office, in order to administer this regime. The increase in numbers of asylum seekers leading to a crippling rise in the cost of providing support has led to a desire to find a way to reduce cost and to discourage those who claim asylum when not entitled to it from coming to the United Kingdom and doing so. Section 55 of the 2002 Act has been the result. It provides, so far as material:-

> "**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 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 & 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 & 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 & Asylum Act 1999 (appeals).

Claim for asylum bears the same meaning as in s.94 of the 1999 Act.

Section 55 (10) provides that an adverse decision under s.55 is not appealable under s.103 of the 1999 Act. That section enables an appeal to be brought to an asylum support adjudicator if, in on application for support under s.95, "the Secretary of State decides that the applicant does not qualify for support under that section". S.103(3) provides:-

> "On an appeal under this section, the adjudicator may –
>
> (a) require the Secretary of State to reconsider the matter;
>
> (b) substitute his decision for the decision appealed against; or
>
> (c) dismiss the appeal".

The adjudicator is thus able to reconsider the facts and to reach his own decision on the application. I was informed that statistics showed that some 40% of appeals have been allowed, a figure relied on by Mr. Starmer Q.C. in submitting that there must be real concern at the standard of decision-making by NASS. Safeguards to ensure fairness are therefore needed.

4. I have had put before me a considerable amount of evidence about the background leading to, the reasons for and the purpose of s.55. Some of this has been deployed to explain the mischief which the section was designed to remedy and some to try to influence the construction of the section. In addition, the explanatory notes have been exhibited as a further suggested aid to construction.

5. Section 55 was introduced into the 2002 Act by means of a Government amendment in the House of Lords. There was thus nothing in the White Paper which preceded the laying of the Bill. A briefing note of 7 October 2002 describes 'a raft of tough new measures to be' brought in to help tackle abuse of the asylum system, as refugees start arriving through UNHCR, and new economic migration routes are opened up …". These include, it is said, the removal of:-

> "[T]he presumption of support for those who apply for asylum in this country, outside of airports or ports, unless they give a truthful and credible account of their circumstances and how they arrived here, and demonstrate that they are claiming asylum at the earliest opportunity (exceptions to this would be families with children, those with special needs or those whose home country situation had changed significantly since they came to the United Kingdom)".

Later on, in explaining why this policy was being adopted, it is said:-

> "We will provide support if people can give a credible account of their circumstances – Claimants for all other benefits are expected to do the same, and there is not reason why asylum seekers should not do the same. We expect Claimants to be straight with us about who they are and how they got here.
>
> It is wholly reasonable to expect (except in exceptional cases) that if an individual is genuinely fleeing persecution they ask for protection as soon as they arrive in this country. If they wait weeks or even months to do so it casts doubt on the credibility of their claim and we expect them to counter that with a credible account".

6. The examples are forms of widespread abuses, including those who enter to work illegally and try to get support by claiming asylum when found out, those who run multiple claims, those who have already claimed in a safe country or have passed through safe countries on their way to the United Kingdom and those who refuse to give details of how they got to the United Kingdom. It was also said that there would be a right of appeal to an asylum support adjudicator. However, when the amendment was introduced into the House of Lords on 17 October 2002, what is now s.55(10) was included.

7. Lord Filkin, who introduced it for the Government, stated that it was designed to assist those who were genuine by "allowing access to our …. arrangements as soon as possible'" and that it would "increase the likelihood that those who do not need our protection will return home". The new clause, he said :-

> "..ends the presumption of support for those who apply for asylum in-country unless they give a truthful and credible account of their circumstances and how they arrived here and can therefore demonstrate that they are claiming asylum at the earliest opportunity". (See Hansard (Lords) 17 October 2002 Column 978).

At Column 1002, in answering a number of points raised in the debates on the amendment, the Minister accepted that anyone who could make a reasonably persuasive case that he did not know of the requirement to claim as soon as reasonably practicable would 'clearly not be caught by the provision'. He also said:-

> "If [asylum seekers] are delayed in [claiming asylum and support] it will be open to them to provide full and complete information explaining why. If that explanation is credible, we shall accept it".

8. On 5 November 2002, the amendment, having been agreed by the House of Lords, came before the Commons. A briefing note of 1 November 2002 repeated the matters dealt with in the earlier note. It also sought to counter concerns which had been raised by the Joint Committee on Human Rights that the amendment gave rise to potential incompatibilities with the ECHR. To the concern that to leave a person destitute would breach Article 3 and/or 8 it was said:-

> "The European Court has set a very high threshold for breaches of Article 3. The fact that a person is destitute does not inevitably mean that there is a breach of Article 3. the European court has held that homelessness does not necessarily reach the Article 3 threshold".

Submissions to much the same effect were made and developed by Mr. Garnham. The lack of appeal was said to be justifiable because:-

> "An appeal to the asylum support adjudicators would be inappropriate since they have no expertise on the issue of whether the asylum claim was made as soon as reasonably practicable. If it is claimed the Secretary of State is adopting an unreasonable stance whether a claim is late then he can be judicially reviewed in the usual way".

Not surprisingly, Mr Garnham does not place reliance on the first sentence of the extract cited.

9. The Secretary of State on 5 November 2002 in supporting the government position said this (Hansard 5 November 2002 Column 199):-

> "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. We need therefore to allow a reasonable period before we presume that people have come into the country for another reason and have been sustaining themselves, and that when they could no longer do so they decided that the asylum system would sustain them, being more generous than the equivalent something-for-something welfare to work system.
>
> We are saying to people, "If you have been here some time, by all means tell us how you got here, what your circumstances are, the means of entry and what you have been doing since you reached this country and we will provide you with support". That is what our

> proposals provide, and I think that that is reasonable. People with families will be sustained and those with special needs will be supported. That is in the proposal. People who have been in this country for some time and have decided to claim asylum can continue with that claim, but there is no reason on God's earth why we should sustain them. We should remember that those who choose to take part in the dispersal system receive not only sustenance, such as food and heating, but accommodation, equipment and other materials. As we do not automatically do the same for the indigenous population, it is not a lot to ask that we put these people on equal terms".

10. Following Royal Assent to the 2002 Act on 7 November 2002, the Minister (Beverley Hughes) made a written statement about s.55. She said it would come into force on 8 January 2003 and continued, so far as material:-

> "From that date [8 January 2003], if an applicant for support from the National Asylum Support Service (NASS) makes an asylum claim immediately on arrival at the port then support will be granted provided the other criteria for support are fulfilled. If the person fails, without good reason, to make an asylum claim immediately at the port of arrival then support will be refused unless one of the exceptions applies …
>
> But apart from these exceptions, we expect all single asylum seekers or couples without children who wish to claim asylum and who want NASS support to make an immediate application for asylum at the port of arrival. 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.
>
> The Secretary of State is prohibited by statute from providing support unless he is satisfied that the person claiming support has made the asylum claim as soon as reasonably practicable after arrival in the United Kingdom. In most cases, for those not within the exceptions, that will mean claiming asylum immediately on arrival at the port".

11. A number of agencies involved in providing immediate and urgent support to destitute asylum seekers such as the Refugee Council and Refugee Action expressed deep concerns about s.55. In particular, the new provisions meant that they were unable to provide any assistance unless the applicant could show an IS 96 (a form showing that the claim had been made at port) or an acknowledgement by NASS that it was accepted that the claim had been made as soon as reasonably practicable. One of the problems which had produced much suffering was that NASS was often unable to reach a decision on a claim immediately so that the Claimant was told to return the following day. No support was provided overnight since it was apparently believed that interim support could not be provided. Mr.

