THE UNIVERSITY OF QUEENSLAND
AUSTRALIA

The University of Queensland, TC Beirne School of Law
Legal Studies Research Paper Series

R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department: A Case of "Mountainish Inhumanity"?

Dr Peter Billings – TC Beirne School of Law
Richard A. Edwards – University of West England

Research Paper No. 09-12

2009

This paper can be downloaded without charge from the
Social Science Research Network electronic library at:
http://ssrn.com/1365082

www.law.uq.edu.au

TC BEIRNE SCHOOL OF LAW

Electronic copy available at: http://ssrn.com/abstract=1365082

R. (Adam, Limbuela and Tesema) v Secretary of State for the Home Department: A Case of "Mountainish Inhumanity"?

Peter Billings and Richard A. Edwards*

Principal Lecturers, Human Rights Unit, Faculty of Law, University of the West of England, Bristol

Asylum policy; Asylum seekers; Asylum support; Inhuman or degrading treatment or punishment; Positive obligations

In this article the authors discuss the decision of the House of Lords in Adam, Limbuela *and* Tesema, *where the judges gave detailed scrutiny to the support duty under s.55 of the Nationality, Immigration and Asylum Act 2002 towards those who are seeking asylum and considered the approach to be adopted in determining whether there was an incompatibility with Art.3 of the European Convention on Human Rights if support was denied.*

> "The state has taken the Poor Law policy of 'less eligibility' to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self sufficiency, save family and philanthropic aid, to a particular class of people lawfully here".[1]

Introduction

In *Adam*, the court addressed the application of a key policy of the present Government's ongoing and frenetic attempt to manage the asylum "crisis", as it is typically presented, efficiently.[2] Section 55(1) of the Nationality

* Thanks to Jane Kay and Jackie Jones for their comments. The usual disclaimer applies.

[1] *R. (on the application of Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66 *per* Baroness Hale at [77] ("*Adam*" hereafter).

[2] David Blunkett, "We are a Haven for the Persecuted, But Not a Home to Liars and Cheats" *The Times*, October 7, 2002, p.18; Lord Filkin, HL Debs, cols 976–982 (October 17, 2002),

Electronic copy available at: http://ssrn.com/abstract=1365082

Immigration and Asylum Act 2002[3] (the "2002 Act") precluded the Home Secretary and other public authorities from supporting and accommodating asylum seekers where the Home Secretary "is not satisfied the claim was made as soon as reasonably practicable after arrival in the UK".[4] Parliament recognised that in some circumstances the prohibition on state support could result in a breach of the asylum claimant's (or their dependant's) Convention rights.[5] Therefore, s.55(5) stated that nothing in that provision was to be taken as preventing the Home Secretary from complying with the statutory duty incumbent upon him to act compatibly with Convention rights.[6] *Adam*, like several other cases before it, specifically concerned the operation of s.55(5) of the 2002 Act and Art.3 of the Convention.

The elusive legal principles and difficult factual issues, at the cutting edge of human rights jurisprudence, concerned normative questions regarding:

(1) *whether* the state-imposed regime applicable to some asylum seekers constituted treatment at the hand of the state for the purposes of Art.3 of the Convention;

moving the Government amendment that inserted the "late asylum claims" provision into what became the 2002 Act; and, Lord Rooker HL Debs, col 706 (July 6, 2004), responding to a proposed amendment to repeal s.55 during debates on the Asylum Bill 2004. Primarily, efficiency has been measured by politicians in terms of how quickly and cost effectively the whole asylum process can be administered. Paradoxically, the removal of state support for late asylum claimants led to delays in concluding the substantive asylum claim, as in the case of Limbuela who was unaware of the date of his asylum appeal because he was sleeping rough. Moreover, administering s.55 diverted Home Office officials away from making high quality and timely decisions on substantive asylum claims.

