R v Brent LBC ex p D

Queen's Bench Division
Moses J
19 December 1997

Public policy precludes illegal entrants and overstayers from eligibility for assistance under National Assistance Act 1948 s21 unless they are unfit to travel.

Facts

The applicant was a single, male citizen of Brazil. He was diagnosed as being HIV-positive in 1993 and entered the United Kingdom with a six-month visitors' visa in September 1994. In early 1995 the applicant was refused leave to remain as a student. He remained in the United Kingdom in breach of immigration rules working casually to make ends meet. In early 1997 the applicant became increasingly ill. For about a month between June and July 1997 he was a hospital in-patient suffering from pancreatitis, bilateral pneumonia and unstable, insulin-dependent diabetes. After discharge the applicant was too weak to work and lost his accommodation although the owner let him sleep in the garage. There followed several more hospital admissions. The applicant was not fit to travel back to Brazil and was unable to provide for himself in terms of food and accommodation. On 29 August 1997 Immunity Legal Centre wrote to the Home Office on the applicant's behalf seeking exceptional leave to remain until such time as the applicant was fit to travel back to Brazil. On the same day Camden Citizens Advice Bureau wrote to the respondent local authority on the applicant's behalf seeking residential accommodation under National Assistance Act 1948 (NAA) s21. The respondent local authority took the view that it could not be under a duty to assist the applicant under NAA 1948 s21 because he was an illegal entrant. The respondent local authority assessed the applicant in any event under National Health Service and Community Care Act 1990 s47. The respondent local authority's assessment was that the applicant was fit to travel and that his illness by itself was insufficiently grave to render him in need of assistance under NAA 1948 s21. The evidence showed, however, that without food and accommodation the applicant's illness would be exacerbated.

Held:

1 In general, an illegal entrant or illegal overstayer is not entitled to assistance under NAA 1948 s21 because in applying for assistance such a person relies on his own wrongdoing in choosing to remain in United Kingdom. Public policy accordingly precludes such a person from obtaining the statutory benefits sought.

2 Where, however, an illegal entrant or overstayer is unfit to travel in the sense that s/he is unable to travel without the risk of serious damage to his/her health or life then the right to life and at least a minimum standard of health and the duty of civilised nations to safeguard life and health overrides the principle that a person may not take advantage of his/her own wrongdoing.

Cases referred to in judgment:

Akinbolu v Hackney LBC (1996) 29 HLR 259; (1996) 160 JP Rep 995; [1996] EGCS 73; (1996) 93(19) LS Gaz 28; [1996] NPC 60; (1996) SJLB 118; (1996) *Times*, 13 May, CA.

D v United Kingdom [1997] 24 EHRR 423; (1997) *Times*, 12 May, ECHR.

Hipperson and Others v Newbury District Electoral Registration Officer and Another [1985] 1 QB 1060; [1985] 3 WLR 61; [1985] 129 SJ 432; [1985] 2 All ER 456; (1985) 83 LGR 638; (1985) 82 LS Gaz 2247, CA.
Manan (Abdul), Re [1971] 1 WLR 859; 115 SJ 289; [1971] 2 All ER 1016, CA.
R v Brent LBC ex p Shah [1983] 2 AC 309.
R v Eastbourne (Inhabitants of) (1803) 4 East 103.
R v Governor of Pentonville Prison and Another ex p Azam [1974] AC 18; [1973] 2 WLR 1058, HL.
R v Hillingdon LBC ex p Streeting [1980] 1 WLR 1425; (1980) 124 SJ 514; [1980] 3 All ER 417; (1980) 79 LGR 167; (1980) 10 Fam Law 249, CA.
R v Secretary of State for the Environment ex p Tower Hamlets LBC [1993] QB 632; [1993] 3 WLR 32; [1993] 3 All ER 439; (1993) 25 HLR 524; [1993] Imm AR 495; [1994] COD 50; [1993] NPC 65; (1993) *Times*, 9 April; *Independent*, 22 April, CA.
R v Secretary of State for Social Security ex p Joint Council for the Welfare of Immigrants [1996] 4 All ER 385; (1996) 146 NLJ Rep 985; (1996) *Times*, 27 June; *Independent*, 26 June, CA.
R v Westminster CC and Others ex p M, P, A and X (1997) 1 CCLR 85; (1997) *Times*, 19 February, CA.
R v Westminster CC ex p A (1997) 1 CCLR 69; (1996) 93(42) LS Gaz 28; (1996) 140 SJLB 222; (1996) *Times*, 10 October; *Independent*, 16 October, QBD.
R v Westminster CC ex p Castelli (No 2) (1996) 26 HLR 616; (1996) 8 Admin LR 435; [1996] COD 390; (1996) 140 SJLB 86; (1996) *Times*, 27 February; *Independent*, 23 February, CA.
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267; [1956] 3 WLR 870; 100 SJ 841; [1956] 3 All ER 683; [1956] 2 Lloyd's Rep 413.

