QBCOF 96/0461 and 0462/D

Neutral Citation Number: [2000] EWCA Civ 1293
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(Beldam LJ and Buxton J)

Royal Courts of Justice
Strand
London WC2

Friday, 21st June 1996

B e f o r e:

LORD JUSTICE NEILL
LORD JUSTICE SIMON BROWN
LORD JUSTICE WAITE

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REGINA

- v -

SECRETARY OF STATE FOR SOCIAL SECURITY
ex parte B and JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

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(Computer Aided Transcript of the Palantype Notes of
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MR N BLAKE QC and MISS F WEBBER (Instructed by Christian Fisher, WC1A 1LY) appeared on behalf of the Appellants

MR S RICHARDS and MR S KOVATS (Instructed by Official Solicitor) appeared on behalf of the Respondents

J U D G M E N T

LORD JUSTICE NEILL: After anxious consideration and despite the powerful reasons advanced by Simon Brown L.J. I find myself unable to agree with the conclusions which he has reached in his judgment.

The appellants seek to challenge the validity of the Social Security (Persons from Abroad) Miscellaneous Amendment Regulations 1996 (SI 1996/30) (the 1996 Regulations). The 1996 Regulations came into force on 5 February 1996. I propose to direct my attention to the effect of these regulations on the eligibility of asylum seekers to receive income support under the urgent cases provisions.

Income support was introduced by The Social Security Act 1986. The principal Act now dealing with the criteria for eligibility for income support is the Social Security (Contributions and Benefits) Act 1992 (the Act of 1992). Provisions relating to income-related benefits are contained in Part VII of the Act of 1992. Section 124 in Part VII of the Act of 1992, provides, so far as is material, as follows:

> (1) A person in Great Britain is entitled to income support if -
>
> > (a) he is of or over the age of 18 or in prescribed circumstances and for a prescribed period of or over the age of 16 ...;
> > (b) he has no income or his income does not exceed the applicable amount;
> > (c) he is not engaged in remunerative work and, if he is a member of a married or unmarried couple the other member is not so engaged; and
> > (d) except in such circumstances as may be prescribed -
> > > (i) he is available for, and actively seeking, employment;
> > > (ii) he is not receiving relevant education."

Certain categories of persons, however, are ineligible for income support. These categories are set out in Regulation 21(3) and Schedule 7 to the Income Support (General) Regulations 1987 (SI 1987/1967) (the 1987 Regulations). The 1987 Regulations have been amended from time to time, most recently by the 1996 Regulations. The 1987 Regulations were made under the Social Security Act 1976 and

certain other enabling provisions; they now have effect as if made under inter alia the Act of 1992: see section 2(2).

Regulation 21 of the 1987 Regulations is concerned with special cases. Regulation 21 has to be read in conjunction with Schedule 7 which sets out the categories of special cases and prescribes the amount if any ("the applicable amount") which may be recovered by a person in one of these categories. A "person from abroad" is one of these categories. Regulation 21(3) contains a definition of the term "person from abroad" for the purposes of Schedule 7. It is, however, unnecessary for the purposes of this judgment to examine the definition of "person from abroad" in detail. It sufficient to say that at all material times the definition has covered persons coming to this country seeking asylum.

Part VI of the 1987 Regulations, however, contains provisions relating to claimants who fall into one of a number of categories of "urgent cases". One of these categories consists of certain persons from abroad as defined in Regulation 70(3) of the 1987 Regulations. In the past and until 1993 persons seeking asylum, though not within a defined group in Regulation 70(3), were in practice treated as "urgent cases" pending the final determination of their applications for asylum. Urgent cases payments are paid at 90% of the normal income support level.

Until the enactment of The Asylum and Immigration Appeals Act 1993 (the Act of 1993) persons seeking asylum from abroad had no special status in U.K. immigration law. The Act of 1993 was passed to make provision for persons who claimed asylum and to introduce certain specified rights of appeal under The Immigration Act 1971. In addition it was provided in section 2 of the Act of 1993 that nothing in the Immigration Rules should lay down any practice which would be contrary to the Convention relating to the Status of Refugees and the Protocol to that Convention. I shall refer to this Convention as the 1951 Convention.

Following the coming into force of the Act of 1993 certain amendments were made to the 1987 Regulations. Regulation 70 of the 1987 Regulations was amended so as to include as a special category of "person from abroad", who might be treated as an urgent case, "an asylum seeker" who was such for the purposes of the newly introduced paragraph 3(A) of Regulation 70. The new paragraph 3(A) was in these terms:

> "For the purposes of this paragraph, a person -
>
> > (a) becomes an asylum seeker when he has submitted a claim for asylum to the Secretary of State that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom and that claim is recorded by the Secretary of State as having been made; and
> >
> > (b) ceases to be an asylum seeker when his claim is recorded by the Secretary of State as having been finally determined or abandoned."

In 1994 the 1987 Regulations were further amended so that in paragraph 21(3), after the definition of "person from abroad" there was inserted the following definition:

> "'person from abroad' also means a claimant who is not habitually resident in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is -
>
> > (a) ...
> >
> > (b) a refugee within the definition in article 1 of the [1951] Convention ...; or
> >
> > (c) a person who has been granted exceptional leave to remain in the United Kingdom by the Secretary of State."

This amendment was introduced by paragraph 4 of the Income-related Benefits Schemes (Miscellaneous Amendments) (No. 3) Regulations 1994 (1994/1807).

