



**FIRST-TIER TRIBUNAL
ASYLUM SUPPORT**

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Appeal Number AS/15/07/33510

UKVI Ref. 13/01/01316/002

Appellant's Ref.

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

Tribunal Judge	<u>MS GILL CARTER</u>
Appellant	<u>MR HM</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, and gives reasons for the decision given on Wednesday the 15th day of July 2015, dismissing the above mentioned appeal.
2. The appellant, who is a 65 year old citizen of Zimbabwe, appeals against the decision of the Secretary of State who, on 27th June 2015, decided to discontinue support provided under Section 4 of the Immigration and Asylum Act 1999 (the 1999 Act) on the grounds that the appellant no longer satisfied any 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. The appellant attended the oral hearing and gave his evidence in person in the Ndebele language, through the assistance of an independent interpreter. The respondent was represented by Ms Crozier.
4. I was asked to delay the start of the hearing for an indeterminate period whilst the Asylum Support Appeals Project (ASAP) attempted to contact the appellant's solicitor at Burton & Burton in order to obtain their consent to appear for the appellant. I refused to do so since this would have been disproportionate.
5. ASAP were notified on day two of the appeal (a week ago) of the identity of the appellant's solicitors and given the opportunity to contact them with an offer of

free representation at the hearing. It is clear that Burton & Burton had assisted the appellant in the preparation of his support appeal, since they had been in contact with him up to and including the day before the Tribunal and had provided for the purposes of the Tribunal an email dated 13 July 2015 outlining the appellant's present position.

6. The appellant's representative at Burton & Burton was not in the office at the time of the postponement request and had had ample opportunity to accept the services of ASAP when they were first offered. I am fully satisfied that the appellant was not disadvantaged in any way by appearing in person and I took full account of the evidence provided by his solicitors.

Background

7. It is accepted that the appellant is a failed asylum seeker and the following chronology was not disputed. The appellant came to the United Kingdom in March 2001 and enjoyed leave to remain as a student up until 2004. Thereafter on 25 November 2012 he lodged a claim for asylum, which was refused on 16 April 2013. Subsequent appeals were dismissed and he became appeal rights exhausted on 6 August 2013.
8. Thereafter further submissions were lodged on 28 March 2014 and rejected on 23 July 2014. This rejection was challenged by Burton & Burton by way of an application for permission for judicial review on 10 November 2014 and a negative decision in this application on the papers was issued on 3 June 2015.
9. During the course of his asylum claim and subsequent appeals the appellant was supported under Section 95 of the 1999 Act. Thereafter, with a brief suspension when the appellant's further submissions were rejected and prior to his judicial review challenge, support under Section 4 was provided continuously until the decision of 27 June 2015. It is the refusal on the papers of the appellant's judicial review application which led to 27 June 2015 discontinuation of support and thereby to the present appeal.

The Law on Entitlement to Section 4 Support

10. 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
11. 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.
12. 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) [not relevant to this appeal];

(b) [not relevant to this appeal];

(c) [not relevant to this appeal];

(d) he has made an application for judicial review of a decision in relation to his asylum claim in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998;

(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.

13. The case of *R (NS) v First-Tier Tribunal and SSHD* [2009] EWHC 3819 (Admin) held that an appellant, who cannot satisfy Regulation 3(2)(d) because permission to proceed has not been granted in judicial review proceedings in England or Wales, is not precluded from falling within Regulation 3(2)(e).

14. Mr Justice Stadlen confirmed in *NS* that:

"There is a variety of factual circumstances in which the question of whether [this] Regulation is satisfied may arise." and "It is desirable that these questions should be addressed not in abstract but on the facts of particular cases".

15. He gave no further or more general analysis of the approach to be taken:

"It would be wrong for me... simply to give any kind of general ruling as to the correct interpretation of the Regulation... because there is a variety of factual circumstances in which the Regulation may fall to be applied."

16. In the absence of any more specific guidance from the courts, it is appropriate to have regard to the respondent's Guidance to Case Owners on Regulation 3(2)(e), most recently updated in January 2015, which states:

"Applicants are most likely to establish that they should be supported under regulation 3(2)(e) if they cannot be expected to take steps to leave the UK and so avoid the consequences of destitution that might lead to them suffering inhuman and degrading treatment. The most common case types where this applies (the list is not exhaustive) are when:

- *The applicant has submitted a late appeal against the Secretary of State's decision to refuse asylum and the AIT is considering whether to allow the appeal to proceed out of time.*
- *The applicant has submitted further submissions which are*

outstanding

These are examples only and Caseworkers must consider each case on its own facts."