Legislation/guidance referred to in judgment:
Asylum and Immigration Act 1996 ss8 to 11 and Sch 1 – Housing Act 1985 Part II – Housing Act 1996 ss161 and 185 – Immigration Act 1971 ss14, 24, 25 and 28 – National Assistance Act 1948 s21 – National Health Service and Community Care Act 1990 s47 – European Convention of Human Rights arts 2 and 3 – Immigration Rules (HC 395).

This case also reported at:
Not elsewhere reported.

Representation
S Knafler (instructed by Hodge, Jones & Allen) appeared on behalf of the applicant.
E Laing (instructed by the London Borough of Brent, Legal Services) appeared on behalf of the respondent.

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Judgment
MR JUSTICE MOSES:

Introduction
The Applicant is a citizen of Brazil, aged 33. He seeks to quash the decision of the London Borough of Brent ('the Council') to refuse him assistance under section 21 of the National Assistance Act 1948 ('the 1948 Act') . He has what is described as advanced HIV/AIDS. He is, he says, destitute without accommodation or the basic necessities of life. But he is unlawfully in the UK; he is an illegal overstayer. He has applied to the Immigration and Nationality Directorate for exceptional leave to remain on the grounds of his ill health, saying that he is unfit to travel

back to Brazil. He accepts that he must return there, but says that he cannot do so, at present, without causing serious aggravation to his medical condition. Whilst the Home Office considers his application, he says he is entitled to assistance from the Council under the 1948 Act.

Three issues arise, only two of which fall for determination before me.

(1) Is a person unlawfully in this country, who has applied for exceptional leave to remain because he is unfit to travel, entitled to assistance under section 21 of the 1948 Act?

(2) Is the Applicant's lack of finance and accommodation relevant in assessing his needs under section 21? (A point kept open by the Council pending an appeal to the House of Lords, but decided contrary to their contention in *R v Westminster City Council and others, ex parte M, P, A and X* (1997) 1 CCLR 85).

(3) Whether the Council's assessment that the Applicant's needs did not in any event require assistance under section 21 can be impugned?

The Facts

The Applicant was diagnosed as HIV positive in 1993. In September 1994 he entered the United Kingdom with a six months visitors' visa. In early 1995 he was refused leave to remain as a fashion student. He remained in breach of the Immigration Rules and continues to do so.

In early 1997 he became increasingly ill and on 4th June 1997 he was admitted as an in-patient at Middlesex Hospital with pancreatitis and bilateral pneumonia. His diabetes continued to worsen. On 9th July 1997 he was discharged from hospital and until the end of the month was looked after by the well-known charity, the London Lighthouse. At the end of July 1997 he returned to his hostel, but he was unable to pay the rent and had to sleep in a garage, when the owner permitted him to do so.

