‘The law of common humanity’: revisiting *Limbuela* in the ‘hostile environment’

abstract

Introducing an Immigration Bill in 2013, Home Secretary Theresa May famously promised the introduction of a ‘really hostile environment’ for ‘illegal migrants to Britain’.[1] This policy has its predecessors. In 1996, after losing a court battle over the lawfulness of restricting asylum-seekers’ access to benefits, the government introduced primary legislation providing that no migrants apart from specified exceptions would be entitled to mainstream social assistance (income support) or social housing.[2] In particular, this excluded those who claimed asylum after entering the UK, unless they had dependent children. Injunctions were granted for applicants found foraging for food in dustbins and begging outside tube stations. The Court of Appeal decided in *MPAX*[3] that local authorities had the power, and a duty, to support such applicants under s21 National Assistance Act (NAA) 1948, as they were ‘in need of care and attention’ and moreover were entitled to remain in the UK awaiting determination of their asylum claim. In response to this, Labour introduced a new national asylum support system in the Immigration and Asylum Act 1999. Then, in response to a sharp increase in asylum claims, further primary legislation in 2002[4] provided that those asylum-seekers who had not claimed asylum ‘as soon as reasonably practicable’ would be refused all access to support. Some hundreds of High Court injunctions, backed up by campaigns, evidence and legal interventions from NGOs, churches and community groups, eventually led to the House of Lords decision in *Limbuela*[5] that, since a breach of art 3 ECHR was clearly foreseeable, refusal of support was unlawful.

The modern ‘hostile environment’ measures[6] target migrants unlawfully present in the UK. The reality is that these measures are likely to catch families, young people, those in long Home Office and tribunal backlog queues awaiting the outcome of an application or appeal, and failed asylum-seekers and others who cannot return home. This paper explores the political, social and legal contexts for the earlier litigation on behalf of destitute migrants. I then consider the barriers to the achievement of a *Limbuela* for our time.

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[1] https://www.theguardian.com/politics/2013/oct/10/immigration-bill-theresa-may-hostile-environment Accessed 6/7/17

[2] Asylum and Immigration Act 1996

[3] *MPAX*, cited as *R (A) v Westminster City Council [1997] EWCA Civ 1032*

[4] Nationality, Asylum and Immigration Act 2002 s55

[5] *Limbuela,* cited as *R (Adam, Tesema and Limbuela) v SSHD [2005] UKHL 66*

[6] Immigration Act 2014 part 3 Access to Services, Immigration Act 2016 Part 2 Access to Services

1. Introduction

In Part 2 I summarise the background to the two sets of litigation, highlighting the legal principles and public law grounds for the judicial decisions. I then give postscripts on cases dealing with non-asylum migrants. In Part 3 I review the principles and arguments from the 1996 and 2003-5 litigation. In Part 4 I set out the legal and practical difficulties facing a modern *Limbuela* - style challenge for destitute migrants. In Part 5 I examine the 'law of common humanity' as a principle existing alongside modern human rights law, and consider whether deploying this could address any of those difficulties.

For many the hung parliament following the June 8 general election appears to have opened a way to achieving progressive changes.[7] Currently there appears to be no majority Parliamentary appetite explicitly to abolish all human rights exceptions to the exclusion of migrants from welfare and social care provisions. And so long as legislation is not explicit, both human rights law and the 'law of common humanity' arguably remain to ensure a safety-net for at least those who can present a strong case that they cannot be expected to leave the UK.

In part 6 I conclude however that, for the reasons discussed in parts 3 and 4, though individuals may win the right to support, or gain 'permission to rent', a sustained legal campaign against the use of destitution and homelessness to drive out irregular migrants is unlikely to be successful. In my view both practical and legal difficulties stand in the way of a *Limbuela* –style mass litigation against the 'hostile environment' measures. Further, where parliament has legislated in plain words, 'the law of common humanity' does not provide any further protection for individuals than art 3 ECHR.

2. The historical background,[8] the litigation and some postscripts

a. Historical background

The UK welfare state introduced after the Second World War provided benefits for the unemployed and a pension for those reaching retirement age, paid for by National Insurance contributions taken from wages and earnings. A separate National Assistance scheme provided financial subsistence to those with no or insufficient contributions; temporary accommodation where the need for it could not have been 'reasonably foreseen'; and accommodation

[7] (Such as how backbench Labour MP Stella Creasy's proposed Queens Speech amendment on free NHS abortion for Northern Irish women won support of enough Tory MPs to achieve a change in government policy)

[8] Summarised, more succinctly than here, by Lady Justice Hale (as she then was) in *O & Bhikha [2000] EWCA Civ 201* and by Lord Slynn of Hadley in his opinion in *Westminster v NASS [2002] UKHL 38*

and support to those who needed 'care and attention'.[9] The Supplementary Benefits Act 1966 replaced the subsistence payments with a completely new scheme, and the Housing (Homeless Persons) Act 1977 replaced the housing duty.[10] Only the duty to provide residential accommodation for those needing 'care and attention' remained largely unreformed.[11]

This welfare structure, along with major building programs providing local authority housing for rent for the general population, enjoyed general public support until the advent of Thatcher's Conservative governments from 1979, prefigured by the policies of such as LB Wandsworth, which passed into Conservative control in 1978. These abandoned previous 'one nation' rhetoric for a frank espousal of low taxes, privatisation of state enterprises and selling off local authority rented housing, whether by discounted 'right to buy' to individual tenants or by selling entire council estates to private companies.[12]

The 1979 Conservative manifesto included plans to curtail migrants' access to welfare benefits.[13] From 1980, immigrants entering the UK under the immigration rules (as spouses, workers etc) were granted leave to remain on a condition of 'no recourse to public funds'. 'Persons from abroad' were also excluded from regular entitlement to benefits, though applications could be made for 'urgent cases' payments, at 90% of income support, for example for those facing a temporary lack of funds from abroad.[14,15]

To put the government's measures into perspective, it is worth looking at current refugee statistics. The United Nations High Commission on Refugees (UNHCR) gives 65.5 m forcibly displaced people worldwide, of whom 22.5 million are recognised as refugees under the UN Convention. Added to that are 10m stateless people (and some 38m internally displaced people). It is well-known that only a small minority of these – the UNHCR gives 6% - are present in all of Europe, of which around 36,000 a year make it to the UK.[16] The figures

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[9] National Assistance Act 1948

[10] The 1948 Act had treated homelessness as an individual problem. The 1966 BBC play *Cathy Come Home* significantly influenced government policy, and, as part of the 1974 reform of local government, housing was removed from social services departments into newly-created housing departments.

[11] Until the Care Act 2014 came into force, see below

[12] One of the first estates to be sold off was East Hill in Wandsworth SW18, under construction in 1979 and squatted for over a year as part of a local campaign against the proposed sale. http://www.newsshopper.co.uk/news/8848143.MEMORY_LANE__Squatters_take_over_flat_blocks/ accessed 10/7/17

[13] It was not until 1986, following the Falklands war and the miners' strike, that the Thatcher administration embarked on major social security reform affecting the general population. In social attitude surveys social security remained popular.

[14] Terry Patterson, in *From Immigration Controls to Welfare Controls* eds Steve Cohen, Beth Humphries and Ed Mynott, Routledge 2002 p160.

[15] Though a record of having claimed public funds could, but did not always, prejudice a future application to remain.

[16] http://www.unhcr.org/uk/figures-at-a-glance.html accessed 18/7/17

in the 80's were even smaller. Some useful reports[17] show the sharp rises in numbers in the early 90's and early 2000's which prompted government action.

