FIRST-TIER TRIBUNAL ASYLUM SUPPORT

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Appeal Number AS/12/07/28619
UKBA Ref. 10/09/01388/004
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	SS
Respondent	Secretary of State for the Home Department

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 procedure rules) and gives reasons for the decision made on Monday 6 August 2012 to remit the appeal and require the Secretary of State (SSHD) to reconsider the matter.

2. The appellant, a citizen of Afghanistan, stated as born on 7 January 1986, appeals against the decision of the respondent who, on 26 June 2012, refused to provide her with accommodation under section 4(1) of the Immigration and Asylum Act 1999 (the 1999 Act) on the grounds that she has not demonstrated any exceptional or compelling circumstances that require the SSHD to exercise her discretion to provide the appellant with support under this provision.

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 procedure 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).

Background

4. On behalf of the appellant, it is said that she arrived in the United Kingdom (UK) in September 2010 and claimed asylum in Croydon shortly thereafter. She was initially provided with section 95 support and dispersed to Newcastle where she remained until the final determination of her asylum claim. It is said that she became appeal rights exhausted in or around April 2011.

5. Thereafter, it is said that the appellant lived at various temporary addresses in Newcastle, Leeds and London. Sometime around May 2012 she became street homeless and approached a police officer at Kings Cross station for help. The appellant was detained and remained in custody for approximately 3 days during the course of which she was seen by an Immigration Officer and a doctor. It is said that her mental health deteriorated during this period and she attempted to kill herself and was placed on level IV observation.

6. On 5 May 2012 the appellant was formally issued with notice that she was to be detained under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002. The notice was signed by an Immigration Officer.

7. On 8 May 2012 the appellant was seen and discharged by a nurse. A note of her 'relevant medical history' on the discharge records suggests that the appellant was or had been suffering from insomnia and gastritis. The appellant's release from detention was said to have been negotiated by her immigration solicitors, following which the appellant was granted temporary admission to the UK by the SSHD on condition that she reside at an address in Newcastle. This address was the same address at which the appellant had previously been accommodated by the SSHD.

8. Upon arrival and production of her IS96, it is said that she was given access to the flat. The following day, however, the appellant was informed by a housing officer of Newcastle City Council that the property was owned and managed by the Council and no longer used for the provision of asylum support. The appellant was given three days in which to leave the property and on the third day she was removed and the locks changed.

9. For reasons that are not made clear in the representative's submission, neither the appellant nor those advising her appear to have made any attempt to contact the respondent to seek alternative UKBA accommodation. Instead, she approached various charities for assistance including the Red Cross who provided her with some financial support and eventually paid for bed and breakfast accommodation in Newcastle on a temporary emergency basis.

10. On 10 May 2012 the North of England Refugee Service submitted a fresh application for support under section 4(1)(b) because the appellant was a person already having been released from detention and granted temporary admission to the UK. The application was made on a form used to access section 4(1)(c) support, namely by persons seeking release from detention on immigration bail. The appellant states that it was necessary to use this form because there is no other form available for applications under section 4(1)(b). Whatever the intention may have been, the application stated that the appellant "would like to be provided with S4 support as a bail address".

11. On 11 May 2012, the respondent refused the said application stating simply that the appellant was not entitled to Section 4 support on the grounds that she had been released on temporary admission on 8 May 2012 and therefore her section 4(1)(c) application "is no longer being assessed".

12. The appellant appealed to this Tribunal and her appeal was dismissed on 23 May 2012. Unfortunately, the Judge seized of the appeal did not have before him a detailed submission sent by the appellant's representatives together with supporting documentation. As such, on 30 May 2012 the tribunal set aside the decision of 23 May 2012 for procedural irregularity. New directions were issued to both parties requesting information and documentation and the case was listed for determination on the papers on or after 8 June 2012.

13. In the intervening period, the appellant's representatives submitted a further application for section 4 support dated 1 June 2012. This application was again on the form designed for those seeking a bail address under section 4(1)(c) but on this occasion, the application could not have been clearer in setting out the basis of the application, namely that it was made pursuant to section 4(1)(b).