In the middle of August 1997 he became ill again and was re-admitted to Middlesex Hospital. On 29th August 1997 the Immunity Legal Centre wrote to the Home Office seeking exceptional leave to remain for the Applicant until he was fit to travel out of the United Kingdom. In that letter they wrote:

> *. . . We have requested a medical report from his consultant . . . and will forward this as soon as it is received. Our client is currently in hospital . . .*
>
> *. . . [He] is exceptionally weak and under weight and his consultant has told him that he is not fit to travel. He therefore wishes to remain in this country until his condition has stabilised. He is currently terrified to return to Brazil in case his condition deteriorates suddenly. We therefore request that you grant him a period of exceptional leave to remain on the basis of his severe ill health. We should be grateful if you would grant it without a bar on public funds as he is unable to support himself at present.*

On 29th August 1997 he was discharged from hospital and went back to the garage where he was living. On the same day (29th August) the Camden Citizens Advice Bureau applied for assistance to the Council seeking residential accommodation for the Applicant under section 21 of the 1948 Act. They wrote as follows:

> *. . . There is nothing within the wording of the National Assistance Act that limits a local authority duty [under that Act] to asylum seekers. Mr ['D'] has made an application through his legal centre at Immunity for exceptional leave to remain in the UK and we enclose a copy of their letter dated the 28th August 1997. . . .*

They referred to his circumstances in the letter saying:

. . . He is not able to return to Brazil for reasons outlined by his lawyers. . . .

They concluded by asking that the Council should consider the application:

. . . notwithstanding his application for exceptional leave to remain has not yet had a response. He should be given temporary leave to remain and is still entitled to help under the National Assistance Act in the meantime.

That letter enclosed, as I have said, the letter of 28th August to the Immigration and Nationality Directorate. It said he was unable to return for reasons in that letter, and asked the Council to assess his eligibility for assistance in the form of accommodation, food and other care provision. The letter enclosed a letter from Dr Reid, dated 29th August 1997, which reiterated that he had severe pancreatitis related to drugs and has been left an insulin-dependent diabetic. His diastolic control is not good. The other letter of the same date was to similar effect, saying:

. . . He is on special medications for the HIV virus. His general state is such that he is weak and has lost a lot of weight. He will need continued special, frequent follow-up for his diabetes and HIV.

It is to be noted that neither of the letters from the doctor asserted that the Applicant was unfit to return to Brazil, although the letter of 28th August 1997 had said that a consultant had told the Applicant that he was not fit to travel.

On 2nd September 1997, whilst accepting that the Applicant was extremely unwell, the Council took the view that it was under no duty to provide assistance because the Applicant was an illegal immigrant. On 5th September this view was challenged by the Applicant's solicitors. The view of the Council was confirmed on 12th September by the Council's asylum team which said that non-asylum seekers did not qualify for assistance, because '. . . their circumstances arise by choice, they have options which are not open to asylum seekers by definition'. However, the Council's asylum team did say that they would arrange an assessment to be undertaken by the Council under section 47 of the National Health Service and Community Care Act 1990, notwithstanding that the Council was under no duty to provide assistance.

Since the quality of that assessment is also impugned, it is necessary to set out in greater detail the findings on the assessment. The Applicant at the time of the assessment was in hospital. In the form used to note the results of the assessment there are a number of details as to the physical abilities of the Applicant. They are recorded in that form and show that the scores in relation to his physical abilities were such that he was not registerable as suffering from physical disability unless he had a limb missing or uncontrolled epilepsy, haemophilia or AIDS, and that this diagnosis substantially affected activities of daily living.

Mr McHugh (the Care Manager) and Mr Alexander (the Service Unit Director) took the view on the basis of that assessment that he was not too ill to travel, and that his illness did not require residential accommodation. They took the view that the Applicant had the option to return to Brazil, and thus the fact that he was without support and had no roof over his head was due to his choice to remain here unlawfully. Should his condition deteriorate, they acknowledged that he might require treatment as an in-patient but not social care, outside hospital. They also considered that he should not be granted priority over others in greater need for whom the Council was unable to provide because of lack of resources.

Thus the refusal to provide the Applicant assistance under section 21 was not only on the grounds that he was an illegal overstayer and, as such, not entitled to assistance, but also that, even if he was so entitled, neither his illness nor his lack

A of resources led to a requirement to provide assistance. His illness was insufficiently grave; his absence of resources was due to his failure to leave and to return to Brazil.

