FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

Address:

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

Telephone: 020 7538 6171
Fax: 020 7538 6200

Appeal Number AS/10/03/22069
UKBA Ref. 03/06/00199
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	JS
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 Tuesday the 25th day of May 2010 dismissing the above mentioned appeal.

2. The appellant is a 29 year old citizen of Iran. He appeals against the decision of the Secretary of State for the Home Department (SSHD) who on 1 March 2010 refused the appellant's application for support under s95 of the Immigration and Asylum Act 1999 (the 1999 Act) on the grounds that the appellant did not currently have any outstanding asylum claim. The letter invites the appellant to submit a further application in the event that his status changes.

3. In his grounds of appeal, the appellant states that he delivered his subsequent application for asylum in person to the UK Border Agency (UKBA) on 23 February 2010 and that his claim has not been determined. He cites the decision of this Tribunal in *AS/10/01/21325* to the effect that a person making a subsequent asylum claim is an asylum seeker for the purposes of Part 6 of the 1999 Act and thereby entitled to support under s95 of the 1999 Act as opposed to s4 support.

4. The appellant was represented at the hearing by Mr McClosky of the Asylum Support Appeals Project (ASAP) on instructions from Refugee Action. The respondent is represented by Counsel Mr Blundell, on instructions from the Treasury Solicitor.

Factual Background

5. The appellant is said to have entered the United Kingdom illegally in the back of a lorry on 28 May 2003. He claimed asylum and was served with an IS151A (Notice to a Person they are an illegal entrant) and IS91 (Notice of Detention) on 29 May 2003. He was interviewed on 23 June 2003 and on 9 July 2003 the SSHD refused his claim for asylum. The appellant appealed and his appeal was heard by an Immigration Judge on 3 October 2003. The appeal was dismissed in a determination promulgated on 27 October 2003. So far as I am aware, the appellant did not seek to appeal to the Asylum and Immigration Tribunal (as it then was) against that decision and so became appeal rights exhausted.

6. I do not have any information on the appellant's case history between the date when his asylum appeal was finally determined in 2003 to the date he lodged his further representations. I do not know whether any attempts were made by the respondent to remove the appellant from the United Kingdom (UK) nor why he has continued to remain in the UK 6 years after an Immigration Judge dismissed his appeal. On 23 February 2010, however, he attended the Liverpool Further Submissions Unit and made further submissions. These have been recorded by the SSHD but a decision has not been made on whether they amount to a fresh claim for asylum.

7. On 24 February 2010 the Appellant applied for support from UKBA under s95 of the 1999 Act. On 11 March 2010 UKBA refused his application on the basis that he does not have any outstanding asylum claim. The Appellant appealed against this decision on the grounds that he had made further submissions to the SSHD on 23 February 2010 and placed reliance upon my determination in *AS/10/01/21325*. Having made an application for support under s4 (as well as under s95), however, the appellant has been in receipt of s4 supports since 26 March 2010.

8. Pursuant to directions issued by the Tribunal, I am in receipt of a skeleton argument and supporting documentation from Treasury Solicitors, on instructions from the SSHD. These include:

   a) an explanation for the SSHD's letters of 1 and 11 March 2010;
   b) a Guidance Note from the SSHD to the Tribunal;
   c) a copy of the judgment in *R (ZA and SM) v Secretary of State for the Home Department* [2010] EWHC 718 (Admin) (*ZA (Nigeria)*).

9. A set of documents were also received from Refugee Action acting for the appellant. These include:

   i) A copy of the appellant's support application;
   ii) A copy of what purports to be the appellant's "fresh claim" submitted on 23 February 2010;
   iii) Copy documentary evidence of college attendance.

Submissions for the appellant

10. The appellant relies on my determination in *AS/10/01/21325* promulgated on 3 February 2010, in which I allowed the appeal of an appellant who, like this appellant, had been refused s95 support on the basis that he did not have an outstanding asylum claim but had made further submissions.