14. Unfortunately, for reasons which are not clear, the appeal was determined by the Judge in question one day earlier than intended, and remitted to the SSHD for further consideration. The Judge accepted on the strength of the documents before him that the appellant was destitute and that she had applied for support under section 4(1)(b), albeit on a form intended for applications under section 4(1)(c) and that this had not been fully considered by the SSHD. He further instructed the appellant to provide the SSHD with more evidence to satisfy the exceptional and compelling test.

15. On 26 June 2012 the respondent made her decision which is the subject of this appeal. This letter states the following:-

> *"...You made an application for support under section 4 of the Immigration and Asylum Act 1999 (the 1999 Act) this was refused and following an appeal was remitted to the UKBA to reconsider on 7 June 2012.*
>
> *The decision has been taken* ***to reconsider the application under section 4(1)(a)*** *of the Immigration and Asylum Act 1999.* (My emphasis)
>
> *After careful consideration I have made a decision on behalf of the Secretary of State that you are not entitled to section 4 support.*
>
> *You are refused* ***section 4(1)(a) support*** *on 26 June 2012 for the following reason:*
>
> *You have not demonstrated any exceptional or compelling circumstances that requires the Secretary of State to exercise her discretion to provide you with support under section 4(1)(a) of the 1999 Act.*
>
> *Section 4(1)(a) of the 1999 Act enables the Secretary of State to provide accommodation facilities to persons temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 of the 1971 Act. The Secretary of State has the power to provide support under section 4(1)(a) but she does not have a duty to exercise this power and she does not routinely do so.*
>
> *The Secretary of State will exercise her discretion to support individuals under section 4(1)(a) in exceptional and compelling circumstances. There is no precise definition of what amounts to exceptional and compelling circumstances as such a decision is dependant on the particular facts of the case being considered. However as a rule of thumb, 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 their ECHR obligations. It is however exceptional that such a case will arise given the availability of other forms of support for vulnerable applicants and the fact those who have been granted Temporary Admission have no immigration status, are liable to removal and can generally avoid a breach of their rights by returning home. It is the claimant's responsibility to return home and not the*

Secretary of State's responsibility to support those who choose to remain in the UK illegally.

As a matter of policy the Secretary of State does not provide support under section 4(1)(a) of the Immigration and Asylum Act 1999 to asylum seekers or failed asylum seekers. *Support can be provided to eligible asylum seekers under sections 98 and 95 of the 1999 Act whilst their claim remains outstanding. Failed asylum seekers, who have exhausted all rights of appeal, can also claim limited support in the form of accommodation and essential living needs under section 4(2) of the 1999 Act. Both these forms of support are subject to a destitution test. Support may also be provided under section 4(1)(c) of the 1999 Act to those released on bail from immigration detention.*

In addition to the above, you could avoid becoming destitute by returning to Afghanistan where you could enjoy access to all your ECHR rights without interference.

You are a national of Afghanistan who currently has no outstanding applications for leave to remain in the UK and thereby have no legal basis on which to stay. It is open to you to take the necessary steps to leave the UK voluntarily, by for example, registering for Assisted Voluntary Return for Irregular Migrants (AVRIM) programme, managed by Refugee Action: Choices". (Emphasis added).

The appellant's case

16. The appellant's application dated 10 May 2012 was made on a form headed "Application for a Bail Address and Support" under section 4(1)(c) of the Immigration and Asylum Act 1999. Nothing in that application suggests otherwise. Thus although UKBA should have been aware that the appellant was on temporary admission and that she had been issued with accommodation following a release from detention, the application did not make it clear that support was being sought under any other provision.

17. The application for support dated 1 June 2012 was made on the same form as previously but on this occasion, the appellant's representatives deleted the reference to section 4(1)(c) and inserted section 4(1)(b) in its place. In order to ensure that there was no misunderstanding of the basis of the application, the representatives enclosed a supporting letter in which they said:-

"Our client's initial application for support was submitted on the form used to apply for accommodation and support under section 4(1)(c) IAA 1999, to those on immigration bail. Nevertheless.. [the] intention was for the UKBA to also consider her support under section 4(1)(b) of the 1999 Act under which they are empowered to provide support to those released from detention and granted temporary admission to the UK, as is the case here. The application was submitted on the form utilised for bail applications because the UKBA have not published any separate form to be used for applications under section 4(1)(b). Our client's advisers cannot be criticised for using the wrong form where the correct form does not exist.

