IMPLICATIONS OF THE GOVERNMENT`S APPEAL ON ASYLUM BENEFITS

SECTION 55 OF THE NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

The practical consequences of Mr Justice Collins's decision last week in the cases of asylum seekers who were refused benefits could be very serious indeed. This paper relies on the report of the case which appeared in "The Times" law reports on 20 February 2003.

Section 55(1) positively forbids the Secretary of State to provide or arrange for the provision of support from public funds or accommodation to a person if:

(a) the person makes a claim for asylum which is recorded by the Secretary of State; and
(b) the Secretary of State is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom.

A like prohibition *mutatis mutandis* is imposed on local authorities by subsections (3) and (4). The wording of the basic provisions of section 55 is unusual in that public bodies are positively forbidden from exercising particular statutory functions in certain circumstances. These may well be unique provisions, which is an indication of the significance of section 55.

The basis for the decision is firstly that the Secretary of State, in taking decisions which caused the applicants for judicial review in this case to be denied benefits did not follow a proper procedure which complied with the normal requirements of administrative law and secondly that the denial of any right of appeal was contrary to Article 6 of the Human Rights Convention. The first sentence of this Article states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

The task of deciding in accordance with section 55 whether asylum seekers are to be denied benefits falls on the National Asylum Support Service (NASS), established under the Immigration and Asylum Act 1999 and controlled by the Home Office. Units of NASS completed screening forms for the asylum seekers who were the applicants in the proceedings before Mr Justice Collins and it was on the basis of information provided about individuals by answers to questions on these forms that the relevant officials in NASS took the section 55 decisions. They did not see the asylum seekers or question them in order to determine whether their respective claims were made as soon as practicable after arrival. According to the learned judge, this procedure did not ensure that all necessary information was obtained so that all relevant information could be taken into account and a fair decision could be reached. He considered that all new arrivals should be orally questioned before any decision could be reached.

There will of course be an appeal, but if the Court of Appeal upholds the lower court's decision then the Home Office will have to change its procedures. The normal procedure is that the initial interview with new claimants is exclusively concerned with screening and in particular with method of travel. It ought not to be too difficult to include questions related to section 55. However, the Home Office might well have a problem if it had to delegate decisions on section 55 to immigration officers who carried out screening interviews instead of leaving them to NASS officials. The former do not take decisions about asylum but pass the applications on to case workers. One of the curiosities about the asylum system in the Home Office is that the decision on the substantive claim is not taken by the officers who interview the claimants but by officials, presumably more senior, at Lunar House, Croydon headquarters of the Immigration and Nationality Division, who do not meet the claimants themselves but simply decide on the basis of written interview records and other documentary evidence. The Home Office could have serious problems if the same stricture delivered by the judge in this case were applied to substantive asylum decisions, though it could be argued there that the asylum seeker had all the protection he needed through the appeal system

Apart from shortcomings identified in Home Office procedures on section 55 decisions, the judge held also that there was a breach of Article 6 by reason of the absence of any right of appeal against an adverse decision. Indeed, from the report it appears that this is the only breach of Article 6; the reasons for impugning the Home Secretary's decisions discussed above appear to be based solely on principles of administrative law as applied in judicial review decisions. If the Court of Appeal agrees that the absence of a right of appeal against an adverse decision under Section 55 is a breach of Article 6 of the Human Rights Convention, it could have serious consequences for the provisions of Part 5 of the 2002 Act relating to the appeals system, which is to be brought into force in April this year. Sections 94, 96, 97 and 98 in Part 5 prescribe circumstances in which if the Home Secretary certifies a claim there is no right of appeal. Briefly these are as follows:

- Section 94: this applies to asylum and human rights claims from persons resident in all the states which are due to be admitted as members of the European Union in 2004. The Home Secretary

may certify that an asylum or human rights claimant is entitled to reside in one of these states.

- Section 96: applies to any immigration decision and is not limited to asylum claims. No appeal against a particular adverse decision if the ground on which the applicant wishes to appeal has already been decided against the applicant and the Home Secretary or an immigration officer so certifies.
- Section 97: applies also to any immigration decision. The Home Secretary may certify that a particular adverse decision, asylum or non-asylum, was taken on the ground that the person's removal from the United Kingdom was in the interests of national security or in the interests of the relationship between the United Kingdom and another country.
- Section 98: applies to any immigration decision which is a refusal of leave to enter or of entry clearance. The Home Secretary may certify that the decision to exclude or remove the person in question from the United Kingdom is conducive to the public good.

These are major provisions of the Act which were designed to speed up the processing and final disposal of asylum claims by denying rights of appeal in various important categories of cases. Increasingly it appears that if the government wants to deal effectively with the growing problem of asylum seekers it will have to make more derogations from the Human Rights Convention because of the risk that the courts may strike down drastic provisions such as those discussed above on grounds of their incompatibility with that Convention.

There have been suggestions that denial of benefits could be an infringement of individuals' rights under Article 3, on the ground that it would amount to "inhuman or degrading treatment", though the report of the case does not indicate that that argument was canvassed before the court.. It could be argued that denial does not amount to such treatment. Article 3 prohibits torture or such treatment and it can be argued strongly that it was never intended to prohibit sanctions which are so much milder than and far removed from physical or mental torture. It would be appropriate to invoke the *eiusdem generis* rule. If this rule of interpretation were applied it would mean that "inhuman or degrading treatment or punishment" must be taken as referring only to treatment or punishment which is similar to torture, e.g. parading prisoners on television or making prisoners stand outside for long periods in freezing temperatures.

23 Feb 2003