The Evidence and Arguments

17. Entitlement to support is a two-part test. An applicant must first show that they are destitute. In this case destitution is not in dispute. However, an applicant must also demonstrate one of the primary criteria set out in Regulation 3(2)(a) to (e). This is a discontinuation decision and therefore the burden of proof lies initially with the respondent. The standard of proof is that of a balance of probability.
18. Support was most recently provided to the appellant under Regulation 3(2)(e) in order to avoid a breach of his rights under the European Convention, since he could not be expected to remedy his destitution by taking steps to return to Zimbabwe whilst he had an outstanding and active judicial review application.
19. It is not in dispute that the judicial review application which formed the basis for the most recent grant of Section 4 support has been rejected. Thus the respondent has discharged the initial burden of proof. The burden then passes to the appellant to show whether there is any other ground on which support should be provided to him. In this case only Regulation 3(2)(e) was argued.
20. The appellant in his written and oral grounds of appeal relies on the fact that he believes his judicial review application to be ongoing. Specifically he believes that his solicitors will make a renewed application for the permission application to be heard at oral hearing.
21. In support of his case the appellant produced three documents:
 - (i) A letter from his solicitors dated 17 June 2015 in which he is advised that the Upper Tribunal has refused his application for permission for judicial review. The letter concludes 'I have forwarded a copy to the barrister to advise whether there are any merits to renew the application to an oral hearing. Having looked at the decision of the court I believe it is going to be difficult to be successful at any oral hearing. I will await the barrister's response and up-date you accordingly'.
 - (ii) An email from his solicitor dated 13 July 2015 addressed 'to whom it may concern'. The appellant's solicitor confirms that he is instructed in relation to a judicial review application and gives the following update, 'There has been a delay in renewing the oral application due to the cut backs in legal aid for these types of challenges and the fact that my client could not raise funds to cover my fees and that of counsel. Counsel has advised that there are merits to renew the application to an oral hearing and I propose to submit the application in the next few days. Clearly from this my client's application will be ongoing and in such circumstance his NASS funding should continue as he is clearly destitute'.
 - (iii) An application for remission from court fees, which the appellant advised that he had signed on the morning of his support hearing and had faxed back to his solicitors.

22. The appellant's oral evidence was that his solicitor's office was some distance away in Nottingham, whereas he was living in Stoke-On-Trent, but he had spoken to his solicitor both yesterday and last week. He had completed legal aid forms some while ago (he could not be exactly certain when) but his solicitor had not yet confirmed whether or not legal aid had been granted. His solicitor had not told him when he would next be in touch, but he expected that something would happen imminently.
23. It was Ms Crozier's argument that the appellant's funding position was unclear and he may or may not ultimately renew his application for judicial review. There was no guarantee that he would do so and thus at the present time no entitlement to support. If he did renew his application he could reapply for support.

My Findings

24. The sole question before me was whether or not the appellant's present position demonstrated a continuing entitlement to support under Regulation 3(2)(e). It is important to note that Regulation 3(2)(e) is concerned with the potential violation of the appellant's rights by way of the respondent's decision to refuse support and not by way of any decision to refuse his asylum application or to remove him to Zimbabwe. The position of this Tribunal is set out in *AW v LB Croydon and AD & Y v LB Hackney*:

"If there is no legal or practical obstacle to prevent an asylum seeker returning to his country of origin, denial of support by the Secretary of State would not constitute a breach of that person's convention rights. He has the choice to return to his country of origin. Neither Article 3 nor Article 8 impose a duty on the United Kingdom to provide support for a failed asylum seeker when there is no impediment to his returning to his own country".

25. The case of *NS* confirms that each case should be addressed on its own particular facts and does not prescribe any precise preconditions for entitlement. In the absence of any more specific guidance from the courts, it is appropriate to have regard both to *AW* and to the respondent's Guidance to Case Owners on Regulation 3(2)(e), which I have quoted at paragraph 16 above.
26. As matters stand the appellant had his judicial review application refused on 3 June 2015. The initial assessment of his chances of success in a renewed oral application was low, although subsequent advice has been received to the contrary. The 13 July 2015 email from the appellant's solicitors does not assist in resolving the question of whether the appellant is funded to take further legal action – it refers to cut backs in the legal aid system and does not say whether legal aid has now been granted or, if not, how the application could be funded. The appellant has not received any positive news from his solicitor regarding legal aid and spoke to him as recently as yesterday. The fact that a fee remission form has been signed by the appellant is not evidence that an application will actually proceed.
27. I note that the appellant's solicitor indicates in his email that he proposes to submit a judicial review application in the next few days, but I have no actual evidence to this effect. I have seen no such application, I have seen no evidence of any funding for such an application and I note that the application on the papers was refused on 3 June 2015 and thus that the appellant's representative has had a considerable period in which to apply for renewal of

the judicial review and has failed to do so. Any such renewal application would now be significantly out of time, if it proceeded at all.

28. At the moment the appellant's plans to renew the judicial review application are not sufficiently evidenced or tangible to represent a legal or practical obstacle to prevent him from taking steps to leave the United Kingdom. As of now the appellant's asylum claim has been fully examined and determined and, in these circumstances, it would be reasonable to expect him to make arrangements to return to Zimbabwe. In this way he can avoid the effects of destitution and thereby any potential breach of his convention rights. I find that Regulation 3(2)(e) is thus not currently satisfied.
29. Since I have found that the appellant does not currently satisfy the Regulation 3(2)(e) criteria, his appeal is dismissed. There is nothing in this decision which would prevent him from reapplying to the Home Office for support when and if a renewed judicial review application was sufficiently far advanced to satisfy either Regulation 3(2)(d) or Regulation 3(2)(e).

Signed : Ms Gill Carter
Deputy Principal Tribunal Judge, Asylum Support

Dated : 20 July 2015