FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

Address:

2nd Floor
Anchorage House
2 Clove Crescent
London
E14 2BE

Telephone: 020 7538 6171
Fax: 020 7538 6200
Appeal Number AS/11/03/26412/JH
UKBA Ref.
Appellant's Ref.

IMMIGRATION AND ASYLUM ACT 1999
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Tribunal Judge	Sehba Haroon Storey
Appellant	MM
Respondent	Secretary of State

STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (the Rules), and gives reasons for the decision given on Monday the 11th day of April 2011, dismissing the above mentioned appeal.

2. The appellant, a citizen of New Zealand, stated as born on 1 October 1960, appeals against the decision of the respondent who, on 8 March 2011, refused to provide her with accommodation under Section 4(1)(a) of the Immigration and Asylum Act 1999 (s4(1)(a)) on the grounds that she has not demonstrated any exceptional or compelling circumstances that requires the Secretary of State to exercise her discretion to provide her with support.

3. In her Notice of Appeal, the appellant requests a determination on the papers. I have considered her request with reference to rule 27 of the Rules and I am satisfied that within the particular circumstances of this case, an oral hearing is not necessary for the appeal to be disposed of justly. Accordingly, I proceed to determine this appeal under rule 27(2).

The Facts

4. This is the appellant's second appeal, her first appeal under reference AS/11/02/26112 having been determined on 4 March 2011 and remitted to the Secretary of State for further reconsideration. For ease of reference, I shall refer to the decision in AS/11/02/26112 as the 'first decision'. The current appeal is in relation to a subsequent application for s4(1)(a) accommodation.

5. The facts of this case and the history of the care proceedings in respect of the appellant's daughter are set out in detail in the first decision. I do not therefore propose to rehearse them here.

6. In relation to the appellant's immigration status in the UK, I accept that she has been granted temporary admission to remain pending the outcome of the care proceedings. Otherwise, she is an overstayer and does not have any current leave or outstanding application for leave to remain in the UK before the Secretary of State.

7. As regards the care proceedings, I have been provided with the order of the Newcastle Upon Tyne County Court dated 3 March 2011. I note that the case has been listed for review on 18 May 2011 and a final hearing is scheduled to take place on the first available date after 29 August 2011. The appellant currently enjoys one hour of supervised access with her daughter twice weekly.

The Appellant's Case

8. The appellant's claim for s4(1)(a) accommodation is predicated on the following:-

   (a) She is destitute and requires s4(1)(a) accommodation in order to avoid a breach of her human rights under the European Convention on Human rights (ECHR). She accepts in principle that the test of destitution required to be satisfied under s4(2) of the Immigration and Asylum Act 1999 should also apply to decisions made by the respondent in relation to applications for accommodation under s4(1)(a).

   (b) She owns a vehicle which has now been sold for £1,100. She awaits receipt of the cheque from her friend. The appellant's debts exceed the sale proceeds of the car.

   (c) She does not own a property in New Zealand. She has a one-seventh share in her deceased father's estate which includes an industrial property along with commercial debt. The property has not been sold to date. As at 23 March 2011, the appellant's share was worth in the region of $87,086 (roughly equivalent to £41,468).

   (d) She is currently supported by Newcastle City Council in the exercise of its powers under Section 2 of the Local Government Act 2000 (s2 LGA 2000) in order to avoid a breach of the appellant's human rights. The support is said to be temporary pending the outcome of this appeal.

   (e) S4(1)(a) support is necessary in order to comply with section 55 of the Borders, Citizenship and Immigration Act 2009 (s55 BCIA 2009) in particular to safeguard and promote the welfare of her child. Failure to provide support under s4(1)(a) interferes with her and her child's family life, contrary to Article 8 of the ECHR.

   (f) But for the temporary emergency accommodation provided by the local authority, she is at risk of street homelessness which would amount to inhuman and degrading treatment contrary to Article 3 of the ECHR.

The Respondent's Case

9. The respondent's refusal to award the appellant support under s4(1)(a) is based upon the following:

   (i) The appellant has overstayed her lawful leave to remain in the UK. She currently has no outstanding applications before the Secretary of State and has no legal basis upon which to remain in the UK.

