Appeal Number: ASA/01/10/0957
NASS Ref Number: 01/05/00686/001
Appellant's Ref Number:
ADDRESS

ASYLUM SUPPORT ADJUDICATORS
Christopher Wren House
113 High Street Croydon CR0 1QG
Telephone: 020 8688 3977
Fax: 020 8688 6075

IMMIGRATION AND ASYLUM ACT 1999
ASYLUM SUPPORT APPEALS (PROCEDURE) RULES 2000

Adjudicator	Mrs Sehba Haroon Storey
Appellant (s)	FK
Respondent	Secretary of State

REASONS STATEMENT

1. This Reasons Statement is made in accordance with Rule 13 of the Asylum Support Appeals (Procedure) Rules 2000 ("the Rules"), and gives reasons for the Adjudication given on Wednesday the 17th day of October 2001 remitting the above mentioned appeal.

2. The appellant, a 55 year old Kosovan, appeals against the decision of the Secretary of State who on 21st September 2001 decided to discontinue support to the appellant.

3. The appellant's notice of appeal was received by the Asylum Support Adjudicators ("ASA") on 9th October 2001 and a copy of the same was faxed to the respondent in accordance with Rule 4(1) of the Rules requiring the latter to produce the Secretary of State's appeal bundle. By response dated 10th October 2001, Mr. James Craker of the Outreach Team advised as follows:

> "The above is a family case which should be withdrawn with immediate effect. Under NASS policy family cases are not terminated but their support withdrawn with the court having no jurisdiction on such cases. The applicant is given an open-ended letter of support, which entitles the applicant to take up our offer of support at a later date, while the dispersal location is on a no choice basis. We would respectfully ask that this matter by treated by the asylum support adjudicator as hereby withdrawn by the Home Office and vacate it from the court's list."

4. A second letter received on the same date stated as follows:

> "The Secretary of State has again decided that this case be withdrawn with immediate effect. You will note that within NASS Policy Bulletin 17 section 2.2, that families who breach their conditions of support without reasonable excuse will no longer have permission to remain in emergency accommodation, however the offer of support in the dispersal area remains open.
>
> This decision is not open to appeal and thus I again stress that the court has no jurisdiction on this case as no termination of support has been served and thus there is nothing to appeal against.
>
> We would respectfully ask that this matter be treated by the asylum support adjudicator as hereby withdrawn by the Home Office and vacated from the court's list."

5. On 12th October 2001 the Secretary of State forwarded a bundle of documents under protest but maintained that the ASA did not have jurisdiction to hear an appeal under Section 103 of the Immigration and Asylum Act 1999 ("the Act") on the decision in question.

6. On 15th October 2001, the appeal was considered and directions issued in accordance with Rule 14 requiring the appellant to furnish further medical evidence and the respondent to submit a full written submission on the issue of jurisdiction, further details of the consideration given to the case, in particular in respect of the appellant's wife's medical condition and a direction to facilitate the appellant's attendance at the hearing.

7. It is the normal practice of the ASA to decide jurisdiction as a preliminary issue at hearings and where jurisdiction is founds, to determine the appeal immediately thereafter. Where jurisdiction is not found, evidence is not taken on the facts and the appellant is advised that the matter can proceed no further.

8. On 16th October 2001 the respondent submitted an unsigned and undated "draft response" by way of submissions on jurisdiction. The respondent stated therein that:

> "We have not made a decision in [the appellant's] case which falls within the terms of Section 103(1) or 103(2) of the Act and, accordingly, an appeal to the ASA may not be brought, and we do not see that directions under Rule 14 of the Procedure Rules may be given.
>
> The Secretary of State has the discretion under Section 98 of the Act to provide temporary support while it is decided whether to provide support under Section 95. In [the appellant's] case we have provided temporary support in the form of emergency accommodation in [London?] until a decision was made that he qualified for Section 95 support and we offered to provide this support in [enter name of dispersal town]. [The appellant]

failed to travel to take up this support without a reasonable excuse. Our approach in such cases, where the household contains a dependant minor, is that we keep open our offer of Section 95 support in a dispersal area whilst requiring the family to leave their emergency accommodation five working days after notification. This offer of dispersal support is still open to [the appellant] and family and should he indicate that he wishes to take up this support then arrangements will accordingly be made for him and his family. NASS has not made a decision which falls within the terms of Section 103(1) or 103(2) of the Act and it is therefore not possible for an appeal to be brought to the ASA.

In these cases where it is not possible to bring an appeal to the ASA, we do not issue an appeal bundle under Regulation 4(2) of the Procedure Rules. Rather our approach is to provide sufficient documentation for the ASA to determine whether or not an appeal may be brought under Section 103 of the Act. Notwithstanding this, in the case of [the appellant] and family we decided to issue a bundle without prejudice to our position that we do not consider that the ASA [has] jurisdiction to hear an appeal on the decision in question...