11. In that case I considered the statutory scheme in the light of the judgment of the Supreme Court in *BA (Nigeria) PE (Cameroon) v Secretary of State for the Home Department* [2009] UKSC 7 *(BA (Nigeria))* as well as the judgment of the Court of Appeal in *R (ZO (Somalia), MM (Burma)and DT (Eritrea) v Secretary of State for the Home Department* [2009] EWCA Civ 442, [2009] 1 WLR 2477 (*ZO (Somalia)*), but without the benefit of legal submissions from either party. I concluded that once a subsequent application for asylum has been recorded as received by the SSHD the applicant becomes an asylum seeker entitled to the provision of s95 support, until such time as the claim is determined and allowed, or determined with certification under s94 or s96 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act).

12. On behalf of the appellant, Mr. McClosky makes a number of submissions in relation to the authorities cited, in particular *BA (Nigeria), ZO (Somalia)* and *ZA (Nigeria)*. Quoting Lord Hope in *BA (Nigeria)* (paragraph 33), he submits that "rule 353, as presently drafted, has no part to play in the legislative scheme" and is effectively dead. In so far as the decision of the Divisional Court in *ZA (Nigeria)* attempts to resurrect rule 353, he asks me to find that the decision of the UK Supreme Court in *BA (Nigeria)*, being the superior decision, must be applied. Furthermore, he reminds me that *ZA (Nigeria)* and *R (WJ) (China) v SSHD* [2010] EWHC 776 (Admin), have both been granted permission to appeal to the Court of Appeal, whilst *ZO (Somalia)* is currently before the Supreme Court. As such, the dicta of the two Divisional Court judgments is not settled caselaw and must be treated with caution. He asks me to find that the ratio of the Supreme Court in *BA (Nigeria)* and the Court of Appeal in *ZO (Somalia)* however, are binding upon me and must be applied. I will refer to these submissions further below.

Submissions for the SSHD

13. On behalf of the SSHD, Mr. Blundell contends that my decision in *AS/10/01/21325* is wrong in law in concluding:

    a) that the decision in *BA (Nigeria)* entitles the appellant to a right of appeal merely by the making of further submissions following the refusal of his asylum claim and dismissal of appeal, without those submissions reaching the fresh claim threshold of paragraph 353 of the Immigration Rules; and

    b) that the decision in *ZO (Somalia)* means that someone who is an asylum seeker for the purposes of the Council Directive 2003/9/EC, "laying down minimum standards for the reception of asylum seekers" (the Reception Directive), Council Directive 2004/83/EC of 29 April 2004 on "*minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*", (the Qualification Directive) and Council Directive 2005/85/EC of 1 December 2005 on "*minimum standards on procedures in Member States for granting and withholding refugee status*" (the Procedures Directive) must also be an asylum seeker for the purposes of the 1999 Act.

14. Mr Blundell suggests that the correct approach to take in relation to whether or not further submissions amount to a fresh claim is that set out in the judgment of the Divisional Court in *ZA (Nigeria)*. In that case, the court clarified the dicta

of *BA (Nigeria)* and held that rule 353 continues to apply to determine whether further submissions amount to a fresh claim, notwithstanding Lord Hope's comments in *BA (Nigeria)*. On Mr. Blundell's interpretation, the *BA (Nigeria)* principle only applies where there is in any event an immigration decision within the meaning of s82(2) of the 2002 Act, a decision which is only made after the SSHD has decided whether or not further submissions amount to a fresh claim. If the SSHD decides that they do not amount to a fresh claim, a s82(2) immigration decision is not made. It is not therefore necessary to certify it.

15. He further submits that as the new statutory scheme discussed in *BA (Nigeria)* is that introduced by the 2002 Act, its interpretation and application has no bearing on the system of asylum support set out in the 1999 Act.