In broad terms the position at the end of 1995 was as follows:

(1) Persons from abroad, which included asylum seekers, were treated as special cases under the 1987 Regulations.

(2) Subject to exceptions, persons from abroad were not entitled to income support.

(3) Asylum seekers, however, as specified in paragraph 3A of Regulation 70 of the 1987 Regulations,

were treated as "urgent cases". In the period during which an asylum seeker was treated as an urgent case he was entitled to receive 90% of the normal income support benefit until his claim for asylum had been finally determined.

(4) If an asylum seeker was successful or was granted exceptional leave to remain he would then become entitled to income support in the usual way. He would no longer be treated as a person from abroad.

(5) If, however, his claim was finally rejected or abandoned he was no longer treated as an urgent case and any right to any benefit as an urgent case came to an end.

It was against this legislative background that the 1996 Regulations were introduced. I turn next to the factual background.

It will be convenient to refer first to the statement made by the Secretary of State to the Social Security Advisory Committee in accordance with section 174(2) of the Social Security Administration Act 1992, in which the purpose of the 1996 Regulations was explained as follows:

> "The purpose of these Regulations - together with measures in the Asylum and Immigration Bill announced by the Home Secretary since the Regulations referred to the Committee - is:
>
> > To ensure that the U.K. remains a haven for those genuinely fleeing from persecution, whilst discouraging unfounded applications from those who are actually economic migrants. The growing number of these unfounded applications prevents speedy processing of applications from those who genuinely merit asylum and imposes an unjustifiable cost on the British taxpayer.
>
> The Government recognises that genuine refugees do not come to the U.K. to obtain social security benefits but to escape persecution. Their rights to asylum will not be curtailed in any way by these regulations or the Bill. And those who make their true intentions clear when they arrive in this country, and seek asylum at the port of entry will continue to have access to benefits while their claims are considered by the Home Office. However, well over 90% of those claiming asylum are eventually found not to be genuine refugees. Most of these applicants are economic migrants. The number of such applicants coming here is influenced by the ready availability of benefits. British benefits compare favourably with average wages in many countries from which asylum seekers come. Other European countries offer more limited benefits, less opportunity to work and have tightened up the procedures applying to asylum seekers. As a result the number of asylum claims in Western Europe as a whole has fallen by over a third since 1993 while in the same period the number of claims in Britain has doubled. So the proportion of all those claiming asylum in Europe who came to Britain has

> risen from 4% to 13% over ten years. Consequently, the total cost of social security benefits for asylum seekers already exceeds £200m. per year.

.....

> The proposed regulations mean that people claiming asylum at the port of entry will continue to be eligible for benefits while their claim is processed by the Home Office. In addition benefits will be available for those who claim asylum after arrival in the U.K. as a result of a significant upheaval in their home country since their arrival here.
>
> However, 70% of all asylum claims are made by people who entered this country as tourists, students, business people or illegally and subsequently make a claim. The Government will continue to consider such asylum claims. But benefits will no longer be available to those who enter the country on one basis and subsequently make an asylum claim (except following a significant upheaval in their home country).
>
> Any British citizen whose claim for social security benefit is refused is not entitled to receive that benefit while appealing against refusal. Yet under the existing rules any asylum seeker whose claim for asylum is rejected by the Home Office can continue to claim benefits while appealing against refusal. As a result a high proportion of asylum seekers whose asylum claim is rejected appeal against the decision, even though only 4% of such appeals are upheld. The regulations submitted to the Committee would put asylum seekers on a similar basis to British benefit claimants. They will continue to be entitled to appeal, but will not be entitled to receive benefits while doing so."

The 1996 Regulations came into force on 5 February 1996. The effect of the 1996 Regulations in relation to income support was to exclude from the definition of asylum seekers those who sought asylum otherwise than on arrival in the United Kingdom and those whose claims for asylum had been determined by the Secretary of State or abandoned. An exception was made in cases where the Secretary of State made a declaration that the country of which the asylum seeker was a national was subject to a fundamental change in circumstances such that a person would not normally be asked to return to that country.

It was accepted on behalf of the appellants that, if looked at in isolation, the enabling powers in the primary legislation empowered the Secretary of State to make regulations specifying the persons who were or were not entitled to receive income support and other income-related benefits. But, it was argued, Parliament did not intend these enabling powers to be used in such a way that persons might be

deprived of their common law or statutory rights, or in such a way as to interfere with fundamental human rights. As the argument developed, however, counsel for the appellants concentrated his attention on the suggested conflict and inconsistency between the 1996 Regulations and the rights conferred and the regime established by the Act of 1993.

Counsel for the appellants drew our particular attention to section 6 of the Act of 1993. This section provides:

> "During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim he may not be removed from or required to leave the United Kingdom."

He also drew attention to the provisions in schedule 2 to the Act of 1993 which set out the rights of appeal given to an asylum seeker who has received an adverse decision from the Secretary of State. The Schedule confers on a person making use of the appeals procedure a similar immunity from being removed from the United Kingdom until his appeal has been finally determined.

The argument for the appellants was developed on the following lines:

(a) Post-entry claims were no more likely to be unfounded than claims on entry into the United Kingdom. The statistics showed that post-entry claims and on-entry claims had broadly similar prospects of success. There were many reasons why some genuine refugees were unable to or were inhibited from claiming asylum at the port of entry.