Garnham accepts that that belief was erroneous and it is now accepted that interim support can and should be provided where a Claimant appears to have no means of support and nowhere to receive shelter overnight. There was apparently some concern that this might prejudice a subsequent decision to refuse support since it might be argued that that decision was in effect a withdrawal of support. Indeed, that argument was put forward somewhat faintly by Mr. Starmer. It is clearly a bad point since compliance with s.55 is a precondition to the receipt by an asylum seeker of support and any interim support prior to a determination that that precondition has not been met must be without prejudice. For reasons which will become apparent, I am far from persuaded that whether there is a withdrawal or a grant makes any difference (it is said to be relevant in relation to the application of Article 6 of the ECHR). However, quite apart from the problem initially created by an absence of interim support, the agencies are distressed that they cannot act to assist those who present themselves as destitute because they will not receive any recompense from NASS in respect of any costs incurred in providing such assistance. They have also expressed concern that they may be regarded as public bodies within the meaning of the Human Rights Act 1998 and may be breaching a Claimant's human rights if support is refused to one who is obviously destitute and who will have to sleep rough and has no means of obtaining food. The evidence put before me shows, that apart from the 6 claims in issue, there are many examples of Claimants refused support under s.55 who have had to sleep rough unless fortunate enough to find some charitable individual who is prepared to help them, usually for a night or two but, understandably, not for longer. There can be no question but that the effect of s.55 as presently being applied by NASS has been and will be that a considerable number of asylum seekers will be left destitute with no means of support. It is obvious that they will be likely to resort to begging or other more serious criminal activities in order to survive. Some whose claims are not genuine may be forced to return whence they came, but those whose claims are well-founded will hardly be likely to return to face persecution or treatment which breaches Article 3 of the ECHR. It is in this context to be noted that the official figures for 2001 show that some 7,200 in-country applications were allowed against some 3,600 in respect of those who 'claimed immediately', on arrival. It can hardly be suggested that an in-country application is less likely to succeed than one made at the port of entry.

12. Guidance was issued to NASS staff on how to operate s.55. The document before me is dated 7 January 2003, the day before the provisions came into force. Paragraph 3.1 under the heading 'Summary' states:-

> "… In practice, if an applicant makes a claim immediately on arrival at the port then they 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".

There are other qualifications which relate to families with dependent children, those under 18 and breaches of human rights. It is said that the burden of proof is on the applicant to show that it was not reasonably practicable to have made his claim sooner. It is said that each case must be considered on its own merits 'taking into account the information provided by the applicant and that person's circumstances'. Examples are then given. Each example of a correct refusal is

based on a claim made and known to have been made a significant time (the least being one week) after arrival in the United Kingdom. They are of course only examples, but it is interesting to note that they do not, as we shall see, cover the circumstances of any of the claims before me. In relation to human rights, the guidance requires vigilance to spot any health problems or pregnant women. Whether a Claimant is under 18 should be decided on physical appearance. If the decision is adverse, it is the practice of the Home Office to refer the matter to the local authority social services department to investigate. If that investigation shows the Claimant to be under 18, support from the local authority under the Children Act will be provided. In the meantime, the Claimant has nothing.

13. The Secretary of State has submitted a statement by Christopher Mace, the Deputy Director General in the Immigration and Nationality Directorate of the Home Office (IND). He sets out the background to s.55 from the Home Office point of view, making the point that some two thirds of asylum applications are made in-country. It is believed by IND (although no evidence for that belief has been nor perhaps could be provided) that it was likely that many were being made by persons who had been in the United Kingdom for some months or years. The ratio of in-country claims as against those made at port has not varied to any significant extent over the years. He sets out five principal reasons leading to the enactment of s.55. The first relates to the desirability of preventing last minute claims by those on the point of removal. It is not relevant to the claims before me nor (subject to alleged breaches of the ECHR) could it be. The second is the contention that it will reduce the scope for the offence of facilitating the entry of asylum seekers into the United Kingdom. Requiring claims to be made at port will, it is said, significantly increase the possibility of detecting those facilitators. Mr. Mace notes that the most frequent reason for failing to claim asylum at (usually) an airport is obedience to the facilitator's instructions. He concludes:-

> "If those arriving at ports know they must apply for asylum at the port than it will deter facilitators from bringing asylum seekers to the U. K. and thereby significantly reduce the incidence of this serious offence".

Whether that is well founded is not for me to decide. But it is a significant belief since, as will become apparent when I set out the practice of NASS and the circumstances of the claims, refusal of port arrivals has been on the basis that the claim could and should have been made at the port and that obedience to facilitators' instructions is no excuse.

14. Thirdly, it is said that it will enable fraudulent claims to be prevented. It is regarded as 'an effective way of minimising the scope for fraudulent claims … provided it is applied robustly in a way which requires the asylum claim to be made at the port of arrival, as Parliament intended, unless the asylum seeker can show a good reason for not doing so'. Fourthly, it will increase the likelihood of claims being made in safe countries which at present are being transited. Fifthly, it will enable speedier decision-making generally by bringing Claimants into the system at the earliest opportunity. It is not entirely clear how leaving an asylum seeker at large and destitute so that he has no fixed abode will enable his claim to be examined more quickly. Difficulties in communication are obvious.

15. All these reasons have been challenged. At the outset of the hearing, Mr. Garnham applied for an adjournment to enable the Claimants' evidence contradicting these assertions to be answered. I made it clear that I could not go behind the words of the Act which Parliament had enacted. Whether the reasons which have led to its enactment are good or bad is not for me to decide. I have to determine Parliament's intention from the words it has chosen to use and, although I have had put before me an abundance of background material which I have summarised, it cannot be used to override the plain meaning of those words. In those circumstances, I refused Mr. Garnham's application. In fairness to him, he did not pursue it, although he reserved the right, if anything should become material, to reapply. In the result, he did not need to do so.

16. Mr. Garnham submitted first that the burden was on a Claimant to satisfy the Secretary of State that his claim had been made "as soon as reasonably practicable" after arrival. That is clearly right: the wording of s.55(1) permits no other conclusion nor did Mr. Starmer argue to the contrary. Mr. Garnham then submitted that the words used showed that the Secretary of State must focus on the claim rather than the Claimant in deciding whether the "as soon as reasonably practicable" test was met. Thus in port cases reliance on the advice of a facilitator could not prevent refusal. There must be a physical impossibility or difficulty and there was no subjective element. That is said to be consistent with what was said in Parliament.

17. I unhesitatingly reject that submission. The words used in my judgment inevitably require the decision-maker to consider whether the moment at which the asylum claim was made was in all the circumstances as soon as reasonably practicable after arrival. The use of the adverb reasonably must involve a consideration of whether what the Claimant did was reasonable. That is in fact what the Government spokesmen have said in Parliament and is consistent with the introduction in the guidance to NASS staff that "when considering whether a person can satisfy the Secretary of State that they applied as soon as reasonably practicable each case must be considered on its own merits taking into account the information provided by the applicant and that person's circumstances". There is a subjective element: the decision maker must determine why the Claimant did not claim earlier than he did. He must then decide whether the Claimant acted reasonably: there the test is objective. It follows that reliance on advice could amount to a valid reason for not claiming at the port. The nature of the advice and the circumstances surrounding reliance on it will determine whether it does.

