FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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

Telephone: 020 7538 6171
Fax: 0126 434 7902
Appeal Number AS/15/07/33514
UKVI Ref. 15/06/00497/001
Appellant's Ref.

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

Tribunal Judge	MS GILL CARTER
Appellant	MR KK
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 15th day of July 2015 in which I dismiss the above mentioned appeal.

2. The appellant, who is a 40 year old citizen of Sri Lanka, appeals against the decision of the Secretary of State who, on 2 July 2015, refused his application for support under Section 95 of the Asylum and Immigration Act 1999 (the 1999 Act).

3. The appellant was represented in the preparation of his appeal by Jein Solicitors. With their consent he was represented at the hearing by Mr Kotrly of the Asylum Support Appeals Project (ASAP). The respondent was represented by Ms Crozier.

Background

4. The appellant first entered the United Kingdom on 8 July 2008. He made a claim for asylum on that day and it is not disputed that he failed to attend an asylum interview on 11 December 2008 and thereafter, having also failed to reply to a warning letter, he was judged to be an absconder and his claim for asylum was treated as withdrawn by the Home Office by virtue of paragraph 333C of the Immigration Rules.

5. It is also not in dispute that the appellant re-entered the United Kingdom on 23 February 2015. He expressed a wish to claim asylum and accordingly was allocated an appointment on 5 March 2015 at the Asylum Intake Unit. It appears that this was an error on the part of the Home Office, who had not at that time had access to the appellant's previous immigration history due to his file being in storage.

6. The CID printout notes confirm that, upon the discovery that the appellant had made a previous claim for asylum in 2008, his Asylum Intake Unit appointment was cancelled and he was advised to make a further submissions application. This he duly did, lodging further submissions on 23 March 2015. These further representations remain outstanding.

7. On 5 June 2015 the appellant made an application for subsistence support under Section 95 of the 1999 Act and it is the 2 July 2015 refusal of that application which gives rise to the present appeal.

The Relevant Legislative Background

8. Section 95(1) of the 1999 Act states as follows:

> *"The Secretary of State may provide, or arrange for the provision of, support for –*
>
> *(a) asylum seekers, or*
> *(b) [not relevant to this appeal],*
>
> *who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed."*

9. Section 94(1) of the 1999 Act defines an asylum seeker as *"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"*. A 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"*.

10. The case of the Queen on the application of *Nigatu v The Secretary of State for the Home Department [2004] EWHC 1806 (Admin)* addresses the meaning of the term "recorded".

11. Section 94(3) states that (for the purposes of support to asylum seekers) 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) [not relevant to this appeal]"

12. Immigration Rules set out the procedure to be followed by immigration caseworkers in various scenarios. With regard to treating an asylum application as withdrawn, paragraph 333C of the Immigration Rules states as follows:

> *"If an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued. An application may be treated as impliedly withdrawn if an applicant fails to attend the personal interview as provided in paragraph 339NA of these Rules unless the applicant demonstrates within a reasonable time that that failure was due to circumstances beyond his or her control. The Secretary of State will indicate on the applicant's asylum file that the application for asylum has been withdrawn and consideration of it has been discontinued."*

13. Paragraph 353 of the Immigration Rules continues as follows:

> *"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."*

The Arguments

14. The respondent's 2 July 2015 refusal of support asserts that the appellant is not entitled to Section 95 support since he is neither an asylum seeker nor a dependent of an asylum seeker. It is argued that the claim for asylum made in 2008 was treated as withdrawn when the appellant absconded and that the March 2015 representations, prepared by Jein Solicitors, do not automatically entitle the appellant to support under Section 95 of the 1999 Act.

15. Applying paragraph 353 of the Immigration Rules, the March 2015 correspondence falls to be considered as further submissions, which still await consideration as to whether or not they constitute a fresh asylum claim. Once considered, if rejected they will either be refused as further submissions without an in-country right of appeal or it may be determined that they represent an asylum claim, in which case a right of appeal would be offered. This assessment process by an immigration caseworker has not yet occurred.

16. The appellant's arguments set out by Jein Solicitors in his grounds of appeal are that the March 2015 submissions should be treated as a fresh asylum claim for the purposes of Section 95 support since, when the appellant re-entered the UK on 23 February 2015, he was asked to make a fresh claim by the Home Office. A copy of the appellant's March 2015 submissions is provided.

17. Mr Kotrly also raised a question as to whether the decision to deem the appellant's 2008 asylum claim as withdrawn was ever properly served upon him. The respondent's CID printout confirms only the making of the decision and not its service and it is clear that, at the point when the appellant arrived in the UK for a second time, his file was not available.

18. Ms Crozier confirmed that the usual procedure would be that the decision would be served to the file due to the appellant's whereabouts being unknown, but that this correspondence should then be delivered to the appellant upon his

contacting the respondent afresh. It cannot be determined from the papers presented at the appellant's support appeal whether or not this last action ever occurred.

My Findings

19. This is an application for support and therefore the burden of proof falls upon the appellant. The standard of proof is that of a balance of probability. In this case the appellant's arguments are insufficient to persuade me that he currently meets the criteria for entitlement to Section 95 support and I accept the respondent's submissions in this regard.

20. I make it clear that in determining this matter I have not given any consideration to what (if any) potential entitlement the appellant may have under either Section 4(1) or Section 4(2) of the 1999 Act. This is because the appellant wishes to remain in his present accommodation, where he receives emotional, practical and medical support. He does not therefore wish to apply for support under Section 4, being aware that this would be provided by way only of a support and accommodation package which would thus require him to move.

21. I am satisfied that the Secretary of State properly deemed the appellant's 2008 asylum claim to be withdrawn in accordance with paragraph 333C of the Immigration Rules. I cannot know at what point this decision was served, but it is clear from the representations made by the appellant's present solicitors that he is fully aware of that decision. In any event, even were that not the case, the appellant brought his asylum claim to an end by leaving the UK.

22. I apply the current case law of *R (on the application of YH) v SSHD [2008] EWHC 2174 (Admin)* in determining that the appellant is to be treated as a failed asylum seeker, who is seeking to make fresh representations in relation to his claim to asylum of July 2008. Despite the appellant's return to his country of persecution and his subsequent return to the UK, he is not to be treated as an asylum seeker. Any renewed claim that he makes now will be considered as fresh representations in relation to his old claim for asylum. It is unfortunate that the appellant was given an erroneous impression of his position when he entered the United Kingdom because his previous immigration history had not at that time been considered. However, this mistake was quickly rectified and the case of *YH* has made it clear that Rule 353 applies.

23. I am satisfied that the March 2015 submissions are currently in the hands of the appellant's immigration caseworker, who has not yet determined in accordance with paragraph 353 of the Immigration Rules whether the appellant has a fresh claim. The appellant therefore does not currently have an asylum claim which has been recorded as such in *Nigatu* terms.

24. On that basis I am obliged to dismiss the current appeal, since the appellant does not currently satisfy the Section 94(1) definition of an asylum seeker. There is nothing in this decision to prevent him applying again for such support, should his fresh representations be at some stage recorded as an asylum claim.

Signed : Ms Gill Carter
Deputy Principal Judge, Asylum Support

Dated : 20 July 2015