16. On the interpretation of the Reception Directive laid down by the Court of Appeal in *ZO (Somalia)*, Mr. Blundell submits that the SSHD's position is that that decision is wrong in law but that in any event it has no effect on the statutory provisions in the 1999 Act or in the 2002 Act which govern asylum support as these long pre-dated the Reception Directive. He says that an individual's eligibility for asylum support is governed by the UK's domestic statutes and the decision in *ZO (Somalia)* does not directly concern the meaning of either of these statutes. In his submission, unless and until the 1999 Act is amended, it should continue to bear the same meaning that it did on the day that it was passed. Specifically, the term "asylum-seeker" in the 1999 Act should have the interpretation given to it in the 1999 Act and not by reference to *ZO (Somalia)*.

17. Finally, even if the SSHD is wrong on these points, he submits that this does not entitle an individual in the appellant's position to s95 or s4 support. They would simply be entitled to the minimum support required by the Directive. I will refer to these submissions further below.

Legal and Policy Framework

18. Section 95 of the 1999 Act provides, so far as is relevant, that:

> "(1) The Secretary of State may provide, or arrange for the provision of, support for –
>
> (a) asylum-seekers, or
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed."

19. Section 94(1) of the 1999 Act provides the following definitions:

> " 'asylum-seeker' means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined;
>
> 'claim for asylum' means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom."

20. The definition of 'asylum seeker' in s94(1) of the 1999 Act was amended by s44 of the 2002 Act but only in so far as it added to the definition, a requirement that an 'asylum-seeker' means 'a person who has made a claim for asylum at a place designated by the Secretary of State'. This requirement however, is not in force and no such place has been designated other than the Further Submissions Unit in Liverpool where all further submissions are required to be delivered in person.

21. Section 95 provides *inter alia* that:

"(3) For the purposes of this Part, a claim for asylum is determined at the end of such period beginning –

(a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or
(b) if the claimant has appealed against the Secretary of State's decision, on the day on which the appeal is disposed of,

as may be prescribed.

(4) An appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration Appeals Commission Act 1997.

(5) If an asylum-seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum-seeker while –

(a) the child is under 18; and
(b) he and the child remain in the United Kingdom.

(6) Subsection (5) does not apply if, on or after the determination of his claim for asylum, the asylum-seeker is granted leave to enter or remain in the United Kingdom (whether or not as a result of that claim)."

22. So far as is relevant, s4 of the 1999 Act provides that:

"(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) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94) –

(a) asylum-seeker,
(b) claim for asylum, and
(c) dependant.

(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."

23. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 provides that:

"(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-

(a) – (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."

24. Guidance on how regulation 3(2)(e) should be interpreted and applied by Case Owners is contained in the Secretary of State's "Section 4 Support Instructions". So far as is relevant, this provides as follows:

"An important consideration is whether the applicant can be expected to leave the UK to avoid a breach [of ECHR rights]. It would not be reasonable to expect a person to leave the UK in the following circumstances (this list is not exhaustive):

- The applicant has submitted a late appeal against the Secretary of State's decision to refuse asylum and the [IAC] is considering whether to allow the appeal to proceed out of time.

- The applicant has submitted to the Secretary of State further submissions which are outstanding. Support under section 4 may be provided in such cases, if there is or will be a delay in serving a decision on these further submissions, unless it is clear that the further submissions are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all."

25. Rule 353 of the current Statement of Changes in Immigration Rules (HC395) is concerned with the assessment of whether further submissions following the refusal of a human rights or asylum claim should be treated as a "fresh claim". It provides as follows:

" 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material

that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and
(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.

353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

This paragraph does not apply to submissions made overseas."

26. Section 17 of the UK Borders Act 2007 provides the following:

"17. Support for failed asylum-seekers

(1) This section applies for the purposes of—

(a) Part 6 (and section 4) of the Immigration and Asylum Act 1999 (support and accommodation for asylum-seekers),
(b) Part 2 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (accommodation centres), and
(c) Schedule 3 to that Act (withholding and withdrawal of support).