At the 1992 Conservative Party conference, Social Security minister Peter Lilley vowed[18] to *'clamp down on the something for nothing society'*. He rails against 'bogus asylum-seekers', 'claiming using a dozen different invented names'. In 1993, announced in a press release *New Rules to Curb Abuse by People from Abroad,*[19] 'urgent cases' payments were terminated for 'persons from abroad', except for some asylum-seekers.[20] In 1994, the new 'habitual residence test' targeted European national 'benefit tourists', a measure which also affected British citizens returning from long periods abroad.[21]

In his 1995 conference speech, Peter Lilley again attacked 'bogus asylum-seekers'. The government introduced regulations[22] denying benefits to those who applied 'in-country' rather than on arrival. In a later debate on the 1996 Asylum and Immigration Bill Peter Lilley said:

> …anyone who claims at the port will get benefit. Those who do not must have convinced the immigration authorities that they have the means to support themselves in this country. It is reasonable to hold them to that assurance. They have given it, and demonstrated that they are not asylum seekers but business men, tourists or students.[23]

The Social Security Advisory Committee viewed this as a poor Home Office response to its own institutional inability to respond to formal requests made under international law,[24] instead employing stigma and destitution to influence migrants' behaviour. This was a clear change in public policy – no longer offering *protection for* those seeking asylum, but offering the host society *protection from* a new, stigmatised, social category – 'bogus asylum-seekers'. [25]

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[17] *The minority within the minority: refugee community-based organisations in the UK and the impact of restrictionism on asylum-seekers*; Roger Zetter & Martyn Pearl (2000) Journal of Ethnic and Migration Studies, 26:4, 675-697*; Changing support for asylum-seekers – an analysis of legislation and parliamentary debates* – working paper no 49 Emily Fletcher, University of Sussex, May 2008; *Refugee settlement Can communities cope?* 2002 Charities Evaluation Service, PQASSO, Evelyn Oldfield Centre

[18] https://www.youtube.com/watch?v=FOx8q3eGq3g accessed 9/7/17.

[19] Terry Patterson n14, 164

[20] Until changes made in 1988, rates for asylum-seekers had been even lower. (Ibid p 171)

[21] *Swaddling v Adjudication Officer (Free movement of persons) [1999] EUECJ C-90/97 (25 February 1999)*

[22] Social Security (Persons form Abroad) Miscellaneous Amendment Regulations 1996 (SI 1996 30).

[23] Hansard, 15 July 1996: Column 843, quoted in Fletcher (see n17)

[24] Report by the Social Security Advisory Committee under s 174(1) Social Security Administration Act 1992 cmnd 3062 (1995-6 at para 10, 63-66. Patterson n14 p162 criticises that Committee for not having highlighted the hardships caused to other categories of migrants by the changes.

[25] Fletcher (see n17)

b. The 'prequel': the JCWI case, Eastbourne and 'common humanity'

Challenging the regulations, the Joint Council for the Welfare of Immigrants issued judicial review proceedings against the Department of Health and Social Security.[26] They noted that the right to claim asylum, and to appeal against a refusal, had been brought into UK domestic law by the Asylum and Immigration Appeals Act (AIAA) 1993, which made no distinction between on arrival and in-country claims. In the Court of Appeal, Simon Brown LJ accepted that the Secretary of State had the right to discourage economic migrants by restricting access to benefits. However, the regulations would also harm genuine applicants. He said:

> 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:
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> > "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." (writer's emphasis).
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> …
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> 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.

Here appear to be two major statements of legal principle. First, that there are in English law principles so basic that there is no need to have recourse to any international convention to rely on them; and secondly there are factual situations considered so unacceptable that only primary legislation could show that parliament intends them.

c. Asylum seekers: S21 National Assistance Act 1948 and the 1996-7 litigation

The government promptly legislated to deal with this legal setback. A new part of the Asylum and Immigration Bill headed *'persons subject to immigration control'* (PSIC) excluded asylum-seekers from access to public sector housing

[26] *Joint Council for the Welfare of Immigrants & Anor, (R. on the Application of) v Secretary of State for Social Security [1996] EWCA Civ 1293*

and social security benefits, apart from those who had claimed asylum on arrival, or who had dependent children.[27]

The impact was immediate. Single in-country asylum-seekers were overnight reduced to sleeping on the street and begging for food. Applications were made to local authority social services departments for support. The refusals were challenged by four cases *M, P, A and X*, brought by a West London solicitor, Jerry Clore, arguing that s21 National Assistance Act (NAA) 1948, under which local authorities owed a duty to those requiring accommodation and subsistence because of their need for 'care and attention', could apply to destitute single asylum-seekers. At first instance Mr Justice Collins held that s21 was 'available as a safety-net' and was 'a provision of last resort'. Local authorities continued to refuse, and injunctions continued to be granted, until the judgment was upheld in the Court of Appeal.[28] The decision 'caused consternation'.[29] Local authorities faced intense pressure on temporary accommodation and on social services budgets, and received only ad-hoc payments from central government for the extra responsibility. By the end of 1999, around 57,000 single asylum-seekers were in the care of local authority social services, mostly in London.[30]

Then the Immigration and Asylum Act (IAA) 1999 set up the National Asylum Support Service (NASS), operating an entirely separate financial support scheme with payment in vouchers, and a separate national social housing system, dispersing asylum-seekers to 'no-choice' accommodation outside London. Those working with asylum-seekers said this:

> NASS has pushed them deeper into poverty and marginalized them further. Financial support is set at 70% of income support levels which means that a couple without children receive £59.26 a week. A young single adult has to live on under £30 a week. Accommodation in the dispersal areas is often far from shops, schools and the GP: to pay for bus fares can mean missing out a meal. … The National Association of Citizen Advice Bureaux (NACAB) recent Evidence Report *Process error, CABx clients' experience of the National Asylum Support Service* exposes this incompetence and shows the additional unnecessary hardship people are subjected to.[31]

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[27] Asylum and Immigration Act 1996. The mechanism consisted of excluding all PSICs and then listing those categories to be exempted from the exclusions, such as those with indefinite leave to remain, exceptional leave to remain, refugee status, EEA nationals etc. This Act also made it a criminal office for an employer to employ someone so excluded.

[28] *MPAX* n3

[29] Lord Hoffman, in *Westminster v NASS* [2002[UKHL 38, which decided that a local authority was obliged to support an asylum-seeker needing 'care and attention, and could not rely on the availability of support from the new national asylum support system.

[30] *The minority within the minority* n17

[31] Asylum Support Appeals Project steering group report, October 2002; see also *The deserving and the undeserving? Refugees, asylum-seekers and welfare in Britain* Rosemary Sales, Critical Social Policy 2002.

A 2000 Audit Commission report[32] found no evidence of any relation between level of benefits and numbers seeking asylum, and also found that in 1999 around 60% of asylum claims were made after arrival despite the consequent lack of access to benefits. Moreover, evidence presented later to the courts[33] showed that there was little difference in asylum success rates between those who claimed on arrival and those who claimed in-country.

d. Asylum seekers – section 55 Nationality, Immigration and Asylum Act 2002 and the 2003-5 litigation

A Home Affairs Select Committee report stated that in 1999/2000, of £794m spent on the entire asylum determination process, £534m was spent on asylum support.[34] Thus in October 2001 Home Secretary David Blunkett announced a fundamental overhaul of asylum. A Home Office White Paper[35] promised a seamless asylum process, including 'reform' of the appellate system and physical separation of asylum-seekers into accommodation and removal centres to facilitate removals of rejected applicants. The Nationality, Immigration and Asylum Act (NIAA) 2002 also aimed to cut the cost of support, by excluding those who did not 'claim asylum as soon as reasonably practicable' (section 55).[36]

The accommodation centres were never built, and total removals have never risen much above 15,000 annually.[37] But Section 55 had an immediate impact. Many asylum-seekers passed through UK immigration controls accompanied by 'facilitators' who kept hold of their (false) documents for re-use and abandoned their 'customers' in the arrivals lounge or in some suburban London street. After commencement on 8 January 2003, bewildered individuals finding some airport official to assist them to claim asylum, or finding some kind person in Hammersmith or Hounslow to help them, then

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[32] *Another Country* Audit Commission 2000, pp 9,10. Successive governments continue to cite the availability of benefits, and the asylum support regime, as 'pull factors' for 'economic migrants'.