18. To assist in making decisions under s.55, screening forms have been provided to the various Asylum Support Units. The initial version of the form required Claimants for asylum to be informed as follows:-

> "You have claimed asylum in the United Kingdom. The questions I am about to ask you relate to identity, status and travel route. At this stage you will NOT be asked to give details about your asylum claim, you will be provided with an opportunity to do this at a later date. 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 Section 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. You will not have to leave the United Kingdom while your case is under consideration. It is possible that the United Kingdom may not be the state responsible for considering your asylum application. If this is the case, you will be informed of any applications and decisions to transfer your case to another country. Information you give us, including biometrics data such as fingerprints, will be held in confidence, but may be disclosed to other government departments and agencies, local authorities, law enforcement bodies and international organisations and asylum authorities to enable them to carry out their functions. Information may be used for documentation purposes in the event of your application being refused".

There are then a number of printed questions with spaces for answers. The initial ones 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 can be produced to support his account of when and how he arrived. There are then questions about means. There then follow some questions asking what happened at the port or, if the arrival was in the back of a lorry, what was it carrying, what type was it and how long he was in it. More details of documentation are also requested. Because of the pressure of work at Croydon, an abbreviated form was provided which omitted the questions about documentation. On 17 January 2003 a new form was substituted. It does not apply to the initial decisions in the claims before me but there has been a fresh interview in some in which it was used. The only difference of significance is in the introduction 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 asylum claim as soon as practicable after arrival in the UK. Do you understand? (Record answer).

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 "I.A.T.") 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. That being so, it is unnecessary for me to consider the jurisprudence on this subject. A useful guide is to be found in the opinion of the Privy Council delivered by Lord Clyde in *Stefan v G.M.C.* [1999] 1 W.L.R. 1293. The extent of such reasons is tied in with the application of Article 6 of the ECHR, a matter which I propose to deal with later. Suffice it to say that they need not be at all lengthy but they must enable the Claimant to know why his claim has been refused.

22. In the light of the true construction of the legislation and the requirements of domestic law which I have set out, I turn to consider the circumstances of the individual claims. The accounts given by the Claimants have not been tested and so must be regarded as claims rather than established fact. I shall summarise the circumstances of each.

23. **(1) "J".**

J is a 26 year old man who comes from Iran. He arrived in the United Kingdom in the back of a lorry on 7 January 2003. He had fled Iran because he was being persecuted for having converted to Christianity. He was dropped off between 1 and 2p.m. in, he was told, London. He did not know what to do and spoke no English. Eventually by chance he came across an Iranian who lived in Newcastle but was visiting London for the

day. This man, whom he named, took him to Newcastle, allowed him to stay with him overnight and gave him £40 in exchange for all the money J had on him, namely $50. J was taken by the man on 8 January to what transpired to be a solicitor's office. He was told to go to North Shields Immigration Office and given a letter explaining he wished to claim asylum. He went there on 8 January and was interviewed. He explained, according to the notes on the form, that he had not applied at port because:-

> "I did not know what to do and the weather was very cold, I just wanted to go somewhere warm. K [the Iranian] said OK come to Newcastle and then go to the police tomorrow."

He had no money or valuables and no address in the United Kingdom. He described the lorry and its cargo somewhat vaguely and said the journey had been about 15 days.

24. In his case, the refusal letter gave the following reasons:-

> "In particular, you claim to have met a solicitor within a very short time of coming in the UK. You also claim to have been too cold to do anything in connection with your claim for asylum. None of this seems credible. The Secretary of State is not therefore satisfied that you have provided an adequate explanation of when and how you arrived then in the UK. If you can produce credible evidence of those matters, or credible details of where, when and how you arrived, the Secretary of State will consider your case further …"

It also said that the Secretary of State was not satisfied that there were any circumstances which would exempt him from s.55: that presumably is a reference to s.55(5).

25. Since it is indeed difficult to follow how the lack of credibility assertion could be justified, particularly as no questions were asked to seek in any way to elaborate the account if it was to be treated with scepticism, following further representation, J's claim has been allowed. It therefore remains only as an example of the approach to claims such as his based on arrival in a lorry.

**(2) "F".**

26. F is a 33 year old Angolan. He was in the army. He had been told that he was suspected of spying and, knowing what would happen to him, he decided he must flee. His godfather arranged with an agent whom he paid $5,000 to assist him to escape. The UK was his godfather's idea since he would be safe there. The agent got him overland to Kenya. He stayed

there for about 3 weeks while papers were prepared for him, he having given the agent passport size photographs.

27. The agent made all the arrangements at Nairobi and London. He had been told by the agent not to claim asylum at the airport. He had seen the passport was red but otherwise had no knowledge of the details. The agent had spoken to the Immigration Officer: he had not. He had travelled to Newcastle and claimed asylum there on the same day as he had arrived. The form does not indicate that any further details were requested about this. He had £1.50 and nowhere to live in the UK. his statement made for the purpose of these proceedings says that the agent told him he must claim in Newcastle and arranged for him to be taken there. He arrived in London about 5 am, caught an 8 am train to Newcastle and on arrival was taken to the office of the North east Refugee Centre. He was then sent to Newcastle airport to claim asylum. The applicability of s.55 was not decided until the following day and he had to sleep rough overnight. The following day the Refugee Centre put him in touch with a Portuguese national called Maria who helped him for a few nights. He was unaware that he should have claimed asylum at the airport. The reasons given in the refusal letter are as follows:-

> "[T]he Secretary of State is not satisfied that you could not have claimed asylum at the airport, mainly because (as you claim) your agent told you not to do so. Assuming you arrived at an airport as you claim, you could and should have claimed asylum there".

There then follows the standard paragraph which is intended to deal with s.55(5).

28. A statement from Dave Roberts, the head of UK Border Control Operations for the Immigration Service produced on behalf of the Defendant, seeks to say that F's account of how he managed to get into the UK without seeing or producing a passport could not be true. He explains that there is a system at Nairobi whereby an identity check against the passport would have taken place particularly as the airline would have been unwilling to risk a fine for bringing an illegal entrant to the UK. Whatever may be the theoretical position, in practice, particularly in Kenya, bribery and corruption is rife. The fact that forged passports are commonly identified shows by itself that many do get through controls abroad. Mr. Roberts says that it is inconceivable that he would not have known the identity under which he was travelling. I see the force of that, but the fact is that it is a fairly common account from those who say they achieved entry with the help of an agent and forged documents. Particularly if the passport was (as here) likely to have been an European Union passport (almost certainly Portuguese) it is easy to see how a busy immigration officer might be prepared to wave through a passenger who was with another and who was said not to speak English. However, I accept that the account may properly be regarded as improbable and for that reason if for no other it should have been probed at least to some extent. And it is not fair to look at that in

isolation: all the circumstances must be considered since even if the account of how entry was achieved is not accepted, it does not follow that he did not enter then nor that he was not obeying instructions not to claim at the airport.

29. It is, incidentally, relatively easy to think of a reason why the Claimant should have been kept in ignorance of or at least did not divulge the name in which he travelled. That name would be on the flight manifest and enquiries could then be made which might lead to identification of the agent.

**(3) "M"**

30. M is a 42 year old Hutu woman from Rwanda. She had been living in a camp run by Rwandan soldiers since 1994 and was subjected to regular rapes and beatings at the hands of Tutsis. On 3 January 2003 she managed to escape and went in a lorry to Uganda. Her uncle there said it was not safe to remain there and arranged for her to go with an agent to the UK, flying from Kampala. There were two other women with her and the agent. The agent provided the necessary documentation which she did not see and he dealt with the immigration officer at London and then called her to come through immigration control. She had arrived in the UK on 7 January 2003. The form records that she said she did not know where to claim asylum when she got into the UK and she had no money and nowhere to live.