(b) The statistics also showed that the claims of many asylum seekers were successfully established only after an appeal brought in accordance with the Act of 1993. In addition many asylum seekers were granted exceptional leave to remain at the conclusion of the appeal process.

(c) The effect of the 1996 Regulations was to prevent many asylum seekers from establishing a valid claim to refugee status or from obtaining the grant of exceptional leave to remain.

(d) A further effect of the 1996 Regulations was to render nugatory in many cases the right to appeal

conferred by the Act of 1993.

(e) The categories of asylum seekers excluded from income support by the 1996 Regulations were in effect rendered destitute. They were fugitives from their own country and were almost certain to have no financial resources of their own. The conditions imposed on them on entry made it impossible for them to seek employment.

(f) In summary, the 1996 Regulations ran counter to the expressed will of Parliament that persons seeking asylum should not be required to leave the United Kingdom until their claims had been finally decided. The 1996 Regulations were also in conflict with the obligations of the United Kingdom under the 1951 Convention.

These are powerful arguments.

In determining whether secondary legislation is ultra vires the enabling statute, however, it is necessary to consider both the primary purpose and the main effect of the legislation. It is also necessary to remember that a court faces particular difficulties when it is examining a decision which involves the allocation of public funds.

It is clear that, as the appellants contend, the inability to claim income support would have an adverse effect on a significant number of genuine asylum seekers. Some may be obliged to return to conditions of danger. Others may be obliged to live in penury or to abandon their claims to asylum. Yet others will be unable to exercise their rights to appeal or may forfeit the chance of being granted exceptional leave to remain. On the other hand, it is equally clear that the legislation is not aimed at the genuine asylum seeker.

The Secretary of State is given by Parliament the responsibility of deciding the categories of persons who are entitled to income support and other similar benefits. The choice of these categories and the

allocation of resources between different groups is prima facie a matter for the Secretary of State, though it is accepted on his behalf that he could not exercise his powers in such a way as to act in direct contravention of an Act of Parliament.

It is not suggested that in framing the 1996 Regulations the Secretary of State acted irrationally or for an improper purpose. The appellant's arguments are founded on the alleged illegality of the regulations. But the Secretary of State has to try to strike a balance. The statistics demonstrate that a majority of asylum seekers are not found to be genuine refugees, though it is true that many may be granted exceptional leave to remain. In the view of the Secretary of State the claims of the unsuccessful asylum seekers have placed an increasing and unsustainable burden on the resources both in money and in manpower which he has available.

It must be a matter of great regret that some of those who are genuinely seeking asylum in this country will be turned away because they have no one to whom they can look for assistance and no money with which to obtain food or shelter. But Parliament has not imposed on the Secretary of State any express obligation to provide funds to enable persons claiming asylum to exercise all the rights conferred on them by the Act of 1993.

I regard the decision of this court in R. v. Home Secretary ex p. Leech [1994] QB 198 as plainly distinguishable. In that case the Prison Rules had a direct effect on prisoners' rights to communicate with their legal representatives. Furthermore, it was recognised in Leech at 217F that section 47(1) of The Prison Act 1952 authorised some screening of correspondence passing between a prisoner and a solicitor.

As I have already said, in determining whether secondary legislation is ultra vires it is necessary to consider both the primary purpose and the main effect of the legislation. If secondary legislation

brought into force under one statute has an impact on rights conferred by another statute or rights established by the common law, the court has to consider the extent of that impact and, provided the secondary legislation is prima facie within the enabling powers, to examine the objects which the secondary legislation seeks to achieve. In my judgment a court is only entitled to intervene where the interference with the other rights is disproportionate to the objects to be achieved.

In the present case the 1996 regulations were aimed primarily at those who are not genuine asylum seekers and the principal impact of the regulations will be on them. I accept that the regulations will also have a very serious effect on a considerable number of genuine asylum seekers and those who might be hoping to obtain exceptional leave to remain, but I am not satisfied that the Secretary of State has exceeded his powers. Parliament has entrusted the Secretary of State with the administration of the system of benefits which includes the allocation of the resources made available to him. He has to strike a balance. The changes will interfere with existing rights and expectations. But the extent of that interference is important. Looking at the objects to be achieved by the legislation and its results I do not consider that the threshold of illegality has been crossed.

I have found this to be a very anxious case but in my judgment the court is not entitled to declare the 1996 Regulations to be illegal. I would dismiss the appeal.

LORD JUSTICE SIMON BROWN:

Introduction

In recent years the number of persons seeking asylum in the United Kingdom has risen significantly both in absolute terms and in relation to the rest of Western Europe. Of those applying only some 25% are ultimately found to be genuine refugees: 4 - 5% as strictly defined by the 1951 UN

Convention relating to the status of refugees (as amended by the 1967 Protocol) (the Convention); some 20% being granted exceptional leave to remain as, for example, fugitives from civil war or torture for a non-Convention reason, the borderline between the two categories being often a very fine one. The 75% whose claims fail are regarded as economic migrants. With the numbers now applying, the time taken to resolve their claims is inevitably too long and the cost of all this to the taxpayer is enormous.

