Lords Millett and Walker took the unusual step of admitting that they had changed their initial views on the matter. There is some hope therefore that the majority's decision will not represent the law for long and that Lord Scott's thoughtful dissent will become the orthodoxy.

IVAN HARE

ASYLUM-SEEKERS HAVE HUMAN RIGHTS, TOO

THERE can be few minorities—with the possible exception of those who are suspected of involvement in international terrorism, whose due process rights are currently suspended under Part IV of the Anti-terrorism, Crime and Security Act 2001—who suffer greater unpopularity than asylum-seekers. Yet these are the very groups for whom enforceable human rights are most essential, in order that they may protect themselves against the tyranny of the majority—and of its elected representatives. This proposition is vividly illustrated by the Nationality, Immigration and Asylum Act 2002, section 55(1) of which provides that the Secretary of State "may not provide or arrange for the provision of support" such as food and shelter 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". It may be recalled that broadly similar provisions, contained in secondary legislation, were quashed by the Court of Appeal in *R.* v. *Secretary of State for Social Security, ex p. J.C.W.I.* [1997] 1 W.L.R. 275, Simon Brown L.J. remarking at pp. 292–293 that they reduced those seeking to establish refugee status to "a life so destitute that ... no civilised nation can tolerate it"—a "sorry state of affairs" which "[p]rimary legislation alone could ... achieve".

The 2002 Act is rather less draconian: the harshness of section 55(1) is tempered by section 55(5)(*a*), which lifts the prohibition on assisting asylum-seekers to the degree necessary to avoid a breach of their Convention rights. The interpretation and application of these provisions has been the subject of recent judicial attention, most notably in *R. (Q)* v. *Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 3 W.L.R. 365 and *R. (S)* v. *Secretary of State for the Home Department* [2003] EWHC 1941 (Admin) (*The Times*, 6 August 2003). These cases raised two important issues: was section 55 itself compatible with the ECHR and, if so, was the scheme being implemented in a manner consistent with the Convention?

The first matter was addressed in *Q*, in which the Court of Appeal accepted that the scheme as a whole is rendered compatible with the ECHR by section 55(5)(*a*). Indeed, the *discretion* which this appears to give the Secretary of State to exercise his powers so as to avoid a breach of asylum-seekers' Convention rights is transformed into an *obligation* by section 6 of the Human Rights Act, which requires public authorities to act compatibly with the ECHR. The extent to which the section 55(1) prohibition on assistance is thus ameliorated turns ultimately upon the scope of the relevant Convention rights, the most obviously germane of which is Article 3. This provides (*inter alia*) that no one shall be subjected to inhuman or degrading treatment—which, according to *Pretty* v. *United Kingdom* (2002) 35 E.H.R.R. 1, extends to showing a lack of respect for human dignity or arousing fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.

Although the court accepted in *Q* that a *positive obligation* may be drawn out of Article 3, it proved unnecessary to do so because the negative obligation to desist from inhuman or degrading treatment was engaged in the present context: the subjection of asylum-seekers to a statutory regime which prohibits them from working (Asylum and Immigration Act 1996, s. 8) and restricts their eligibility for support amounts to positive action. Disagreeing on this point with Collins J.'s first instance judgment ([2003] EWHC 195 (Admin)), the court concluded that the resultant obligation to support an asylum-seeker arises not when there is a real risk that he will be reduced to the state described in *Pretty*, but only when he verges on that condition. The practical application of these principles was addressed in *S*, which is considered below.

It was, however, an argument founded upon Article 6(1) ECHR which proved decisive in *Q*. That provision entitles individuals to (*inter alia*) a "fair and public hearing" before an "independent and impartial tribunal", whenever their "civil rights and obligations" are determined. The meaning of the last expression, which was considered at length in *Runa Begum* v. *Tower Hamlets L.B.C.* [2003] UKHL 5, [2003] 2 W.L.R. 388, is notoriously uncertain, but the Attorney-General was prepared in *Q* to allow the court to assume, without conceding, that the claimants' civil rights were engaged. Since the immigration officials who assess cases under section 55 are not independent of the executive, and there is no possibility of appeal against their decisions (section 55(10) of the 2002 Act), a clear prima facie breach of Article 6(1) was established.