[3] The Act came into force on January 8, 2003, notwithstanding the warning of the Joint Committee on Human Rights that there was a threat of a violation of Art.3 and/or Art.8 by virtue of (what became) s.55 (23rd Report of Session 2001–02, HC 1255 HL 176 at [8]). The principal reasons for enacting s.55, cited at the *Adam* hearing, were: to deter unmeritorious asylum claims; to encourage prompt asylum claims; and to save public money. Such reasoning was identical to arguments underpinning the Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996 (SI 1996/30) (deemed ultra vires in *R. v Secretary of State for Social Security Ex p. JCWI* [1996] 4 All E.R. 385) and ss. 9, 10 and 11 of the Asylum and Immigration Act 1996 (effectively emasculated by the Court of Appeal decision in *R. v Westminster CC, Ex p. A; Hammersmith and LBC, Ex p. M* [1997] EWCA Civ 1032).

[4] S.55 removed all entitlements to welfare support arising under the Immigration and Asylum Act 1999 (ss. 4, 95 and 98), the 2002 Act (s.17 and s.24), Housing (Scotland) Act 1987 (s.29(1)(b)), Housing Act 1996 (s.188(3) or s.204(4)) and the Local Government Act 2000 (s.2).

[5] Human Rights Act 1998 ("HRA") s.1 and Sch.1 (that transform most of the 1950 ECHR Articles into domestic law).

[6] HRA, s.6.

Electronic copy available at: http://ssrn.com/abstract=1365082

(2) *when* the state's duty to protect and prevent human rights violations is engaged, or, alternatively, *what* is the requisite standard of proof that asylum seekers must satisfy;
(3) the related question regarding the *threshold* at which the duty arises; and,
(4) in the circumstances, the *nature* of the duty incumbent on public authorities to prevent inhuman and degrading treatment from arising?

The political resonance of this case, and others before it, is readily apparent given that the "intensely political issue" [7] at hand is bound up with concern about the integrity of the United Kingdom's borders and the cost of the asylum process as a whole; both central themes in recent General Elections. Therefore, the jurisprudence has profound consequences for state policy aimed at deterring economic migrants with specious claims. The judicial interpretation and application of policies restricting welfare support to asylum seekers have prompted debates about parliamentary supremacy[8] and the separation of powers.[9] Clearly such constitutional issues are at the forefront of their Lordship's minds in *Adam*. Finally, one should not permit consideration of the legal touchstones formulated in these cases to mask the underlying issue: what level of abject suffering or potential suffering is permissible in a civilised society where the state is partly responsible for the individual's misfortune.

The facts

All three asylum claimants were barred from receiving state support by virtue of the operation of s.55(1) and at the time of their "s.55(5)" hearings were in receipt of interim relief. When Mr Limbuela's application for judicial review came before Collins J. he had been deprived of all support and forced to sleep rough for two days. Evidence at the hearing established that, but for the grant of interim relief on July 28, 2003, Mr Limbuela would have been sleeping rough and begging for food. Evidence was also submitted relating to a series of medical complaints affecting the applicant. The judge, mindful that it was winter, concluded that the threshold for degrading treatment was reached. Mr Tesema was granted

[7] *Per* Lord Hope at [13].

[8] For example, "Blunkett Accuses Judges of Damaging Democracy" *The Telegraph*, February 21, 2003, following Collins J.'s decision in *R. (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin), in which the (then) Home Secretary called on the judiciary to recognise the supremacy of Parliament.

[9] As between executive and judiciary, see A. Bradley, "Judicial Independence Under Attack" [2003] P.L. 397, and, on "political" judgments, see Laws L.J. in *Limbuela* [2004] EWCA Civ 540 at [58], [72] and [80].

interim relief just prior to his eviction from emergency accommodation provided by NASS. Gibbs J. concluded that if evicted, on the evidence before him, charitable assistance was not available and Mr Tesema would have no money for food, he would have no private sanitary facilities at night and would be compelled to sleep on the streets. Thus, the court deemed it unlawful to compel a person to sleep on the streets with no financial support. Finally, Mr Adam slept rough in a shelterless car park between October 16, 2003, when the Home Secretary determined that he was excluded from support, and November 10, 2003, when he was granted interim relief. While some charitable support was available in the form of access to sanitary facilities and food provided by the Refugee Council during the daytime, nevertheless the judge concluded that Art.3 was violated.

