Briefing Paper 8.10

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Asylum Seekers and Destitution

Section 55

1. As with other briefing papers on this website, this paper should not be regarded as legally authoritative on the matters which it covers. It is intended for information and guidance only.

2. The influx of thousands of asylum seekers into the United Kingdom which began during the nineties gave rise to a need to make some provision for their maintenance while their cases were being considered by the Home Office or on appeal. Statutory provision for support was made by Part VI, sections 94 to 127 of the Immigration and Asylum Act 1999. Under section 96, support may be provided for asylum seekers and their dependants in the form of accommodation, food or other essential items and costs incurred in connection with pursuing claims or appeals. The latter did not at first extend to legal aid, but asylum seekers became eligible for legal aid by later legislation. Local authorities can be required by the Home Secretary to provide support and provision is made for the Secretary of State to reimburse local authorities which are so required. By section 115 asylum seekers are barred from claiming a whole range of cash benefits otherwise payable under social security legislation, e.g. attendance allowance, income support, child benefit and housing benefit.

3. Section 95 empowers the Home Secretary to provide support for asylum seekers or their dependants who appear to be destitute or likely within a given period to become destitute. By subsections (2) and (3) they are considered to be destitute if they do not have and cannot obtain both adequate accommodation and food and other essential items. The Home Secretary is authorised to define by statutory instrument what is meant by "essential items".

4. One of the problems faced in dealing with asylum is that of late claims. People may arrive with the intention of claiming asylum but it suits them not to claim immediately on arrival at the airport but to wait until they have had an opportunity to consult lawyers or other immigration advisers before formulating the substance of a claim. Also, many claims are made only when, e.g. a person is found to be in the United Kingdom without a visa or with a visa which has expired, sometimes months or years after their arrival However, if they do make such belated claims they cannot be deported until their claims(and appeals) have been considered and rejected. It goes without saying that most late claims are bogus. As a deterrent against delay section 55 of the Nationality, Immigration and Asylum Act 2002 was enacted. By that section the Home Secretary **may not provide or arrange for the provision of support** under provisions in the 1999 and 2002 Acts which legislate for support for asylum seekers if he **is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United**

Kingdom.

5. The words just quoted in italics from subsection (1) of section 55 are draconian in that they do not just give a discretion to the Home Secretary to withhold support in the cases of late claimants but positively require him to do so. However, the severity of subsection (1) is mitigated by subsection (5), which states that section 55 :

"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 and Asylum Act 1999 or section 17 of this Act in accordance with section 122 of that Act (children), or
(c) the provision of support under section 98 of the Immigration and Asylum Act 1999 or section 24 of this Act (provisional support) to a person under the age of 18 and the household of which he forms part."

5. The exemptions for support for children in (b) and (c) are straightforward and do not call for discussion here. In this paper and in discussion of the recent House of Lords decision on the effect of section 55 I am concerned with (a). The Human Rights Act 1998 made the European Convention on Human Rights directly justiciable by the courts of the United Kingdom, whereas previously any claim that human rights had been infringed had to be taken to the European Court in Strasbourg. Article 3 of the Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The denial of support to an asylum seeker under section 55 may leave him destitute and the question then arises whether this consequence amounts to a breach of his rights under Article 3. This was the question considered by the House of Lords in
Regina v. Secretary of State for the Home Department ex parte Adam and others [2005] UKHL 66, reported in summary form in "The Times" Law Reports on 4 November 2005.

6. The case was a judicial review proceeding of the actions of the Home Secretary in three cases, all raising the same point of law, in which support had been refused to individual asylum seekers under section 55. The questions raised in the case are summarised and answered in the following extracts from the speech of Lord Bingham of Cornhill:

- "6. Article 3 of the European convention prohibits member states from subjecting persons within their jurisdiction to torture or inhuman or degrading treatment or punishment. Since these appeals do not concern torture or punishment, the focus is on inhuman and degrading treatment. Does the regime imposed on late applicants amount to "treatment" within the meaning of Article3? I think it plain that it does. Section 55(1) prohibits the Secretary of State from providing or arranging for the provision of accommodation and even the barest necessities of life for such an applicant. But the applicant may not work to earn the wherewithal to support himself, since section 8 of the Asylum and Immigration Act 1996, the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225) and standard conditions included in the applicant's notice of temporary admission (breach of which may lead to his detention or prosecution) combine to prevent his undertaking any work, paid or unpaid, without permission, which is not given unless his application has been the subject of consideration for 12 months or more.....

- 7. May such treatment be inhuman or degrading? Section 55(5)(a) assumes that it may and that assumption is plainly correct.....Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all Article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.....

- 8. When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.

- 9. It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and forseeably finite period, or was seriously hungry, the threshold would, in the ordinary way, be crossed."

7. The House of Lords was affirming earlier decisions of the Court of Appeal and High Court. It is worth emphasising that the House of Lords did not rule that section 55 violated Article 3 of the Convention and counsel for the three applicants did not contend that it did. The possibility of a challenge under Article 3 to the main provision of section 55 was obviously foreseen by the draftsman of the 2002 Act and the effect of subsection (5)(a) is that the obligation on the Home Secretary to deny support to late claimants does not apply if to do so means that it would amount to inhuman treatment of those claimants within the meaning of Article 3. Their Lordships stressed that particular cases had to be considered on their merits. The facts of the three cases before it

were fairly straightforward, so it is not possible to say what the outcome might have been if, for example it had been demonstrated that the applicants had ready access to food and lodging provided by a charity or by members of their own families in the United Kingdom. Also, the outcome might well have been different in the case of any of the three applicants who had been in the United Kingdom for more than 12 months and was authorised to take employment. Their Lordships were unanimous that a high threshold needed to be crossed before the applicants could be treated as destitute, so it is at least possible that in other cases where applicants are not in such desperate straits as the three applicants whose cases were under consideration, a court might rule that the obligation of the Secretary of State to withhold support was properly discharged. However, it is possible to sympathise with the problem which faces officials of the Immigration and Nationality Division (IND) faced with deciding whether support can be denied to particular late claimants. Clearly section 55 will not from now on be as effective in deterring late claims as it was intended to be. The easy way out would be to forget about section 55 and refrain from seeking to penalise late claimants under it. However, that gives rise to a legal quandary. The section somewhat unusually prohibits the provision of support to late claimants unless they fall within one or other of the exemptions in subsection (5), so any decision to ignore the effect of the section and make payments to late claimants regardless of circumstances would mean that in those cases not covered by the exemptions any payment by way of support out of public funds would be unlawful. The IND officials are between the devil and the deep blue sea.

In paragraph 7 of his speech, quoted above, Lord Bingham said that "a general public duty to house the homeless or provide for the destitute cannot be spelled out of Article 3". It appears, however, that in the case of asylum seekers who submit late claims, who are in need of support and whose state of destitution takes them above the threshold as defined by their Lordships, there is such a duty.

Harry Mitchell QC
8 November, 2005