   (ii) Paragraph 7 of Schedule 3 to the Nationality Immigration and Asylum Act 2002 (the 2002 Act) provides that persons who are in the United Kingdom in breach of immigration laws and who are not asylum seekers are not eligible for support under the 1999 Act unless it is necessary to avoid a breach of their ECHR rights.

   (iii) There is currently no published policy regarding the Secretary of State's powers to exercise her discretion to provide support under s4(1)(a). Her written submissions state, however, that she is reviewing her powers with the intention of publishing her policy decision shortly but is able to say at this stage that, in keeping with her previous practice, she will only exercise her discretion to support individuals under s4(1)(a) in exceptional and compelling circumstances. This is dependent on the particular facts of the case but as a general rule, a claimant may demonstrate compelling circumstances where they have no other form of support available to them and where support is necessary to avoid a breach of the respondent's ECHR obligations. One consideration will be the availability of other forms of support.

   (iv) The Secretary of State notes the availability of aftercare services under Section 117 of the Mental Health Act 1983 (s117 MHA 1983) and the duty contained therein to provide such services to patients detained under Section 3 following their release. It is submitted that a duty to provide support supersedes the application of a power.

   (v) As regards s55 BCIA 2009, it is submitted that the refusal to provide support will not disproportionately affect the relationship between mother and daughter.

The Legislative Framework

10. S4(1)(a) (as amended by section 49 the Nationality, Immigration and Asylum Act 2002 and section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) provides:-

Accommodation for persons on temporary admission or release

'(1) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –

(a) temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 to the 1971 Act;
(b) released from detention under that paragraph; or
(c) released on bail from detention under any provision of the immigration Acts.

11. In so far as is relevant, s55 BCIA 2009 provides the following:-

'(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom; and
(b) (not relevant).

(2) The functions referred to in sub-section (1) are –

(a) any function of the SSHD in relation to Immigration, Asylum or Nationality;
(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) ...(not relevant)'

12. In so far as is relevant, s117 MHA 1983 (as amended) provides as follows:

(1) This section applies to persons who are detained under section 3 above .....and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.

(2) It shall be the duty of the Primary Care Trust or Local Health Board and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Primary Care Trust or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a community patient while he remains such a patient.

13. Insofar as it is relevant, s2 LGA 2000 provides the following:

Promotion of well-being

(1) Every local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects—
(a) the promotion or improvement of the economic well-being of their area,
(b) the promotion or improvement of the social well-being of their area, and
(c) the promotion or improvement of the environmental well-being of their area.

(2) The power under subsection (1) may be exercised in relation to or for the benefit of—
(a) the whole or any part of a local authority's area, or
(b) all or any persons resident or present in a local authority's area.

(3) In determining whether or how to exercise the power under subsection (1), a local authority must have regard to their strategy under section 4.

(4) The power under subsection (1) includes power for a local authority to—

(a) incur expenditure,
(b) **give financial assistance to any person**,
(c) enter into arrangements or agreements with any person,
(d) co-operate with, or facilitate or co-ordinate the activities of, any person,
(e) exercise on behalf of any person any functions of that person, and
(f) **provide** staff, goods, services or **accommodation to any person**.

(5) The power under subsection (1) includes power for a local authority to do anything in relation to, or for the benefit of, any person or area situated outside their area if they consider that it is likely to achieve any one or more of the objects in that subsection.

(6) Nothing in subsection (4) or (5) affects the generality of the power under subsection (1).

Discussion

14. I am grateful to both parties for their detailed submissions in this case. I am now far better placed to make an informed decision than I was in the first decision. Whilst I remain of the view that the respondent needs to publish the criteria she applies when deciding whether to exercise her discretion to provide support under s4(1)(a), I am encouraged that she is considering publishing her policy position shortly as it is undesirable to have appellants being bounced back and forward between the UKBA and the tribunal. Had I not been in a position to determine this appeal on the issue of destitution alone, I would have had no option but to remit the appeal again for the reasons given in the first decision. Given however, that the appeal fails on destitution for the reasons stated below, it will not be necessary for me to consider whether the Secretary of State has exercised her discretion in accordance with law.