31. She claimed asylum and was interviewed at Croydon on 9 January but the decision to refuse was not made until 10 January. The reasons given are as follows:-

> "… if you arrived in the UK by car (sic), you could have claimed asylum at the airport on your arrival. You said at the interview that the person you came with was calling the names off a paper to walk through immigration and you did not claim there. However, the Secretary of State does not consider this to be a satisfactory explanation for why you did not claim at the airport."

After the standard s.55(5) paragraph, the letter concludes with an encouragement to make further representations if any evidence can be provided to satisfy the Secretary of State that she 'did not have the opportunity to asylum at the port'."

32. Mr. Roberts dismisses her account as impossible. She has expanded on and explained some details of it in a subsequent statement. Her account, if thought to be incredible or likely to be disbelieved, should have been probed at the interview. It was not. It may be that it was indeed improbable and that her whole story may be difficult to accept, but it does not necessarily show that she did not arrive when she says she did.

33. No questions were asked as to what she did when she got into the UK. In her statement lodged in these proceedings she has given her account. The agent took her to a hotel and the next day took her to the Refugee Legal Centre. She was told the Home Office was not accepting any more applications that day. She was given £10 and sent to Migrant Helpline, who could offer her no assistance. She went to Croydon Police who put her into Eurotower Hotel where she was able to spend the night. She had no food that day. She was cold and miserable and unable to sleep because she could not get warm.

34. After her interview, she had nowhere to spend the night and eventually was allowed to stay in Croydon Police Station sitting on a chair provided she did not fall asleep. Since her refusal until she got interim relief from the duty judge she had nowhere to go, had been feeling ill, cold and hungry and only survived because a stranger took pity on her.

**(4) "D"**

35. D is an Angolan aged 22. He arrived by air on 8 January 2003 and claimed asylum the same day at Croydon. About a fortnight before his escape from Angola he had been at home. His father was actively involved in an opposition movement. He heard a loud bang and, on coming downstairs found his father shot dead and his mother and sister naked. Both had been raped by the soldiers who were holding them. He was taken to prison and held in appalling conditions and his mother was routinely taken away and, on return, was distressed and said she had been raped. He was interrogated and beaten. He managed to escape from detention and met up with a man called Papa Idu who had known his father and who was prepared to finance an agent to help him to leave Angola and reach the UK. He did not see his passport and the agent dealt with the immigration officer at the airport in London.

36. The agent was someone who had known his father. After entry on 8 January, he was taken by the agent directly to the Home Office in Croydon to claim asylum. He was, he recalls, interviewed more than once, but a decision was not reached until 9 January. I do not have before me the original screening form, but it is apparent from a subsequent interview which led to a further refusal letter that the Claimant was recognised to have been suffering from a degree of trauma as a result of what had happened to him in Angola. And his experienced solicitor who saw him on 10 January was struck by his difficulty in answering routine questions and his distress when it came to recounting his experiences.

37. He had been found a bed over the night of 8/9 January, but had to sleep rough in the street outside the Home Office in Croydon over the night of 9/10 January. He was referred to his solicitors at about 6.30 p.m. that evening and, as a result of an application to the duty judge, he has now obtained interim support.

38. The initial refusal letter gave as the reason for refusal the following:-

> "… you have provided an explanation of hour (sic) you arrived in the United Kingdom. However you have provided no evidence to substantiate this explanation and the Secretary of State cannot be satisfied that you arrived in the way and the time you claimed asylum as soon as reasonably practicable after your arrival."

The grammar may be curious but the meaning is apparent. The reasons are jejune in the extreme and in any event it is difficult to follow what evidence could reasonably be expected to be provided to substantiate the account given. It is hardly surprising that the intervention of the Claimant's solicitor led to a further interview and a reconsideration.

39. That interview took place on 16 January. The interviewer went into greater detail than usual. The Claimant had produced a birth certificate which showed him to have been born in 1985, but he stated (as the form shows) that that was wrong and his correct date of birth was 1980. he described how he had got through the airport and had not seen or had to show his passport or been asked any questions by the immigration officer. The agent had dealt with that and he did not know he had to apply for asylum: the agent told him he was being taken to a place where he could receive help.

40. He described his health problems, mainly stomach pains and an inability to sleep and nightmares when he did.

41. On 17 January, his claim was again refused. The letter, so far as material, stated:-

> "You had the opportunity to claim asylum at the airport but you failed to do so. The Secretary of State accepts your account that you are suffering a degree of trauma in connection with things that have happened to you and your family as explained by you during your interviews. The Secretary of State accepts therefore that, if he could be satisfied that you arrived in the U.K. on the date and by the means you claim than it was reasonable in your case not to claim asylum at the airport and to make the claim as soon as possible in-country instead.
>
> However, the Secretary of State remains very perplexed by your account of how you arrived in the U.K. At interview you admitted that your documents had been shown to an official at the airport, but you said that you had not spoken to the official yourself as you had been standing behind the agent with whom you had travelled. The Secretary of State does not find this account credible. It would not have been

possible for you to pass through immigration controls on entry to the United Kingdom without showing your passport and without speaking to officials yourself. In addition, it would not have been possible for you to board an aeroplane in the country where you say you changed planes without showing your passport. In addition, when you were interviewed, you did not provide any information about the airline you came on or any other flight details, and you said you did not know what country you had stopped in to change planes on your way from Congo to the United Kingdom. All this seems difficult to believe.

Finally, you have not provided any materials or documentation to support your claim to have arrived in the United Kingdom on 8 January 2003.

Having regard to all the above, the Secretary of State cannot be satisfied that you arrived in the way and at the time you claimed, and, therefore, that have made your asylum claim as soon as reasonably practicable after your arrival in the United Kingdom. He must be satisfied of the date and means of arrival in the U.K. before he can be satisfied that an asylum claim has been made as soon as reasonably practicable. He is not so satisfied. He therefore does not have the power to grant you asylum support.

The Secretary of State is not satisfied that there are any circumstances in your case that would exempt you from section 55. You may not, therefore, be provided with support under sections 4, 95 and 98 of the 1999 Act.

There is no right of appeal to an Asylum Support Adjudicator against this decision.

Whilst you do not qualify for support from the National Asylum Support Service because the Secretary of State is not satisfied that you claimed asylum as soon as reasonably practicable after your arrival in the United Kingdom, it appears, because of what you have told us about your state of health, that you may have care needs. If you have care needs, you might qualify for support from your local authority. Therefore we would suggest that you contact them to seek support.

In the meantime, it is always open to you to attend your local hospital for treatment".

The last two paragraphs are said to have been intended to point him to the local authority on the basis that he might get some support under s.21 of the 1948 Act because he was not destitute only by reason of the refusal to provide support. Illness might be an added factor: see *R(Westminster CC) v NASS* [2002] 1 W.L.R. 2956.

