Appeal Number: ASA/05/05/9315
NASS Ref. Number: HO.S 798722
Appellant's Ref. Number: OX/245/04

ASYLUM SUPPORT ADJUDICATORS
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IMMIGRATION AND ASYLUM ACT 1999
ASYLUM SUPPORT APPEALS (PROCEDURE) RULES 2000

Adjudicator: MRS SEHBA HAROON STOREY

Appellant (s): MAS

Respondent: Secretary of State

REASONS STATEMENT

1. This Reasons Statement is made in accordance with Rule 13 of the Asylum Support Appeals (Procedure) Rules 2000 ("the Rules"), and gives reasons for the Adjudication given on Tuesday the 7th day of June 2005 substituting my own decision for the decision appealed against.

2. The appellant, a 29 year old claimed national of Somalia appeals against the decision of the Secretary of State who on 13 May 2005 decided to refuse his application for support under Section 4 of the Immigration and Asylum Act 1999 as amended (the 1999 Act), on the grounds that the appellant did not satisfy one or more of the conditions set out in Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (the 2005 Regulations).

3. At the hearing before me, the appellant was represented by Counsel Mr Adrian Berry upon the instructions of Pierce Glynn Solicitors. The respondent was not represented. The appellant appeared in person and gave evidence in English.

4. It is not disputed that the appellant claimed asylum upon arrival in the United Kingdom (UK) on 26 January 1993. He was granted exceptional leave to remain for an initial period of twelve months commencing 1 July 1996 and thereafter for a further three year period expiring on 1 July 2000. In September 1998 the appellant was convicted and sentenced to seven years imprisonment and recommended for deportation (he says to Somalia) upon completion of his sentence. He states that he did not appeal against this at the time.

5. On 20 February 2003, the Home Secretary signed a Deportation Order in respect of the appellant, pursuant to Section 67(2) of the Immigration Act 1999. I have before me the determination dated 9 January 2004 of Adjudicator Rex Billingham, of the

Immigration Appellate Authority. He states that the appellant's asylum application was refused on 15 July 2003 and that following receipt of a letter dated 29 October 2003 from the Kenyan Authorities, authenticating the Kenyan passport used by the appellant to gain entry to the UK as belonging to him, the respondent decided to deport the appellant to Kenya. The appellant appealed against destination but the adjudicator determined that on the evidence before him, the appellant was a Kenyan national and that Kenya was therefore the country to which the appellant should be deported. Thereafter, removal directions have been set for the appellant to be returned to Kenya on four separate occasions, but removal has not been carried out.

6. On 1 March 2005 the appellant was taken to the Kenyan High Commission with a view to applying for a travel document but I am told that this has been refused. The appellant believes (as does the respondent) that this is because he has informed the Kenyan Authorities that he considers himself a national of Somalia. That the appellant made such a claim should have come as no surprise to anyone given that he has done so consistently since the date of his arrival in the UK. Indeed, I have also seen two official documents issued by the Immigration and Nationality Directorate of the Home Office, one of which is a grant of Exceptional Leave to Remain to the appellant wherein the respondent also refers to him as a Somali national. What is therefore surprising is that having received a letter from the Kenyan Authorities acknowledging the appellant to be the rightful owner of the Kenyan passport authenticated by them in October 2003, the respondent did not pursue this matter further with the Kenyan Authorities.

7. I am told that the appellant's prison sentence was fully served on 28 February 2003 and that thereafter he has been held in immigration detention pursuant to the powers contained within the Immigration Acts 1971-1999. This totals a period of two years and three months. The appellant has challenged the lawfulness of his detention in the Administrative Court and a permission hearing of his application was heard on Wednesday 8 June 2005. I understand that permission has been granted by Richards J and a hearing is scheduled for early July to consider the issue of interim relief including bail.

8. The appellant applied for Section 4 support on 22 April 2005. On his application form he declared that he is a Somalia national. The basis of his application was twofold namely that he is taking all reasonable steps to leave the UK or place himself in a position to be able to leave and that he is unable to leave the UK because there is no safe route of voluntary return available to Somalia. The application form recorded that attempts to obtain travel documents to Kenya had failed and that there is presently no removals to Somalia, given the ongoing civil war.

9. In their decision letter of 13 May 2005, the respondent stated the following:-

> "In taking this decision I have noted that on your Section 4 application you indicated that you are applying for support on the basis that you are destitute, taking all reasonable steps to leave the UK and yet unable to do so as there is no safe route of return to Somalia. As a failed asylum seeker, you are now expected to make all effort to voluntarily return home. The IOM can facilitate returns to both Kenya and Somalia at present."