On 18th September the Council issued its decision in writing to refuse assistance (the decision under challenge), saying that the Applicant's circumstances
B '. . . are not such as to satisfy the Local Authority's eligibility criteria for services either by virtue of his illness or otherwise'.

Facts Occurring Subsequent to the Decision
After the assessment, on 19th September 1997 Dr Reid wrote:

C *As a result of the pancreatitis he has now been left an insulin dependent diabetic and has lost a lot of weight and become very weak. The diabetes is extremely unstable. Understandably with such a severe life threatening illness he is very ill physically and psychologically and because of the severity of the pancreatitis it is going to take a long time to recover – he will almost definitely be left permanently*
D *a diabetic. I cannot stress how unstable his diabetes is – he has needed frequent changes to his insulin dosage. He is under care of the diabetic team as well as the HIV team. . . . He thus needs a very stable environment to ensure that he can be carefully monitored. He is not fit to travel. He could not be looked after in Brazil because the close monitoring of his diabetes and HIV and his pancreatitis could*
E *not be done there.*

It is important to distinguish two features of this opinion. Firstly, the view that he was unfit to travel and, secondly, the doctor's belief that he would receive inadequate medical care in Brazil.

F The fact that he may receive inadequate care in Brazil is not a ground relied upon, whether for his application for exceptional leave to remain or his assertion that he is entitled to assistance pending his return. The sole ground upon which this case was founded is upon his claim that he is at present unfit to travel.

On 5th September 1997 Dr Swann said in a letter that the Applicant was still
G unfit to travel. That was also confirmed in a letter dated 28th November 1997 from Dr Miller, in which he said:

In the short term I would not advise that ['D'] was fit to travel by air to Brazil. However, if he makes a good recovery from his chest infection then I would think he was medically fit to fly in about ten days from the date of this letter. *Obvi-*
H *ously if his recovery is slow or incomplete then it may be necessary for him to defer a decision about flying.*

Apparently, the Applicant had been admitted to hospital with various symptoms. I am told that he has still not recovered from those symptoms and is, at
I present, still unfit to travel. The evidence shows that without food and shelter this Applicant's illness will be exacerbated. It is that condition which forms the foundation of the contention that it is the combination of the absence of food and shelter and his illness which is aggravated by the lack of those necessities which give rise to the need for assistance under section 21.

J *The Applicant's Unlawful Presence: A Matter of Construction or Public Policy*
The question is whether the fact that the Applicant is present in the United Kingdom unlawfully deprives him of any right to claim assistance under section 21. This issue cannot be resolved as a matter of construction of the wording of section 21. Indeed, the fact that it cannot be so resolved forms a basis of one of Mr
K Knafler's arguments on behalf of the Applicant. There is no residence qualification in section 21. Had there been such a qualification, it might have been

possible to imply a qualification that the residence must be lawful. Whether a qualification of residence implies that the residence must be lawful will depend upon the statutory context in which such a qualification is to be found.

In *Hipperson and Others v Newbury District Electoral Registration Officer and Another* [1985] 1 QB 1060 the Greenham Common women qualified to vote because the Court of Appeal thought that Parliament could not have intended that the right to vote should depend upon the electoral registration officer's decision as to which residential breaches of the law disqualify an aspiring voter (see page 1075D). But the court thought that disobedience to a court Order would disqualify them from the franchise on the basis that there was a real distinction between a breach of the general law and a breach of a court Order. The case is of importance in this respect. The court took the view that there was little distinction between an approach based on statutory construction and one based on public policy, namely that it is wrong that a person can rely upon his own unlawful act to secure an advantage.