42. This claim illustrates the importance of sensitivity in considering a Claimant who may have suffered serious trauma which may have affected his ability to explain himself properly. Furthermore, the absence of supportive documentation is inevitable if the account given is true. The agent had the documents and kept them. Forged passports can be reused with photographs changed. It is also clear that the account given by the Claimant accords with that given by many others and there is no reason to suppose that there has been any collusion. The agents are adept at getting their clients into the U.K. and, whatever may be the instructions to immigration officers and the system supposedly in operation, they may well have found loopholes. In this context, I note the evidence of Timothy Woodhouse, a policy official in the Immigration and Nationality Policy Directorate of the Home Office, given in another claim, *R (Tamil Information Centre) v Secretary of State for the Home Department* and dated 15 May 2002. That claim concerned allegations of unlawful race discrimination in connection with immigration. He said this:-

> "The need to operate efficient, streamlined, intelligence-led port control procedures to facilitate entry to the U.K. of almost 90 million arriving passengers each year (of whom 12.2 million were non-EEA nationals subject to immigration control) meant that if the immigration service had to examine all passengers with the same degree of scrutiny there would inevitably be extensive delays at U.K. ports of entry".

He went on the explain that there was therefore considered to be a need to target nationals from particular countries where there was information that travel documents were being abused or there were concerted attempts to avoid controls. He noted:-

> "During 2001, the Immigration Service detected more than 6,601 attempts by a wide variety of groups and individuals to enter the U.K. using forged or counterfeit travel documents or visas".

43. This evidence demonstrates the enormous pressure on individual immigration officers to process passengers as quickly as possible. In addition, it must be obvious that considerable numbers will have achieved entry by the use of forged or counterfeit documents which, incidentally, shows how regularly the controls at foreign airports designed to try to ensure that would be illegal immigrants are not allowed on the plane are evaded.

**(5) "B"**

44. B is from Ethiopia. Her date of birth was accepted by the officer who first interviewed her as 25 February 1986, making her 16. Her father had been politically active, had been arrested in early 2002 and had not been seen since. In December 2002 she was herself beaten and severely ill-treated by soldiers who asked her about her involvement. She was then detained and further ill-treated. On release, 'believing she was in real danger', she left Ethiopia with the help of someone arranged by her mother. That person had all the documents and she was taken through immigration control without being asked any questions. This was on 10 January.

45. Her minder then simply left her. She spent the night at the airport. She was in tears. She went to the information desk and said she wanted to claim asylum, but was told it was too late that day. The next day she managed to find someone from Hillingdon Council's asylum team who arranged for her to have temporary accommodation. On Monday 13 January she was referred to the Refugee Council and eventually got to the Home Office on 14 January when she was interviewed.

46. Since she was accepted to be under 18, she was referred to Hillingdon for support to be pursued by them, but on 15 January her claim was rejected because it was said she was assessed to be over 18. She was then referred back to NASS. Despite the acceptance of her age by the person who had interviewed her on 14 January, on 16 January her application was refused. The reasons given were:-

> "You had the opportunity to claim asylum at the airport but you failed to do so. The Secretary of State is not satisfied by your account of an agent dealing directly with the Immigration Officer. The Secretary of State does not consider this to be an adequate reason for not claiming asylum at the airport. The importance of claiming asylum at the airport of entry in the U.K. is well advertised and generally understood".

It was said that Hillingdon's age assessment was accepted and that, if she wanted to maintain that she was under 18, she could apply to a local authority for support under the Children Act "although this is unlikely given Hillingdon's determination of your age".

47. I am told that there are notices at airports telling asylum seekers that they must claim at the airports, although how prominent they are is not entirely clear. Mr Mace tells me: -

> "Although the statute does not require the Secretary of State to inform all would be asylum seekers of the change in the

> law, large posters in many different languages have in fact been placed at all departure points for the U.K. and arrival area in the U.K., making clear what is expected of asylum seekers".

However, to say that the requirement is well advertised and generally known goes too far. Furthermore, the letter did not make clear whether her account of how she obtained entry was accepted or not.

48. She was destitute. She was referred to solicitors who obtained interim relief from the duty judge (who happened to be me). On 7 February she was interviewed again, no doubt because it was recognised that the initial refusal letter was not likely to stand up to judicial scrutiny. Account was taken of her statements submitted for these proceedings. Her account was that she did not understand what was said to her and so the agent spoke on her behalf and as a result she was allowed through. She confirmed the passport she had was Ethiopian. The screening form records her as having said 'The name in the passport was [B's first name], but her solicitor who was in attendance, had said that that is inaccurate. She said she had not seen inside it but the agent had told her that.

49. There followed a further refusal letter. This, so far as material, reads:-

> "You have not provided any further evidence to substantiated your account of your journey to the United Kingdom by air and how and when you arrived. We have enquired about the flights to Heathrow terminal 3 from Addis Ababa [via Rome on that day and Ethiopian Airlines have informed us that there is no record of anyone in the names of 'E' or 'B' having been on the flight, depute your assertion that the passport you travelled under was in the name E. You have therefore failed to satisfy the Secretary of State that you arrived on the date you claim, 10 January 2003.
>
> Furthermore, you say you travelled on an Ethiopian passport. To gain entry to the U.K. in those circumstances, you would need to have entry clearance. We have enquired with the Vice-Consul in Addis Ababa and have been informed that no entry clearance has been granted to someone of your name. Had you presented at Heathrow, as a visa national, with no entry clearance stamp in your passport you would have not been admitted. The Secretary of State cannot accept your account of the circumstances of your arrival.
>
> The Secretary of State cannot therefore be satisfied that you claimed asylum as soon as reasonably practicable after your arrival in the United Kingdom

> Even if the Secretary of State were satisfied that you arrived on the date you claim, he does not consider the fact that Abdullah spoke for you to be an adequate explanation for not claiming asylum when you passed through immigration Control".

50. Arguments continue between the Claimant and the Defendant on the facts and, in particular, on the significance (if any) of the absence of the names on the flight manifest or embassy records. It is clear that the Claimant could have arrived by the flights she described and no doubt Hillingdon could confirm the referral from the airport. It is difficult in the circumstances to see how it could reasonably be doubted that she arrived when she did and no suggestion has been made that the description of what occurred once she had got through immigration control was untrue.

51. Her case raises in addition the question of age determination. It is for obvious reasons unusual for asylum seekers who enter illegally whether by lorry or on false documentation through a port to have reliable proof of their age with them. Reliance is therefore placed on the interviewer's assessment on seeing the Claimant. It is extremely difficult to judge age accurately and virtually impossible to tell whether someone who says he or she is just under 18 is in fact just over. The difficulty is much greater when dealing with someone from a different country, particularly if that person has had to face hardships or to take responsibilities which someone of their age would not be expected to have to shoulder in our society. While the Claimant has the burden of establishing that he or she is under 18, unless there is good reason to doubt what he is told, the interviewer should not disbelieve the Claimant. The guidance says, in my view entirely properly, that the benefit of doubt should be given to the Claimant.

52. In this case, it seems that the local authority had no more evidence than the interviewer and formed a different opinion from observing the Claimant. There was no reconsideration. It seems to me that at the very least there must in those circumstances be a doubt and so, in accordance with his policy, the Defendant should have given the Claimant the benefit of it. That is by itself sufficient to establish that the decision under attack cannot stand.

**(6) "Q"**

53. Q is a 20 year old Iraqi Kurd. He arrived in the U.K. in a lorry on 8 January and was deposited, it seems somewhere in London at about 5 a.m. He had no money and spoke no English. He found someone who spoke Arabic and was told to go to Croydon. He walked for some 3 hours and eventually reached the Home Office. He was refused support later in the evening.