Earlier authorities

Notwithstanding the existence of two substantial authorities from the Court of Appeal[10] the state of the law in this area was in serious difficulty when the conjoined cases came before the Court of Appeal; decisions rested upon fragile legal principle leaving "uncomfortable scope for the social and moral preconceptions of the individual judge".[11] In *Q*, Collins J. held that the common law of humanity,[12] prayed in aid, in *ex parte JCWI*, was removed by s.55(1), but that where the state effects a measure which results in treatment properly described as inhuman or degrading, or which interferes with their private life by adversely affecting their mental or physical health to a sufficiently serious extent, Arts 3 or 8 will be violated. It was not necessary to wait until damage of a sufficient severity occurs, provided there is a "real risk" that it will occur.[13] Significantly, the judge doubted whether charity offered a real chance of support, and, therefore, to leave someone destitute (as defined) would mean normally that there was a real risk of a human rights violation.[14] The Court of Appeal agreed that the regime imposed on asylum seekers constituted

[10] *R. (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, and *R. (on the application of T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285, and the respective analyses by R. Thomas, "Asylum Seeker Support" (2003) 10 J.S.S.L. 163, and P. Billings and R. Edwards, "Safeguarding Asylum Seekers Dignity: Clarifying the Interface Between Convention Rights and Asylum Law" (2004) 11 J.S.S.L. 83.

[11] *Per* Laws L.J. in *Limbuela*, fn.9 above, at [58] following his assessment of several first instance decisions at [49]–[57].

[12] *R. v Inhabitants of Eastbourne* [1803] 4 East 103.

[13] *Q*, fn.8 above, at [70].

[14] ibid. at [72]. Although the "real risk" test was not followed, in practice, there appears to be no practical difference in the approach taken to these cases by Collins J. and the court in *Adam*.

treatment within the meaning of Art.3[15] and the state was obliged to take positive steps to prevent subjecting individuals to serious ill treatment. However, the appellate court considered the "real risk" test inappropriate; rather, the Home Secretary was obliged to provide support where the condition of asylum seekers "verged on" the degree of severity described in *Pretty v UK*.[16] The Court of Appeal considered that a greater degree of certainty about the fate of asylum seekers was warranted in cases involving potential human rights violations within the state's jurisdiction, where the state exerts a relative degree of influence over the condition of asylum seekers.[17] By contrast in substantive "protection" claims, where removal to another state is contemplated, a more relaxed standard of proof is appropriate because of the acute evidential and credibility problems present in asylum/human rights determinations. The difference between the two "duty" tests formulated in the Administrative Court and Court of Appeal was one of degree of anticipation.

Subsequently, when the Administrative Court in *S, D and T* applied the "verging on" test established by the Court of Appeal in *Q*, Kay J. observed that it was difficult to imagine a situation in which a destitute asylum seeker, without any other means of support, would not rapidly become one to whom the *Pretty* test applied.[18] Thus, to the extent that a temporal distinction was introduced by the Court of Appeal in *Q*, Kay J. clearly considered the realities of the situation would effectively elide such a distinction. Moreover, the judge agreed that the passage in *Pretty* could be used to "illustrate that the consequences of the treatment are not limited to physical injury or illness and to emphasise the importance, in the context of Article 3, of respect for human dignity."[19] However, Kay J.'s decision was appealed in the case of *T*, and the Court of Appeal played down the legal significance of the loss of T's dignity consequent upon the treatment he endured. Emotional distress, though a relevant factor when considering the application of Art.3, was not determinative by itself.[20] This was a crucial distinction between the court of first instance in *S, D and T* and the appellate court in *T* in regard of the Art.3 "threshold" issue.[21]

[15] *Q*, fn.10 above, at [56]–[57].
[16] 35 E.H.R.R. 1, at para.52.
[17] *Q*, fn.10 above, at [61].
[18] *R. (on the application of S, D and T) v Secretary of State for the Home Department* [2003] EWHC 1941 (Admin) at [33] *per* Kay J.
[19] ibid. at [22].
[20] [2003] EWCA Civ 1285 at [12].
[21] The decision at first instance was reversed, the respondent did not, in fact, verge on the condition described in *Pretty*.

