SHS/28780

FIRST-TIER TRIBUNAL
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Appeal Number AS/12/08/28780/SK
UKBA Ref. 10/09/01388
Appellant's Ref.

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

Tribunal Judge	Mrs Sehba Haroon Storey
Appellant	MS SS
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, and gives reasons for the decision given on Wednesday the 26th day of September 2012 substituting my own decision for the decision of the Secretary of State for the Home Department (SSHD).

2. The appellant, a national of Afghanistan stated as born on 7th January 1986, appeals against the decision of the Secretary of State who on 9th August 2012 decided to refuse her application for support on the grounds that she has not demonstrated any exceptional or compelling circumstances that require the SSHD to exercise her discretion to provide her with support under Section 4(1)(b) of the Immigration and Asylum Act 1999 ("the 1999 Act").

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).

4. The appellant's appeal against a previous related decision was determined by me on 6th August 2012 and remitted to the SSHD for reasons set out in that determination. I attach below a copy of that judgment marked Appendix 1 to avoid repetition of the earlier background.

The decision of the SSHD

5. Following my remittal, the appellant's application for s.4(1)(b) accommodation was reconsidered and refused. In addition to the summary of the reasons set out in paragraph 2 above, it is said on behalf of the SSHD that:

    a) Failed asylum seekers who are appeal rights exhausted can claim limited support in the form of accommodation and essential living needs under s.4(2) of the 1999 Act, subject to the destitution test;

    b) Support may also be provided under s.4(1)(c) of the 1999 Act to those released on bail from immigration detention;

    c) In considering whether to exercise discretion in the appellant's particular case, it is noted that she does not meet "any of the conditions set out under s.4(2) of the 1999 Act";

    d) If discretion were given to her case, she would be "placed in a preferential position to other failed asylum seekers being considered for s.4 support. It would not be appropriate to take any such action";

    e) The appellant does not have a legitimate expectation that she would be granted support in this case. At no point during the relevant period did the UKBA issue a letter to her informing her that support had been granted under a provision of the 1999 Act;

    f) The issue of an IS.96 is in no way an indication that support has been or will be granted to a failed asylum seeker or anyone else;

    g) As there was no longer a reason to detain her, she was temporarily released to an address previously known to her;

    h) As a failed asylum seeker, it is open to the appellant to avoid becoming destitute by returning voluntarily to Afghanistan.

6. In response to directions, the respondent made the following additional submissions:

    > " ...The [SSHD] has not published any guidance as to processing applications under 4(1)(b). This indicates that Parliament's intention was that failed asylum seekers would be considered under the 4(2) regulations and the existence of 4(1)(b) was for use by the [SSHD] under her discretion. Given the nature of "exceptional and compelling circumstances" it may be that a published policy may be difficult as an exceptional case may require consideration above and beyond that which can be considered and set out in writing.
    >
    > Although we note the observations of the tribunal judge about the lack of a published policy this in itself does not make the applicant eligible for support. The reasons for refusal were clear.

> The applicant has not provided any evidence that she fits any of the criteria of section 4(2). Her pre action protocol has been answered and although her representative indicates an intention to place a judicial review this has not yet taken place and there is no evidence that any [application] made for judicial review would be accepted to be considered. Furthermore the applicant's representative argues that applications under 4(1)(b) should not be judged by the criteria of 4(2). As the applicant has applied under section 4(1)(b) and not 4(2) she should not be granted support under 4(2) as she has not requested it."

The appellant's case

7. The appellant's position remains unchanged. I have received lengthy further submissions from those representing the appellant. The majority of the points made emphasise previous submissions. The following, however, are matters central to their case namely that:

    I. The SSHD has purported to give a basis for the exercise of her discretion in relation to both s.4(1)(a) and (b), which is that an applicant must demonstrate "exceptional or compelling circumstances" but this alone cannot comprise a lawful policy without further explanation of how the terms is defined.

    II. The SSHD's decision letter reveals that she has not in any event considered "exceptional or compelling circumstances" but has refused support on the basis that the appellant does not meet "any of the conditions set out under section 4(2) of the 1999 Act" and that "if discretion was given in [the appellant's] case, [she] would be placed in a preferential position to other failed asylum seekers being considered of Section 4 support".