54. It is to be noted that the screening form notes that he was suffering from stomach and tooth ache and was feeling sick and tired. The reasons for refusal are stated thus:-

> "On the basis of the lack of detail in your response to the questions which has (sic) been put to you in connection with your journey to the U.K. and when and how you arrived in the U.K. and then travelled to Croydon, the Secretary of State cannot be satisfied that you arrived on the dates you claim or therefore, that you have made your asylum claim as soon as reasonably practicable after your arrival in the U.K.".

Since the Claimant was not asked any questions of the sort referred to in the refusal letter, it is not surprising that an offer to reconsider following a further interview was made. Unfortunately, the solicitors representing the Claimant gave him very bad advice and declined a further interview on the ground that he had made a statement giving extra information. This led to a further refusal on 6 February.

55. While I understand and to an extent sympathise with the attitude of the Defendant, the reality is that there is nothing to justify the disbelief. The solicitors have seen sense and a further interview has now been held. The further decision is awaited. That the Claimant is apparently destitute is shown by his having had to spend the night of 8/9 January sleeping in 'a tunnel by a telephone box'.

56. As will I hope be apparent from my consideration of the individual cases, the decision making process in each is flawed. There has been a failure initially to investigate the circumstances in which entry was achieved sufficiently and, when there has been reconsideration, the approach has been coloured by an assumption that a failure to claim at the port will itself be justification for refusal. The individual's reasons for not claiming must be considered and that means at least asking about the pressures on him, what he was told and what his beliefs were. Whether or not in the end they are granted asylum, many of those arriving are vulnerable and may well have suffered serious ill-treatment. Equally, the so-called economic migrants are frequently trying to escape conditions which no one in this country would regard as tolerable. Where an account is regarded with scepticism, again some questions should be asked about it and the Claimant should be told that it is thought not to be credible so that an opportunity can be given for further explanations to be proffered. And it should be noted that in all four of the port arrivals which are before me a similar account is given of how the Claimant passed through immigration control and that he or she was unaware of the details on the passport used. That is said by Mr. Roberts to be impossible. There is evidence produced by the Claimants which explains how it could be done. Since there can be no suggestion of collusion, it suggests that the procedures may be in place but investigations should be carried out to see whether they are being properly applied in practice.

57. It may well be that the Defendant is indeed correct to regard a failure to claim at port in alleged reliance on the instructions of an agent as in general an insufficient excuse. Where an apparently able-bodied young person uses this excuse having left his or her family in the country from which he or she has allegedly had to flee, it may well be believed the excuse is manufactured. But that will often depend on an overall view of credibility which the procedure is not designed to enable the Defendant to form. However, if no good reason is given for having done the agent's bidding, it may be lawful to reject the excuse. I am, however, far from persuaded that it will in most cases justify a conclusion that the Claimant had been in the country for some time and did not arrive when he or she said.

58. I must now consider the impact of s.55(5). Mr. Garnham submitted that if the arguments put forward by the Claimants were accepted, s.55 would have no real force at all. S.55(1) would, he submitted, be emasculated. However, Parliament has enacted both subsections and each must be given its proper weight. If that means that the regime lacks teeth and will not achieve what was hoped, so be it. I must construe the legislation as I find it, since it was clearly Parliament's intention that the Defendant should not act in a way which meant that any Claimant's human rights were breached.

59. The Claimants submit that the common law has long recognised the importance of what has been called the law of humanity and that destitution engages fundamental rights. Reference is made to *R v Inhabitants of Eastbourne* (1803) 4 East 103. That case concerned the liability of the parish of Eastbourne to maintain a foreigner. In argument, counsel cited some reported observations of Lord Holt in *St Giles v St Margaret*, a case concerned with whether the English wife of a foreigner, continuing irremovable in a parish with her husband for 40 days, gained a settlement. Lord Holt is reported as having said:-

> "…that he did not know that a foreigner had a right to be maintained in any place to which he came; but that they might let him starve".

Lord Ellenborough CJ (hardly one of the most liberal of judges) stated:-

> "We owe it to the memory of Lord C.J. Holt to believe that he never uttered such a sentiment",

In his judgment, in which the rest of the court (Le Blanc and Lawrence JJ) concurred, Lord Ellenborough 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".

60. In *R v Secretary of State for Social Security ex p. JCWI* [1997] 1 W.L.R. 275 that passage was cited by Simon Brown LJ in striking down secondary legislation which sought to deprive asylum seekers who failed to claim asylum on arrival of support. The purpose of the regulations was similar if not identical to the present legislation, namely to discourage economic migrants from making and pursuing asylum claims. Simon Brown LJ said (p.283):-

> "No one could dispute the desirability of these aims. There is, however, a problem. A significant number of genuine asylum seekers now find themselves faced with a bleak choice: whether to remain here destitute and homeless until their claims are finally determined or whether instead to abandon their claims and return to face the very persecution they have fled".

Simon Brown LJ concluded his judgment (with which Waite LJ agreed) with these words (at p.293):-

> "It is not for this court to indicate how best to achieve this consistency with the Secretary of State's legitimate aim of deterring unmeritorious claims. I content myself merely with noting that many European countries, so we are told, provide benefits in kind by way of refugee hostels and meal vouchers; that urgent needs payments could be made at a significantly lower rate than the 90 per cent rate hitherto paid; and that certain categories of claim (perhaps, as suggested, in country claims brought more than four or six weeks post-arrival) could be processed under the "without foundation procedure". All that will doubtless be for consideration. For the purposes of this appeal, however, it suffices to say that I for my part regard the Regulations now in force as so uncompromisingly draconian in effect that they must indeed be held ultra vires. I would found my decision not on the narrow ground of constructive refoulement envisaged by the UNHCR and rejected by the Divisional Court, but rather on the wider ground that rights necessarily implicit in the Act of 1993 are now inevitably being overborne. 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 themselves as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs".

61. In 1996 Parliament sought to achieve the same result by primary legislation: see Immigration & Asylum Act 1996 ss.9, 10 and 11. In *R v LB Westminster and Others ex p M* [1997] 1 C.C.L.R. 69 I heard a challenge to the refusal of local authorities to provide support under s.21 of the 1948

Act. I note that I recorded (at p.77) Mr. Beloff, Q.C., for the local authorities, as having submitted:-

> "… Parliament acted as it did in the belief that the result would be totally to deprive asylum seekers of access to public assistance of any sort so that, unless they could find charitable persons or bodies who were prepared to help, they would indeed be destitute and face the intolerable dilemma referred to Simon Brown LJ".

Mr. Beloff accordingly submitted that:-

> "to allow these applications would be to frustrate the will of Parliament which has been so clearly and unequivocally set out in the 1996 Act".

I decided that if Parliament had really intended to cut off all means of support, it should have said so in terms. Only thus would it disapply the law of humanity expounded by Lord Ellenborough C.J. My decision was upheld by the Court of Appeal ([1997] 1 C.C.L.R. 85). But it was made clear that s.21 did not apply except as a last resort for the truly destitute. Lord Woolf, M.R., said (p.95A-D):-

> "Asylum seekers are not entitled merely because they lack money and accommodation to claim they automatically qualify under section 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 section 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".

