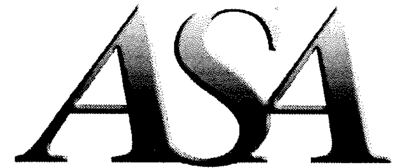
Appeal Number: ASA/05/03/9119
NASS Ref. Number: 04/02/02129
Appellant's Ref. Number:
ADDRESS:



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)	MH
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 furnishes reasons for the Adjudication given on Wednesday the 23rd day of March 2005 dismissing the above mentioned appeal.

2. The appellant, a 23 year old, claimed national of Iran, appeals against the certificate of the Secretary of State dated 16 February 2005 discontinuing support to the appellant under paragraph 7(A)(1)(ii) of Schedule 3 (the Schedule) to the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) as amended by Section 9 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act), on the grounds that the Secretary of State is satisfied the appellant has failed without reasonable excuse to take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily.

3. At the hearing before me, the appellant appeared in person without representation. The respondent was represented by Ms Leatherland. The appellant gave his evidence in Sorani through the interpretation of Mr Dara, an independent interpreter appointed by the Asylum Support Adjudicators (the ASA).

4. It is not disputed that the appellant arrived in the United Kingdom by lorry from Turkey on 13 February 2004 and claimed asylum in Croydon together with K, a 14 years-old minor, claiming to be his cousin. K was said to have arrived on a different lorry also from Turkey and whilst both claimed asylum in Croydon at the same time, they did so independently of each other.

5. The appellant and K were then accommodated together by Croydon Social Services apparently upon K's insistence and they have continued to be

accommodated together since that date. So far as I am able to establish, no checks have ever been carried out by either NASS or Croydon Social Services to establish whether K and the appellant were related as claimed.

6. Whilst the appellant's claim for asylum was rejected on 13 April 2004 and his appeal against that decision was dismissed by an Adjudicator on 24 June 2004, K was granted full refugee status on 10 March 2004. A letter of the same date was issued to him informing him of the success of his application. I do not know why he was granted refugee status within one month of his claim without, apparently, any investigations being carried out into the basis of his claim. Nor have I been advised why he continues to be supported under provisions designed for those who have no lawful entitlement to remain in the United Kingdom when by rights he is a person with full refugee status and entitled to be supported as such. The appellant however did not seek leave to appeal to the Immigration Appeal Tribunal.

7. On 1 December 2004, the appellant was contacted by letter and advised that he and his family no longer had any basis upon which to remain in the United Kingdom and must make immediate arrangements to leave. He was advised to apply for passports if he was not already in possession of valid travel documents. He was further advised that the Immigration Service may be able to assist him with any necessary arrangements or alternatively he may wish to approach the International Organization for Migration to apply for assistance in returning home.

8. The appellant was made aware that by virtue of paragraph 7(A) of the Schedule, he and his family would be ineligible for asylum support if the Secretary of State certified that in his opinion, he had failed without reasonable excuse, to take reasonable steps to leave the United Kingdom voluntarily, or to place himself in a position in which he was able to leave the United Kingdom voluntarily. He was advised that the Secretary of State is not however prevented from providing or continuing to provide asylum support if it is necessary to do so to avoid a breach of a person's rights under the European Convention on Human Rights (ECHR).

9. The appellant was warned that if he did not make immediate arrangements to leave the United Kingdom, and his case was certified, his support could be terminated and he and his family could be evicted from their accommodation. He was reminded that in those circumstances a person (other than a child) covered by Schedule 3 would also be ineligible for support by a local authority and that the only circumstance in which a local authority would be able to accommodate the appellant and his family together was if this was necessary to avoid a breach of a person's ECHR rights.

10. The Secretary of State also reminded the appellant that under Section 35 of the 2004 Act, a person who fails to take steps to obtain a travel document with a view to facilitating their removal from the United Kingdom, when required to do so by the Secretary of State, may be guilty of a criminal offence and if found guilty of this offence may be liable to up to two years

imprisonment and/or a fine. The appellant was invited to make contact should he require any further information.

11. At the hearing before me, the appellant confirmed that he had received the letter of 1 December 2004 but had not made any attempt to act upon the instructions contained therein.

12. A letter in similar terms was written to the appellant on 22 December 2004. It invited him to attend an interview with the Immigration Services on Thursday 6 January 2005 to discuss his arrangements for leaving the United Kingdom. The appellant was advised that if he was unable to attend the interview he should make contact on the telephone number provided. He was also advised that if he failed to attend without reasonable excuse this could result in certification of his case. The appellant was issued with appropriate warnings as per the letter of 1 December 2004 and in particular, he was warned that he may be committing a criminal offence if he fails to take specific action to document himself with a view to facilitating his removal from the United Kingdom.