[33] In *S,D & T* n45, *Limbuela* n48 and n5

[34] Immigration Minister Mike O'Brien, giving evidence to special standing committee 4/5/99 (cited in *Alienating asylum-seekers: welfare support in the Immigration and Asylum Act 1999* Peter Billings Journal of Social Security Law 2002 n7)

[35] *Secure Borders, Safe Haven Integration with Diversity in Modern Britain* Home Office 2002 CM 5387

[36] At the same time, s54 and schedule 3 of that Act excluded many non UK citizens over the age of 18 including EEA nationals from all forms of residuary assistance across the UK.

[37] Home Office statistics show total enforced removals per year falling from 15,252 in 2009 down to 12,460 in 2014, and down further to 10,969 in 2017. *Immigration Statistics, October to December 2014* (2015) and *Jan-March 2017 (2017)*

found that that delay in making their claim excluded them from support.[38] Sue Willman[39] reported to her law centre management committee:

> "6 test cases were issued by Refugee Legal Centre, Jerry Clore[40] and another solicitor. … On 31st January HFCLC applied for 6 injunctions for people who were homeless that day and had been sleeping rough and had no money for food. The judge granted the injunction at 11.30pm. We left the office after midnight after putting the clients in a cab to Eurotower[41] where they receive board and lodging and no money. We have since applied for another 9 injunctions. We gave the clients small amounts of money for food during the days they spent in our office while we were working on the court cases".[42]

On 19 February Mr Justice Collins quashed the Home Office decisions on the grounds of procedural unfairness. On 18 March, in *Q & Ors,*[43] the Court of Appeal dismissed the Secretary of State's appeal. The court recast the 'as soon as reasonably practicable' test. It found that the denial of support under s55(1) constituted 'treatment' within the meaning of art 3 ECHR, and that failure to provide support to a person already in a condition verging on the degree of severity described in the recently-decided ECtHR case of *Pretty*[44] would be unlawful. For the others, 'whose fate will be uncertain', s55(5) required the Secretary of State to admit further applications from those who did not find any charitable assistance. The assessment procedure was unfair, and in breach of art 6 ECHR as operated. Applicants were not informed of the purpose of the screening questions, nor were applicants offered an opportunity to explain the delay claiming asylum, or to respond to incredibility allegations. However, 'with careful questioning and appropriate fact checking' s55 was capable of operating effectively.

Home Office procedures did change, but refusals and injunctions continued. In a further test case, *S, D & T*,[45] Mr Justice Maurice Kay considered copious

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[38] Applicants claiming asylum after arrival in the UK had to attend the Asylum Screening Unit in Croydon. This, notoriously, had lengthy queues. The Housing and Immigration Law Group reported a queue of around 600 on 7/1/03, the day before s55 came in to force - also see BBC news article and picture19/2/2003 at http://news.bbc.co.uk/1/hi/uk/2779585.stm accessed 17/7/17

[39] Co-author of *Support for Asylum-seekers* Sue Willman, Stephen Knafler and Stephen Pierce, LAG, 1st edition published in 2001 (out of print), 3rd edition 2009; and at that time housing and community care law solicitor at Hammersmith and Fulham Community Law Centre

[40] Of Clore & Co Solicitors, a legal aid firm in West London, and a member of the Law Centre's management committee

[41] *"Oddly, neighbours weren't concerned about the sudden, illegal transformation of the student hall into a raging* backpackers digs with Pentonville-*style security. It's only when the Home Office started housing asylum seekers* there in the early 2000s that residents pitched a fit (surprise, surprise) and the Council discovered the block *wasn't authorized as a hostel. The owner applied for a retrospective change of use* in 2006 but the Home Office *didn't stick around*". http://hovelled.com/the-bizarre-evolution-of-stockwells-14-storey-student-hallhostelrefugee-home/ accessed 11/7/17

[42] Hammersmith & Fulham Community Law Centre report to management committee 14/3/03

[43] *R(Q & Ors) v SSHD [2003] EWCA Civ 346*

[44] *Pretty v UK (2002) 35 EHRR 1,* which considered whether a refusal of the DPP to undertake not to prosecute if someone assisted the applicant to die amounted to 'treatment' under art 3 ECHR

[45] *R (S, D & T) v SSHD [2003] EWHC 1941 (Admin)* especially para [9]

evidence compiled from individuals and NGOs addressing in detail issues such as: to what extent asylum-seekers relied on or were controlled by their facilitators; what did asylum-seekers know about the asylum reception systems in different European countries, or about asylum law and procedure; did they see the Home Office notices warning of the need to claim asylum before passing through immigration control - what did they even know about airports, airlines, documents or immigration control.

By October several hundred injunctions had been lodged. On 15 October Maurice Kay J in his capacity of Head of the Administrative Court issued a statement.[46] He noted that:

> About a quarter of all cases lodged in the Court this year have been asylum support cases. They account for approximately 800 cases in our current workload. Clearly they are having a significant impact on the ability of the Court to process cases in this and other areas… applications are coming in at around 60 a week...

He stated that on the facts most applications were arguable; where the injunctions applications had been adjourned for a hearing the Secretary of State did not defend them; and rarely were the applicant's facts challenged. The court made detailed requests to both sides on procedure and in particular to keep emergency applications to a minimum.

Despite this, refusals and injunctions continued. On 18 December 2003 Home Secretary David Blunkett announced that those who could present a 'credible explanation' of how they arrived in the UK within three days of applying for asylum would generally be accepted for support.[47] Meanwhile hundreds of applications remained stayed in the Administrative Court. Further first instance cases had been decided, arriving at different conclusions on both fact and law. A further test case, *Limbuela,*[48] was heard in the Court of Appeal on 21 May 2004. Laws LJ said:

> We are left with a state of affairs in which our public law courts are driven to make decisions whose dependence on legal principle is at best fragile, leaving uncomfortable scope for the social and moral preconceptions of the individual judge (I mean no offence to the distinguished judges who have heard these cases); and law and fact are undistinguished. We need to see whether there is room for a sharper, more closely defined approach. [58]

His dissenting judgment represented a principled view that the issue in the case was a political one, which judges should not be deciding. However, arguably, the very granting of so many injunctions had effectively transferred the decision to provide support from the executive to the courts. The

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[46] *[2003] All ER (D) 236 (Oct)*

[47] From Refugee Council press release accessed 13/7/17 https://www.refugeecouncil.org.uk/latest/news/1031_home_secretary_announces_policy_change_regarding_section_55

[48] *Limbuela [2004] EWCA Civ 540*

ostensible legal issue dividing that court was whether the Secretary of State could lawfully 'wait and see' whether denial of support to a particular individual did indeed result in a breach of art 3 – an approach found at first instance by Collins J to be 'distasteful' [52] and by Gibbs J as 'abhorrent' [93]. Both Carnwath and Jacob LLJJ decided that there was a 'practical certainty' that if the around 600 injunctions were dismissed, charities would not be able to cope and the claimants would have no lawful means of fending for themselves. Pending an SSHD petition to the House of Lords, NASS produced 'interim guidance' accepting that it 'must' provide support unless there is positive evidence that the individual has alternative support.