10. In a letter dated 24 May 2005, the respondent made further submissions stating that the appellant had arrived in the UK with Kenyan documents and that his asylum claim was based on his Kenyan nationality. It was said that the appellant "now maintains that he is from Somalia". The respondent considered that the appellant had not taken

> "genuine steps to leave the United Kingdom or to put him [self] in a position to do so. It is clear that the appellant is intentionally delaying his removal by refusing to provide essential information and until such time he does, he cannot be seen as co-operating".

11. The respondent further submitted that the appellant could not be regarded as fulfilling the destitution criteria because he was currently held in detention pending removal. It was suggested that the appellant could take appropriate steps to leave the United Kingdom voluntarily through the International Organisation for Migration (IOM) or by cooperating with the Immigration Service and furthermore that it was the view of the Secretary of State that there is a safe and viable route of return to Mogadishu.

12. By letter dated 6 June 2005, the respondent made further submissions which were said to replace the submissions of 24 May 2005. In it they stated that

> "if [the appellant] is a national of Somalia arrangements will be made to return him there provided he signs the appropriate forms and disclaimers. It is possible to facilitate returns to Somalia (direct to Mogadishu) if the person is willing to go voluntarily. The appellant has not agreed to sign the forms".

For this reason, the respondent took the view that the appellant cannot be said to be taking steps to leave the UK or place himself in a position from which he can leave voluntarily.

13. It was further argued that there was no requirement upon NASS to grant the appellant Section 4 support in order to assist his application for bail and that refusal of Section 4 support in these circumstances did not amount to a breach of the appellant's right to liberty and security of the person pursuant to Article 5 of the European Convention on Human Rights (ECHR).

14. Mr Berry for the appellant submits that Regulation 3(2)(a) only requires the appellant to take all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave and not "genuine steps" as submitted by the respondent. He argues that the appellant has acted reasonably throughout in as much that he has always maintained he is a national of Somalia and that he has provided details of his identity, date of birth and place of birth but that the respondent has consistently refused to accept this information. Mr Berry said that as the appellant had never had a hearing of his asylum claim, that the substance of his case had never been examined and tested and that the appellant had effectively been denied a refugee status determination.

15. On the issue of destitution, Mr Berry considered that the appellant was destitute because the only accommodation available to him was his prison cell and this did not amount to adequate accommodation within the meaning of Section 95(5) of the 1999 Act. He considered that the appellant was likely to be granted bail by the Administrative Court on the grounds that it is unlikely that he will be removed in the foreseeable future given that Kenya does not accept him as a national and the respondent has consistently refused to accept that the appellant is in fact a national of Somalia.

16. Section 4(2) of the 1999 Act (as amended by Section 49 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) allows the Secretary of State to provide, or arrange for the provision of, facilities for the accommodation of a person and his dependants if –

(a) he was (but is no longer) an asylum seeker, and

(b) his claim for asylum was rejected.

17. The criteria to be used in determining eligibility for and provision of accommodation to a failed asylum-seeker under Section 4 are set out in Regulation 3 of the 2005 Regulations. These came into force on 31 March 2005.

18. Regulation 3 states as follows:

> (1) .....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-
>
> (a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;
>
> (b) not relevant;
>
> (c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
>
> (d) not relevant;
>
> (e) the provision of accommodation is necessary for the purpose of

avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

19. Section 95(3) of the 1999 Act states that a person is destitute if –

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his essential living needs.

20. In determining whether accommodation is adequate, the Secretary of State must, *inter alia* have regard to whether it would be reasonable for the person to continue to occupy the accommodation.

21. Where an appellant seeks to appeal against a decision to refuse him Section 4 support, the burden of proof is upon him to prove on a balance of probabilities that he meets the criteria for a Section 4 award.

22. I have given careful consideration to all the evidence that is before me, including all documents and submissions received from both parties to the appeal.

23. Whilst I accept that the appellant arrived in the UK with Kenyan documents I reject the respondent's submission that his claim was based on his Kenyan nationality. I do so on the basis of having seen firstly the letter dated 1 July 1996 from IND recording that the appellant's application for refugee status in the United Kingdom has been refused but that he has been granted Exceptional Leave to Enter the United Kingdom until 1 July 1997. That document clearly records the appellant as being of Somali nationality. A second document dated 1 July 1997 grants the appellant leave to remain until 18 July 2000 and also clearly records the appellant as being Somali. I do not know how the NASS case worker making the submissions in this case came to the conclusion that the appellant's asylum claim was based on his Kenyan nationality. I am satisfied on the evidence before me that the appellant has consistently maintained that he is from Somalia and I therefore reject the assertion made by NASS that this is somehow a recent stance taken by him.

24. The fact remains however that on the basis of a letter received from the Kenyan authorities the respondent accepted that the appellant was of Kenyan origin and the rightful holder of the Kenyan passport used to facilitate his entry to the UK. Removal directions have been given to Kenya and until such time as the respondent or the Administrative Court direct otherwise, those removal directions stand.