13. The appellant confirmed in his evidence that he had received this letter also but that he did not attend the interview as arranged. Asked why he had failed to attend, the appellant said that he had not been well that day and had not been able to make contact on the telephone number provided either. He claimed that he had attended the following day in compliance with his reporting conditions and advised the Immigration Officer that he was unwilling to return to Iran where he feared his life was in danger.

14. On 17 January 2005, the appellant was sent a third letter advising him that in the opinion of the Secretary of State, he had failed, without reasonable excuse, to place himself in a position in which he is able to leave the United Kingdom voluntarily. He was asked to make contact within seven days of the date of the letter if he disagreed with this finding.

15. At the hearing before me, the appellant confirmed that he had received all three letters, but despite his failure to act upon them, he asked me to accept that he had nevertheless taken their contents seriously. He repeated his earlier claim that he did not take any action to document himself because he feared that his life was in danger were he to return to Iran. He further added that he could not leave K alone in the United Kingdom and that K was so distressed at the prospect of the appellant's return to Iran that he was willing to return there with him. This argument had not been advanced by him previously at either his asylum appeal before the Immigration Adjudicator or in his grounds of appeal in the present case.

16. During cross examination, it was put to the appellant that according to K, he had a brother-in-law living in the United Kingdom who had accompanied him to the Home Office Screening Unit on 13 February 2004. Ms Leatherland produced a note from K's Immigration file recording his various references to his brother-in-law. The appellant denied that K had a brother-in-law in the United Kingdom but confirmed that all other details provided by K at his screening appointment and recorded on his file were true.

17. The appellant was questioned about his relationship to K whom he claimed was the son of his mother's real sister. Despite this, however, the appellant admitted he did not know the name of the village in which K had resided in Iran and that he had never visited K or his family during the 22 years he lived in his own country.

18. I have given careful consideration to all the evidence that is before me including all documents contained in the Secretary of State's bundle of evidence, copy file notes produced by the Presenting Officer at the hearing and the oral testimony of the appellant himself.

19. I do not find the appellant a credible witness and I have serious concerns as to whether he is related as claimed to K, now a 15 years old boy who has been accepted as his dependent for support purposes and with whom he has been permitted to reside since 13 February 2004, without any checks being carried out into the claimed relationship. Furthermore, I do not accept as credible that the appellant could be K's first cousin given the absence of any contact between them during K's lifetime prior to their arrival in the United Kingdom, his lack of knowledge of K's place of origin and his failure to identify and name K's close relatives.

20. Where termination of support is justified on the grounds of a failure to comply with the reasonable requirements of the Secretary of State that a failed asylum seeker take reasonable steps to either leave the United Kingdom voluntarily or place himself and his dependants in a position in which he is able to leave the United Kingdom voluntarily, the burden of proof is upon the Secretary of State to establish that failure. The standard of proof is that of the balance of probabilities. Once proved, the burden shifts to the appellant to demonstrate reasonable excuse for such failure. The standard of proof is again that of the balance of probabilities.

21. Paragraph 1 of the Schedule states *inter alia* that a person to whom this paragraph applies shall not be eligible for support or assistance under a provision of the Immigration and Asylum Act 1999 (the 1999 Act) or a provision of the 2002 Act.

22. Paragraph 7(A) as amended renders ineligible for support a fifth class of person namely the failed asylum-seeker with family, and states as follows:

> "7A (1) Paragraph 1 applies to a person if –
>
> (a) he –
>
> (i) is treated as an asylum-seeker for the purposes of Part VI of the Immigration and Asylum Act 1999 (c. 33) (support) by virtue only of section 94(3A) (failed asylum-seeker with dependent child), or
>
> (ii) is treated as an asylum-seeker for the purposes of Part 2 of this Act by virtue only of section 18(2),

(b) the Secretary of State has certified that in his opinion the person has failed without reasonable excuse to take reasonable steps –
   (i) to leave the United Kingdom voluntarily, or
   (ii) to place himself in a position in which he is able to leave the United Kingdom voluntarily,

(c) the person has received a copy of the Secretary of State's certificate, and

(d) the period of 14 days, beginning with the date on which the person receives the copy of the certificate, has elapsed".

23. Paragraph 3 of the Schedule however states:

"Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that its exercise or performance is necessary for the purpose of avoiding a breach of –

(a) a person's Convention rights, or
(b) a person's rights under the Community Treaties."

24. I have before me a copy of the respondent's decision letter dated 16 February 2005. It is not disputed that the appellant is a person who is treated as an asylum seeker solely by virtue of his being a failed asylum seeker with a dependant child under 18. It is also not disputed that his case has been certified under paragraph 7A(1)(b)(ii) above, that he has received a copy of the Secretary of State's certificate and that the period of 14 days, beginning with the date on which the person receives the copy of the certificate, has elapsed.