Adam: The decision and analysis

The House of Lords unanimously dismissed the Home Secretary's appeal, and in so doing clarified the law in most respects.[22] The Home Secretary was under a duty to exercise his s.55(5) powers to prevent degrading treatment, that, on the evidence, was an imminent prospect by virtue of the entire regime imposed on the respondents by the state.

(1) Did the statutory regime amount to "treatment" for the purposes of Art.3?
The House of Lords confirmed the approach taken by the courts below,[23] recognising that while it is not the function of Art.3 to prescribe a minimum standard of social support for those in need, the refusal of state support combined with the denial of the right to work amounted to "treatment".[24] Lord Brown (with whom Lord Hope agreed) identified the issue in terms of whether "the state is to be properly regarded as responsible for the harm inflicted (or threatened) upon the victim",[25] and he regarded the question of whether this was a case of positive action, rather than mere inaction, as unhelpful.

(2) What standard of proof must be met to trigger the Home Secretary's statutory duty?
In the Court of Appeal in *Limbuela*, Jacob L.J. labelled the "verging on" test as, "abhorrent, illogical and very expensive" although it "seems to be the only next logical stopping place" once the "real risk" test was rejected in *Q*.[26] Indeed, following the rejection of that standard, in this particular context, seemingly "the executive and the courts are faced with the "wait and see" approach".[27] Carnwath L.J. understood the "verging on" test established in *Q* to mitigate the worst effects of a *pure* wait and see approach. Where the evidence establishes clearly that charitable or other means of support are unavailable then the presumption will be that severe suffering will imminently follow: "it is not necessary for the claimant

[22] See the comments on proportionality in the conclusion, below.

[23] Specifically, the Court of Appeal in *Q*, fn.10 above at [56]–[57]; and see *Chapman v UK* (2001) 33 E.H.R.R. 399 at para.99.

[24] *Per Lord Bingham at [6] and Lord Scott at [66]–[68].* This, seemingly straightforward, conclusion was represented as a "significant extension of existing jurisprudence, without apparent precedents in the ECtHR or member states" by Carnwarth L.J. in the C.A. (see *Limbuela*, fn.9 above, at [116]). But the HRA and its scheduled Convention rights were intended to be a floor not a ceiling for human rights protection in the United Kingdom.

[25] *Adam* at [92] and Lord Hope at [53].

[26] At [142].

[27] *Per* Laws L.J., fn.9 above, at [57].

to show the actual onset of severe illness or suffering."[28] This line of reasoning was adopted by the House of Lords. Lord Bingham identified that the duty incumbent on the Secretary of State arises:

> "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."[29]

(3) What is the Art.3 threshold?

It is well known that a minimum level of suffering is required for Art.3 to apply, a consequence of the fact that once an infringement of the interests protected by Art.3 is established then a violation automatically flows. There is no room for the state to justify its actions simply because Art.3 prohibits the most egregious forms of treatment. The focus is on the prohibition of such treatment *not* the justification of conduct. Any treatment that reaches the threshold is by definition beyond the pale of what is acceptable in a democratic society. All of this is well settled in the case law of Strasbourg. However, in the Court of Appeal, Laws L.J. proffered a so-called "spectrum analysis", in which His Lordship attempted to map the contours of Art.3.[30] In essence the spectrum analysis was an attempt to introduce elements of proportionality and utilitarian calculus that Art.3 has always set its face squarely against. The spectrum analysis had no support in either the text of Art.3 or the jurisprudence of the ECHR in this context. While notions of balance may be acceptable in cases where the state has to intervene to protect individuals from third party violence, as in *Venables and Thompson v News Group Newspapers Ltd*[31] for example, there was no place for such considerations in a case where the state was directly responsible for the treatment. The purpose of Art.3 is in large part to prevent the objectification of human beings. Therefore, the creation by law of a destitute class of individuals for deterrent purposes falls squarely within its ambit. The introduction of fine gradations in order to facilitate deference to the executive is, in the context of Art.3, most unwelcome. Fortunately, the House of Lords applied Occam's Razor. Lord Hope refuted the idea, expressed in the Court of Appeal that the threshold is higher:

[28] *Per* Carnwath L.J. fn.9 above, at [95], and see P. Billings and R. Edwards, above, at 109, where the author's argued for presumptions of fact in this context where the absence of support would place Convention rights at imminent risk.

[29] Lord Bingham at [8]. "Imminent prospect" and "verging on" are synonymous. Factors affecting that judgment were age, gender, the weather and time of year.

[30] Laws L.J., fn.9 above, at [59]–[72].

[31] [2001] Fam. 430.

> "where the treatment or punishment which would otherwise be found to be inhuman or degrading is the result of what Laws LJ refers to as legitimate government policy. That would be to introduce into the absolute prohibition, by the backdoor, considerations of proportionality. [. . .] [Proportionality] has no part to play when conduct for which it [the state] is directly responsible results in inhuman or degrading treatment or punishment."[32]

Lord Hope acknowledged that issues of proportionality may arise in the context of cases where public authorities are under implied obligations to act to avoid an incompatibility, but in this case the public authority was directly responsible for the treatment which, arguably, breached the Convention right.[33] Lord Brown looked "at the problem in the round".[34] Contentiously, he did consider the motivation for the treatment as important; the policy arguments put forward on behalf of the Home Secretary, Art.16(2) of Council Directive 2003/9/EC,[35] and the absence of a positive obligation to house the indigenous homeless. These he viewed as "powerful" arguments but still rejected them. Specifically, on the last point he opined:

> "It seems to me one thing to say, as the ECtHR did in *Chapman*, that within the contracting states there are unfortunately many homeless people and whether to provide funds for them is a political, not judicial, issue; quite another for a comparatively rich (not to say northerly) country like the UK to single out a particular group to be left utterly destitute on the streets as a matter of policy."[36]

Counsel for the Home Secretary had conceded that the policy's necessary consequence was that some asylum seekers would be reduced to street penury. With Strasbourg jurisprudence in mind, Lord Brown considered that this "must therefore be regarded as intended, in which case it can readily be characterised as degrading treatment".[37] Or, it could be deemed unintended, "involving hardship to a degree recognised as disproportionate to the policy's intended aims".[38] On either approach, his

[32] *Per* Lord Hope at [55] and Baroness Hale at [77]: the spectrum analysis "invites fine distinctions which have no basis in the Convention jurisprudence". However, see Lord Bingham at [7]: "I would accept that in the context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one." This could be construed as sympathetic to the Court of Appeal's approach to the threshold question.

[33] ibid. at [48].

[34] See *N. v Secretary of State for the Home Department (Terrence Higgins Trust Intervening)* [2005] 2 A.C. 296 at [88].

[35] The Directive governs minimum reception standards for asylum seekers.

[36] *Adam* at [99]. Also, see P. Billings, and R. Edwards, above, at 96–97.

[37] ibid. at [101].

[38] ibid.

Lordship concluded that street homelessness would cross the threshold into degrading treatment.