The House of Lords[49] decided that the answer to the 'wait and see' issue was shown by the clear words of s55(5) that support may be given '*…for the purpose of avoiding a breach of a person's Convention rights…'.* On how to decide when that point might be reached, their Lordships were trenchant. Lord Scott said:

> Most of us will have slept out of doors on occasion; sometimes for fun and occasionally out of necessity. But these occasions lack the features of sleeping rough that these respondents had to endure under the statutory regime imposed on them. Not only did they have to face up to the physical discomfort of sleeping rough, with a gradual but inexorable deterioration in their cleanliness, their appearance and their health, but they had also to face up to the prospect of that state of affairs continuing indefinitely … with no money of their own, no ability to seek state support and barred from providing for themselves by their own labour ... [71]

Baroness Hale noted that the UK is not a country where it is generally possible to live off the land, and said this:

> We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam's age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under article 3? I think not.

A 2006 Refugee Action report[50] stated that, up to the House of Lords judgment in *Limbuela,* 14760 asylum-seekers' applications for support were referred for a decision under s55. Of those, leaving aside those with dependants, those who were deemed to have applied in time, and those accepted as having a human rights basis for support, 9410 were refused. In the year following the

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[49] *Limbuela n 5*

[50] *Asylum Statistics United Kingdom 2003 (2nd edition)* cited at endnote 18, *The Destitution Trap – Research into destitution among refused asylum seekers in the UK* Refugee Action 2006

House of Lords judgment, only 225 applicants were refused support out of only 1565 referred for a decision.

e. Postscript 1 - 'failed asylum-seekers'

Under the national asylum support scheme introduced by the IAA 1999, 'failed asylum-seekers' could be supported under s4 of that Act. Section 4 support, referred to as 'hard cases' support, was not publicised, and many failed asylum-seekers remained destitute until in *Salih and Rahmani*[51] the High Court ordered the Secretary of State to publicise the scheme.[52] Accommodation is no-choice, outside London, and support via electronic voucher (azure card) of still, 15 years later, just over £35pw. The numbers supported under s4 grew to 11,655 in 2009 (though down to around 3000 by 2013),[53] and some people, including those with children born after the applicant's asylum claim was finally determined, have been living on s4 support for several years. A large proportion of s4 recipients rely on a claim that they have a 'barrier to removal', usually an inability to obtain national documents. The Home Office is generally reluctant to accept that a person may not be practicably removable from the UK,[54] and recipients face repeated reviews, withdrawals of support and appeals to the asylum support tribunal.[55]

f. Postscript 2 - other migrants without children

Besides introducing the new asylum support system, the IAA 1999 had reinforced the 1996 exclusions of other migrants from benefits and services. In particular, s116 precludes the provision of residential accommodation under s21 NAA1948 to any such person if their need for it arises 'solely' from their destitution.

The 2000 Court of Appeal judgment in *O v Wandsworth (O & Bhikha)*[56] summarised the legal position:

> … (i) overstayers or illegal entrants, (ii) persons here with leave but with a condition of no recourse to public funds or following a maintenance undertaking, and (iii) those who are appealing against a decision to vary or refuse to vary limited leave (in

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[51] *Salih & Rahmani [2003] EWHC 2273 (Admin)*

[52] http://www.asaproject.org/uploads/Factsheet-2-section-4-support.pdf accessed 14/7/17

[53] https://www.refugeecouncil.org.uk/assets/0003/0290/Asylum_Support.pdf accessed 14/7/17

[54] See e.g. *Revisiting removability in the 'hostile environment'.* Sheona York 2015 Birkbeck Law Review, 3 (2). pp. 227-257. ISSN 2052-1308. E-ISSN 2052-1316.

[55] Asylum Support Appeals Project, *The Next Reasonable Step* http://www.asaproject.org/uploads/The-Next-Reasonable-Step-September-2014.pdf accessed 21/7/17

[56] *O v LB Wandsworth, Bhikha v Leicester City Council [2000] EWCA Civ 201*

> each case whether or not asylum seekers) **have no access to assistance under s.21(1) if their need arises solely because of the physical effects of actual or anticipated destitution.**

The two applicants were 'in need of care and attention'. Ms O had serious mental health problems and Mr Bhikha had recurrent duodenal cancer. Simon Brown LJ noted:

> **S.21(1A) necessarily predicates that there will now be immigrants with an urgent need for basic subsistence who are not to be provided for anywhere in the welfare system. Parliament has clearly so enacted and so it must be.** [p12]
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> …
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> … The word "solely" in the new section is a strong one and its purpose there seems to me evident. Assistance under the 1948 Act is, it need hardly be emphasised, the last refuge for the destitute. **If there are to be immigrant beggars on our streets, then let them at least not be old, ill or disabled.** (writer's emphasis)

Simon Brown LJ noted that the 1998 case of *ex p D:*[57]

> … held that, in general, illegal entrants and overstayers are not entitled to assistance under s.21 because they are relying on their own wrongdoing in choosing to remain in the United Kingdom, but that, where they are unfit to travel without the risk of serious damage to their health, then the law of humanity prevails in their favour. [p14]

However, he concludes [p20] that not even illegality should … bar an applicant who otherwise qualifies for support:

> In my judgment, however, it should be for the Home Office to decide (and ideally decide speedily) any claim for ELR[58] and to ensure that those unlawfully here are promptly removed, **rather than for local authorities to, so to speak, starve immigrants out of the country by withholding last resort assistance from those who today will by definition be not merely destitute but for other reasons too in urgent need of care and assistance.** [20] (writer's emphasis)

g. Postscript 3 - families with dependent children

Migrants with children under 18 (whether unlawfully present or otherwise), and unaccompanied migrant children (whether asylum-seekers or not) may apply for assistance under s17 Children Act 1989 to 'safeguard and promote the welfare of children within their area who are in need'. A local authority has a general duty to do this 'by providing a range and level of services appropriate

[57] *R v LB Brent ex p D (1997) HLR 31, [1998] CCLR 241*

[58] Exceptional leave to remain, now discretionary leave to remain

to those children's needs'. Schedule 3 of NIAA 2002 provides that a person to whom that schedule applied 'shall not be eligible' for that support or assistance. By para 7(a) & (b) that Schedule excluded someone who was in the UK in breach of the immigration laws … and was not an asylum-seeker. However, Para 3 provides an exception. Support may be provided 'if, and to the extent that … [it] is necessary for the purpose of avoiding a person's Convention rights'.

A series of cases considered whether and how the s17 duty would be affected where the parent of the 'child in need' fell into a category excluded from support by Sch 3.[59] In *M v Islington,*[60] in which the local authority had offered to pay the applicant's travel costs back to her country of origin, the Court of Appeal considered that the court below had concentrated on the immigration status of the adult rather than looking at the local authority's duty *to the child.* It also considered, even before *ZH (Tanzania),*[61] that a local authority should be careful before it '*encourages or in practice enforces the expulsion of the child before the effect of her citizenship on the child's immigration status has been decided by the proper authority for that purpose, the Immigration Appeal Tribunal'.*[62]

In *Amalea Clue*[63] the Court of Appeal considered whether the local authority had a duty not just to a 'child in need' but to the child's excluded mother, who had made an application for leave to remain. Local authorities were concerned about the impact of such cases on social services budgets, especially given Home Office casework delays. The court applied *O & Bhikha* and decided:

> But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim. [66]

3. Analysis of the challenges

a. 'what Parliament intended'

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[59] Even before Sch 3 was introduced, some authorities had resisted applications by analogy with *R v Northavon District Council ex parte Smith: HL 18 Jul 1994,* which said that a person declared intentionally homeless could not defeat the operations of a local authority's housing duties by applying to Social Services. The judicial reviews must have been settled, as the author can find no reported cases on this point.

[60] *M v Islington and SSHD* [2004] EWCA Civ 235

[61] *ZH (Tanzania)[2011] UKSC 4,* which noted the importance of a British citizen child's enjoyment of her rights of citizenship, such as growing up and being educated in the country of her nationality.