To speed up the process of decision-making and to reduce the expenditure on benefits, the respondent Secretary of State for Social Security (the Secretary of State) made the Social Security (Persons from abroad) Miscellaneous Amendment Regulations SI 1996/30 (the Regulations), which came into force on 5th February 1996. What in essence the Regulations do is to remove all entitlement to income-related benefit from two particular categories of asylum seeker - those who submit their claims for asylum otherwise than immediately upon arrival in the United Kingdom (subject to a limited exception where the Home Secretary makes what is called an "upheaval declaration"), and those whose claims have been rejected by the Home Secretary but who then appeal to the independent appellate authorities.

The Secretary of State's intention is to discourage economic migrants from making and pursuing asylum claims. This in turn will speed up the system to the advantage of genuine refugees. All this is expected to save the taxpayer some £200 million per annum.

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.

The appellants' case in essence is that the Regulations are in the result *ultra vires*. The enabling power, widely drawn though it is, cannot, they submit, have been intended to permit this degree of interference

with statutory rights under the Asylum and Immigration Appeals Act 1993 (the 1993 Act) and/or with fundamental human rights. The argument failed before the Divisional Court on 26th March 1996. It is now renewed before us.

The asylum regime

Until the 1993 Act there was no primary immigration legislation dealing with asylum seekers. Rather our Convention obligations were acknowledged in the various immigration rules made under the Immigration Act 1971. These prohibited action not in accordance with the Convention and provided the skeleton of a determination procedure in accordance with guidance contained in the UNHCR Handbook. The 1993 Act put into statutory form our recognition of the primacy of the Convention (section 2) and our obligation of non-refoulement under Article 33 of the Convention. As to this, section 6 provides:

> "During the period beginning when a person makes a claim for asylum and ending when the Secretary of State gives him notice of the decision on the claim, he may not be removed from, or required to leave, the United Kingdom."

Section 8 and paragraphs 7, 8 and 9 of Schedule 2 to the 1993 Act give parallel protection until the end of the appeal process. In short, the 1993 Act provides determination procedures, protection from refoulement, and appeal rights to all categories of asylum seekers, the appeal procedures being part of the overall asylum determination process - see *Sandralingham v Secretary of State for the Home Department* (1996) Imm.AR 97 at 112:

> ".....in asylum cases the appellate structure as applied by the 1993 Act is to be regarded as an extension of the decision-making process."

It is further relevant to note that all asylum seekers are treated alike, subject only to this exception: there is provision in the Act (see paragraph 5 of Schedule 2) whereby the Home Secretary can certify

that a claim is without foundation either as not raising any Convention issue or as being otherwise frivolous or vexatious. This procedure, conveniently called the "without foundation procedure", is typically used for what are known as "safe third country cases". When used, there are expedited time limits at all stages of the procedure and, if the special adjudicator agrees with the Secretary of State's certificate, there is no further appeal to the immigration appeal tribunal.

The position of asylum seekers before the Regulations

Although we were treated to the very fullest exposition of the legislative history of the benefits system, both generally and more particularly as it applied to various categories of immigrants and asylum seekers down the years, it seems to me that in fact only the broadest appreciation is required.

The principal (consolidating) Act now dealing with the criteria for eligibility for state benefits is the Social Security (Contributions and Benefits) Act 1992 (the 1992 Act). Part VII (sections 123 - 137) deal with income-related benefits -income support, housing benefit, family credit and council tax benefit - which together are designed to ensure a basic minimum provision for those not entitled to contributory benefits (such as unemployment or sickness benefit).

The Income Support (General) Regulations SI 1987/1967 (as amended by SI 1993/1679 to deal specifically with asylum seekers who for the first time entered the statutory language by way of the 1993 Act)(the 1987 Regulations) have effect as if made under *inter alia* the 1992 Act. This is the principal statutory instrument governing entitlement to income support. Regulation 21(3) and Schedule 7 to the 1987 Regulations set out categories of persons who are generally ineligible for income support. "Persons from abroad", who include asylum seekers, are amongst them. Their requirements are deemed to be nil. By Regulation 70 of the 1987 Regulations, however, certain persons from abroad, including asylum seekers, are eligible for "urgent cases payments". These are

paid at 90% of the normal income support level. These payments are sometimes called the "safety net within the safety net". They act, moreover, as the gateway to other safety net benefits such as housing benefit, and to other benefits in kind such as free school meals, free prescriptions and free dental treatment.

Prior, therefore, to the coming into force of the Regulations now impugned, all asylum seekers were entitled to urgent cases payments amounting to 90% of normal income support benefit and, in addition, to housing benefit and the other benefits "passported" through income support. When homeless, they were in the same position under Part III of the Housing Act 1985 as other homeless people save only that they had to be content with "any accommodation, however temporary", and any need they established was to be regarded as "temporary only" - see section 4 of the 1993 Act.

The Regulations

The Regulations impugned were made in the exercise of powers conferred in particular by the following provisions in the 1992 Act:

> "135(1) The applicable amount, in relation to any income-related benefit, shall be such amount or the aggregate of such amounts as may be prescribed in relation to that benefit.
>
> (2) The power to prescribe applicable amounts conferred by subsection (1) above includes power to prescribe nil as an applicable amount.
>
> 137(2) Regulations may make provision for the purposes of this Part of this Act -
>
> (a) as to circumstances in which a person is to be treated as being or not being in Great Britain.
>
> 175(3) ....any power under this Act to make regulations..... may be exercised -
>
> (a) either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case....."