25. I reject the respondent's submission that the appellant has not taken genuine steps to leave the UK or place himself in a position in which he is able to do so by insisting to the Kenyan authorities that he is in fact a Somali national. The respondent maintains that in taking this stance the appellant is intentionally delaying his removal and cannot be seen as co-operating.

26. Regulation 3(2)(a) requires the appellant to take "all reasonable steps". I am satisfied that in order for his attempts to be regarded as reasonable, the appellant must act in a

truthful and honest manner. The appellant has consistently maintained that he is from Somalia. He has provided his name, date of birth and place of birth in order to assist the process of identification. The respondent has chosen not to act upon that information and instead to accept the contents of the letter from the Kenyan authorities of October 2003. That is their prerogative.

27. I am satisfied that by agreeing to speak with the Kenyan authorities at the request of the respondent, the appellant has acted reasonably and was co-operating with attempts to obtain a travel document to facilitate his departure. If the Kenyan authorities were satisfied in 2003 that the appellant was lawfully entitled to the passport used by him to facilitate his entry to the UK, the appellant's statement that he was a national of Somalia, should not have been an obstacle to them in granting him a travel document. In the circumstances, I find that the appellant does satisfy the condition set out in Regulation 3(2)(a).

28. The respondent states in the alternative that if the appellant is a national of Somalia, arrangements can be made for him to return there provided that he signs appropriate forms and disclaimers but that he has refused to do so. Firstly, I have not seen any evidence of this refusal. Even if the appellant has refused to do so, I have seen no evidence that the appellant has been served with a notice of intention to deport to Somalia against which he would have a right of appeal. In the event that the respondent is now willing to accept the appellant's claimed nationality and seeks to return him to Somalia, the appellant is entitled to require that the respondent follow the correct procedure to facilitate this. The respondent submits that the appellant could take appropriate steps to leave the UK voluntarily through the IOM. I have however had produced to me a letter from the IOM addressed to the appellant's solicitors. This confirms, and I accept that they are not currently assisting people in detention with voluntary return.

29. Furthermore, the respondent argues that the appellant cannot be regarded as fulfilling the destitution criteria because he is currently held in detention pending removal. Counsel submits that the appellant is destitute on the grounds that a prison cell does not amount to adequate accommodation within the meaning of Section 95 of the 1999 Act and relies upon the case of R *on the Application of B* v *The London Borough of Southwark* [2003] EWHC 1678 Admin. Whilst the respondent maintains that a refusal of Section 4 support to the appellant does not amount to a breach of the appellant's rights protected by Article 5 of the EHCR, Counsel argues that such refusal is an impermissible interference with the appellant's Article 5 rights.

30. I am aware that the Home Office policy on detention states that detention is only to be used as a last resort and will usually only be appropriate to effect removal, establish identity or the true basis of the claim, or prevent absconding. The policy also states that it is not an effective use of detention space to detain people for lengthy periods if it would be practical to affect detention later in the process once any rights of appeal have been exhausted. It is further stated that detention where removal is not necessary for the purposes of removal of the individual is not compatible with Article 5 and detention for the purposes of deterrence is not permitted.

31. I accept that the appellant has served his sentence in full and that he has been detained for two years and three months under Immigration Powers of Detention. On the evidence before me, it would seem to be unlikely that the appellant can presently be removed from the UK or indeed could co-operate with voluntary repatriation through the IOM.

32. The question however of whether the appellant's detention is lawful or otherwise is not a matter for me to determine. The applicant in R *on the Application of B* v *The London Borough of Southwark* was being detained following conviction for a criminal offence and was due to be released on the Home Detention Scheme but had no adequate accommodation available to him. He was not an Immigration detainee. The appellant on the other hand in being detained pursuant to powers contained within the Immigration Acts. Until such time as the respondent decides not to detain him or is ordered by the Administrative Court to release him, his detention continues to be lawful. As such and with particular regard to the limits of my jurisdiction, I am satisfied that the respondent's refusal to grant asylum support is not a disproportionate interference with the appellant's rights under Article 5.

33. In the circumstances, I readily accept that accommodation in a prison cell does not amount to adequate accommodation and that it would not be reasonable to continue to occupy a prison cell where there is an alternative available. In the event that the Administrative Court grant the appellant interim relief and bail, I am satisfied that the appellant will be destitute on the basis that he will no longer have access to adequate accommodation nor the means to meet his essential living needs.

34. For the reasons above stated, in the event that the appellant is granted bail, he is entitled to the provision of Section 4 support. I accept Counsel's submission that upon release the appellant would not have adequate accommodation available to him nor the means to provide for his essential living needs. In the particular circumstances of this case, the provision of accommodation would in that situation be necessary for the purpose of avoiding a breach of the appellant's ECHR rights.

Signed:..... Dated:.....
Chief Asylum Support Adjudicator