[62] *M v Islington* n50 para 30. (The judge must surely have meant '*the effect of her citizenship on the mother's immigration status' SY*)

[63] *Birmingham City Council v Amalea Clue (SSHD and Shelter intervening) [2010] EWCA Civ 460*

The *JCWI* case[64] challenged the 1996 social security regulations on *ultra vires* grounds. The weakness of this mode of attack was shown by the speed of the government's response in bringing in primary legislation.

However, while noting that the Refugee Convention does not explicitly require that the receiving state should support an applicant during the asylum process, Simon Brown LJ concluded that 'parliament could not have intended' asylum seekers to choose between destitution while they pursued their claim and returning to persecution in their country of origin. And we have seen how in the subsequent cases parliament is found 'not to have intended' the relevant category of migrant to starve.

Harvey[65] sees this as an inevitable challenge between the executive and judiciary, arising *when controversial legal changes are proposed which appear to interfere with what are generally considered to be basic human rights.* He asks whether, when considering 'what parliament intended', the question is confined to what the immediate parent Act says. In the *JCWI* case, which dealt with social security regulations, the majority of the court looked beyond the parent social security legislation to the Asylum and Immigration Appeals Act 1993, holding that subordinate legislation must not conflict with statutory rights afforded by other primary legislation.

Harvey concludes that *'by amending the [asylum and immigration bill] to reinstate the regulations, the government signalled its lack of concern for principle in the face of its own public policy imperatives'*.[66] But he does not discuss the content of those basic human rights, nor say what principle was to be relied upon. I discuss this in Part 5 below.

In introducing the restrictive measures into primary legislation, the government in 1996 presumably thought it had achieved an effective, watertight exclusion of in-country asylum-seekers from benefits. The House of Lords debate,[67] though strongly critical of the government's intentions, refers only obliquely to the *Eastbourne* judgment, and not at all to the National Assistance Act.

In *MPAX* at first instance[68] Collins J said:

> …what mattered was the intention of Parliament in passing the 1948 Act, not … the 1996 Act, but in any case it was impossible to imagine that Parliament in 1996 intended that an

[64] JCWI case n 26

[65] *Asylum seekers, ultra vires and the Social Security Regulations* Colin J Harvey, Public Law 1997

[66] Ibid, final paragraph

[67] Hansard HL Deb vol 573 col 596 June 24 1996

[68] Case comment, Public Law 1997, 188

> asylum-seeker should be left destitute and starving; if Parliament did so intend, it would almost certainly put itself in breach of the European Convention on Human Rights.

However, in the Court of Appeal the emphasis was different. The court did state: '*the general approach of parliament was that that those who were in need, should not be without all assistance'*. [69] It also noted the overriding purpose of the National Assistance Act as part of a *'comprehensive scheme to bring about an end to 350 years of the Poor Law and, accordingly, is a prime example of an Act which is 'always speaking'*.[70] But the case was not decided by reference to rights, common law or otherwise, but more simply, by noting that s21 NAA 1948 was not affected by exclusions effected whether by changes in social security legislation or directly by the AIA 1996. As Billings[71] comments, *'the decisions can be reconciled within a "vires"- based model of judicial review – as an exercise in statutory interpretation'.* He nevertheless finds that the *JCWI* case and *MPAX* '*mark the high watermark of judicial activism in administrative law prior to the Human Rights Act 1998*,' but this is hard to see: the applicants simply were entitled to assistance under the law as it stood.

Arguably, challenging the 'destitution plus' provision would provide a sterner test. We saw in the discussion of *O & Bhikha* how the court explicitly stated that '*Parliament has clearly so enacted and so it must be',* precisely not challenging the 'destitution-plus' test itself, but merely finding that Ms O and Mr Bhikha met it. The court decided that the local authorities should have based their decision on the applicants' need for 'care and attention', and not attempted to exclude on grounds of immigration status.

In relation to 'destitution-plus' it was therefore clear 'what parliament intended' then, as with the 'hostile environment' measures now. I now look in detail at how the human rights arguments were deployed in the *Limbuela* litigation, and consider whether such arguments could sustain a frontal attack on either 'destitution-plus' or the 'hostile environment' measures.

b. The human rights arguments

In contrast to the 1996 litigation and *MPAX,* the s55 litigation rested on whether and at what point a denial of asylum support would be deemed 'inhuman and degrading treatment' so as to breach art 3. There was no

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[69] MPAX n3 p93H

[70] Ibid, holding para 5 – interesting that Bennion on statutory construction refers to this very case as an example (*Understanding common law legislation: drafting and interpretation* F A R Bennion, *Contradictory enactments and updating construction* Oxford Scholarship Online accessed 28/6/17)

[71] *Alienating asylum-seekers: welfare support in the Immigration and Asylum Act 1999* Peter Billings Journal of Social Security Law 2002

question that the ECHR was in play. Bradley[72] discusses Home Secretary David Blunkett's 'irascible' response to the High Court decision in the six cases which led to *Q,* in which Collins J said: *Parliament can surely not have intended that genuine refugees should be faced with the bleak alternatives of returning to persecution or of destitution.* In response Blunkett is quoted as saying: "*Frankly I'm personally fed up with having to deal with a situation where parliament debates issues and the judges overturn them. … I don't want any mixed messages going out so I am making it absolutely clear today that we don't accept what Justice Collins has said".*[73] Bradley refers to newspaper reports:

> Unaccountable and unelected judges are openly and with increasing arrogance and perversity, are usurping the role of Parliament, setting the wishes of the people at nought and pursuing a liberal, politically correct agenda of their own, in their zeal to interpret European legislation[74]

Blunkett's complaints were unfounded, since Parliament had legislated a measure which included section 55(5), by which support may be given *'for the purpose of avoiding a breach of a person's Convention rights',* and it is of course the legislation which the courts must interpret.[75] However, the courts were bound to consider art 3 even if the legislation had not included it (to consider whether the provision would be incompatible with the ECHR). In public Blunkett welcomed the *Q* judgment as upholding the government's right to operate s55, but he was forced to limit its operation significantly, since art 3 ECHR *as included in the legislation* precluded reducing asylum-seekers to 'a life to destitute that … no civilised nation can tolerate it'.[76] As Maurice Kay J stated in *S, D & T,*[77] *'I do not suppose that any reasonable person, including the Secretary of State, views the alternative with equanimity'.* Arguably, however, what we saw in the Court of Appeal and House of Lords in *Limbuela* was a straightforward application of the human rights exception plainly provided for in s55(5), and the acceptance of the *Pretty* analysis of 'treatment' and its test for an art 3 breach. The crux of the decision was the courts' guidance on the general factual situation.

4. Difficulties facing a *Limbuela*- style challenge to the 'hostile environment'

We have noted the several primary Acts which exclude migrants (whether 'failed asylum-seekers' or otherwise, unlawful or otherwise) from access to

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[72] *Judicial independence under attack* Anthony Bradley, Public Law 2003
[73] Ibid, also BBC http://news.bbc.co.uk/1/hi/uk/2779343.stm accessed 16/7/17.
[74] *Daily Mail,* February 21, 2003 (quoted in Bradley, ibid)
[75] (Unless Pepper v Hart [1992] UKHL 3 applies)
[76] See Blunkett's 18/12/2003 change of policy 47
[77] S, D & T n 45

benefits, social services assistance and housing. The new 'hostile environment' measures provide *inter alia* for the exclusion of irregular migrants from private rented property and from holding money in bank accounts, and require an up-front payment of 150% of the price of NHS hospital treatment. The cases discussed above suggest that an excluded migrant who is destitute, street homeless, and with an arguable to claim to remain, may still have a claim for support (such support to be provided by local authority social services departments as now), relying on formal human rights exceptions in the legislation itself. The 'right to rent' and bank account measures in the Immigration Act 2014 do also (albeit obliquely) provide for the Secretary of State's discretion. We may therefore wonder why we have not seen any significant challenges, never mind a *Limbuela* – style litigation campaign. I believe there are four clear reasons.

a. Legal and factual complexity

First, both the National Assistance Act 1948 litigation and the section 55 litigation concerned a category of migrant whose presence in the UK was indubitably **lawful**. The AIAA 1993 had recently brought into domestic law the principles of the Refugee Convention, namely that a person claiming asylum was entitled to an individual determination of their claim, and could not be refouled until that claim had been finally determined. Secondly, the legislation which excluded them from benefits was simply expressed. In 1996 the exclusions rested on whether they had claimed asylum at the port, on entering the UK, or not. In 2003 the question was only slightly less clear: whether an in-country asylum-seeker had claimed asylum 'as soon as reasonably practicable'?

