



**FIRST-TIER TRIBUNAL
ASYLUM SUPPORT**

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Appeal Number AS/12/09/28892
UKBA Ref. 04/08/01681/005
Appellant's Ref.

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

Tribunal Judge	<u>Sehba Haroon Storey</u>
Appellant	<u>FAI</u>
Respondent	<u>Secretary of State</u>

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 2008 Procedure Rules) and gives reasons for the decision made on Wednesday 3 October 2012 to dismiss the appeal.
2. The appellant, a citizen of Sudan stated as born on 31 December 1974, appeals against the decision of the respondent who on 3 September 2012, refused to provide him with accommodation under section 4(1)(b) of the Immigration and Asylum Act 1999 (the 1999 Act) on the grounds that he has not demonstrated any exceptional or compelling circumstances that require the Secretary of State for the Home Department (SSHD) to exercise her discretion to provide the appellant with support under this provision.
3. The appellant originally requested a determination on the papers. On 20 September 2012, his representatives asked that the matter with dealt instead at an oral hearing. However, the matter had already been considered by a judge on 17 September 2012 with a view to issuing directions. He decided that a paper hearing was not appropriate in the particular circumstances of this case and substituted an oral hearing pursuant to rule 5(3)(f) of the 2008 Procedure Rules.
4. On 21 September 2012, the appeal was heard by tribunal judge Saunders to determine the preliminary issue of the appellant's destitution. Judge Saunders found as fact that the appellant was destitute. I attach marked "Appendix A" a copy of the interlocutory decision.

5. The matter now comes before me for determination of the substantive issue of the appellant's entitlement under section 4(1)(b) of the 1999 Act.
6. At the hearing before me, the appellant was represented by Ms. Fishwick of the Asylum Support Appeals Project (ASAP) and the respondent was represented by Presenting Officer Ms. Crozier.

Background

7. According to a chronology provided by the respondent, the appellant is a failed asylum seeker. His asylum application was made on 13 April 2004 and the refusal served on him on 8 June 2004. He became appeal rights exhausted on 24 December 2004.
8. The appellant was granted section 95 support on 19 August 2004. This came to an end on 27 January 2005 when the appellant became appeal rights exhausted. On 11 April 2005, he was granted section 4 support under regulation 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (the 2005 Regulations). This was discontinued and came to an end on 20 May 2009.
9. At some point in 2009, the appellant left the UK by clandestine means, apparently in search of his partner and son. He is said to have remained in France for 6-7 months but was eventually arrested by the French Authorities and returned to the UK on 18 October 2010. The appellant was detained on arrival and it is said that he made a further claim for asylum. This was refused and certified on 20 February 2011. Thereafter, it is said that the appellant made further submissions on 7 July 2011; 9 November 2011 and 22 May 2012. These have all been refused, the last refusal being served on 31 May 2012.
10. On 10 November 2010, the appellant was released from detention and provided with section 4 accommodation in Middlesbrough. I do not have a copy of the IS.96 issued to him upon release and I do not therefore know the basis upon which he was released or whether the release was subject to conditions, other than one of reporting to UKBA.
11. On 17 May 2012 the appellant was detained and served with refusals of his further representations of 7 July 2011 and 9 November 2011. An IS.93E completed that day by a Chief Immigration Officer records that the only barrier to his removal to Sudan was the absence of a passport/ETD and that detention was necessary to enable a face to face interview, arranged for 23 May 2012 at the Sudanese High Commission, to take place.
12. I do not know whether that interview took place. There is no mention of it in any of the documents before me. I am told, however, that the day before the scheduled interview at the Sudanese High Commission, the appellant again made further representations. These were rejected on 31 May 2012.
13. The appellant remained in detention pending removal and on 1 July 2012 he was granted a bail address under section 4(1)(c) of the 1999 Act pending his bail hearing. In evidence before me, the appellant said that his solicitors had applied for bail on his behalf and that he was waiting to be notified of his court hearing date. Two days before his release on 12 July 2012, he was asked by an Immigration Officer whether he had an address to which he could be released on

temporary admission. Initially he did not, but the following day the appellant's friend agreed to accommodate him and the appellant was released on 12 July 2012.

14. The appellant remained with his friend for a few weeks but it is said that following the return of the friend's wife, the appellant was asked to leave and on 10 August 2012, his representatives applied on his behalf for accommodation under section 4(1)(b). This was refused by the SSHD on 3 September 2012 and is the subject of this appeal.