Lord Donaldson MR said at page 1074:

> *This issue can be approached on the basis of statutory construction, treating the words 'resident' and 'residence' wherever they occur in the Act as being impliedly preceded by the word 'lawful' . It can also be approached on the basis of public policy . . . The two approaches are in no way inconsistent with one another, and may indeed overlap, since Parliament is unlikely to have intended a result which was contrary to public policy in the strict sense of those words.*

An example of the statutory construction approach can be found in *In re Abdul Manan* [1971] 1 WLR 859. In that case Lord Denning construed the meaning of words 'ordinarily resident' in the Commonwealth Immigration Acts 1962 and 1968 as meaning 'lawfully ordinarily resident'. In *R v Brent London Borough Council, ex parte Shah* [1983] 2 AC 309 Lord Scarman adopted an approach relying upon the public policy identified above. He said at page 343H:

> *. . . If a man's presence in a particular place or country is unlawful, eg in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence . . . There is, indeed, express provision to this effect in the Act of 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could have been obtained if he had acted lawfully.*

It is that approach which has, in my view, governed the observations, admittedly *obiter*, of the Court of Appeal in a number of cases that local authorities do not owe a duty under legislation dealing with homelessness to illegal entrants and overstayers.

In *R v Hillingdon London Borough Council, ex parte Streeting* [1980] 1 WLR 1425 the court decided that a duty to a homeless person arose even where that homeless person had no local connection. However, Lord Denning MR observed at page 1434C-D:

> *Of course if he is an illegal entrant – if he enters unlawfully without leave – or if he overstays his leave and remains here unlawfully – the housing authority are under no duty whatever to him. Even though he is homeless here – even though he has no home elsewhere – nevertheless he cannot take any advantage of the Acts. As soon as any such illegality appears, the housing authority can turn him down – and report his case to the immigration authorities. This will exclude many foreigners.*

Dunn LJ reached the same conclusion by construing a 'person' as meaning one who is in the United Kingdom lawfully (see page 1439). That there is no need to reach the conclusion that one who is here unlawfully has no right to claim under the homelessness legislation by a process of statutory construction was emphasised by Sir Thomas Bingham MR in *R v Secretary of State for the Environment, ex parte Tower Hamlets London Borough Council* [1993] QB 632. He said at page 643D-E:

> *It is common ground that housing authorities owe no duty to house those, homeless or not, priority need or not, who require leave to enter and illegally enter without any leave. I agree with this view. It would be an affront to common sense if those who steal into the country by unlawful subterfuge were then to be housed at public expense. But what is the legal rationale of this agreed rule? It cannot be derived by any process of construction from the Housing Act 1985 or the Immigration Act 1971. It can only, I think, be the inference, derived from common sense and fortified by the Immigration Rules and* Reg v Hillingdon London Borough Council, Ex parte Streeting *. . ., that Parliament cannot have intended to require housing authorities to house those who enter the country unlawfully.*

However, there are limits to the public policy which prevents unlawful presence being relied upon to secure an advantage.

In *Akinbolu v Hackney London Borough Council* (1996) 29 HLR 259 an overstayer who had secured a tenancy, without questions being asked about his immigration status, could not be evicted on the grounds that he was an illegal overstayer. Public policy did not require, in the context of those provisions of the Housing Act 1985, which are concerned with security of tenure, that occupation be read as lawful occupation (see page 267).

I derive from these authorities guidance as to the approach I should adopt: the issue is not to be resolved by what Lord Wilberforce described in *R v Governor of Pentonville Prison and Another, ex parte Azam* [1974] AC 18 at 63E 'as a dry interpretation of words alone'. The resolution of the issue will depend upon being able to identify a clear public policy in the context of the relevant statutory provisions. I emphasise the need for clarity.

In *R v City of Westminster, ex parte Castelli* (1996) 28 HLR 616 the court was concerned with a worker from the European Union, who had been a person qualified to be in this country as a worker but who had ceased to work, and had not been given leave to remain. He had not been ordered to be removed, and thus he was not a person unlawfully here. He, therefore, had rights under Part II of the Housing Act 1985. Swinton Thomas LJ said at page 632:

> *Whatever the rationale of Lord Denning and Dunn LJ's observations . . . [in* ex parte Streeting*] they must in my opinion be confined to the situation where the immigrant commits a criminal offence by entering or remaining in this country, or at any rate where crime was involved in his entry (such as deception). I cannot with the necessary degree of confidence go further, and say that Parliament could not conceivably have intended that a lawful immigrant from Europe should still be entitled to public housing when he was no longer seeking work here. It may be that Parliament did not intend that, but we cannot be sure; so we should stay with what the statute says.*

That case is also of importance in identifying a category of persons, who, whilst not in this country as a matter of legal right, are not to be regarded as falling within the same category as an illegal overstayer or an illegal entrant, a subject to which I shall return below.