25. The Secretary of State's decision letter and certificate deals adequately with both Articles 3 and 8 of the ECHR and concludes that neither the appellant's nor K's Convention rights are likely to be breached by the decision to withdraw support from them as a family. I am therefore satisfied that the respondent has given consideration to Paragraph 3 of the Schedule.

26. Furthermore, I have no hesitation in finding that the Secretary of State has proved that the appellant has failed without reasonable excuse to take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily. The appellant's asylum appeal has been dismissed by an Immigration Adjudicator, who did not accept that there is any reasonable likelihood that the appellant has a well founded fear of persecution in Iran. Nor did she accept that he would be at risk of persecution or that his human rights would be violated when he returned there. The appellant did not seek to challenge these findings before the competent authority. They are binding upon me and I accept them.

27. On the basis of the same, I am satisfied that the appellant has not demonstrated reasonable excuse for his failure to take reasonable steps to document himself as required by the Secretary of State. Indeed the appellant offered no excuse for his failure save to repeatedly assert his unwillingness

to return to Iran. I am satisfied that the appellant has no basis in law upon which he can remain in the United Kingdom and the respondent is entitled to require him to leave the country.

28. As required by Paragraph 3 of the Schedule, I must consider whether the Secretary of State is under a duty to continue the provision of asylum support to the extent that this is necessary to avoid a breach of the appellant's and/or his dependant's rights under the ECHR. In doing so, I am limited to considering only the impact of the decision on the appellant and K whilst they remain in the United Kingdom without the benefit of asylum support and not the consequences of the appellant having to return to Iran.

29. In *SSHD v Limbuela, Tesema and Adam [2004] EWCA Civ 540,* Lord Justice Laws distinguished between (a) breaches of Article 3 which consist in violence by State servants, and (b) breaches which consist in acts or omissions by the State which expose the claimant to suffering inflicted by third parties or by circumstances. He argued that a breach falling under (a) is absolutely forbidden but a decision under (b) where it is made in the exercise of lawful policy, which may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision, is lawful 'unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the State's right to implement the policy on Article 3 grounds'. He continued that 'a person is not degraded....if his misfortune is no more – and of course, no less – than to be exposed to suffering (not violence) by the application of legitimate government policy'.

30. On the facts and evidence before me, I am satisfied that the decision of the Secretary of State to withdraw support from the appellant was made in the exercise of lawful government policy likely to expose the appellant and K to a degree of suffering which falls short of the severity described in *Pretty v UK 35 EHRR 1.* I am therefore satisfied that their Article 3 rights have not been breached.

31. I have also considered whether there is a likelihood of a breach of the appellant's Article 8 Convention rights and K's Article 8 Convention rights, insofar as they can be argued to adversely impact upon the appellant. In doing so, I have based my own analysis on the questions needing to be addressed in order to properly decide on Article 8, as set out by Lord Bingham in *R-v- SSHD ex parte Razgar [2004] UKHL 27.* Lord Bingham framed his questions so as to fit the context of immigration decisions. In adopting his framework of analysis, I have made modifications in order to fit the different context of asylum support decisions.

32. The questions that need to be addressed in asylum support appeals are:

> (1) Will the proposed withdrawal of support be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

33. In certain cases, the first matter to be addressed under question (1) will be whether there is any protected right under Article 8, that is to say whether there is an extent family or private life. There may be cases where there is no family life relationship within the meaning of Article 8, for example in the case of a parent and an adult son or daughter whose relationship has no special features over and above normal emotional ties. The focus under Article 8 is on the factual content to claimed family relationships.

34. In the case of this appellant however, I am satisfied, by virtue of the fact that he and K have shared the same accommodation since February 2004, that there is some factual content between them albeit I do not find it to have the degree of substance and quality claimed for it by the appellant. That is principally because of his failure to demonstrate knowledge about K commensurate with his own claimed relationship as cousin.

35. In relation to question (1) therefore, I am conscious of the fact that one of the likely consequences of a decision under Paragraph 7A of the Schedule, may be that the child of the family is accommodated by the local authority under Section 20 of the Children Act or taken into care under Section 31. A family in this position is not eligible for local authority support under Section 17 of the Children Act or Section 21 of the National Assistance Act 1948. The only circumstance in which a local authority would be able to accommodate the family together would be if this was necessary to avoid a breach of a person's ECHR rights. (This does not apply to the appellant in this case because K should have been supported by the local authority since being granted refugee status).

