

20 March 2003

Court of Appeal judgment on Section 55 of the Nationality, Immigration and Asylum Act 2002

The Court of Appeal has rejected the Home Office's appeal of Justice Collins' ruling on Section 55 of the Nationality, Immigration and Asylum Act 2002 (NIA Act). The following is a summary of the key points from the judgment.

Key points

- The judgment focuses on three main areas of the original decision by Mr Justice Collins:
 - What constitutes "as soon as reasonably practicable";
 - Destitution and The Human Rights Act 1998;
 - Fairness (including right to appeal).
- Decisions will continue to be made under Section 55 of NIA Act.
- It is likely that the questions asked at screening interviews will be more in-depth (and may be different for individual asylum seekers) in order to take consideration of any impediment to applying 'as soon as reasonably practicable'.
- It is likely that one person will both screen and make a decision on eligibility of an asylum seeker for support.
- Destitution itself is not in breach of Article 3 of the European Convention on Human Rights (ECHR).
- If a person is refused under section 55, an Article 3 claim will be considered, providing it satisfies the threshold for Article 3 claims. The burden is on the applicant – so evidence will be important.
- Judicial review will still be the only avenue to appeal against a decision to refuse support under section 55.
- There will be a 'radical overhaul' of procedures in relation to section 55.

How to interpret 'as soon as reasonably practicable'

- **Section 55 (1) the 'as soon as reasonably practicable' test** may be framed as: "On the premise that the purpose of coming to this country was to claim asylum and having regard both to the practical opportunity of claiming asylum and to the asylum seeker's personal circumstances, could the asylum seeker reasonably have been expected to claim asylum earlier than he or she did?"
 - This should take into consideration:
 - Physical impediments
 - Practical impediments
 - Mental state of asylum seeker
 - Anything the asylum seeker may have been told by an agent (smuggling agent) assisting him/her to get into the UK.

- The burden of proof is on the applicant to show that he/she applied as soon as reasonably practicable. Even if someone arrived via an airport and did not claim asylum at port, this should not automatically result in a refusal of support under Section 55. (*See paragraphs 17-18 of judgment*).

Destitution – Human Rights Act

- **Section 55 (5)** of the 2002 Act permits the Secretary of State to provide support where Section 55 (1) would otherwise prohibit it where this is necessary in order to avoid a breach of the asylum seeker's Convention rights.
- The Court ruled that this preserves asylum seekers' rights under the ECHR.

Article 3 ECHR 1998: The burden is on the applicant to show that such support is necessary to avoid being subjected to inhumane or degrading treatment or punishment. The threshold is high.

- **The types of treatment that may fall into Article 3 are:**
 - Actual bodily injury
 - Intense physical or mental suffering
 - Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or
 - Arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance
 - Suffering which flows from naturally occurring illness, physical or mental, where it is, or risks being, exacerbated by conditions of detention, expulsion or other measures, for which the authorities can be held responsible. (*See 119(v) of Conclusions*)

A risk that an asylum seeker may be reduced to this state of degradation is not enough. (*See paragraph 110 (vii)*).

- Where it is made clear that the condition of an applicant verges on the above, Section 55 (5) permits and section 6 of the Human Rights Act obliges NASS to provide support.
 - **Article 8 ECHR 1998:** The burden is on the applicant to show that such support is necessary to avoid a breach of article 8 ECHR 'right to private and family life' but it "adds little to article 3".

Fairness

- The Court found that the system had not been fair or operated fairly by the Secretary of State; hence, the appeals were overturned. This is because:
 - The purpose of the screening interview was not explained to the applicant clearly
 - Caseworkers did not have a relevant test for when was 'reasonably practicable' or when refusal to support would have breached Article 3 ECHR
 - The applicants' state of mind on arrival was not taken into consideration
 - Interviewing skills and a more flexible approach are required when trying to find out why someone didn't claim asylum on arrival, rather than simply completing a standard form questionnaire
 - The interviewer and the decision maker should be the same person, because the decision will rely on the asylum seeker's credibility
 - If the Secretary of State does not believe that they gave enough information to show that they applied as soon as reasonably practicable, the applicant should be given the opportunity of further explanation. The system that has operated to date does not provide that opportunity.

Right to appeal against Section 55 decision

- The right to appeal on judicial review under the system as it was being operated did not satisfy 'Right to a fair and public hearing within a reasonable time before an independent and impartial tribunal' (Article 6 ECHR).
- The judgment concludes that if the proposed 'radical overhaul' of the current process is carried out, there is no reason why section 55 should not operate effectively. (*See Paragraph 119 (xiv)*).

What this means in practice

We hope this will mean that those people who do not apply for asylum at the port of entry will now be given a fair opportunity to apply for support. However we are concerned that the judgment stated that merely being at risk of destitution was not a breach of Article 3 of the ECHR. This may mean that people actually have to be destitute to qualify for support. It is likely that there will be further judicial reviews in this area and the Refugee Council will continue to monitor this situation.