    III. The appellant should not have been released from detention, and granted temporary admission (TA) unless the UK Border Agency was satisfied that she had an address. The purpose of s.4(1)(b) is precisely to enable the SSHD to arrange for the provision of accommodation for this class of people (those whom the UK Border Agency have decided to release from detention on TA) where they do not have an address to go to.

    IV. UKBA did not exercise their discretion to grant the appellant support under section 4(1)(b) because they (wrongly) believed that the appellant had an address to go to. Had they properly investigated the accommodation position, and considered the issue of support, they would have been bound to provide support under section 4(1)(b) when releasing the appellant from detention.

UKBA policy on release from detention on TA

8. UKBA policy on Bail and TA is recorded in various Border Force Operations Manuals. A Manual entitled "Bail, Including Chief Immigration Officer's Bail" ((the Bail Manual) dated November 2011, records in section 1 the commitment given by Ministers that detention will only be used as a

last resort and the presumption that TA/release will be granted whenever possible. It further notes however, that there will be occasions when this is not considered appropriate.

9. Section 1 of the TA Manual dated November 2011, states that paragraph 21 of Schedule 2 to the 1971 Act gives an immigration officer authority to temporarily admit any person to the UK who is liable to be detained under paragraph 16 of the same Schedule. TA may be given:

   - pending the completion of examination;
   - pending the implementation of removal directions;
   - pending the resolution of any outstanding appeal.

10. Section 1 also states that the immigration officer may at any time decide to resume detention, e.g. if the person fails to observe place of residence, employment or reporting restrictions.

11. Section 3 of the TA Manual provides guidance on the granting of TA and the notification of conditions, such as the place of residence, employment and reporting to a Border Force officer. Officers are instructed (section 1.1) to record the grant of TA and any conditions on form IS.96. Before granting TA, the Immigration Officer must ensure that the person has been examined as thoroughly as possible and an appropriate risk assessment has been conducted. The following factors "should always be taken into account" during the risk assessment:

   - Criminal History
   - History of Violence
   - Confirmed Address
   - Medical History
   - Risk to the public
   - Evidence that the sponsor or address have a record of criminal offending that may put the passenger or the public at risk
   - Evidence of previous failure to comply with TA
   - For minors – the relationship to and suitability of the sponsor and accommodation.

12. Furthermore, the TA manual states that in all cases the details of the risk assessment undertaken and the full reasons for either granting or denying TA must be clearly recorded on the TA/ Detention-Risk Assessment Pro-forma along with the decision. In addition the officer's signature, printed name, date and the time of each decision or activity should be recorded legibly on the port file.

13. Where a person fails to comply with conditions attached to their TA, section 4 of the TA Manual states that consideration should be given to the resumption of detention. Similarly, should a person fail to report at the end of an authorised period of TA or when required for removal, the Border Force officer should consider detention unless there are very compelling reasons which would warrant a warning.

The grant of TA to the appellant

14. I do not have available to me the written record of risk assessment conducted on behalf of the SSHD that led to the appellant being given TA on 8 May 2012. Nor have I been told what is recorded on the appellant's file. In the light of the clear instructions given in the TA Manual, I can only deduce that a risk assessment was carried out and the availability or otherwise of accommodation to the appellant will have been one of the primary considerations.

15. The appellant has consistently stated that in May 2012 she was street homeless. It is for this reason she says, that she spent 3 days in a police cell because she had nowhere else to go. She could not therefore have suggested to the official granting her TA that the address in Newcastle, to which she was released, and at which she was obliged to reside as a condition of her TA, was available to her. She maintains that the accommodation was allocated to her by UKBA and arrangements were made for her to travel to Newcastle.

Discussion

16. The legislative framework is set out in appendix 1. Section 4(1) confers on the SSHD a power to provide accommodation (not a duty) to 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.

17. Under s.4(2) the SSHD has power to provide accommodation to a person who is a failed asylum-seeker. The SSHD has made regulations under s.4(5) specifying the circumstances in which accommodation can be provided to a failed asylum seeker if the person concerned appears to the SSHD to be destitute.