Whereas the tests to be confronted now, e.g. whether a person has a human rights claim to remain in the UK which 'is not hopeless or abusive', or whether it would be 'simply impossible' to remove them, cannot be answered just by checking Home Office records ('has the person recorded an asylum claim? Where and when was the claim made? Is it still outstanding?'), but depends on detailed consideration of the individual's immigration history and factual circumstances, (on which there may already have been Tribunal findings) and consideration of objective country evidence (again on which there may have been Tribunal findings).

On removability,[78] the Home Office has always, as a matter of policy, resisted the suggestion that many migrants may not be returnable, and certainly

[78] *Revisiting removability in the 'hostile environment'* n54

publicly underestimates the numbers of irregular migrants, whether 'failed asylum-seekers' or overstayers, illegal entrants and so on, whose situation reaches the 'Hale threshold'[79] beyond which it is 'simply impossible' to remove. The Asylum Support Appeals Project 2014 report *The Next Reasonable Step*[80] demonstrates the Home Office's stance on removability. The vast majority of applications would be likely to be resisted.

Similarly, a claim to remain in the UK on human rights grounds, other than a protection claim, is a qualified right, over which there has been intense litigation.[81] The application of art 8 ECHR is now itself the subject of primary legislation, which provides *inter alia* that a person's private life acquired while unlawfully present should be given 'little weight' by a tribunal.[82] It would seem unlikely, for example, that a statement such as made in *Salih & Rahmani,* that a 'failed asylum-seeker' may nevertheless have a good reason for not wanting to return home, would be accepted now as showing a 'genuine obstacle' to return, and not without great difficulty as an arguable art 8 claim.

It is true that both *O & Bhikha* and *Amalea Clue* require a local authority in assessing a claim for support not to consider the person's immigration case (apart from whether it is hopeless or abusive) but, realistically, hard-pressed social services departments are very likely to apply a higher test of 'hopelessness' than envisaged in *Amalea Clue*, where a child was involved.

b. *The destitution is not concentrated, largely unseen, and pervades the general population*

We might next ask why challenges of refusals of support for destitute migrants are not more frequent, or at least not more often publicised. But the circumstances of the earlier litigation were very different. Both the NAA 1948 litigation in 1996 and the section 55 litigation in 2003-5 were responses to legislation that changed overnight the position of a large group of people who had recently arrived in the UK. The impact was clear straight away on the streets, especially in Croydon around the Home Office Asylum Screening Unit, outside the Refugee Council office in Brixton and in places near Heathrow. In a very short time refugee community groups and charities were overwhelmed with requests for help. In contrast, many of the migrants affected by the exclusions from benefits, and becoming affected by the new 'hostile

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[79] *Khadir [2005] UKHL 39 [4] (Baroness Hale)*

[80] ASAP n 55

[81] *Immigration control and the place of Article 8 in the UK Courts – an update* Sheona York 2015 JIANL 29 n 3. Note that the 2017 UKSC judgments *of MM (Lebanon) [2017] UKSC 10* and *Agyarko [2017 UKSC 11* do not provide a 'last word', since the relevant decisions were made before the Immigration Act 2014 measures were introduced (for these see next Note)

[82] Section 117 Nationality, Immigration and Asylum Act 2002, introduced by s19 Immigration Act 2014

environment' measures, have been in the UK for a long time, surviving by a mixture of unlawful work, help from family and support from their church or community group, and are not all concentrated in a few places. Campaigning groups such as *Still Human Still Here* and joint local authority-NGO networks such as *No recourse to public funds network*[83] work to raise the profile of this issue, and the Scottish Parliament's recent report[84] shows an understanding and sensitivity to the problem which has escaped the Home Office. Indeed the recent Refugee Action report[85] shows the extent of destitution among those who are formally entitled to support. But destitution is no longer confined to migrants (if it ever was). With industrial numbers of claimants refused disability benefits under the fitness to work procedures, and those 'sanctioned'[86] under the benefits system, a similar level of hidden destitution is spreading through the general population, and even becoming normalised, as shown by the fact that the increased reliance on food banks evinces little official concern.[87] And for many of those citizens who are destitute, it is no more an answer to suggest that they can get work than to suggest to irregular migrants that they can go home.

c. The treatment of the evidence

We saw above how the Court of Appeal in *Q* decided that it was lawful for the Home Office to expect each single applicant for asylum support to show how he or she could not access any charitable support. Most unusually, after *Q* was decided, the s55 litigation operated almost like an emergency public inquiry. The Administrative Court, Court of Appeal and eventually the House of Lords permitted the applicants and the NGOs intervening in the cases (and the Respondent Home Office) to present general evidence on the availability of charitable support for destitute asylum-seekers, and, at every level, the courts accepted the evidence as applying in general terms to the individuals before them. As noted by Maurice Kay J's statement as Head of the Administrative Court, the applicants' individual facts were rarely challenged. And importantly the Home Office 'interim guidance' effectively reversed the burden of proof, stating that NASS 'must' support an applicant unless there was positive evidence of availability of other support.

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[83] http://www.nrpfnetwork.org.uk/Pages/Home.aspx

[84] *Hidden Lives – New Beginnings: Destitution, asylum and insecure immigration status in Scotland* Scottish Parliament SP paper 147, 22 May 2017

[85] ***Slipping through the cracks*** Refugee Action 2017

[86] A benefits sanction may last up to 12 months, and the support provided is less than that provided under section 4 support.

[87] https://www.trusselltrust.org/2017/04/25/uk-foodbank-use-continues-rise/ accessed 21/7/17

In contrast, the issues facing migrants experiencing destitution, whether from the pre-existing general exclusions from benefits and services or from the operation of the recent 'hostile environment' measures, are far more diverse, and far less capable of being presented as conclusively and inevitably affecting a particular class of migrant who, for some clear and generally accepted reason, cannot simply 'go home'. The very continued existence of *Still Human Still here* and the *No Recourse to Public Funds* network*,* shows paradoxically precisely how hard it has been to produce statistics and narratives on migrant destitution as clear and compelling as was the evidence in *Limbuela*.

d. The function of judicial review

In *Limbuela*[88] the Court of Appeal considered how far it was proper for the court to consider the background facts:

> It must be obvious that it is not possible for this court to make full, accurate and detailed findings of fact as to the exact realities faced by s.55 asylum-seekers in London, let alone elsewhere. Such an exercise could only be satisfactorily conducted by a process of factual enquiry involving a wide-ranging examination of the evidence, with oral testimony and cross-examination. **A process of that kind is inapt for determination in the course of adversarial litigation in the judicial review jurisdiction, and particularly inapt in this court.** … **but … we must surely reach and describe some impression of the general or background evidence.** We are at least required to articulate a kind of touchstone for the application of Article 3 in these cases. [36]

I suggest that at least part of what impelled the court to take this course was the heavy burden the litigation had placed on the Administrative Court. It is instructive to compare how that court (Collins J, in fact) subsequently dealt with another potentially enormous number of judicial review applications from migrants – the 'legacy cases'.[89] After the 2006 discovery of the 450,000 unresolved asylum applications, the new UK Border Agency set up the Case Resolution Directorate, with a target of 'concluding' those applications within 5 years. Many of those applicants had already been waiting long periods for a decision. Some were asylum-seekers supported by NASS, some supported by local authorities under previous legislation, some had made fresh claims for asylum, or an application for further discretionary leave to remain, and there were 'failed asylum-seekers' and those without current applications who were surviving informally whether by unlawfully working or relying on family and friends. The numbers were huge, and the pressure on communities to support