Given that we do not consider that the ASA have any jurisdiction to hear an appeal in this case, we do not consider that you can make directions under Regulation 14 of the Asylum Support Appeals (Procedure) Rules 2000. Accordingly, please note that we do not intend to comply with the other requests made in your letter of 15th October 2001.

The Secretary of State may pay any reasonable travelling expenses incurred by an appellant in connection with attendance at any place for the purposes of an appeal under Section 103 of the Act. Given that we do no consider that an appeal to the ASA may be brought in this case we are not prepared to provide the costs of travel for [the appellant] to attend the ASA offices."

9. At the hearing before me the appellant appeared in person and was assisted through the interpretation of Mr E Merovci in the Albanian language. The respondent was not represented and a telephone call to the Presenting Officer's unit confirmed that they had received specific instructions from NASS not to attend the hearing.

10. In *R v Immigration Appeal Tribunal, ex parte Lokko* [1990] IMM AR539, the Queen's Bench Division confirmed the decision of the Immigration Appeal Tribunal that a court or tribunal has the power to decide its own jurisdiction and in particular to decide whether an appeal lies before them. A right of appeal depends upon the relevant statutory provisions and the lodging of a notice of appeal but it is for the tribunal in question to determine whether or not it has jurisdiction to hear the appeal, not the Secretary of State. This principle was subsequently confirmed in the case of *Akhuemonkhan* (14461) 10th January 1997, a case which also concerned the Immigration Appellate Authorities.

11. Accordingly, the Secretary of State in attempting to have this matter "withdrawn" without consideration of whether there is jurisdiction to hear the appeal in full, is patently wrong.

12. Having satisfied myself that I have the power to determine whether I have jurisdiction to hear this appeal, I decided to proceed in the absence of the respondent and in accordance with Rule 9 of the Procedure Rules.

13. Section 103 of the Immigration and Asylum Act 1999 states as follows:

> "(1) If, on an application for support under Section 95, the Secretary of State decides that the applicant does not qualify for support under that section, the applicant may appeal to an adjudicator.
>
> (2) If the Secretary of State decides to stop providing support for a person under section 95 before that support would otherwise have come to an end, that person may appeal to an adjudicator."

14. I am satisfied that on an ordinary meaning of the above statutory provisions, it is the stopping of the support which generates a right of appeal and not whether the Secretary of State decides to confirm that discontinuance in writing. It is apparent from the few documents the Secretary of State has considered appropriate to submit for consideration, that a letter was sent to the appellant on 4th September 2001, advising him that the Secretary of State had decided that he qualified for accommodation and essential living needs support under Section 95, and that he was to be provided with vouchers and accommodation in a dispersal area. The appellant tells me and I accept that following this letter, he did indeed receive approximately £500 in vouchers from the respondent.

15. I have also seen a letter from Daniel Jeffery, Housing Allocation Team, to the appellant in the following terms:

> "Regarding support termination
>
> We have been informed by NASS of the Home Office that your support has been terminated.
>
> Your current accommodation will be cancelled on 19th September 2001. We are also writing to your current landlord to instruct them to cancel your accommodation.
>
> Please return to Refugee Council offices or approach, Citizens Advice Bureau or Legal Advice Centre for further information and advice."

16. On any normal meaning of the words contained in that letter, it is apparent that the Secretary of State has decided to stop providing support to the appellant. I further take into the account the appellant's own evidence that he has since this date ceased to receive vouchers from the respondent. Notwithstanding therefore that the offer of accommodation in the dispersal area may remain open to the

appellant and his family, the fact remains that having awarded subsistence support to the appellant, that support is no longer available to him.

17. Furthermore, I am reminded that Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with a convention right. Article 6 of the European Convention on Human Rights states that in the determination of his civil rights and obligations...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

18. Had the appellant not had a minor dependant within his family, he would have been issued with a discontinuance notice upon failure to travel against which he would have had a right of appeal. His reasons for failing to travel would then have been considered by an asylum support adjudicator and the appellant would have had an opportunity to demonstrate whether he had reasonable excuse for such failure. In particular, he would have been able to raise his right to respect for family life, his wish to remain in the London area near his two adult sons and to request the court to consider whether it was right and proper for his sick wife to be made to disperse away from London.

19. However, because the appellant has a minor dependant, he is made subject to NASS Policy Bulletin 17, the practical effect of which is to deprive him of subsistence support and a right of appeal which would enable an independent and impartial tribunal to determine whether his refusal to disperse was reasonable. I am satisfied that the application of NASS Policy Bulletin 17 constitutes a breach of the appellant's Article 6 rights, in that the document seeks to deny him a fair a public hearing to determine whether he had reasonable excuse for his failure to travel.