Due to the varied and variable circumstances late claimants find themselves in, practical guidance, rather than a precise criterion for defining the Art.3 threshold, was proffered. On the question of how severe the human condition must be before the Home Secretary should act to avoid a breach of Art.3, Lord Bingham observed:

> "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. It is not necessary that treatment, to engage article 3, should merit the description used, in an immigration context, by Shakespeare and others in *Sir Thomas More* when they referred to 'your mountainish inhumanity'."[39]

Lord Hope considered that the safety net of s.55(5) was wider than the Government was prepared to concede; catching more than extreme cases where asylum seekers resorted to begging or prostitution.[40] Baroness Hale opined that to have to endure the indefinite prospect of "rooflessness" and "cashlessness" was, in today's society, inhuman and degrading. She made the telling point that any woman left in the position of the applicants would be in real danger.[41] Potentially, s.55(5) was applicable to the bare fact of sleeping rough, since this cannot be detached from the "humiliation and sense of despair" that results from exposure to the elements, associated risks to health and safety and lack of access to sanitary facilities.[42] The reference to "humiliation" in this passage is important and would appear to follow on from Carnwath L.J.'s judgment in the Court of Appeal. He considered that the failure of the appellate court in *T* to attach separate weight to the ingredients in the second part of the *Pretty* test was confined to the particular facts, and did not preclude reliance on the second part of the test in other cases. It should be recalled that the second part of the *Pretty* test refers to non-physical aspects of a person's condition, relating to treatment that; humiliates, debases, disrespects, diminishes dignity, or arouses feelings of fear anguish and inferiority capable of breaking moral and physical resistance. Previously,[43] the authors have expressed unease

[39] ibid. at [7], guidance that drew explicit support from Baroness Hale at [79].
[40] Lord Hope at [59].
[41] At [78].
[42] Lord Hope at [59] and Lord Scott at [71]: "Growing despair and a loss of self-respect are the likely consequences of the privation to which destitute asylum seekers [. . .] are exposed."
[43] P. Billings and R. Edwards, above, at 99–100 and 110–111.

with the approach taken by the Court of Appeal in *T* in respect of the second part of the *Pretty* test, and the court's decision on the facts.[44] The dicta of Carnwath L.J. in *Limbuela*, and Lords Hope and Scott in *Adam* are to be welcomed, they affirm the importance of Art.3, and Art.2, that reflect "the fundamental values of a decent society, which respects the dignity of each individual human being, no matter how unpopular or unworthy she may be."[45]

(4) The nature of the duty incumbent on the Home Secretary to prevent serious ill-treatment

The key to understanding the s.55(5)(a) duty was the use of the phrase "avoiding a breach". That wording required the Home Secretary to exercise his powers pre-emptively before the state of inhuman and degrading treatment is reached with all the consequences that would flow in such circumstances.[46] Nothing in their Lordships' judgments departed from the principle, accepted by the Court of Appeal in *Limbuela*, that the assessment of the claimant's position should be based on current facts extant at the time of the judicial review hearing, not when interim relief was first granted.[47] In keeping with the responsibilities on the state to take measures designed to ensure that individuals are not subjected to serious ill treatment and the wording of s.55(5)(a), Carnwath L.J. in the Court of Appeal concluded that *general action* by the state was warranted where, as in this instance, the alternative provision of support by charities was unable to cope.[48] He concluded that adequate measures were not in place:

> "if we allow the appeal, we must anticipate that they and up to 600 others will become dependent on charitable support. We have no evidence from the Secretary of State as to how in practice he expects that sudden influx to be handled or that he has policies in place adequate for the purpose. On the evidence presented by Shelter and others, [. . .] there is not simply a 'real risk', but a practical certainty

[44] Lord Brown (at [102]) also noted difficulties with the correctness of the decision in *T* insofar as while T was "living" at Heathrow, that was unlawful in itself, and even if living at an airport terminal was not sufficiently degrading, realistically street homelessness was imminent.

[45] *Per* Baroness Hale at [76].

[46] Lord Hope at [43] and Lord Scott at [72].

[47] *Per* Carnwarth L.J., fn.9 above, at [113], following *E. and R. v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [43] and [76]–[77].