Regulation 8 of the Regulations amends Regulations 21 and 70 of the 1987 Regulations so as to remove entitlement to urgent cases payments from all asylum seekers save those who submit a claim for asylum on arrival in the United Kingdom and, even then, entitlement ceases on the date when the

Home Secretary records the claim to have been determined by him or abandoned. The only exception to this is when the Home Secretary makes an "upheaval declaration" - when, that is, an in-country claim is made within 3 months of the Home Secretary making a declaration that the country of which the claimant is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country. The rest of this judgment will take this "upheaval declaration" exception as read.

Regulation 7 of the Regulations amends the Regulations governing entitlement to housing benefit (the Housing Benefit (General) Regulations SI 1987/1971 as amended) in such a way as to remove that particular entitlement in precisely corresponding circumstances.

It is I think unnecessary to recite the actual language of any of the Regulations by which these various results are achieved: the route is somewhat tortuous.

The effect of the Regulations on asylum seekers

It follows that from 5th February 1996 two main categories of asylum seeker are wholly excluded from benefit: (1) in-country (as opposed to on-arrival) claimants; and (2) all claimants pending appeal from an adverse determination of the Home Secretary. These I shall call the deprived asylum seekers.

In the event of homelessness the deprived asylum seekers are peculiarly disadvantaged. Not, of course, if they have a priority need for accommodation (as do roughly a third who have dependent children): then the housing authority is obliged to house them even though they can pay no housing benefit. (The Secretary of State has now reached agreement with local authorities to pay them a

substantial part of the costs involved and thereby bought off judicial review challenges to the Regulations which the authorities themselves had instituted.) But local authorities have refused to accept that asylum seekers deprived of all benefits have a priority need on the grounds of being "vulnerable" for "other special reason" within the meaning of section 59(1)(c) of the 1985 Act - this being a separate issue raised before us on an immediately following appeal.

If the local authorities are correct in that view, it follows that those of the deprived asylum seekers not otherwise in priority need face this situation:

1. They have no access whatever either to funds or to benefits in kind.

2. They have no accommodation and, being ineligible for housing benefit, no prospect of securing any.

3. By the express terms of their leave to stay they are invariably forbidden from seeking employment for six months and, even assuming that thereafter they apply for and obtain permission to work, their prospects of obtaining it are likely to be poor, particularly if they speak no English.

4. They are likely to be without family, friends or contacts and thus in a position of peculiar isolation with no network of community support.

5. Their claims take on average some 18 months to determine, on occasions as long as 4 years. An individual has no control over this and no means of hastening a final decision. If eventually the claim succeeds there is no provision for back-payment.

6. Quite apart from the need to keep body and soul together pending the final determination of a claim, expense is likely to be incurred in pursuing it. Applicants must attend for interviews with the Home Office and with any advisers they may have. They must have an address where they can be contacted with notices of appointments or decisions. To miss an appointment or the time for appeal is to forgo their claim.

Others, it is true, face the same total loss of benefits under the various regulations: prisoners, those in Holy Orders and virtually all other immigrants. But prisoners and the clergy each have their own obvious support systems, respectively the state and their religious communities. And non-asylum-seeking immigrants have since 1980 invariably been admitted subject to the condition of "no recourse to public funds" and, more importantly, unlike asylum seekers, can in any event return to their country of origin. Truly, deprived asylum seekers are in a unique position and one which threatens total destitution. No doubt, as Mr. Richards submits, voluntary organisations do what they can to help. The need, however, far exceeds their capacity. As Mr. Blake puts it, charity cannot bridge the gap between the Regulations and the 1993 Act.

Before leaving this section of the judgment I should just add this. Whatever may be the correct decision on the homelessness appeal, its effect, we are told, is likely to be comparatively short-lived. The Secretary of State proposes to bring into force this summer further legislation to relieve local authorities of any duty to house deprived asylum seekers whether in priority need or not. The position will, in short, worsen.

Mr. Richards submits, and I would accept, that the Regulations must be judged as at the date they were brought into force and not by reference to later legislation. By the same token, however, the Secretary of State must have known that local housing authorities would deny any liability to house most of the deprived asylum seekers. And whatever effect the Regulations may have in terms of accelerating the decision-making process for those who remain, that effect too could only be for the future.

The appellants' arguments

The Regulations are said to be *ultra vires* because of implied restrictions in the enabling power. Two central arguments are advanced. The first and wider one is that the Regulations are inconsistent with the 1993 Act in the sense that they create various sub-categories of asylum seekers in a way that the

1993 Act itself does not. It is not, submits Mr. Blake, for the Secretary of State in Regulations to redefine how asylum seekers should be treated, even with regard to benefit payments.

Secondly, and more narrowly, Mr. Blake submits that the Regulations materially interfere with the exercise of rights by asylum seekers under the 1993 Act. This I shall call the conflict argument.

Let me consider each in turn.

1. Inconsistency

The 1993 Act makes no distinction between on-arrival and post-arrival (sometimes called "in-country") claimants nor, indeed, in terms of entitlement to remain, between those awaiting the Home Secretary's decision and those awaiting decision on appeal. There is, therefore, in this sense a clear lack of consistency between the Regulations and the 1993 Act.

Similarly the mechanism available in the 1993 Act by way of the "without foundation procedure" for speedily weeding out obviously bogus claims finds no reflection in the Regulations.