On reflection it is acknowledged that no mention of the prior section was included on the application form and accordingly the UKBA are not at

fault for making a decision solely based on the client's eligibility for section 4(1)(c)".

18. The appellant's representatives then provided detailed reasons in support of their client's claim for section 4(1)(b) support. In essence, they argued that their client's circumstances were exceptional and compelling. They referred to the fact that the appellant had been detained under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002 from which she was released on temporary admission to what was believed to be UKBA accommodation. She was provided with transport to this address and was entitled to expect in the circumstances that adequate accommodation had been provided.

The respondent's case

19. For reasons that are not stated in the SSHD's refusal letter of 26 June 2012, the decision refers solely to refusal of support under section 4(1)(a) of the 1999 Act. There is no mention – not even an acknowledgment – that the appellant has applied for support under section 4(1)(b).

20. On 16 July 2012, this tribunal received a response to further directions from the SSHD. That response once again, addressed the circumstances in which the SSHD will exercise her discretion to support individuals under section 4(1)(a); section 4(2) and section 4(1)(c) of the 1999 Act. At no stage during the course of this lengthy response is any reference made to the fact that the support application was made pursuant to section 4(1)(b). Indeed, the copy application attached to the response is the application of 10 May 2012 and not the application dated 1 June 2012.

The legislative framework

21. Section 4 of the 1999 Act (as amended) by Section 49 of 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.

Failed asylum-seeker

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if –

(a) he was (but is no longer) an asylum-seeker, and
(b) his claim for asylum was rejected.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2).

(4) ....

(5) The Secretary of State may make Regulations specifying criteria to be used in determining –

(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.'

22. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (the 2005 Regulations), which came into force on 31 March 2005, lays down the criteria to be followed in respect of failed asylum-seekers and their dependants and provides:

'(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-

(a) that he appears to the Secretary of State to be destitute, and
(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.

(2) Those conditions are that-

......'

23. Section 103 of the 1999 Act provides a right of appeal to the First-Tier Tribunal (Asylum Support). So far as is relevant, this states:

'(1) ...(not relevant);

(2a) If the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to the First-Tier Tribunal.

(3) On an appeal under this section, the First-Tier Tribunal may –

(a) require the Secretary of State to reconsider the matter;
(b) substitute its decision for the decision appealed against; or
(c) dismiss the appeal.'

Discussion

24. In my judgment, the decision of the SSHD is wrong on a number of counts.

25. Firstly, applicants seeking asylum support under any of the provisions of the 1999 Act or any subsequent legislation are entitled to be informed of the method of application and the criteria to be applied in assessing the merits of applications. They are also entitled to receive a decision on their application explaining why it has been granted or refused. In *Secretary of State for Work and Pensions v Elmi* [2011] EWCA Civ 1403, a case concerning article 7(3)(c) of the Citizens Directive *2004/38/EC*, the Court of Appeal criticised the Secretary of State for Work and

Pensions for requiring EU workers to register for Income Support without putting in place a proper and lawful system of making and monitoring such applications. Moses LJ held at [26], that "...a lawful system requires the obligations of legal certainty to be satisfied".

26. That certainty is plainly missing from consideration of applications for support under sections 4(1)(a) and (b). Parliament has legislated for the provision of support for persons temporarily admitted to the UK and those released from detention, both on bail and without. However, whilst there is an open and transparent published policy in place setting out the criteria for the grant of section 4(1)(c) support to those released on bail from immigration detention, there is no published criteria available to assist applicants wishing to apply under sections 4(1)(a) or (b). The letter of refusal appear to suggest that there is an unpublished policy relating to applications under section 4(1)(a), namely that the SSHD "does not provide" such support to asylum seekers and failed asylum seekers.