Destitution

15. In contrast to the appellant's first appeal, it is now conceded on the appellant's behalf that the requirement to prove destitution should be a qualifying condition for entitlement under s4(1)(a). The Secretary of State has also indicated that the destitution test applies to s4(1)(a) applications as it does to applications by failed asylum seekers under s4(2). This view is supported by the judgment of the then Lord Phillips MR sitting in the Court of Appeal in *R(K) v London Borough of Lambeth* [2003] EWCA Civ 1150 and referred to in the first decision. I am therefore satisfied that the requirement to prove destitution is a qualifying condition for applications under s4(1)(a). As such, before I consider whether the appellant's circumstances warrant the grant of section 4 accommodation, I must first accept that she is destitute.

16. In respect of the sale proceeds of the appellant's car, I accept that these are insufficient to pay off her accrued debts and that this sum should not therefore be taken into account in deciding the issue of destitution.

17. The availability of assets in New Zealand, however, is a different matter. The appellant's representatives now submit that there appears to be some confusion in respect of her financial situation and that her only asset in New Zealand is the one-seventh share in her late father's estate which is not realisable. That is not, however, what was said to the respondent in the letter of 26 May 2009 seeking leave to remain outside the Immigration Rules. This is

referred to in paragraph 6 of the respondent's refusal letter of 26 January 2010 in the following terms:

> "You have stated in your letter dated 26 May 2009 that you had intended buying a property in a 'more suitable' part of New Zealand, but that you could only sell ***one of your properties*** which meant that you could not relocate". (My emphasis).

18. I can see no reason why the appellant would have disclosed this information to the respondent unless it was true. On the basis of this voluntary disclosure, I find as fact that the appellant owns more than one property in New Zealand and that at least one of these is capable of being sold or possibly rented to tenants in order to raise adequate funds for her support in the UK.

19. Even if that is not the case, I take the view that the appellant is entitled to receive aftercare services, free of charge, from her Primary Care Trust or Local Health Board or Local Authority pursuant to s117 MHA 1983.

20. The appellant's representatives submit that s117 MHA 1983 does not require the relevant authority to provide former section 3 patients with aftercare services unless these are necessary in order to meet an assessed need that arises from a person's mental health condition: see (*R (Mawanza) –v- London Borough of Greenwich and London Borough of Bromley* [2010] EWHC 1462 paragraph 62). They take the view (based upon the comment of the hospital manager in the appellant's discharge notes) that save for her belief in respect of UV light, "there was no other evidence of mental illness".

21. There is a great deal of conflicting evidence concerning the appellant's mental health in the documents before me. I have seen the documented record of the appellant's discharge referred to in paragraph 21 above and note the comment to which I have been referred. The same notes also record that the appellant continues to suffer from a mental disorder; that she wished to be discharged from the section and that after reading the reports and listening to the professionals "the Panel felt there was insufficient evidence to warrant detention under Sec 3. Therefore the Section is discharged." Furthermore, as recently as 4th November 2010, it was said by the appellant's representatives in a letter to the respondent that she is "suffering from mental health problems". There are also repeated references in submissions and correspondence to the appellant's mental illness in particular, her continuing belief that UV light is seriously detrimental to her health and that of her daughter.

22. On the evidence before me, (which includes submissions from the appellant's representatives in this and the previous appeal) I am satisfied that the appellant is suffering from ongoing mental health problems and that she was discharged at her request because of "insufficient evidence to warrant detention". Her need for aftercare services cannot in my opinion be disregarded, at any rate until an assessment of her needs has been conducted. As stated by Hickinbottom J in *Mawanza* at paragraph 6, although s117 MHA 1983 aftercare services are triggered by discharge from section 3 detention, the duty to provide aftercare services is a continuing one (*R v Ealing District Health Authority ex parte Fox* [1993] 3 All ER 170) - and it does not cease until both the relevant Primary Care Trust and social services department (or anyone through whom they might exercise their statutory functions) conclude that such services are no longer required. There is no evidence before me to suggest that the relevant Primary Care Trust and social services department have even been approached to provide the appellant with aftercare services, let alone a conclusion having been reached that such services are not required.