20. Accordingly, I am satisfied that the Secretary of State has decided to stop providing support to the appellant within the meaning of Section 103(2) of the Act and that accordingly, an appeal does lie to the ASA and I am empowered to hear that appeal.

21. The Secretary of State having been served with a notice of hearing and being fully conversant with the ASA procedures, I consider it proper to proceed to hear the full substantive case notwithstanding that the respondent is not present.

22. Having decided that I have jurisdiction to hear this appeal, I now proceed to consider the facts of this case and to consider whether the appellant has failed to travel without reasonable excuse as stated in the appellant's draft response.

23. The appellant informs me that he came to the United Kingdom on 20th April 2001 accompanied by his wife and minor dependant. He was provided with emergency accommodation in London. He has two adult sons born in 1971/2 and 1982, both of whom are asylum seekers resident in London having been provided with local authority accommodation. The elder son is engaged to be married to another asylum seeker who presently resides with the appellant and his family.

24. The appellant informs me that his wife suffers from ill health and requires constant attention. He produced medical evidence from the Royal Hospital of St Bartholomew, Newham General Hospital, The Star Lane Medical Centre and The Medical Foundation for the Victims of Torture by way of supportive evidence. These documents state that the appellant's wife suffers from severe osteo-arthritis of her hip joints for which she is awaiting orthopaedic treatment at Newham General Hospital, gastritis and duodinitis for which she is awaiting a gastro enterological appointment at Newham General Hospital and, in addition, she suffers from depression for which she is receiving treatment and awaiting a psychiatric outpatient appointment. The general practitioner, Dr Smith, states that she is "a very ill person and not in a fit state to travel". The letter from Newham General Hospital confirms an appointment on 7th November 2001 in the orthopaedic clinic. The letter from the Royal Hospital of St Bartholomew dated 11th October 2001 confirms that she is a patient in the neurology department and is continuing to have further investigations and further follow-up appointments. The letter from The Medical Foundation states that the patient requires hip replacement and is in constant pain.

25. As a result of his wife's medical condition, the appellant states that his wife requires twenty four hour attention which he provides to the best of his ability. He states that there is much that he is unable to do for her and, for this reason, his son's fiancee lives with them and provides additional care for his wife. His two adult sons share the responsibility of taking their mother to her various hospital appointments and to see her general practitioner on a regular basis. This is because neither he nor his wife speak any English and the doctors have refused to see them unless they are accompanied by an interpreter. In addition, he tells me that as he is looking after his wife, he is unable to do the shopping and again his sons assist him with this. His sons, he said, are with him during the day and return to their flat only to sleep.

26. I also heard evidence from the appellant's son who confirmed that his mother is virtually unable to walk as a result of her ill health and has found it extremely difficult coping with life on a third floor flat. He states that a complaint was made to the respondent as a result of which his mother and family were moved to the second floor. As, however, she is virtually unable to walk, he tells me and, I accept, that he and his father regularly have to carry her from the room down the stairs to a waiting taxi whenever she needs to attend an appointment. She has not left her flat at all, other than to attend hospital and doctor appointments. Both he and the appellant state that without the additional physical and moral support of the two adult sons, the appellant would simply not be able to cope with caring for his wife nor would he be able to ensure that she attends her appointments regularly and is understood by the doctors providing the treatment.

27. I have before me a letter dated 1st October 2001 written by the respondent to the appellant refusing his request to consider a change in the accommodation offered on medical grounds. The letter states:

"The health matter was referred to our medical adviser, Dr John Keen, who after much consideration, recommends dispersal to any location is reasonable".

28. In the course of the directions issued on 15th October 2001, the respondent was asked to provide full details of the consideration given by Dr Keen to the appellant's wife's state of health, to include the evidence considered, whether a medical examination took place, the findings of fact and conclusion reached. He was also asked what enquiries if any had been conducted to ascertain the availability of suitable medical treatment in the dispersal area, within a reasonable period, to enable the appellant's wife to continue to receive her current level of treatment for her medical conditions. Furthermore, the Secretary of State was asked whether consideration was given by him to the appellant's request to be housed near his two sons in London and the applicability of NASS Policy Bulletins 30 and 31 to the circumstances of this case.

29. These are the directions to which the Secretary of State refers in his draft response where he indicates that "[W]e do not intend to comply with the other requests made in your letter of 15th October 2001" in addition to failing to provide travel costs to the appellant to facilitate his attendance at the hearing.

30. Policy Bulletin 30 deals with the merits of dispersing asylum seekers to an area different to a family member. It states "...As a general rule an asylum seeker would have to demonstrate that there exists close personal ties between themselves and their relative, before a decision could be made to place him/her in a particular area simply because that family member lives there".