Public Policy or Statutory Provision

Mr Knafler says that there is no room for the application of public policy where Parliament has declined to make any express provision excluding illegal immigrants for the right to claim assistance under section 21. I reject that contention. There is, it is true, no lack of examples of Parliament legislating as to the extent to which immigration status affects statutory entitlement to benefit. Examples are to be found in section 161 and section 185 of the Housing Act 1996, and sections 8 to 11 of and Schedule 1 to the Asylum and Immigration Act 1996. Those provisions merely show, in my view, as Miss Laing submitted, that Parliament has conferred a power on the Secretary of State to make regulations as to who shall be eligible for benefits. Those legislative provisions provide no support for the contention that Parliament wished to abrogate the public policy that a wrongdoer shall not secure an advantage by reliance upon his wrongdoing. They may merely refine that principle in certain statutory contexts. No general principle can be discerned from the observations of the Court of Appeal in *Akinbolu* (QB supra), where, at page 269, they pointed out that Parliament had specifically dealt with security of tenure for asylum seekers, but had not so provided in relation to illegal immigrants. It is not surprising that in that particular circumstance the Court of Appeal commented on the absence of any provision in relation to security of tenure in the case of illegal immigrants.

No assistance can be derived from the Immigration Rules (HC 395), paragraph 41 of which was relied upon by the Council. The Council pointed out that under paragraph 41 it is a requirement of leave to enter as a visitor that an entrant should provide for himself without recourse to public funds. However, 'public funds' are defined in paragraph 6 and there is no reference in that paragraph to section 21 of the 1948 Act. This much can at least be said, that Parliament in the Immigration Rules did not exclude the possibility that one who entered lawfully might have recourse to such assistance in the unforeseen event that he fell within the conditions laid down in section 21. That consideration is of no assistance when considering one who has entered or overstayed in breach of the Rules.

I conclude for these reasons that the task of this court is to identify, if it can, a public policy in the context of section 21, and to consider whether it is of application in this particular case.

The Public Policy and Benefit Legislation

The public policy identified by Miss Laing, on behalf of the Council, is that an Applicant cannot acquire a right to claim assistance under section 21 by the commission of a criminal offence. I accept that there is a principle that a person cannot secure an advantage in reliance upon his own wrongdoing, and that that principle does have application in the context of the National Assistance Act 1948 and the Social Security and Housing Legislation. Such a principle has been expressed in cases to which I have already referred, eg *ex parte Streeting, ex parte Tower Hamlets London Borough Council* and *ex parte Shah*. There is no doubt but that the Applicant committed an offence under section 24(1)(b)(i) of the Immigration Act 1971. He is just within the three-year time limit for prosecution under section 28.

It is suggested, indeed, that if shelter were afforded to this Applicant, the Council would be guilty of harbouring him contrary to section 25, ie by giving him shelter. Mr Knafler asserts that the principle that a person cannot take advantage from his own illegal act has no application where there is no direct connection between the crime and the advantage claimed. Thus a murderer cannot claim benefits under a will or life policy in relation to a murdered spouse; an illegal

A entrant cannot obtain the benefit of ordinary residence acquired illegally (see *In re Manan*, QB, supra). Mr Knafler derives this principle from *St John Shipping Corporation v Joseph Rank Limited* [1957] 1 QB 267. That case was concerned with the refusal to pay freight in respect of the amount of goods by which the freighter had been overloaded. The statute forbidding overloading did not render the con-
B tract illegal. Devlin J said at page 292:

> *The rights which cannot be enforced must be those 'directly resulting' from the crime. That means, I think, that for a right to money or to property to be unenforceable the property or money must be identifiable as something to which, but for the crime, the plaintiff would have had no right or title.*

C

I note that Devlin J used the words 'but for' as connoting a sufficiently direct connection. I do not find assistance in this distinction between an advantage which could not be claimed but for the illegal status of the immigrant and an advantage which is claimed as a direct result of that illegal status. I do not think
D the issue should be resolved by reference to elusive questions of causation. The distinction between a *causa causans* and a *causa sini qua non*, which has troubled the courts in so many fields, is far too uncertain a basis for reaching a conclusion. If the test depended upon a Council showing that the illegal immigrant's status was the direct cause of his claim for assistance, I do not see why he could not
E successfully claim benefits under the homelessness legislation. It is his homelessness which is the direct cause of his need for housing and not his immigration status; yet he would not be claiming the right for accommodation *but* for his status as an illegal immigrant.

In determining whether a person is entitled to claim a statutory benefit the
F correct test to apply is whether he claims the advantage of the benefits in question in reliance upon his own wrongdoing, a test wide enough to cover both descriptions of causation. Illegal entrants and illegal immigrants fall into a different category from asylum seekers. Asylum seekers have no established right to remain, but pending the determination of their claim for status of refugee, they
G cannot be said to be here unlawfully in the same way that an illegal entrant or overstayer could be said to be here unlawfully. They have committed no crime. They cannot be said to have a choice to leave because, since the reality of their fear of persecution has not yet been determined, they may, for all anyone can say, be forced to return to a country where there is a risk of persecution. In the same
H category fall those such as the European national in *Castelli* and those who cannot be required to leave, pending an appeal under section 14(1) of the Immigration Act 1971. An illegal entrant or overstayer has committed a crime, even if he is awaiting a decision as to whether he may have exceptional leave to remain, that is an extra statutory leave. Thus I find no insuperable difficulties in identifying a
I public policy which prohibits such persons from claiming benefits in reliance upon their own wrongdoing.

I turn to explain what I mean by 'reliance upon their own wrongdoing' . An illegal entrant and an illegal overstayer cannot make a claim for assistance, because in so doing they are compelled to rely upon their own wrongdoing. They
J have a choice, whether to stay or to leave. By exercising the choice to remain illegally, they run the risk of destitution or homelessness. However, they can submit to removal or deportation, the cost of which may be borne by those who are made responsible for those costs under the immigration legislation (depending on whether they are illegal entrants or illegal overstayers).

K In the context of section 21, I conclude that an Applicant cannot claim the assistance for which that section provides in reliance upon his own illegal act. To

put it another way, Parliament cannot have intended to confer upon an Applicant the right to make a claim if he does so in reliance upon his own wrongdoing.

The Law of Humanity

However, there is another principle in play, namely the duty of all civilised nations to safeguard life and health. The correlative right to life and health was recognised, unsurprisingly by Collins J in *R v Westminster City Council, ex parte 'A'* (1997) 1 CCLR 69 at pages 29H and 30H of the transcript. It was described as the law of humanity in *R v Inhabitants of Eastbourne* (1803) 4 East 103. That case was concerned with foreigners, to whom no duty was owed under the law, but who were not here unlawfully. Lord Ellenborough CJ said at page 770:

> *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; and those laws were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne.*

That principle finds expression in Articles 2 and 3 of the European Convention on Human Rights and the decision of the European Court of Human Rights in *D v United Kingdom* [1997] 24 EHRR 423. There is no need for reliance upon the Convention or upon the jurisprudence of the European Court of Human Rights to uphold so fundamental a right (see *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1996] 4 All ER 385 at 401E–H.

The decision in the Court of Appeal in *R v Westminster City Council* (1997) 1 CCLR 85 turned upon the correct construction of section 21(1). The status of asylum seekers was not in point, and thus issues as to the law of humanity and public policy did not arise.