62. Mr. Garnham submits, no doubt correctly, that Parliament has now in terms removed the law of humanity in s.55(1). There can now be no support for asylum seekers who in the Secretary of State's view do not claim as soon as reasonably practicable unless there is a breach of their human rights. Mr. Starmer submits first that to leave someone destitute would be a breach of Article 3 which prohibits inhuman or degrading treatment. Mr. Garnham contends that the threshold beyond which Article 3 is engaged is a high one. He referred me to *O'Rourke v United Kingdom* (App. No.00039022/97:23/6/01). The applicant had been evicted from his accommodation due to his misbehaviour and had remained on the street sleeping rough having turned down an offer of bed-sit accommodation because he would have to share a bathroom and toilet. His health had suffered, his asthma and chest infection having worsened. The Court stated:-

> "The Court recalls that in order to fall within the scope of Article 3, mistreatment must attain a minimum level of severity (see *Ireland v United Kingdom* 18.1.78). The Court does not consider that the applicant's suffering following his eviction attained the requisite level of severity to engage Article 3".

63. In *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 205 the question was whether the removal of the applicant to Algeria would breach Article 3. He was a schizophrenic whose condition was being controlled by medication and it was said the medication would not be available and he would have to travel over a considerable distance to obtain medical treatment and would be at risk of attack by terrorists. His health would be seriously endangered. The Court recognised that Article 3 could be engaged in cases of removal where there was a real risk that the standards of Article 3 would be breached. The circumstances must be subjected to rigorous scrutiny. In Paragraph 39, on p.218 the European Court of Human rights ("the ECtHR") decided that the risk was speculative and continued (Paragraph 40):-

> "The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set out by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case [*D v United Kingdom* (1997) 24 E.H.R.R.423] where the applicant was in the final stage of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St Kitts".

64. The 'real risk' test is usually applied in cases which have gone to Strasbourg where there is intended removal. In most cases alleging a breach of human rights complaint is made about what has happened to the applicant. This

has led Mr. Garnham to submit that the Claimants, albeit deprived of support and so destitute or likely to become so, have not yet reached a state where they can be said to have reached the Article 3 threshold. *Bensaid* recognises that the ECHR cannot be applied worldwide and that the risk of a breach of Article 3 must be real and that the threshold is indeed a high one. Here, Mr. Garnham submits in effect that if a Claimant's health begins to suffer, he or she will be able to get medical treatment and so will not suffer sufficiently.

65. The submission is unattractive, but not necessarily wrong on that account. He further suggests that the risk is speculative since a Claimant is unlikely to be left to starve; charity will be found. That suggestion I find even less attractive. The more refusals occur, the greater the pressure on charitable bodies or persons and I have no doubt that the risk of damage to health is real. It is not only physical health, it is also mental. The worry of not knowing how to survive from one day to the next or where he is going to sleep is likely to produce serious damage to a person's mental well-being, and there is before me evidence which supports that proposition.

66. In *R(Husain) v Secretary of State* [2001] EWHC Admin 852, Stanley Burnton J considered an argument that Article 3 would be breached if support was withdrawn because, for example, a condition was broken. In paragraph 53 of his judgment, he said this:-

> "I find the question whether a failure to support destitute asylum seekers constitutes a violation of Article 3 a difficult one. I do not think it 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 Article 3. The judgment of the Court of Appeal in the *JCWI* case indicates that other means of support principally by charities, are scarce. In my judgment, unless other means of support are available when support is withdrawn, there will be a violation of Article 3".

67. 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.

68. Even if Article 3 is not breached, it is submitted Article 8 is. It provides so far as relevant:-

1. "Everyone has the right to respect for his private … life.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In *Bensaid* at paragraphs 46 and 47 (pp 219 –220) the ECtHR said this:-

> "46. Not every act or measure which adversely affects moral or physical integrity will interfere with the respect to private life guaranteed by Article 8. However, the Court's case does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity.
>
> "47.Private life is a broad term not susceptible to exhaustive definition … Mental health must .. be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life".

The Court went on to decide there had been no breach because the risk of damage was speculative and it had not been established that the applicant's moral integrity would be substantially affected to a degree falling within the scope of Article 8.

*69.* *Marzari v Italy* (1999) 28 E.H.R.R. CD 175 has been put before me. The applicant in that case had serious health problems and had, he alleged, been evicted from accommodation and compelled to live in a camper van so that his health deteriorated and he had to be taken to hospital. The Court decided that his complaint was inadmissible because, although the eviction had resulted in a breach of 8.1, it was justified by 8.2. In the course of its judgment, the Court said this (p.179):-

> "The Court must first examine whether the applicant's rights under Article 8 were violated on account of the decision of the authorities to evict him despite his medical condition. It further has to examine whether the

> applicant's rights were violated on account of the authorities' alleged failure to provide him with adequate accommodation. The Court considers that, although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a serious disease might in certain circumstances raise an issue under Article 8 … because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A state has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life".

70. The citations from *Bensaid* and *Marzari* were naturally tailored to the matters in issue in those cases. But it seems to me to be apparent that if a State puts into effect a measure which results in treatment which can properly be described as inhuman or degrading or which interferes with a person's private life by adversely affecting his mental or physical health to a sufficiently serious extent, Articles 3 or 8.1 will be violated. It is not necessary to wait until damage of a sufficient severity occurs provided there is a real risk that it will occur.

71. An asylum seeker can only seek support if destitute or likely to become destitute: 1999 Act s.95. It will not automatically breach Article 3 or Article 8 to refuse someone who is destitute. It must be established that there is a real risk that destitution leading to injury to health will occur. This means that questions should be asked to establish whether there is indeed a realistic chance that there will be a source of support. Thus if, for example, there are friends or relatives to whom the individual may turn, a refusal may be justified, but there must always be the opportunity to reapply if support is not available. It will also be proper to consider whether one who has had the assistance of a paid agent to enter illegally may also, as part of the package, have some means of support available. The Secretary of State is entitled to be sceptical that an asylum seeker who has a family who has paid for him to get to the U.K. will not have taken some steps to ensure he will have some means of support available. However, no assumptions should be made and each case must be considered on its merits.

72. I am satisfied that there will normally be a real risk that to leave someone destitute will violate Articles 3 and 8.1. I am not persuaded that charity offers a real chance of providing support. It would be surprising if the standards of the ECHR were below those believed 200 years ago to be applicable as the law of humanity, although I recognise that in those days the possibility of any charitable assistance would have been extremely

remote. Furthermore, the effect on mental health if there is no anticipated source of support is likely to constitute an interference with private life within the scope of Article 8.

73. The standard form rejection of any application of s.55(5) in all the refusal letters demonstrates that insufficient consideration has been given to the issue. The fact that a Claimant has been sleeping rough or obviously has nowhere to go may of itself show that the risk is real. Enquiries should be made. It is surely more cost effective to provide the minimum support necessary rather than await applications to the Administrative Court unless sufficiently full enquiries have been made to try to establish whether any support is likely to exist.

74. I am conscious that this will weaken the anticipated effect of s.55(1). But Parliament itself recognised that possibility by enacting s.55(5). Furthermore, Parliament can surely not have intended that genuine refugees should be faced with the bleak alternatives of returning to persecution (itself a breach of the Refugee Convention) or of destitution. It is obvious that those least likely to leave the United Kingdom will be those who are genuinely fleeing persecution.

75. Mr. Garnham has not sought to rely on Article 8.2 because the Secretary of State has not done so. I am bound to say that I think it would be difficult to do so since the only ground in favour of justification is the economic well-being of the country. But it can hardly be said that the law can help to prevent crime or disorder or to protect health; indeed, the contrary might well be said to be the case.