Moreover, submits Mr. Blake, the Secretary of State has no good reason to distinguish as he does between the different categories of asylum seeker with a view to discouraging unmeritorious claims. The available statistics, as well as the facts of B's case, make the point. B, it may be noted, despite having claimed asylum on the day she reached the United Kingdom, forfeited her "on-arrival" status by waiting to do so until she arrived, via Waterloo, at Lunar House, the Home Office's Immigration Centre at Croydon, rather than applying on the Eurostar train into Waterloo itself. As for the statistics, these appear to show no significant difference in the rate of recognition as refugees between those applying on arrival (about one third) and those who apply after entry. Similarly, no significant difference exists between the rates recognised respectively by the Home Secretary and, following his

initial refusal, on appeal (sometimes by way of exceptional leave granted thereafter upon the appellate authorities' recommendation). Accordingly, submits Mr. Blake, the mechanism of deterrence falls on the just and unjust alike. In general terms, perhaps, the later an asylum application is made the more likely it is to be bogus. But, as the Social Security Advisory Committee (SSAC) stated in paragraph 38 of their report (to which I shall shortly refer):

> "There are many valid reasons why people do not make their asylum claim immediately on arrival. Lack of knowledge of procedures, arriving in a confused and frightened state, language difficulties or fear of officialdom may all be insuperable barriers to making any kind of approach to the authorities at port of entry. Many intending applicants will quite reasonably want to get help and advice before making their claim. We are told by refugee organisations that there is a common fear that making an asylum application while still in port is more likely to result in immediate deportation, or being held in detention. For these and other reasons, it is easy to see why for the majority of asylum seekers it appears much safer to make their claim from inside the UK."

No doubt, submits Mr. Blake, the asylum scheme itself could properly dictate that in-country applications not made within say 4 or 6 weeks of arrival should be treated as *prima facie* frivolous and vexatious and dealt with under the "without foundation procedure" but, the argument runs, the benefit system, so long as it is contained in Regulations rather than in primary legislation, must remain in harmony with the statutory asylum regime.

For my part I would reject this argument. The responsibility for the benefit budget lies with the Secretary of State and not with the Home Secretary. Subject always to the conflict argument, the Secretary of State is perfectly entitled to reach his own decision as to how asylum seekers should be treated and as to whether all should be treated in the same way. The enabling power is amply wide for these purposes - see particularly section 175(3)(a). He is under no obligation to align the benefit scheme to the approach adopted in the 1993 Act.

As to the distinction made by the Secretary of State between the different categories of asylum seeker, there may or may not be good reason for this. With regard to these matters, however, the Secretary of State is answerable to Parliament rather than the courts, not least given the absence of any irrationality challenge. As Mr. Richards points out, moreover, a detailed scheme exists for Parliamentary oversight and control of the benefit system. Part XIII of the Social Security Administration Act 1992 (sections

170 - 176) provides for the Secretary of State to seek advice from specialist bodies, here the SSAC. True, that Committee advised that the proposed Regulations should be abandoned, but the Secretary of State was not bound to follow it. His duty rather was to present to Parliament a reasoned response to their report. This he did. The Regulations were made subject to negative resolution on 11th January 1996 and debated that day in both Houses of Parliament. They then became the subject of a further report by the all-party Social Security Committee of the House of Commons. Following a further House of Commons debate on 23rd January 1996, they came into force on 5th February. One can argue, as Parliament did, about the justice and logic of the approach followed by the Regulations in contrast to that adopted in the 1993 Act. That, however, as Mr.Richards rightly submits, cannot found a *vires* challenge. I repeat, the Secretary of State was not obliged to follow the same indiscriminate approach to asylum seekers as the 1993 Act adopts.

2. The Conflict Argument -Interference with rights

The right of access to refugee determination procedures, including appeals, is, submits Mr. Blake, fundamental to the protection granted by the Convention to which the 1993 Act gives effect. To deprive large categories of asylum seeker of the most basic subsistence benefits constitutes a serious impediment to such access, significantly reducing their ability to make and process asylum claims (including attending interviews and hearings, collecting supporting evidence, keeping in touch with legal advisers, and above all, staying alive and healthy). In the result, he submits, a number of asylum seekers will either be forced by the Regulations to forgo their claims (or appeals) and leave the country, or else be so seriously handicapped in bringing them to a successful conclusion that refugee status may on occasions be wrongly refused them.

Furthermore, submits Mr. Blake, not only are the Regulations bound to cause many asylum seekers to forgo their claims, they are positively intended to do so: as the Secretary of State accepts, their very object is to discourage numbers of asylum seekers from coming to this country or at any rate from

pursuing their claims here. So be it, responds Mr. Richards, but the intention is to discourage bogus asylum seekers rather than genuine ones and, by the nature of things, it is the bogus ones -economic migrants out to exploit the benefit system - who are most likely to be deterred. These, after all, are by definition (a) here for benefit rather than protection, (b) able without risk to return whence they came, and (c) less expectant of obtaining long-term leave at the end of the determination process, and thus presumably less prepared to await the outcome in penury.