31. Policy Bulletin 31, paragraph 4, deals with the issue of family ties and the applicability of Article 8 of the European Convention on Human Rights to asylum seekers wishing to be allocated accommodation near or with relatives or friends. Paragraph 4.3 states "An asylum seeker may request to be allocated accommodation in London or the south east because they have a relative there. A person's individual circumstances and the nature of the relationship with that relative should always be carefully taken into account. But in the absence of exceptional circumstances dispersal will generally be appropriate". Paragraph 4.5 alerts caseworkers to be mindful of exceptional circumstances of individual cases where it might be appropriate to depart from general guidelines and direct that such cases should be referred to HEO level and be accompanied by a written proposal".

32. The object of Policy Bulletins 30 and 31 is to ensure the compatibility of primary and subordinate legislation with the Human Rights Act 1998. It is for this reason that notwithstanding the requirements of Section 97 which requires that in the exercise of his powers under Section 95 to provide accommodation, the Secretary of State may not have regard to any preference of the supported person or his dependants (if any) to the locality in which the accommodation is to be provided, Policy Bulletins 30 and 31 direct caseworkers to consider whether the decision to disperse is compatible with the Human Rights Act 1998 and, in particular, that they should have regard to Article 8 of the Convention and consider the exception

circumstances of individual cases in deciding whether dispersal outside of London is appropriate. Such consideration would need to be carried out at the outset and in this case, should have been conducted before a decision was taken to disperse the appellant to Middlesborough. I have seen no evidence to suggest that any consideration was in fact given and, in the circumstances, I find that this remains outstanding before the Secretary of State.

33. On the basis of the respondent's draft response that the appellant has failed to travel without reasonable excuse, it would appear that reference is being made to Regulations 19 and 20 of the Asylum Support Regulations 2000 ("the Regulations").

34. Regulation 19(1) of the Regulations states that when deciding:

> (a) whether to provide, or to continue to provide, asylum support for any person or persons, ...
>
> the Secretary of State may take into account the extent to which any relevant condition has been complied with.

35. Regulation 20(1) of the Regulations states that asylum support for a supported person and his dependants (if any) or for one or more dependants of a supported person, may be suspended or discontinued, if –

> (a) the Secretary of State has reasonable grounds to suspect that the supported person or any dependant of his has failed without reasonable excuse to comply with any condition subject to which the asylum support is provided;

36. I have given careful consideration to all the evidence before me including medical reports submitted by the appellant, the oral evidence of the appellant and his son and the Secretary of State's incomplete bundle and draft submissions.

37. The burden is upon the Secretary of State to establish on a balance of probabilities that a relevant condition has not been complied with. Once established, and I find that the appellant did breach a condition of support by failing to travel when required to do so, the burden of proof shifts to the appellant to demonstrate reasonable excuse for his breach. The standard of proof is again that of a balance of probabilities.

38. I have no hesitation in stating that this is a case meriting exceptional compassionate consideration in the light of the particular circumstances of this case. The appellant's wife is sick and frail. The cumulative effect of her various medical conditions is such that the appellant's wife is virtually incapable of walking and caring for herself without the assistance of the appellant and their sons. In addition, I am satisfied that were the appellant and his dependants to be dispersed outside of London, they would require substantial and comprehensive social services support at considerable cost to the public purse. Whilst I accept that the appellant's wife may be able to receive medical treatment for her conditions in other parts of the UK, she may not be be allocated appointments for

some time. This is a matter upon which the Secretary of State needs to make further enquiries. I am, however, satisfied that the appellant and his wife will not receive the high quality personal, practical and emotional support they receive and require daily in London, and which is presently provided free of charge by their sons, from any other source.

39. I am satisfied that the appellant has demonstrated a very close personal tie between him, his wife and his sons which is both personal and emotional. Applying the relevant law as above stated to the appellant's exceptional compassionate circumstances, I am satisfied that the appellant does have reasonable excuse for failing to travel as arranged. In addition, I am satisfied that to disperse the appellant and his dependants away from their extensive and close family network in London may amount to an interference with their right to private and family life. I am satisfied that such interference is not in accordance with the law applying the principles of *Secretary of State v Abdi [1996] IMM AR 148 (CA)*. Whilst I am satisfied that the Secretary of State's dispersal policy pursues a legitimate aim, Policy Bulletin 17 does not. I find that in the case of the appellant, the decision to disperse him away from his family in London is neither necessary nor proportionate.

40. Furthermore, I am satisfied that the respondent is in breach of Article 6 in that Policy Bulletin 17 seeks to deny appellants with families a fair and public hearing before an independent and impartial tribunal.

41. On the totality of the evidence before me, I am satisfied on a balance of probabilities that the Secretary of State has not acted in accordance with the law. There are numerous matters, which have not been considered and accordingly, I remit the appeal to enable full consideration to be given to all outstanding matters referred to herein.

Signed ..... Date .....
Chief Asylum Support Adjudicator