76. I have in addition heard argument on the applicability of Article 14, which prohibits discrimination on specified grounds in the enjoyment of the rights and freedoms guaranteed by the ECHR. In the light of my findings in respect of Articles 3 and 8, I do not need to resolve the question. Despite the interesting argument that there are conflicting Court of Appeal decisions whether there is a need for discrimination to be on the grounds of a personal characteristic or status of the Claimant, I am satisfied that there are no comparators within the test set out by Brooke LJ in *Wandsworth LBC v Michalak* [2002] 4 All ER 1136. The decisions conflicting with *Michalak* are said to be *St Brice v Southwark LB* [2002] 1 W.L.R. 1537 and *R(S) v Chief Constable of S. Yorks* [2002] 1 W.L.R. 3223. The suggestion is that the comparators are asylum seekers whose claims were and whose claims were not made as soon as reasonably practicable. In reality there are not two classes but only one, namely asylum seekers. Some may and some may not overcome the precondition that they make their claim in time. If the Claimants' argument is right, every precondition will provide a discrimination which may engage Article 14 and that is clearly wrong.

77. That leaves Article 6 which is said to have been breached by the absence of any right of appeal. In *Husain* (supra) Stanley Burnton J considered whether Article 6 applied to the withdrawal of support for asylum seekers who had broken conditions upon which that support was provided. The

ECtHR jurisprudence makes it clear that where payments are made as of right if preconditions are fulfilled, Article 6 is engaged, but not where payments are discretionary. The wording of s.95(1) is 'may provide' not 'shall provide' and that is said to confer a discretion, not a duty. Stanley Burnton J drew the inference that the wording showed that Parliament intended to take asylum support out of Article 6.

78. Despite the comparison with the wording used in relation to other social security payments, I am far from persuaded that that is a correct inference. If a destitute asylum seeker who satisfied the preconditions were refused support, it is difficult to imagine what defence there could be to a mandatory order. In reality, the authority to provide support given by s.95(1) can only be exercised to provide such support unless there is some statutory reason to refuse it.

79. In those circumstances, it seems to me that there is, where support is refused, a 'determination' or, to follow the French wording of Article 6(1), a 'contestation' (dispute) about civil rights and obligations: to suggest that withdrawal will and refusal will not engage Article 6 seems to me to be wholly artificial.

80. Judicial review may provide compliance with the requirements of Article 6. The whole process must be looked at, and 'full jurisdiction' does not mean a full decision making power in the independent tribunal: see *R(Alconbury) v Secretary of State for the Environment* [2001] 2 W.L.R. 1389 at 1416, paragraph 87 per Lord Hoffmann.

81. Mr. Garnham placed reliance on *Zumtobel v Austria* (1993) 17 E.H.R.R. 116. That case concerned an expropriation order whereby a strip of land belonging to the applicant was taken for the construction of a highway. The applicant unsuccessfully challenged the order before the Administrative Court on the grounds of breaches of procedural and substantive law. He complained of a breach of Article 6.

82. In paragraph 71 of the judgment on p.126, the Commission noted:-

> "[T]he Administrative Court was able to review the facts of the case in that it could examine inter alia whether they had been incorrectly or incompletely established by the Provincial Government. While the purpose of the review was to determine any procedural defects leading to the unlawfulness of the decision, section 42(2)(3) of the Administrative Court Act did not restrict the Administrative Court in its power to review the facts. In particular, this provision sets no limits in respect of the assessment and supplementation of the facts".

Then in paragraph 73, it was stated that the Administrative Court had explained that it could 'take evidence … in order to control the assessment of evidence'.

83. So it was decided that the powers of the Administrative Court were sufficient to provide for compliance with Article 6. Judicial review is not so extensive, particularly in cases such as these where factual issues arise. Mr. Garnham submits that, since the decision depends on whether the Secretary of State is or is not satisfied that the claim was made as soon as reasonably practicable, that question is the only one to be addressed on an appeal and is in effect a review. But the language of s.95(1) is similar since the Claimant must 'appear to the Secretary of State to be destitute or likely to become destitute'. An appeal under s.103 puts the adjudicator into the shoes of the Secretary of State and the same would apply to s.55(1) if an appeal were permitted.

84. It is suggested that the willingness of the Secretary of State to reconsider his decision prevents a breach of Article 6. I do not accept that. Once an adverse decision has been made, the Claimant will be at a disadvantage and he must be able properly to challenge the findings which led to the initial refusal.

85. In any event, judicial review could not be an adequate remedy unless the facts were properly investigated by the decision maker and adequate reasons were given. Only then could the whole process be regarded as compliant with Article 6. But even then there are likely to be issues of fact which could not be determined on judicial review since this is not the sort of case to which the principle established in *Khawaja v Secretary of State for the Home Department* [1984] A.C.74 applies. There is no determinative fact to be established as there was in that case which turned on whether the appellant was or was not an illegal entrant. Here, the issue turns on whether the Secretary of State is satisfied of something and so this court would not resolve facts but would only be able to consider whether the decision was lawful on the usual grounds.

86. I am therefore satisfied that there is in each of these cases a breach of Article 6. It is possible that fuller investigation and fuller reasons might mean that judicial review was adequate. It is difficult to follow why s.55(10) was enacted, particularly as the reason given relating to the alleged inexperience of adjudicators to deal with the issues raised was understandably not relied on by Mr. Garnham as providing any sensible justification for the lack of an appeal.

87. This judgment has been longer than I had hoped, but it seemed to me that, as these were sample cases which were intended to be used as a vehicle to give some guidance as to the approach which should be adopted to s.55, it was necessary to set out the circumstances and my conclusions in some detail. I am of course well aware that the volume of those entering the United Kingdom, usually unlawfully, and seeking asylum has created and is continuing to create what seems an intractable problem. There is huge

expense involved, amounting to some £1 billion per year. Many claims are refused, but the sheer numbers have resulted in unacceptable delays. Attempts have been made by various means to stem the flow. S.55 represents one such attempt. I am conscious that this decision will mean that it is unlikely to work, at least to the extent which was hoped. But I am sure that whatever is done must accord with those fundamental rights which are to be found enshrined not only in the ECHR but in the Universal Declaration of Human Rights and in the constitutions of many civilised countries.

88. Since writing this judgment, I have seen a report in The Times of a decision of the House of Lords published on 17 February 2003 in *Begum v Tower Hamlets LB.* It gives some guidance whether judicial review can fulfil the requirements of Article 6. It concerned disputes under the homelessness legislation about whether accommodation was suitable where an appeal lay on a point of law only to the County Court under s.204 of the Housing Act 1996. The House upheld the decision of the Court of Appeal that the legislation was compliant with Article 6.

89. The Times reports only the speech of Lord Hoffmann. He is recorded as having said this:-

> "In any case, the gap between judicial review and a full right of appeal is seldom in practice very wide; even with the latter 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 here, on questions of credibility".

But it is to be noted that the system in operation provided for a review of the initial decision by a reviewing officer who so far as possible (although not an independent tribunal) was impartial. There were thus built in safeguards which do not apply here.

90. This case does not change my general approach, but it does suggest that provided the initial decision making is fair and proper reasons are given, the absence of an appeal on fact may not be fatal. However, I do make the point that an appeal to an adjudicator would not necessarily be limited in the way Lord Hoffmann states since a complete rehearing could take place, as in the case of an adjudicator hearing an immigration appeal. Furthermore, an appeal such as that is likely to be speedier and much cheaper than an application to the Administrative Court.

91. I shall hear counsel on the relief which is appropriate in the light of this judgment.