This part of Mr. Richards' argument I would accept. To my mind there is no conflict between the Regulations and the 1993 Act merely because the Regulations are designed to reduce the numbers of those invoking rights of application and appeal under the Act. That said, however, it can hardly be doubted that some genuine asylum seekers as well as bogus ones are likely to be deterred by penury from pursuing their claims and thus be forced to return to the very persecution which they have sought to escape. As the UNHCR stated in their evidence to the SSAC:

> "UNHCR is concerned that asylum seekers may be forced into unlawful exploitative conditions to support themselves whilst exercising their appeal rights. It is difficult to speculate on the range of illegal activities that increasingly desperate persons may resort to, but these are likely to include unlawful employment, dishonesty offences and perhaps more serious criminality involving drugs, prostitution or violent crimes. Such activity could bring them into conflict with the law and undermine the delicate balance of reciprocity that exists between the State offering asylum and the asylum-seeker. Confronted with these choices even genuine but desperate refugees might be compelled to return to face persecution in the country of origin, rather than remain in an impossible position in the United Kingdom. In our opinion, this could amount to *"constructive refoulement"* and may place the United Kingdom in violation of its obligations under the Refugee Convention."

Specific statutory rights are not to be cut down by subordinate legislation passed under the *vires* of a different Act. So much is clear. These asylum seekers' rights, submits Mr. Blake, are being gravely interfered with by the Regulations. They should therefore be struck down, just as this Court struck down a Prison Rule giving an unrestricted power to read, and in certain circumstances stop, correspondence between a prisoner and his solicitor - see *R v Secretary of State for the Home Department ex parte Leech* [1994] QB 198. The prisoner's basic rights in question were identified as those of legal professional privilege, together with unimpeded access both to the court and to legal advice. It was with these rights that the Rule conflicted. The Court of Appeal said this:

> "The question is whether rule 33(3) of the Rules of 1964 creates an impediment to these basic rights. Frequently, it may not be possible for a solicitor to visit a prisoner as soon or as often as may be required. Moreover, correspondence will often be the most effective medium, e.g. in giving advice. A prisoner may wish to obtain legal advice about the conduct of those in authority above him. He may want to know whether he has a remedy against the police, individual prison officers, the governor of the prison or the Home Office. In *Solosky v The Queen* (1979) 105 DLR (3d) 745, 760, Dickson, J. described the impact of a right to read a prisoner's correspondence as follows:
>
> "Nothing is more likely to have a 'chilling effect' upon the frank and free exchange and disclosure of confidences, which should characterise the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date."
>
> We respectfully agree. An unrestricted right to read correspondence passing between a solicitor and a prisoner must create a considerable disincentive to a prisoner exercising his basic rights as expounded in *Raymond v Honey* [1983] 1 AC 1 and *Anderson's* case. In our view it creates a substantial impediment to the exercise of those basic rights. And the right to stop letters on the grounds of objectionality or prolixity means that access to a solicitor by the medium of correspondence can be denied altogether. In our view rule 33(3) is *ultra vires* so far as it purports to apply to correspondence between prisoners and their legal advisers."

This case, submits Mr. Blake, is *a fortiori* to *Leech*, the Regulations here involving an even more direct effect upon an even greater human right.

The Respondent's reply to the Conflict Argument

Mr. Richards' arguments in response are essentially these. First that the court should be reluctant to read into the broad power conferred by the 1992 Act any further restriction than that Regulations made under it should not actually contravene other primary legislation. The question of benefit control is one for the political judgment of the Secretary of State, subject only to the approval of Parliament. A parallel exists with the situation under consideration by the House of Lords in *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham LBC* [1991] 1 AC 521. In both cases the Secretary of State was acting within a carefully defined system of Parliamentary scrutiny and control in an important area of the national economy and with the legitimate aim of removing an unwarranted burden on public funds. Accordingly, here as there, the Court should be yet more reluctant than usual to interfere with governmental action: the super-*Wednesbury* test should apply.

Second, Mr. Richards submits that the appellants' argument, although couched in terms of an implied limitation on powers conferred by the 1992 Act, in effect contends for a positive duty upon the

Secretary of State under that Act, a duty at least to make urgent needs payments to those claiming asylum under the 1993 Act. If it was unlawful for the Regulations to deprive certain categories of asylum seeker of such benefit, it would, he suggests, have been unlawful not to grant it in the first place. There is, however, submits Mr. Richards, no such duty on the Secretary of State, either under the Convention or in domestic law. True, such a duty arises under Article 24 of the Convention if and when a claimant's refugee status is recognised; before that, however, there is none. It would, he submits, be extraordinary if, albeit not in breach of the Convention, a State should be found guilty of constructive refoulement merely by failing to provide economic assistance to claimants.

Third, Mr. Richards submits that only direct interference with established rights constitutes a sufficient basis for holding Regulations *ultra vires* on the ground of repugnancy. Here, he contends, the effect of the Regulations is at most indirect and speculative.

The Divisional Court's judgment

The appellants' challenge below failed on the ground that the exercise of the Regulation-making power is "only to be taken to be *ultra vires* ..... when it involves a plain and direct interference with other provisions" (page 22G). A little earlier (at page 20B -E) the court had said this:

> "Withdrawal of benefit cannot in our view be characterised as deportation, expulsion or refoulement. The UN Convention, the UNHCR Handbook and the 1993 Act cannot be read as requiring or creating an expectation of any particular form of positive support to be extended to refugees or asylum seekers. What is prohibited is state action to enforce removal. Although we accept that conditions might be imposed so hostile to the continued presence of asylum seekers that a decision to leave in order to escape those conditions amounted to constructive deportation, we do not think that the withdrawal of benefit can properly be regarded as positive action on the part of the state amounting to returning the asylum seeker to the country of origin."