(2) A person (A-S) remains (or again becomes) an asylum-seeker, despite the fact that the claim for asylum made by A-S has been determined, during any period when—

(a) A-S can bring an in-country appeal against an immigration decision under section 82 of the 2002 Act or section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68), or
(b) an in-country appeal, brought by A-S under either of those sections against an immigration decision, is pending (within the meaning of section 104 of the 2002 Act)."

27. In so far as they are relevant, the Reception Directive provides the following definitions:

"Article 2 – Definitions

For the purposes of this Directive:

(a) ...

(b) 'application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately;

(c) 'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;

...

(i) 'reception conditions' shall mean the full set of measures that Member States grant to asylum seekers in accordance with this Directive;

(j) 'material reception conditions' shall mean the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance;

..."

Also relevant are Articles 3, 4, 13 and 16 and certain Articles of the Qualification Directive and the Procedures Directive but it is not necessary to cite them individually here.

Decision

BA (Nigeria)

28. My decision is *AS/10/01/21325* was promulgated on 3 February 2010 without the benefit of legal submissions and before the judgments of the Divisional Court in *ZA (Nigeria)* and *WJ (China)* had been handed down. *ZA (Nigeria)* is particularly relevant to asylum support appeals where an appellant has made further submissions following the rejection of a first asylum claim.

29. The Divisional Court in *ZA (Nigeria)* considered there were tensions in the opinions of different law lords in *ZT (Kosovo) v SSHD* [2009] UKHL 6 (*ZT (Kosovo)*) and in *BA (Nigeria)* that were not easy to resolve. The court was clearly right. On the one hand, we have *ZT (Kosovo)* where four out of five members of the Appellate Committee (Lord Philips, Lord Carswell, Lord Brown and Lord Neuberger) decided that the correct approach to take in relation to consideration of further submissions was that laid down in rule 353 and not s94(2) of the 2002 Act. On the other hand, we have the decision of the Supreme Court in *BA (Nigeria)*, (Lord Hope, Lord Scott, Lord Roger, Lord Brown and Lady Hale (dissenting)) that a claim for asylum which has been rejected should be allowed to proceed to appeal in-country under s82 and s92 of the 2002 Act, unless it has been certified as clearly unfounded under s94 or excluded under s96. This should be so whether or not the SSHD has accepted it as a fresh claim.

30. Whilst there is no reference in *BA (Nigeria)* to the decision in *ZT (Kosovo)* being overruled, it is acknowledged in the opening paragraph - see Lord Hope's reference to the "controversy" in *ZT (Kosovo)* - that there is a difference of opinion amongst their Lordships as to the proper approach to be taken to further submissions and the application of rule 353. That difference of opinion is apparent from paragraph 33 of Lord Hope's judgment in *BA (Nigeria)* where he states that "*[r]ule 353, as presently drafted, has no part to play in the legislative scheme*".

31. Decisions of the Divisional Court are binding on this Tribunal. Given the apparent conflict between the decision of the Supreme Court in *ZT (Kosovo)*

and *BA (Nigeria)* in relation to the correct approach to be taken, I particularly welcome the guidance of the Divisional Court in deciphering the true meaning of Lord Hope's opinion. In doing so, I am mindful of the fact that the appellants in *ZA (Nigeria)* and *WJ (China)* have been granted Leave to Appeal to the Court of Appeal. Until such time as the decision in ZA *(Nigeria)* is overruled, it remains good law and must be followed by this Tribunal. Of particular relevance are paragraphs 30-32 of the judgment which state as follows:

> "30. We have not found this an easy matter to resolve. The difficulty in large part is derived from the fact that Lord Hope in *BA (Nigeria)* made the general statement that the 2002 Act contains a complete code for dealing with repeat claims and that rule 353 has no part to play in the statutory scheme, whereas the actual decision in *BA (Nigeria)* was limited to rejecting the contention that "an asylum claim or a human rights claim" did not include a second or subsequent claim which was not a fresh claim. The decision did not address specifically the question whether a decision that a second or subsequent claim is not a fresh claim is an immigration decision, which plainly, taken alone, it is not.
>
> 31. It is, we think, plain that an expansive application of paragraph 33 of *BA (Nigeria)* is not consistent with *ZT (Kosovo)*, the effect of which was both that rule 353 had a useful and necessary existence, and that a decision that a renewed submission is not a fresh claim does not have to generate an appealable immigration decision. We do not accept Mr Gill's submission that *BA (Nigeria)* must be taken to have departed from *ZT (Kosovo)*. The judgments come nowhere near saying so, and we do not think that departure from so recently a decided case can be implied, especially where there is explicit reference to *ZT (Kosovo)* in more than one of the judgments in *BA (Nigeria)*.
>
> 32. In our judgment, resolution of the dilemma is to be found in the limited ambit of the actual decision in *BA (Nigeria)*. Certainly, where there is an appealable immigration decision on a renewed asylum or human rights submission there will be an in-country appeal under section 92(4), unless the Secretary of State has certified under section 94(2) or 96. Where however, as in the present cases, there has been no appealable immigration decision upon a renewed submission which the Secretary of State has decided is not a fresh claim, there is no right of appeal, but the decision may be challenged in judicial review proceedings on rationality grounds. Rule 353 has no part to play in determining whether a renewed submission is an asylum claim or a human rights claim – which is what *BA (Nigeria)* decided. It does have a part to play in determining whether the Secretary of State should make an appealable immigration decision consequent on the renewed submission – which *BA (Nigeria)* did not address. "

32. Thus, in relation to the current appeal, *BA (Nigeria)* has no application as the appellant's further submissions have yet to be considered by the SSHD. In the event that the SSHD rejects the further submissions under rule 353 but decides that the new material submitted has not already been considered and taken together with the previously considered material creates a realistic prospect of success, the appellant will be entitled to an immigration decision under s82 of the 2002 Act against which he will have an in- country right of appeal. At that point the appellant will be entitled to the provision of s95 support.

ZO (Somalia)

33. In *AS/10/01/21325*, I noted the judgment of the Court of Appeal in *ZO (Somalia)*, in which the court were concerned with whether a person whose asylum claim has been finally determined against him and who makes a subsequent claim for asylum could come within the ambit of Article 11(2) (access to the labour market) of Council Directive 2003/9/EC, "laying down minimum standards for the reception of asylum seekers" (the Reception Directive). The court held that the reference in Article 2(c) of the Reception Directive to "an application for asylum in respect of which a final decision has not yet been made" included subsequent asylum applications and that the makers of these further representations remain asylum seekers so long as their representation remain undetermined. As such, it was said that a person making a subsequent claim for asylum falls within Article 3 of the Reception Directive and is therefore entitled to the benefit of reception conditions on the same basis as an asylum seeker making a first application.

34. On that basis I decided that once a subsequent application for asylum has been recorded as received by the Secretary of State, it should likewise be considered that an applicant becomes an asylum seeker entitled to the provisions of s95 support until such time as his claim is determined and allowed, or determined with certification under s94 or s96 of the 2002 Act.

35. As already noted, the SSHD has an appeal against the Court of Appeal judgment in *ZO (Somalia)* pending before the Supreme Court. However, it is Mr. Blundell's submission that even if the SSHD proves unsuccessful in that appeal, *ZO (Somalia)* cannot be relied on in the instant case because an individual's eligibility for asylum support is governed by the UK's domestic statutes and the meaning of the domestic statutes was settled at the time that each of them was passed. Furthermore, he submits that the decision in *ZO (Somalia)* does not directly concern the meaning of either of these statutes. The case concerns the provisions of the Reception Directive dealing with permission to work, and involves a judicial review challenge to the SSHD's refusal of permission to work.