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[88] *Limbuela Court of Appeal judgment* N 48

[89] For a summary of the 'legacy' saga see the Independent Chief Inspector of Borders and Immigration's report http://icinspector.independent.gov.uk/wp-content/uploads/2013/06/CAAU-Report-Final-26-June-2013.pdf accessed 19/7/17

the waiting applicants was heavy. However, in *FH & Ors,*[90] the Administrative Court dealt almost summarily with the first judicial review applications seeking to impugn the delay:

> The need to deal with so many incomplete claims has arisen as a result of the past incompetence and failures by the Home Office. … . It is not for the court to require greater resources to be put into the exercise, no doubt to the detriment of other matters which must be funded by the government, unless persuaded that the delays are so excessive as to be unreasonable and so unlawful. [21]
>
> …
>
> It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. [30]

Practitioners will know that some of the migrants experiencing destitution today are among those whose cases were not 'concluded' under the 'legacy' by 2011 as planned: and who have remained in a state of 'hidden destitution' throughout that time.

5. Could 'common humanity' provide a solution?

Referring back to Harvey's reference to 'basic human rights' and to the government's 'lack of concern for principle',[91] made before the Human Rights Act came into force, I now look at cases relying on the 'law of common humanity' from *Eastbourne* to the *JCWI* case and subsequently, to see if reliance on this could provide a basis for a challenge even where 'what Parliament intended' is absolutely clear.

Following *Eastbourne,* the next reported reference to 'common humanity' is made in 1809 in *Kemp v Wickes,*[92] which stated:

> Here the general law is, that burial is to be refused to no person. This is the law, not only of the English Church; it is the law, not only of all Christian churches; but it seems to be the law of common humanity; and the limitation of such a law must be considered strictissimi juris.[93]

Three points can be made. First, from those two cases we see that the concept of common humanity is regarded at the same time as self-evident and of great

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[90] *FH & Ors [2007] EWHC 1571 (Admin)*. A very few subsequent applications were brought before the Court of Appeal in *SH (Iran) & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 1469 stated *'There is no separate legacy "policy". There is no basis for relying on delay as, in itself, a ground for obtaining leave to remain. There is in the ordinary case no relevant legitimate expectation…'* and warning lawyers of the dire consequences of attempting to re-litigate these issues.

[91] Harvey n65

[92] Kemp v Wickes (1809) 3 Phillimore 264, 161 E.R. 1320

[93] i.e., construed strictly

power. It is similarly referred to without references, explanation or justification in subsequent judgments in the modern era, dealing with different causes of action. In the 1971 case of *Fernandez*[94] Lord Diplock, discussing degrees of risk of harm faced by a person resisting extradition, referred to the alternative of *'applying, untrammelled by semantics, principles of common sense and common humanity'*. In the 1972 tort case of *British Railways Board v Herrington*,[95] in which a young child strayed onto a railway line and was injured by the electric rail, Lord Morris says:

> while the occupier is not under the same duty of care which he owes to a visitor, he owes a trespasser a duty to take such steps as common sense or common humanity would dictate to exclude or warn or otherwise, within reasonable and practicable limits, reduce or avert danger.

Secondly, 'common humanity' is invariably *contrasted* with human rights in general, as well as the ECHR and the Human Rights Act itself. In *AE & Anor,*[96] an asylum appeal considering internal flight, the Court of Appeal said:

> There may be good grounds under the Human Rights Act, or as a matter of common humanity, for not sending this family back to Colombo.

In *Singh v Entry Clearance Officer New Delhi*[97] the Court of Appeal said:

> It might be thought that common humanity – never mind the requirements of the Convention – demands that sensitive cases of this kind should in future be dealt with at all stages with a much greater sense of urgency than would seem to have been in evidence here.

In the Court of Appeal judgment in *AH(Sudan)*[98] the court refers to Lord Phillips MR's judgment in *E and anor v SSHD [2004] QB 531*:

> 'And having stressed the need to distinguish between refugee status under the Refugee Convention; the requirements of the Human Rights Convention; and the dictates of common humanity' …;

In the Art 15(c) Afghanistan country guidance case of *AK*[99] the tribunal relies on the legal principles set out in the earlier case of *HM,* as follows:

> "(a) The Article seeks to elevate the state practice of not returning unsuccessful asylum seekers to war zones or situations of armed anarchy for reasons of common humanity into a minimum standard (QD [i.e. QD(Iraq) [2009] EWCA Civ 620] at [21]).

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[94] R v. Governor of Pentonville Prison, Ex p. Fernandez [1971] 1 WLR 987 p 994

[95] *British Rails Board v Herrington, House of Lords 1972 [1972] 2 W.L.R. 537, [1972] A.C. 877* (post, p. 909F-H).

[96] *AE & Anor v Secretary of State for the Home Department [2003] EWCA Civ 1032* para 70

[97] *Singh v Entry Clearance Officer New Delhi [2004] EWCA Civ 1075* para 92

[98] *AH (Sudan) & Ors v Secretary of State for the Home Department [2007] EWCA Civ 297* para 24

[99] *AK (Article 15(c)) Afghanistan CG [2012] UKUT 163 (IAC)* para 111

Finally, dealing explicitly with the right to support to be afforded to failed asylum-seekers, the High Court in *Salih & Rahmani,*[100] referred to above, says:

> I would add that the Court is by no means insensitive to the problems caused by large-scale immigration of asylum seekers and the difficulties of repatriating those whose asylum claims are unfounded. I have fully in mind that S, whose claim for asylum was rejected on grounds of its lack of credibility, must therefore be regarded as an economic migrant…
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> However, by introducing the hard cases scheme the Home Secretary has himself recognised that common humanity requires that even failed asylum seekers, who are prohibited from working and have no other avenue of support, and have good reason not to return to their own countries, must be provided with the essential basics of life.

Is there any limit on who can benefit from the concept of 'common humanity'? Flo Krause,[101] writing in 1999, believed it to be limited to those lawfully present. Her view was that the judgment in *Eastbourne* rested on the fact that the poor law had no obligation for 'ascertaining the different methods of acquiring settlements' (i.e., enquiring into how a person had the right to 'settle' in a particular area), so there could be no legal justification for singling out foreigners and excluding them. From the perspective of modern immigration law, no clear conclusion can be drawn from such an old case. However, Lord Denning discusses the issue in *Streeting,*[102] in which he refers to *Eastbourne* and to a copyright case and decides (in 1980) that for foreigners, homelessness assistance is limited to those lawfully present.

Krause next refers to *R v Brent ex p D,*[103] which decided that generally an overstayer or illegal entrant (not being an asylum-seeker) could not be entitled to any assistance, unless too sick to return to his country of origin. That case held that, only in those (extreme) circumstances, the 'law of humanity' overrode the principle that a man cannot take advantage of his own wrongdoing. As we have seen above, that judgment was majestically overturned by the Court of Appeal in *O & Bhikha*.[104] That court first decided that in considering entitlement to support, the first question is whether the applicant qualifies for it in terms of need – *the local authority has no business with an applicant's immigration status save only for the purpose of knowing why the care and attention 'is not otherwise available to them'*.[105] And secondly, that there is no general principle of legality excluding certain people from access to social services. Lady Justice Hale, as she then was, noted that in

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[100] *Salih & Rahmani* n51 para 69

[101] *The National Assistance Act 1948 s21 – its scope* Flo Krause, Journal of Housing Law 1999

[102] *R v Hillingdon ex p Streeting 1980 1 WLR 1425*

[103] *R v LB Brent ex p D* n 57

[104] *O & Bhikha* n56

[105] Ibid, Simon Brown LJ, n56 p20.

introducing s21(1A) in the IAA 1999, parliament had not chosen to deny all services to those excluded, but only where the need arises 'solely' from destitution. 'It cannot have been Parliament's intention' to limit eligibility by reference to a person's immigration status.[106] And in *Salih & Rahmani,* already referred to above, we see a post- Human Rights Act reference to common humanity explicitly applying to a category of migrant already determined by a formal procedure to have no further right to remain in the UK.