18. The SSHD has not made regulations specifying the circumstances in which accommodation may be provided to persons falling under the three categories of s.4(1). Nor have any conditions been imposed on the provision of accommodation to such persons. She has, however, published a policy document entitled "Section 4 Bail Accommodation" which sets out some, but not all, criteria for the grant of s.4(1)(c) bail accommodation.

19. In *Razai & others v. SSHD* [2010] EWHC 3151 (Admin), a case concerning bail accommodation under s.4(1)(c), Mr Johnson for the SSHD, did not challenge the proposition that there was a duty on the SSHD to use reasonable endeavours to provide a bail address if the person concerned was otherwise likely to remain in detention.

20. On the evidence before me, I am satisfied that on or around 5 May 2012, the appellant was street homeless and she approached a police officer for assistance. For no other reason than because she had no bed for the night, she was transferred to the police station where she remained for 3 days. She was then seen by an immigration officer who arranged for her to be transferred to Yarl's Wood detention centre. On 8 May 2012 she was issued with an IS.96 and released on TA subject to a condition of

residence at the address in Newcastle specified on the IS.96 and reporting to UKBA Reporting Centre in North Shields. She was reminded that failure to comply with these conditions without reasonable excuse is a criminal offence and that she remained liable to be detained.

21. The appellant is a failed asylum seeker. She is appeal rights exhausted. Further submissions made on her behalf on 16 July 2012 have also been rejected although I am told there may be the possibility of judicial review proceedings being commenced subject to counsel's advice on the merits. As far as I am aware, the appellant does not have a criminal record, nor was she detained at the police station by reason of any suspected criminal activity on her part. Had the police officer who detained her overnight on 5 May 2012 not chosen to do so, she would have no basis for making a claim for s.4 support other than under the s.4(2) provisions for accommodation of failed asylum seekers.

22. The fact remains, however, that she was detained under paragraph 16 of Schedule 2 to the Immigration Act 1971, and released to an address in Newcastle which was not available to her, and which she did not claim was so available. It is conceded on behalf of the SSHD that this decision was not well thought out and "further consideration should have been given to the address put on the appellant's IS.96 letter". It is now claimed that this was never the intention of granting her temporary release (TR) and that other failed asylum seekers have also been given TA or TR on an IS.96 but are expected to apply for support under s.4(2) of the 1999 Act.

23. That may be the case, but unless the SSHD informs persons entitled to claim s.4(1)(b) accommodation of her practice and procedure for handling such claims, how are they to know what is expected of them and how they can comply with her requirements? A lawful system requires legal certainty. As a matter of principle, the SSHD must provide sufficient information to the public on how she intends to operate her discretionary power to grant accommodation under s.4(1)(b) to enable the persons affected to know what the law is and how they can comply with it.

24. There can be no higher authority for this proposition than the dicta of Lord Dyson SCJ, in *R (Lumba) v. SSHD* [2011] UKSC 12 wherein he held that:

> " 35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604, Para 26 Lord Steyn said:
>
> > "Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It

is simply an application of the right of access to justice. "

25. Currently, the SSHD has failed to identify in an open and transparent document which class of persons can apply for s.4(1)(b) accommodation and which cannot. If failed asylum seekers fall within the latter group than she should say so. She also needs to specify the criteria for the grant of accommodation under this provision so that if it is refused, the persons concerned will know why they have been refused and what they must do to exercise an effective right of appeal. That would also assist this tribunal to determine the appeals fairly rather than having to speculate on what may or may not have been taken into consideration by the SSHD in assessing exceptional and compelling circumstances. No doubt it would also be welcomed by UKBA case workers responsible for writing refusal letters who currently refuse s.4(1)(b) applications for entirely the wrong reasons – because there is no guidance in place directing them to the correct approach.