[48] *Limbuela* at [122]. Moreover, it is inapt for the higher courts to judge the daily plight of individual asylum seekers, and the NASS proved inept at administering s.55(5): see *Q. v Secretary of State for the Home Department* [2003] EWHC 2507 *per* Maurice Kay J. at [5].

that the current charitable agencies will be unable to cope with such an influx."[49]

As a consequence of that judgment, which eviscerated s.55(1), the section was substantially in abeyance. The *general action* taken by the Government was to direct Home Office staff not to refuse support unless it was clear that alternative support, including night shelter, food and basic amenities was available, and to apply s.55 only to long-time resident immigration offenders who apply for asylum to avoid being sent home.[50] At the time of the House of Lords hearing some 100 "late claims" cases remained unresolved.[51] There was still no evidence that charities could cope with the volume of impoverished claimants, and, if the appeal was allowed, the prospect of hundreds of judicial review challenges mounting up again. Lord Brown observed that degrading treatment could be avoided by the provision of less than even the modest support made available under s.95 of the Immigration and Asylum Act 1999.[52]

Conclusion

Perhaps awareness of the political and public responses to earlier judgments on this policy and its predecessor, and to other high profile cases involving the human rights of non-nationals, led several of their Lordships to stress that their opinions were not "indulgent" and involved no usurpation of the will of Parliament.[53] Rather, their legitimate task was to guide the Home Secretary in discharging the difficult task of deciding when the statutory prohibition on support is transformed into a mandatory duty to support. It was Parliament's intention that the human rights of asylum seekers should not be breached.

The majority of judges in both the House of Lords and Court of Appeal scrupulously avoided giving any hint of their own views on the Government's policy.[54] However, not all their Lordships were unequivocal in rejecting proportionality in Art.3 cases of this type. Perhaps Lord Brown's opinion leaves the backdoor unlocked, thereby inviting the type of substantive review that would necessitate an assessment of the means used to achieve the policy ends. Indeed, he engages in a form of proportionality adjudication, suggesting that the potential benefits of the

[49] Above, fn.9 at [137].
[50] "Blunkett Backs Down on Aid For Asylum Seekers" *The Times*, June 26, 2004.
[51] *Per* Lord Brown at [81].
[52] ibid. at [102].
[53] *Per* Lord Scott at [73], Baroness Hale at [75] and Lord Brown at [85].
[54] For example, Lord Bingham at [3] and Lord Hope at [14].

policy should not be overstated because "in reality it is unlikely that many claims will be made earlier as a result of it. Nor do the statistics suggest that late claimants make a disproportionate number of unmeritorious claims."[55] Outweighing the speculative efficiency gains of the policy was "the necessary consequence [. . .] that some asylum seekers *will* be reduced to street penury."[56]

Asylum seekers are exercising their vital right to claim refugee status and in the meantime are entitled to be here. If they are denied the basic means of subsistence their physical and emotional well-being is affected, individual autonomy is acutely inhibited, and social relationships impaired.[57] Ethical arguments aside, these consequences may adversely affect an asylum seeker's ability to recount the experiences that prompted their flight and also their ability to maintain contact with the Home Office, legal representatives and support groups. In short, the substantive claim for protection may be critically undermined. Although prior to the House of Lords hearing all three substantive asylum claims were determined, Mr Tesema and Mr Adam being recognised as refugees, the House of Lords seized the opportunity to confirm that the state imposed regime constituted "treatment" for the purposes of Art.3. The Home Secretary's duty to take preventative action was triggered when the asylum seeker could show there was an "imminent prospect" of being denied shelter at night, food or other basic amenities. It was not necessary to "wait and see" if the asylum seeker could evidence a more extreme level of hardship and humiliation than imminent street homelessness. On the basis of evidence adduced before the courts the absence of sufficient charitable support and accommodation meant that the "imminence" test would be satisfied once an asylum seeker could demonstrate that they were destitute and their family or friends could not provide accommodation or funds instead.

[55] *Per* Lord Brown at [101].

[56] ibid. By contrast, Laws L.J. in *Limbuela* advocated a more deferential approach given that immigration control was primarily the responsibility of the democratic arm of government, above, at [72].

[57] See Refugee Survival Trust, *"What's going on?"—A Study into Destitution and Poverty Faced by Asylum Seekers and Refugees in Scotland* (April 2005) available at *www.rst.org.uk*.