36. Whilst this is a matter entirely for the discretion of the local authority, it is not beyond the bounds of possibility that a local authority may decline to accommodate the adults of the family on the grounds that whilst taking a child into care inevitably engages Article 8 of the Convention, such a decision may be justified under Article 8(2) as necessary to protect the rights of others, namely the child. In cases such as this, it is the act or omission of the appellant that places the child in a position where they are at risk of being deprived of shelter and sustenance.

37. *In Johansen v Norway (1996) 23 EHRR 33*, the European Court laid down the following guiding principles to be followed in all care proceedings:

(i) taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit;

(ii) any measures taken to implement a decision to place a child in temporary care should be consistent with the ultimate aim of reuniting the natural parent and child;

(iii) therefore a fair balance must be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child;

(iv) when assessing whether a fair balance has been struck, particular importance attaches to the best interests of the child which, depending on their nature and seriousness, may override those of the parent;

(v) in particular, a parent cannot be entitled under Article 8 to have measures taken that would harm the child's health and development.

38. In principle therefore, an appellant who retains a right of access to and contact with a child, even where the child is placed in care, who is permitted to make regular visits and is consulted about the child's future, would in my opinion have some difficulty arguing that their Article 8 rights had been violated. This is particularly so, given that support for the family could be reinstated upon the appellant taking steps to place himself in a position in which he is able to leave the United Kingdom voluntarily. If he fails to do so, he cannot plead the protection of Article 8 anymore than Mr O'Rourke was able to in the Strasbourg case of *O'Rourke v United Kingdom (Application No 39022/97)* for failing to take advantage of a night shelter and temporary accommodation, electing instead to remain homeless and on the streets over a period of 14 months.

39. Returning therefore to question (1) of paragraph 32, if the local authority elect not to accommodate the appellant and the child on the grounds that any interference with their Article 8 rights is justified, the withdrawal of support by NASS will be an interference with the exercise of the appellant's right to respect for his family life namely to live as one family unit.

40. Progressing on to question (2), I do not accept, on the fact of this case that the consequences for the appellant of such interference are of such gravity as potentially to engage the operation of Article 8. In other cases, they may well do and where the conduct attains a minimum level of severity so as to engage the operation of the Convention as stated in *Costello-Roberts v United Kingdom (1993) 19 EHRR 112*, it is arguable that the consequences may engage Article 8. This will however depend on the facts of individual cases and is more likely to arise where there are very young children and infants in the family unit or where there are issue of mental/physical health.

41. With regards to questions (3) and (4) of paragraph 32 in relation to the present appeal, if I am wrong and Article 8 is engaged, I am satisfied that the decision is nevertheless in accordance with the law. I am also satisfied that the decision is necessary in a democratic society in the interests of an effective and legitimate policy of immigration control, the economic well-being of the country and for the protection of the rights and freedoms of others.

42. In the words of Lord Bingham, "the answering of question (5)...... must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment..."

43. I remind myself that but for the appellant's wilful refusal to place himself in a position in which he is able to leave the United Kingdom voluntarily, he and K would continue to be entitled to receive asylum support until such time as the appellant either left the country or K reached 18, whichever occurs the sooner. The respondent is entitled to require the appellant to take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily. He, unlike K, no longer has any basis to remain here. In doing so, I find that the decision of the Secretary of State is proportionate.

44. I am therefore satisfied that neither the appellant's nor K's Article 8 rights have been breached by the decision under appeal. This is because the appellant could have avoided the discontinuance of support by cooperating with the Immigration Services until his eventual departure to Iran. I do not accept that his departure would in any way infringe K's human rights because he has failed to satisfy me that K does not have an adult male relative in the United Kingdom who could provide him with care in place of the appellant. I can see no good reason why K would have said that such a person exists and had accompanied him to the screening interview unless it were true. Furthermore, K has been granted full refugee status in the United Kingdom and the rights and benefits that attach thereto. If, as asserted by the appellant, K is willing to return to Iran with the appellant rather than be separated from him, he is free to do so if he so wishes.

45. I have gone on to consider the guidance of the Court of Appeal in the case of *R v Kensington and Chelsea ex parte Kujtim [1999] 2 CCLR 340*, a case on Section 21 of the National Assistance Act 1948 which is of persuasive authority in this jurisdiction. I find that by failing to act upon 3 letters sent to him by the respondent and acknowledged to have been received by him, the appellant has demonstrated a persistent and unequivocal refusal to comply with the respondent's reasonable requirements.

46. The question of whether the appellant is liable to prosecution under Section 35 of the 2004 Act for failure to cooperate with removal procedures is not a matter for me to determine.

47. Accordingly, I uphold the Secretary of State's certificate and dismiss the appeal.

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