The appellant's case

15. The appellant relies upon my judgments in AS/12/05/28619 AS/12/08/28780 in which I call upon the SSHD to publish her criteria for assessing claims under section 4(1)(b) and for the application of her discretion.
16. It is said on the appellant's behalf that his application for bail was not given proper consideration and that the SSHD elected instead to release him on temporary admission, thereby preventing him from accessing the section 4 accommodation allocated to him on 1 July 2012. It is further suggested that the motivation for taking this course of action was to avoid having to incur the cost of supporting him and that the result of their decision is likely to render the appellant destitute.
17. The appellant relies upon Article 5 of the European Convention of human Rights (ECHR). He argues that it is a condition of his temporary admission that he must reside at his friend's address, which is no longer available to him. This renders him liable to detention. He also relies upon Articles 3 and 8.
18. At the hearing, Ms. Fishwick pointed out that had the appellant been released on immigration bail to a non-section 4 address as opposed to release on temporary admission, he would have been able to seek a variation of his bail conditions and apply for a bail address from UKBA under their section 4 operational guidance on bail accommodation. This option was not available to someone in the appellant's position who was released on temporary admission to a non-section 4 address. She argued that it was inherently unfair to treat someone in the appellants situation less favourably than the person released on bail to a non-section 4 address.

The respondent's case

19. The respondent submits that section 4(1)(b) of the 1999 Act enables the SSHD to provide accommodation and facilities to persons released from detention on temporary admission under paragraph 21 of Schedule 2 to the Immigration Act 1971. It is accepted that the SSHD has power to provide support under section 4(1)(b) but not a duty to do so. As such, it is said that she does not routinely exercise this power.
20. The appellant is said to be a person who is unlawfully present in the UK within the meaning of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Schedule 3 to the 2002 Act provides that persons who are unlawfully present in the UK are not eligible for support under the 1999 Act unless support is necessary to avoid a breach of that person's rights under the ECHR.

21. In order to engage Articles 3 and 8, it is said that the appellant must show that failure to provide support will have a severe impact on his private and family life. When considering any interference with Article 8 rights, a fair balance must be struck between the rights of the individual and the interests of the community.
22. The appellant is believed to have access to accommodation and essential living needs from his friend. As such, it is said that his circumstances do not engage Article 3.
23. Reference is also made to the appellant's poor immigration history.

The legislative framework

24. 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.’

25. 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-

.....'

26. 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 –
- 26.1. require the Secretary of State to reconsider the matter;
 - 26.2. substitute its decision for the decision appealed against; or
 - (c) dismiss the appeal.'

Discussion

27. At the hearing, the appellant attended in person and gave evidence through an interpreter in the Arabic language. I am satisfied that he and the interpreter were able to communicate effectively and understood one another.

28. The appellant told me in evidence that he had only submitted one claim for asylum, namely his application in 2004. He claimed that he had been invited to make a fresh claim on return from France but had declined to do so because his 2004 claim remained outstanding. He added that he had always been honest with the authorities and took the view that making a fresh claim was not being honest.

29. The appellant was asked to explain how he came to be released on temporary admission to a non-section 4 address rather than to his section 4 accommodation on bail. The appellant said that he had made a bail application to the tribunal but at the point when he was expecting to go to court, he was released on temporary admission. He explained that the Immigration Officer came to see him and asked him if he had an address to which he could be released, but he did not. The following day, he was asked again and having spoken to his friend, he was now able to provide an alternative address.

30. The appellant was asked by Ms. Fishwick whether he had in any way been coerced or compelled to accept temporary admission and he confirmed that he had not. He was asked whether he was aware that had he pursued his bail application and been released on bail to a bail address that he would have been entitled to the provision of accommodation and essential living needs. The appellant confirmed that he was so aware. He added that having lived in the UK for over 8 years, he knew that if granted bail he would have support but that there was always the possibility that bail may be refused. "Everything is possible" he said. "When you are detained, you will take any opportunity to be released."

The Decision

31. I do not propose to set out – yet again – my concerns about the absence of a clear policy on how the SSHD exercises her discretion when considering applications for section 4(1)(a) and 4(1)(b) accommodation. Nor do I consider that the interests of justice will be served by remitting this appeal.

32. I have given careful consideration to all the evidence before me. I am satisfied that the appellant is a failed asylum seeker who has exhausted his appeal rights. He has been in the UK since 2004 and, contrary to his evidence before me, he has submitted numerous further submissions, all of which have received due consideration and been rejected. He has managed to prolong his presence in the UK for over 8 years. During much of that period he has been supported at public expense and as far as I can see, he has made no efforts to return to Sudan – or to attend at the Sudanese High Commission to re-document himself.

33. I accept that the appellant is destitute and currently reliant upon the generosity of charitable organisations for temporary financial assistance. That does not entitle him to the provision of section 4(1) support which, whilst open to failed asylum seekers, is only available in very limited circumstances. I accept that the appellant was detained under powers contained in the Immigration Act 1971 and/or the Nationality, Immigration and Asylum Act 2002 and provided with section 4 accommodation – probably under section 4(1)(b) – on his enforced return from France. However, the SSHD is entitled to review the provision of such support, at any time, and did so on 17 May 2012. This was necessary to ensure the appellant's attendance at a pre-arranged interview at the Sudanese High Commission. That interview appears never to have taken place because the appellant submitted yet more representations.