26. In relation to the current appeal and the reasons provided by the SSHD, I make the following findings:

a) The availability of support under s.4(2) of the 1999 Act to failed asylum seekers, does not preclude them from applying under s.4(1) provided they can show they meet the eligibility criteria e.g. failed asylum seekers released on bail from detention under any provision of the Immigration Acts may apply under s.4(1)(c);

b) The appellant was not eligible to apply for s.4(1)(c) accommodation because she was not released on bail from detention but given TA;

c) As the law currently stands, the conditions set out under s.4(2) of the 1999 Act do not apply to s.4(1)(b);

d) The reason for refusal of s.4(1)(b) accommodation set out at paragraph 5(d) above suggests to me that the SSHD is operating a blanket policy to refuse accommodation under this provision to all failed asylum seekers, whatever their compassionate circumstances, because she considers it inappropriate to do so. The argument that a positive decision would place the applicant "in a preferential position to other failed asylum seekers" and should therefore be refused allows no scope for the application of discretion.

e) In my judgment, the appellant did have a legitimate expectation that on release from detention she was being granted s.4(1)(b) accommodation. This is because an immigration officer took the decision to detain her for non-specific reasons. Having done so, and there being no reasonable prospect of her enforced removal to Afghanistan, the SSHD could not justify continued detention and had to release her on bail or TA. According to the Bail and TA manuals summarised at paragraphs 8-10 above, the appellant could not be released on TA unless she had a confirmed

address, which this appellant did not. The only circumstance in which she could therefore be released was if the SSHD provided her with an address, albeit on a temporary basis, because without it she would have had to remain in detention.

f) I accept that ordinarily the issue of an IS.96 is not an indication that support has been or will be granted to a failed asylum seeker. That does not apply to the facts of this case which in my judgment is an exceptional case justifying a different course of action.

g) I entirely accept that a failed asylum seeker can avoid becoming destitute by returning voluntarily to their country of nationality. That is an option that remains available to the appellant but one she has chosen not to take. If the SSHD is minded to make the availability of s.4(1) accommodation conditional upon the taking of reasonable steps to return or other conditions, it is open to her to set this out in a policy document. Until then it is not a lawful basis for a refusal of accommodation under s.4(1)(b).

27. I readily accept that the lack of a published policy does not in itself make the applicant eligible for support. It does, however, make it impossible for potential applicants to know what the law is and what they have to do to comply with it. It also makes it difficult for the tribunal to judge whether a decision taken by the SSHD is lawful or not.

28. Furthermore, I have some difficulty conceptualising how the failure of the SSHD to publish guidance on the processing of applications under 4(1)(b) indicates Parliament's intention to confine failed asylum seekers to s.4(2) support. S.4(1), (as it now is), has been in place since the 1999 Act was first enacted. The Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) brought into force s.4(2) in order to make provision for the implementation of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Had Parliament intended to limit the application of s.4(1) they could have done so on the same occasion but did not. Since then, they have had further opportunity to do so in the Nationality, Immigration and Asylum Act 2002; the 2004 Act; the UK Borders Act 2007 and the Criminal Justice and immigration Act 2008 - all of which contain provisions relating to asylum support - but again, elected not to do so.

29. Additionally, I am aware that the SSHD regularly provides s.4(1)(c) accommodation to failed asylum seekers – the claimants in *Razai* aforesaid being an example. I do not therefore accept the submission that Parliament's intention was that failed asylum seekers would only be considered under s.4(2).

30. For the above reasons, I do not accept that the decision in this case was either clear or lawful. I am satisfied on the facts and evidence before me that this appellant's circumstances are sufficiently exceptional and compelling to merit the exercise of discretion by the SSHD to grant her s.4(1)(b) accommodation. In my judgment, her release by officials acting on behalf of the SSHD to the address in Newcastle amounted to an offer of accommodation.

31. I therefore substitute my own decision for the decision of the SSHD. The appellant is entitled to the provision of s.4(1)(b) accommodation. The provision of accommodation is always subject to review by the SSHD.

Signed: Dated: 26 September 2012
Mrs Sehba Haroon Storey
Principal Judge, Asylum Support

APPENDIX 1

Appeal Number: AS/12/05/28619
UKBA Ref: 10/09/01388/004

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

Tribunal Judge	Mrs Sehba Haroon Storey
Appellant	
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 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

Principal Judge, Asylum Support