23. Finally, even if I am wrong about the appellant's resources in New Zealand and the availability of s117 MHA 1983 aftercare services, I note that she is currently in receipt of support provided by Newcastle City Council pursuant to s2 LGA 2000 under 'promotion of well-being'. This is confirmed in a letter dated 25 March 2011 from RM, Senior Solicitor of Newcastle City Council to the appellant's solicitor in the current proceedings and states:

> " I confirm that your client was considered at FAS Panel on Friday 18 March 2011. Panel recommended that the emergency support currently provided for [the appellant] should continue to prevent a potential breach of human rights in respect of both your client and her daughter pending the outcome of her appeal against the refusal to grant s.4 support.
>
> I would reiterate that this temporary support is a holding position whilst your client pursues her appeal, whereupon it will be reviewed. I would therefore be obliged if you would keep me informed as to the progress of that appeal."

24. In the light of the stated temporary nature of the available support, the appellant's representatives argue that it would be inappropriate for the respondent to seek to rely upon such availability in order to suggest that the appellant's human rights, and those of her daughter, will not be interfered with if support is withheld.

25. However, also enclosed in the appellant's bundle of further evidence is an email dated 21 March 2011 also from RM, the author of the above letter, to the solicitor acting for the appellant. Interestingly, this has a very different angle and states:

> " As you are aware, your client was considered at FAS Panel on Friday 18 March 2011. Panel recommended that existing support for [the appellant] should continue whilst the care proceedings for [the daughter] are ongoing to avoid a potential breach of human rights in respect of both your client and her daughter.
>
> The only mechanism for such support is under [s2 LGA 2000], via the Local Authority's 'well-being power'. This 'well-being power' can only be exercised in wholly exceptional circumstances and in accordance with the Local Authority's Strategy under S4 LGA. Panel's recommendation for ongoing support under s2 therefore requires ratification by the Director of Adult & Cultural Services. I do not anticipate any problems in this regard, and will confirm to you as soon as I receive the Director's decision."

26. I do not seek to comment upon the glaring difference between the private correspondence exchanged between the appellant's solicitor and the local authority solicitor. Nor do I propose to draw any inference from the fact that one appears to have been written for the benefit of the Tribunal. Suffice to say that I am satisfied that the email of 21 March 2011 represents the true position of the Newcastle City Council, namely that the appellant will continue to receive support under the 'promotion of well-being' provisions of s2 LGA 2000 until the conclusion of the care proceedings, when the matter can be reviewed further by them. This information was not disclosed to me in the previous proceedings.

27. It is worth noting that the decision to take the appellant's daughter into care was taken by the local authority, a party to the care proceedings. But for this decision, the appellant would have no reason for continuing to remain unlawfully in the UK. In the circumstances, it would seem appropriate for the local authority to bear the responsibility for providing the appellant with such support as she may require whilst she remains in the UK on temporary admission, in order to avoid any potential breach of her ECHR rights.

28. The appellant's representatives will no doubt have brought to the appellant's attention that the powers of the local authority under s2 LGA 2000 appear to be considerably wider and more generous than the powers of the Secretary of State under s4(1)(a). Unlike the latter, which consists of full board accommodation on a no choice basis with no provision for financial assistance, the local authority are empowered by s2 LGA 2000 aforesaid to "do anything" which they consider is likely to achieve the social well-being of any person resident in their area, including the provision of financial assistance, goods, services, accommodation and the power to incur expenditure.

29. In the circumstances, I am satisfied that the appellant is currently adequately supported by Newcastle City Council and further that there are no plans for the provision of s2 LGA 2000 services to end until the care proceedings are finally concluded. As the appellant has an alternative form of support available to her, I conclude that she is not entitled to the provision of support under section 4(1)(a) because she does not satisfy the destitution criteria.

Signed Sehba Haroon Storey
Tribunal Judge, Asylum Support

Dated 11 April 2011

SIGNED ON THE ORIGINAL **[Appellant's Copy]**