De Smith on judicial review[107] gives as an example of 'illegality' 'a duty on the State to provide subsistence to asylum-seekers' as a fundamental right which it would be unlawful to breach, giving as authority the 'common humanity' quotation from *Eastbourne* relied upon in the *JCWI* case. Referring in footnotes to Dworkin as well as to eminent judges such as Browne-Wilkinson, Sedley and Laws LLJJ, the textbook says:[108]

> The foundation in precedent for the presumption against the infringement of human rights in English domestic law is therefore solid. The foundation in theory is less apparent in the absence of a written constitution or enumerated bill of rights. However, fundamental rights can be properly viewed as integral features of a democratic state.

In a discussion of 'oppressive decisions',[109] referring again to *Eastbourne,* the textbook states:

> When the Secretary of State for Social Security made a regulation which sought to discourage asylum claims by economic migrants by effectively excluded a large class of such migrants from income support, the Court of Appeal invalidated the regulations on the ground that they were so draconian that they rendered the rights of the migrants to remain in the country nugatory. Simon Brown L.J. held that the regulations contemplated for some migrants "a life so destitute that, to my mind no civilisation can tolerate it".

In the parliamentary Joint Committee on Human Rights report *The Treatment of Asylum-seekers*,[110] section 2 sets out the relevant human rights principles. *Eastbourne* is again referred to, again as if the principle were self-evident.

Blackstone, in his *Absolute Rights of Individuals 1753,*[111] says:

> The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.

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[106] Ibid, Lady Justice Hale, n56 p28
[107] De Smith's Judicial review 7th edition, Mainwork, *Part I, The Context Of Judicial Review* Chapter 5 Illegality; statutory interpretation para 5-042
[108] Ibid 5-043
[109] Ibid *Part II Grounds of Judicial Review*, 11-072, last bullet point
[110] Joint Committee on Human Rights Tenth Report of session 2006-07 Volume 1
[111] https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-101/ accessed 20/9/17

Arguably that ancient and effective prohibition of torture under the common law could be widened to include 'inhuman and degrading treatment,' and thus take us to the same place as *Limbuela* without relying on the Human Rights Act. It could thus be argued that the *reason* why common humanity obliged the people of Eastbourne in 1803 to provide poor law relief to the foreign person otherwise they would starve, is that, by not providing it to her, the parish was meting out 'treatment', in breach of the fundamental duty of the authorities not to torture. Thus we could argue today that common humanity requires that the State not inflict 'treatment' (viz, denial of support or accommodation) to a destitute migrant.

However, this would be fraught with the same evidential and legal problems as a human rights-based challenge. In *Limbuela*, the criteria for entitlement to support under s55 were straightforward: firstly being an asylum-seeker and therefore lawfully present, and secondly being in a condition such that failure to provide support would quite soon breach art 3. For irregular migrants who are not asylum-seekers, and who are therefore not entitled to be in the UK, the important prior issue is not whether their condition does, or would soon, breach art 3 or the law of common humanity. It is whether the migrant can solve their own problems by going back to their country of origin. This question would fall to be considered first by a local authority severely short of funds, in a hostile political climate, in the knowledge that in the immigration jurisdiction the question of a 'barrier to return' of whatever sort faces a high test. For example, local authorities are already carrying out 'human rights reviews' of young 'failed asylum-seekers' currently 'looked after' under 'leaving care' provisions. These young 'leaving care' recipients must show evidence of an outstanding fresh claim for asylum, a meritorious family life claim under Appendix FM or a private life claim under the long residence paragraphs of the immigration rules, (which might include an argument that they are not foreseeably removable). With no outstanding application their support is terminated. A person who claims they are too ill to return to their country of origin would probably have to reach the higher threshold of being too ill to travel, since local authorities will know that the 2005 case of *N v SSHD*[112] holds that, in general terms, a person whose condition will deteriorate in their country of origin through inability to afford appropriate health care has nevertheless no claim to remain in the UK. It is worth noting that *O & Bhikha* was heard before the case of *N,* and while Ms O and Mr Bhikha both had outstanding applications for exceptional leave to remain which were expected to succeed, it is unlikely that such applicants would now be given leave to remain. A claim for support based on common humanity simply has no traction

[112] N v SSHD [2005] UKHL 31

against an immigration tribunal finding that the applicant can just return home, any more than a claim based on art 3 ECHR.

It is true that in *O & Bhikha* the courts clarified that that a local authority faced with someone 'in need of care and attention' (i.e. suffering 'destitution plus') had to provide support, leaving it to the Secretary of State to consider their immigration status and remove them. But a person not meeting the *Limbuela* test (i.e. not an asylum-seeker), nor *O & Bhikha* (i.e. not having care needs other than arising from destitution) nor *Amalea Clue* (i.e. not having a child), or not being a failed asylum-seeker currently meeting the criteria of s4 support, is excluded by s21(1A) from any support, as Parliament has decided in clear words. A person attempting to claim support on a quasi-*Limbuela* basis of (i) its being 'simply impossible' to remove them and (ii) that their condition, arising solely from destitution, was approaching a breach of art 3 or, alternatively, a breach of what common humanity requires, would in my view need unassailable evidence of the impossibility of removal,[113] and even then most local authorities would require an injunction before providing support. Such an exceptional case might conceivably provide a challenge to s21(1A).

And in relation to 'hostile environment' measures, an irregular migrant facing eviction because she has no 'right to rent', or faced with sequestration of money in a bank account rendering her destitute, should be able to rely on the above reasoning where she has an outstanding claim to remain in the UK which is not 'hopeless or abusive', or alternatively an arguable claim that she is not foreseeably removable – since these provisions admit of discretion.

But this takes us no further than arguing breach of art 3 as in *Limbuela,* and does not assist at all with the practical issues of proving destitution, other than for each person separately. And Blackstone himself allows that statute can inflict such measures, 'under the highest necessity'.

6. Conclusion

Whether in previous legislation to exclude migrants from access to benefits, housing or 'care and attention', or in the recent 'hostile environment' measures, and despite the strong views expressed by governments both Labour and Conservative, Parliament has not legislated in clear words to rule out all exceptions on human rights grounds. Commentators and court judgments alike are clear that such would be in breach of the ECHR. It appears,

[113] For example, a child of stateless parents, born in the UK and never left, would have no country to which he could be removed.

though nowhere recently argued, that such would also breach basic common law rights, founding a judicial review claim in illegality or ‘oppressive decision’.

So in principle any destitute migrant formally excluded from benefits or services but either not foreseeably removable from the UK or having an arguable human rights claim to remain, could mount a claim for support if facing a breach of his human rights. However, unlike in the *Limbuela* cases, both local authorities as respondents to any application for support and the Home Office as respondents in any immigration claim are likely to resist both the facts and the legal reasoning advanced in each individual claim. And the circumstances of destitution, and the reasons put forward by any prospective applicant for not being able to return home, are so diverse that a frontal attack on any particular measure, arguing incompatibility with the ECHR or illegality as in breach of ‘common humanity’, is unlikely to succeed. The courts will say that, so long as the human rights exemptions remain in the legislation, and so long as the Secretary of State retains any discretion, the ‘hostile environment’ can operate compatibly with human rights principles and within the law of common humanity.

Sheona York 20 September 2017