Conclusions

I do not pretend to have found this by any means an easy case. Powerful arguments are advanced on both sides. The *Leech* principle is undoubtedly of assistance to the appellants and yet the analogy with *Leech* is not, as it seems to me, exact. As stated, I for my part have no difficulty in accepting the Secretary of State's right to discourage economic migrants by restricting their benefits. That of itself

indicates that the Regulations are not invalid merely because of their '"chilling effect"' (Dickson, J's phrase in *Solosky*) upon the exercise of the deprived asylum seekers' rights under the 1993 Act.

It is, moreover, as I recognise, one thing, as in *Leech*, to condemn direct interference with the unquestioned basic rights there identified; another to assert that the Secretary of State here is bound to maintain some benefit provision to asylum seekers so as to ensure that those with genuine claims will not be driven by penury to forfeit them, whether by leaving the country before their determination or through an inability to prosecute them effectively.

The present challenge, I therefore acknowledge, involves carrying the *Leech* principle a step further and this, moreover, in a field where Parliament has been closely involved in the making of the impugned Regulations.

I have nevertheless concluded that it is a step the Court should take. Parliamentary sovereignty is not here in question: the Regulations are subordinate legislation only. The *Hammersmith* approach cannot, in my judgment, avail the Respondent: it applies only once the court has determined that the Regulations do not contravene the express or implied requirements of a statute - the very question here at issue. Parliament for its part has clearly demonstrated by the 1993 Act a full commitment to the United Kingdom's Convention obligations. When the regulation-making power now contained in the 1992 Act was first conferred, there was no question of asylum seekers being deprived of all benefit and thereby rendered unable to pursue their claims. Although I reject Mr. Blake's argument that the legislative history of this power (including, in particular, an indication to Parliament in 1986 that the government was then intending to exercise it in continuing support of asylum seekers) itself serves to limit its present scope, the fact that asylum seekers have hitherto enjoyed benefit payments appears to me not entirely irrelevant. After all, the 1993 Act confers on asylum seekers fuller rights than they had ever previously enjoyed, the right of appeal in particular. And yet these Regulations for some

genuine asylum seekers at least must now be regarded as rendering these rights nugatory. Either that, or the Regulations necessarily contemplate for some a life so destitute that to my mind no civilised nation can tolerate it. So basic are the human rights here at issue that it cannot be necessary to resort to the European Convention of Human Rights to take note of their violation. Nearly 200 years ago Lord Ellenborough, C.J. in *R v Inhabitants of Eastbourne* (1803) 4 East 103 said this:

> "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving."

True, no obligation arises under Article 24 of the 1951 Convention until asylum seekers are recognised as refugees. But that is not to say that up to that point their fundamental needs can properly be ignored. I do not accept they can. Rather I would hold it unlawful to alter the benefit regime so drastically as must inevitably not merely prejudice, but on occasion defeat, the statutory right of asylum seekers to claim refugee status.

If and when that status is recognised, refugees become entitled under Article 24 to benefit rights equivalent to nationals. Not for one moment would I suggest that prior to that time their rights are remotely the same; only that some basic provision should be made, sufficient for genuine claimants to survive and pursue their claims.

It is not for this court to indicate how best to achieve this consistently 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% rate hitherto paid; and that certain categories of claim (perhaps, as suggested, in-country claims brought more than 4 or 6 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 1993 Act 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 them as best they can but in a state of utter destitution. Primary legislation alone could in my judgment achieve that sorry state of affairs.

I would allow this appeal.

Lord Justice Waite: The principle is undisputed. Subsidiary legislation must not only be within the vires of the enabling statute but must also be so drawn as not to conflict with statutory rights already enacted by other primary legislation. Once that is accepted, the question in the present case becomes one of degree and extent. Do the impugned regulations deprive a significant number of asylum seekers of the rights conferred by the Asylum and Immigration Appeals Act 1993 to remain in the United Kingdom while their claims are considered and any appeal is disposed of? The public as a whole, and those asylum seekers with genuine claims to press in particular, have an interest in discouraging spurious or ill-founded applications. The question is not to be answered, however, by appeal to such considerations of policy, persuasive though they may be. Nor, in my judgment, is the answer to be found through an inquiry as to whether the effect of the regulations on the rights conferred by the 1993 Act is direct or indirect. It involves looking with an objective eye at the practical result for most of those affected by the regulations. The class of asylum seeker comprehended by the regulations is a wide one - embracing all those who have made their application after arrival or who are awaiting the determination of an appeal against refusal of an application. They are not permitted to work for reward. Among their number there may be a few - but it can only be a very few - who are able to benefit from the efforts of the charities who work devotedly but with severely limited resources to house and help asylum seekers. But the effect of the regulations upon the vast majority will be to leave them without even the most basic means of subsistence. The stark question that has therefore to be answered is whether regulations which deprive a very large number of asylum seekers of the basic means of sustaining life itself have the effect of rendering their ostensible statutory right to a proper consideration of their claims in this country valueless in practice by making it not merely difficult but totally impossible for them to remain here to pursue those claims. For all the reasons stated by Lord Justice Simon Brown, with which I agree entirely, the answer to the question, when it is so expressed, can only, in my view, be yes. I would allow the appeal.

Order: appeal allowed; consequential orders as set out in draft order in amended form as lodged with the court.