In my judgment the Applicant's right to life and, at least a minimum standard of health, overrides the principle that a man may not take advantage of his own wrongdoing. Both may be described as different aspects of public policy, both may be in tension, but I cannot conclude that public policy, in its need to preserve the integrity of the law, demands the penalty of loss of life or serious damage to health. If, as I have concluded, it is public policy which forms the basis of the denial of the right to claim assistance, where a claim is made in reliance upon wrongdoing, so too it is public policy which preserves that right where to deny it will cause loss of life or serious damage to health. That aspect of public policy which requires the law to be upheld can be served by the exercise of the Secretary of State's powers of deportation or removal, as envisaged in *ex parte Castelli* at page 627. I emphasise that the fact that such powers exist is of no avail in the case of an illegal immigrant whose life or health are not seriously threatened in the process of removal. I use the words 'process of removal' because this case is not concerned with cases where it is claimed that health will be damaged or death caused on arrival at a particular destination as in *D v United Kingdom*.

Illegal immigrants have a choice whether to remain and run the risk of hardship by remaining or to leave. This case is concerned with a different situation, namely where it is said that travel will cause that damage or death. In such a case, the Applicant's choice to submit to removal and thus remove himself from the very circumstance which forms the basis of his claim is impeded by the threat of serious damage to his health or risk to his life.

Conclusion

I conclude, for reasons that I have given above, that an illegal overstayer has a right to make a claim under section 21, where he cannot undertake the journey

A out of the United Kingdom without risk to his life or serious injury to his health. The Secretary of State will no doubt carefully consider whether the Applicant is fit to travel and as soon as he is, order his deportation. I note that instruction to immigration officers makes specific provision in relation to cases which command compassion due to AIDS/HIV.

B The Council also has the right to consider whether he is too ill to travel. If they conclude he is not, then they are under no duty to him under section 21. The burden of responsibility for making this decision is not to be batted like a shuttlecock between the Council and the Secretary of State. No doubt a local authority will often wish to liaise with the Secretary of State so that a joint decision could be C reached as soon as possible.

This situation is not likely to occur often. There has been no dispute before me that this Applicant is entitled to treatment as an in-patient in hospital, although the juridical basis remained unexplained before me; it may even stem from the law of humanity. Normally, one who is unfit to travel will be suffering such illness D as requires his treatment as an in-patient, and so this problem will not arise.

The Council's Assessment

I need not dwell at too great a length on the Council's assessment that the Applicant was fit to travel. It is accepted that if I rule, as I have done, in a manner adverse to the Council on the first issue, they will look at the application again E and can do so in the light of the up-to-date information.

The assessment was impugned on the ground that the Council failed adequately to investigate the Applicant's condition. Had it done so, it would have discovered that a doctor had advised that he was not fit to travel and would have appreciated the significance of a CD count of 40; a count of less than 300 causes a F risk of developing serious illness (see Lisa Power's affidavit at page 132). It is suggested that since the Applicant was in hospital and had been given permission for his doctors to be questioned, the Council should have made further inquiries and would have appreciated that travel would damage his health further. That was the crucial question. Absent such a conclusion the Council could properly G conclude that the absence of shelter or accommodation which might exacerbate his illness could be cured by his leaving the country and submitting to deportation.

I do not agree that the Council was at fault in failing to make further inquiries. It is true that there was a reference to advice the Applicant had received that he was H unfit to travel, but since he was represented and medical reports were produced, in my view it was not incumbent upon the Council to search for more in making an assessment under section 47 of the National Health Service and Community Care Act 1990. The decision I have reached will afford an opportunity to consider the effect of the absence of shelter and accommodation on his illness, whilst he is I not fit to travel.

Summary

In summary I conclude that the Applicant was entitled to claim assistance under section 21 on the basis that, notwithstanding that he was an illegal immigrant, his J life or health would be seriously at risk should he undertake the journey out of the United Kingdom. This conclusion provides no warrant whatever for an illegal entrant or an illegal overstayer to make such a claim. Illegal immigrants who are not exposed to the risk of serious damage to health or of loss of life by travel have no entitlement to make such a claim.