34. The appellant now seeks to persuade me that because his private arrangement with his friend has fallen through, the SSHD is obligated to accommodate him because otherwise he is at risk of detention and destitution. That may well be the case, but in my opinion, this is a consequence of the appellant's choice to opt for a private address and accept the offer of temporary admission rather than run the risk of being refused bail by a judge. I note and accept the appellant's evidence that he was not coerced or compelled to accept the offer of temporary admission but was motivated by a desire to be released as soon as possible.

35. I do not accept that the appellant's convention rights have been breached. Article 3 is not engaged as it requires a very high degree of severity of harm or potential harm, which has not been demonstrated. Nor is Article 8 engaged as the appellant has not demonstrated an effective family or private life. His wife and son are no longer in the UK and he is a single male with no ties. As far as Article

5 is concerned, the appellant is no more at risk of detention than any other failed asylum seeker, including persons living in bail accommodation.

36. In my judgment the appellant is able to avoid any breach of his human rights by voluntarily returning to Sudan. If there exists any practical or legal barriers to him doing so, he may nevertheless be entitled to the provision of support if he can bring himself within regulation 3(2) of the 2005 regulations. In the event that he is unwilling to return voluntarily to Sudan and a decision is taken to detain him, he would have the option of applying for bail and accommodation under section 4(1)(c).

37. Accordingly, I find the appellant has failed to demonstrate any exceptional or compelling circumstances that require the SSHD to exercise her discretion to provide him with support under section 4(1)(b) of the 1999 Act.

38. In all the circumstances this appeal is dismissed.

Signed: Sehba Haroon Storey
Principal Judge, Asylum Support

Dated: 8 October 2012

SIGNED ON THE ORIGINAL [Appellant's Copy]

APPENDIX A

Appeal Number : AS/12/09/28892
 UKBA Ref. : 04/08/01681/005
 Appellant's Ref. :

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

Tribunal Judge	Mr David Saunders
Appellant (s)	Mr Fathi Abbas Ibrahim
Respondent	Secretary of State

INTERLOCUTORY DECISION AND DIRECTIONS NOTICE

1. The matter having come before me solely to determine as a preliminary issue the question of the appellant's destitution, I find as a fact that the appellant is destitute.

Reasons for findings of fact:

- a) The appellant is living in temporary accommodation and has to leave this on the night of the hearing as he can no longer remain there. This is supported by a letter from the person who has been housing him to date and since his release from detention in July 2012. He has nowhere else to go. He has no family in the UK.
- b) The accommodation is, in any event, inadequate. He is forced to sleep on the living room floor – the property being overcrowded and currently used for contact visits by the owner's daughter at weekends. He does not have a key.
- c) The appellant's essential living needs are not being met. He receives infrequent food from the owner of his current accommodation and is otherwise reliant upon British Red Cross (who gave him £10 per week for food) and Refugee Council who try to provide basic foodstuffs. The Red Cross payments have now ceased (as evidenced by a letter from them) and the food he is provided with is insufficient to sustain him.
- d) He cannot support himself. He does not have permission to work in the UK as is set out in his IS96 form.
- e) The appellant does, therefore, meet the test set out in Section 94(1) of the 1999 Act.

2. Having made the above finding, I issue the following directions pursuant to my powers contained within Rules 5 and 6 of the Tribunal Procedure Rules 2008 and in order that this matter proceed to a final determination:

Directions:

- a) The matter will be re-listed for oral hearing before the Principal Judge **on Wednesday the 26th September 2012 at 11.30 a.m.**
- b) Mr Ibrahim (or his representative on his behalf) is to deliver to the Tribunal and to the UK Border Agency to arrive by no later than noon on 25th September 2012:
 - (i) a written submission which sets out why it is considered that the appellant is entitled to support under Section 4(1)(b) – it having been established that the appellant is destitute.
 - (ii) any further evidence in support of the appeal.
- c) UKBA is to deliver to the Tribunal and to Mr Ibrahim's representative to arrive within the above timescale:
 - (i) a copy of any policy which governs or advises on the exercise of UKBA's power to provide support under S4(1)(b)
 - (ii) details of the assessment that was undertaken following receipt of the appellant's application and which led to the conclusion that this was not a case in which UKBA's discretion to provide support should be exercised
 - (iii) a written submission which sets out why it is considered that the appellant is not entitled to support under Section 4(1)(b) – it having been established that the appellant is destitute.

Signed: David Saunders
Tribunal Judge, Asylum Support

Dated: 21 September 2012

Warning: any failure to comply with these directions may result in the case being struck out under Rule 8. However, directions are issued to assist the parties and, if you are unable to provide all of the evidence that has been asked for, you should still attend any listed hearing.

Any party is entitled to apply for directions, but must give reasons for doing so. They are also entitled to challenge any of these directions by applying for another direction which amends, suspends or sets them aside.

In considering requests for directions, the Tribunal will have regard to the overriding objective of dealing with cases fairly and justly as required by Rule 2. This includes the timely disposal of appeals.