Of course, the possibility of judicial review by a court of full jurisdiction is often capable of remedying any lack of independence earlier in the decision-making process (the "curative principle" of *R. (Alconbury Developments Ltd.)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 W.L.R. 1389). In this case, however, the original process for establishing whether asylum had been claimed promptly and, if not, whether support should be provided pursuant to section 55(5)(*a*), was so deeply flawed—*e.g.* the claimants' credibility was not adequately assessed; they were given insufficient information about the nature and purpose of the interviews, and the interviewers' poor training led to inappropriate reliance upon standard questionnaires—that judicial review was incapable of working its usual curative magic. This conclusion is an important reminder that, although the curative principle is capable of rescuing many decision-making structures from ECHR-incompatibility, it is not a panacea. In result, although section 55 was found in *Q* to be compatible with the Convention, obviating the need to issue a declaration of incompatibility under section 4 of the Human Rights Act, its deficient implementation led to a breach of Article 6(1) on the facts.

The decision in *S* reveals further problems with the implementation of the section 55 regime. First, one of the claimants, who had claimed asylum the day after arriving, was denied support pursuant to section 55(1) without adequate consideration of the particular circumstances of his case; in particular, insufficient account was taken of the fact that little effort had been made at Heathrow Airport, where the claimant entered the UK, to advertise the urgency with which asylum claims must be made. In light of this, the court concluded that the claimant *had* claimed asylum with the requisite promptitude, and that the immigration authorities had failed to apply the test laid down in *Q*, which provides that the promptitude criterion falls to be determined in all the circumstances, including the asylum-seeker's state of mind and knowledge, and any advice provided to him by the agent who arranged his entry into the UK. It was wholly improper administratively to impose a de facto, extra-statutory requirement to claim asylum *upon arrival*.

The court concluded that the two other claimants in *S* had not claimed asylum as soon as reasonably practicable, and that it was, initially, lawful to deny support under section 55(1), since they were at first insufficiently destitute to require assistance for Article 3 purposes. This, however, was not the end of the matter, because as soon as the condition of the asylum-seeker verges upon the state of

destitution described in *Pretty* and adopted in *Q*, the State becomes obliged to intervene. In spite of this, the Home Secretary refused to provide support to the claimants, both of whom had been sleeping rough for some time, with little or no food, and no real prospect of securing charitable assistance. The court found that these circumstances were sufficient to engage Article 3, thereby permitting the Home Secretary under section 55(5)(*a*) of the 2002 Act, and obliging him under section 6 of the Human Rights Act, to intervene. Maurice Kay J. concluded that an obligation to assist would not inevitably arise, because some asylum-seekers are more resourceful (*e.g.* in obtaining alternative assistance) than others, but warned that many of those who are initially denied assistance will eventually become entitled to it under Article 3.

Notwithstanding the highly-charged nature of the asylum debate, the Home Secretary's widely-publicised attack upon Collins J.'s first instance judgment in *Q* (which was, in almost all respects, upheld by the Court of Appeal) is both extraordinary and disquieting. He condemned the decision as an unwarranted judicial incursion into what he regarded as an essentially political field—a view which cannot rationally withstand the enactment of the Human Rights Act, whose *raison d'être* is to make human rights matters justiciable in British courts. Indeed it appears that the government is only now learning that unpopular minorities have human rights, too, and that it is the function of the judiciary, under the separation of powers, to delineate and enforce those rights. Of course, according to the Human Rights Act, Parliament remains sovereign, and the effects of *Q* and *S* could be undone at a stroke. That, however, is unlikely. The very existence of section 55(5)(*a*) of the 2002 Act demonstrates an acceptance—albeit a reluctant one—that the ECHR now traces the limits of acceptable legislative behaviour, even if Parliament may, in theory, transgress those boundaries. That emerging norm of political behaviour in Parliament, coupled with the judiciary's unwillingness to permit administrative circumvention of the resulting legislative nod to human rights, provides a solid, if not unshakeable, foundation for the rights of minorities such as asylum-seekers—and an important safeguard against the sort of majoritarian excesses which truly would render Britain an uncivilised nation.

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