36. Consequently, he submits that the meaning of the domestic statute should govern asylum support, not any newly-discovered interpretation of the Reception Directive. Unless and until the 1999 Act is amended, it should continue, he says, to bear the same meaning that it did on the day that it was passed. For these reasons, he argues, *ZO (Somalia)* is of no assistance in interpreting the provisions of the 1999 Act on asylum support and it is an error of law to interpret the term "asylum-seeker" in the 1999 Act by reference to it.

37. In particular, Mr. Blundell contends that using the decision of the Court of Appeal in *ZO (Somalia)* to interpret the 1999 Act would inevitably lead to one of two problems:

    i) Either it would result in the Reception Directive changing the meaning of the 1999 Act in its application to the support of individuals who have only advanced human rights grounds in their further submissions, even though human rights grounds are not the subject matter of the Reception Directive; or alternatively

    ii) It would produce the odd result that the same words in the 1999 Act would bear one meaning in relation to the support of individuals who have advanced asylum grounds in their further submissions, but a different meaning in relation to the support of individuals who have only advanced human rights grounds.

38. Even if the SSHD is wrong on these points, says Mr. Blundell, that does not entitle an individual in the appellant's position to s95 or s4 support. They would simply be entitled to the minimum support required by the Directive.

39. I have given careful consideration to the submissions of both parties. If I have not referred specifically to the submissions of Mr. McClosky that is because in essence he submits that my decision in *AS/10/01/21325* is correct and I should confirm it.

40. I note that the SSHD's appeal against the Court of Appeal's judgment in *ZO (Somalia)* (and *MM (Burma) and DT (Eritrea)*) was heard by the Supreme Court on 17-18 May 2010. The Court reserved its judgment. It is unnecessary for me to deal with Mr Blundell's submissions on the relevance of the Reception Directive and other interlinked EU Directives for previous UK legislation. That is because I have concluded that even if I was right in *AS/10/01/21325* to consider that *ZO (Somalia)* had implications for the meaning of the term "asylum seeker" as found in UK legislation, they are not such as could be said to make unlawful the refusal of section 95 support to applicants making further representations.

41. In so far as the judgment in *ZO (Nigeria)* is relevant to asylum support claims, I note that the twelfth paragraph of the preamble to the Reception Directive permits Member States to reduce or withdraw reception conditions for asylum seekers in order to avoid the possibility of abuse of the reception system. This includes where the asylum seeker "has already lodged an application in the same Member State".

42. I therefore find that so long as 'material reception conditions' in the form of s4 support are not withdrawn from failed asylum seekers making further representations until their claim is finally determined under rule 353, the SSHD will not be in breach of his obligations under the Reception Directive. The applicant will only be entitled to an in-country right of appeal against a negative decision if the further submissions are accepted as a fresh claim. In that event the applicant will also be entitled to s95 support.

43. In closing I would add two observations in my capacity as Principal Judge of the asylum support jurisdiction. First, it is the experience of the Tribunal that failed asylum seekers whose further representations remain outstanding, often find themselves confined to s4 support for several years owing to delays in the processing of their claim by UKBA. The respondent should not forget that section 4 support was only ever intended to be a short-term measure. As Blake J held in *DT v SSHD* [2008] EWHC 3064 (Admin) in a passage unaffected by the subsequent Court of Appeal judgment:

> " the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimant's ability to form relations either in the work place and outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom ....this restriction can thus be said to be an interference with the right to respect for private life."

44. My final observation is this. It is to be hoped that when the Supreme Court and the Court of Appeal come to give their judgments in *ZO (Somalia), MM (Burma) and DT (Eritrea)* and *ZA (Nigeria) and others* respectively, that they will feel able to comment upon the implications of their judgment for the asylum support

jurisdiction. At present the pattern of frequent pronouncements by the higher courts on generic issues relating to fresh claims and subsequent asylum applications, leaves the asylum support judges often having to second guess how these decisions apply to the asylum support jurisdiction.

45. The appeal is dismissed. However, the appellant remains entitled to s4 support until such time as his further submissions are fully considered.

S. H. Moore

Signed ..... Date 26 May 2010
Principal Judge, Asylum Support