27. In *R v Secretary of State for Education and Employment Ex Parte Begbie* [1999] 1 EWCA Civ 2100, Sedley LJ set out a number of guiding principles for dealing with the application of government policies. Of relevance to this decision, is his warning against a policy being treated by its custodians as a set of rules and his recommendation advocating the use of factual reasons for either agreeing or declining to depart from a policy so as to guard against arbitrariness, inconsistency and rigidity in application. In particular, he held at [92] that:

> "there are today cogent objections to the operation of undisclosed policies affecting individual entitlements or expectations. It is right and proper that a policy...be published...The necessary consequence and indeed purpose of publication is that people will, where appropriate, rely upon it."

28. In a case determined by me in April 2011, concerning section 4(1)(a) support (AS/11/03/26412/JH), it was conceded by the SSHD that there was no published policy regarding her power to exercise discretion when providing support under the said provision. I was given an assurance that the SSHD was reviewing her power and intended of publish her policy decision "shortly". I accepted that assurance. Some 16 months later, however, publication of that policy is still awaited.

29. Secondly, an appellant is entitled to a decision on the application made by them and not, as has occurred in this case, on the application the SSHD believes to have been made. On the information before me, I am satisfied that the appellant always intended to apply under section 4(1)(b), albeit that the application of 10 May 2012 did not make this entirely clear. Had the SSHD introduced an appropriate application form, the appellant could be criticised for not making use of it. However, as none exists, I accept that the comment contained in the 10 May 2012 application that she had been unable to access the accommodation allocated to her by the SSHD was sufficient to indicate the basis of the application being made.

30. Thirdly, I ask myself whether the SSHD acted fairly and reasonably in refusing to grant the appellant section 4 accommodation when alerted to the fact that accommodation allocated to her a matter of days before the application of 10 May 2012 was not available to the SSHD for that purpose and from which the appellant was forcibly removed by Newcastle City Council.

31. In *Begbie*, Gibson LJ accepted as correct the submission that:

"(i) the rule that a public authority should not defeat a person's legitimate expectation is an aspect of the rule that it must act fairly and reasonably;
(ii) the rule operates in the field of substantive as well as procedural rights;
(iii) the categories of unfairness are not closed;
(iv) the making of an unambiguous and unqualified representation is a sufficient, but not necessary, trigger of the duty to act fairly;
(v) it is not necessary for a person to have changed his position as a result of such representations for an obligation to fulfil a legitimate expectation to subsist; the principle of good administration prima facie requires adherence by public authorities to their promises."

The Decision

32. I have given careful consideration to all the evidence before me and I make the following findings of fact:

1) The appellant is a failed asylum seeker who has exhausted her appeal rights;
2) Normally, she would only qualify for support under section 4(2) of the 1999 Act and Regulation 3 of the 2005 Regulations;
3) The appellant was detained under powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002;
4) She was released from detention on temporary admission under section 4(1)(b) and given her particular set of circumstances, allocated accommodation in Newcastle by UKBA;
5) She was evicted from that address because (so it transpired) the SSHD did not have authority to allocate the said accommodation to the appellant;
6) The appellant relied upon the assurance given by the SSHD that the accommodation in Newcastle was available to her and she suffered a detriment resulting from the SSHD's failure to honour her promise;
7) The appellant is destitute and currently relying upon the generosity of charitable organisation who have offered her temporary assistance;
8) The appellant's applications of 10 May 2012 whilst intended as an application for support under section 4(1)(b) lacked clarity and the appellant accepts that the SSHD cannot be criticised for refusing it;
9) The application of 1 June 2012 was clear and unambiguous in stating that it was made under section 4(1)(b); and
10) That application remains outstanding.

33. Accordingly, this appeal is being remitted to enable the SSHD to issue the appellant with a decision on her outstanding application. In the event that accommodation is refused, the appellant will have a fresh right of appeal to the FTT-AS.

Signed: Dated: 6 August 2012

Sehba Haroon Storey
Principal Judge, Asylum Support