FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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

Telephone: 020 7538 6171
Fax: 020 7538 6200
Appeal Number AS/14/02/31105
UKBA Ref. 07/09/00400/005
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	MISS BM
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 12th day of March 2014, dismissing the above mentioned appeal.

2. The appellant, who is a 31 year old citizen of Eritrea, appeals against the decision of the Secretary of State who, on 19th February 2014, 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 her evidence in the Tigrinyan language, through the assistance of an independent interpreter. She was represented by Ms Dixie of the Asylum Support Appeals Project. The respondent was represented by Ms Hogben.

Background

4. It is accepted that the appellant is a failed asylum seeker and the following chronology was agreed. The appellant arrived in the United Kingdom on 22nd August 2007 and made an asylum claim on arrival. This claim was refused on 8th October 2007 and dismissed on appeal on 28th November 2007. After the

refusal of further permission to appeal, the appellant became appeal rights exhausted on 4th February 2008.

5. Five sets of further submissions have been lodged by the appellant in 2008, 2009, 2010, 2011 and 2013. All these submissions have been rejected by the respondent. The most recent set of further submissions was lodged on 16th September 2013 and rejected on 27th January 2014.

6. In terms of the appellant's support history, she was provided with support under Section 95 of the 1999 Act whilst her asylum claim was ongoing. Thereafter, at various times during 2008 to 2011, she was provided with support under Section 4 of the 1999 Act whilst her further submissions were outstanding. Most recently, Section 4 support was granted on 27th September 2013 on the basis that the 16th September 2013 further submissions rendered her eligible for support under Regulation 3(2)(e).

7. The day after the 27th January 2014 rejection of these further submissions the respondent sent the appellant a review letter advising that it was considered that she was no longer eligible for Section 4 support and enquiring as to any basis on which she believed that she remained so eligible. The solicitors representing the appellant in her immigration matters, Barnes Harrild and Dyer, responded on the 17th February 2014 that they were going to issue a pre-action protocol letter, alerting the Secretary of State to their intention to challenge by way of judicial review the decision to refuse the recent fresh representations.

8. No such pre-action protocol letter having been received, the respondent proceeded to issue a letter discontinuing the appellant's support on 19th February 2014. It is that decision which is challenged by the appellant in the current appeal.

The Law on Entitlement to Section 4 Support

9. 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

10. 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.

11. 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) [not relevant to this appeal];

(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.

The matters in dispute

12. Support was most recently provided to the appellant under Regulation 3(2)(e) in order to avoid a breach of her rights under the European Convention, since she could not be expected to remedy her destitution by taking steps to return to Eritrea whilst she had outstanding fresh representations. Those representations having been rejected on 27th January 2014 and no pre-action protocol correspondence having been received, the Secretary of State concluded that the appellant's Regulation 3(2)(e) entitlement to support had come to an end.

13. By the date of the hearing matters had moved on in that a nine page pre-action protocol letter dated 24th February 2014 had been delivered to the Secretary of State by the appellant's solicitors. This formed the basis of the appellant's grounds of appeal, which argued that the appellant "should be supported until this process is concluded".

14. At the hearing Ms Hogben provided a further update. The Secretary of State had rejected the appellant's pre-action protocol arguments in a letter of 10th March 2014. Home Office's records indicated that this correspondence had been received by the appellant's solicitor on 11th March 2014. There was no documentary evidence of this, but Ms Dixie provided considerable assistance by confirming that she had telephoned the appellant's immigration solicitor who agreed that the letter rejecting the pre-action protocol arguments had indeed been received.

15. In summary it was Ms Hogben's argument that the appellant now fails in a hiatus between the rejection of the pre-action protocol letter and the lodging of any judicial review application in the High Court. There was, she argued, nothing outstanding at the present time; the appellant could be expected to take steps to leave the U.K. to avoid any breach of her human rights and thus Regulation 3(2)(e) was not engaged.

16. Ms Dixie argued that the appellant fell squarely within Regulation 3(2)(e) since the respondent's policy in this regard was widely drafted; the appellant remained in the process of pursing her judicial review application and it would be unreasonable to expect her to leave the United Kingdom whilst she was engaged in this process. The appellant should remain eligible for Section 4 support between the end of the pre-action protocol letter and the issue of any application for permission to apply for judicial review. In addition the appellant is said to be psychologically fragile such that the impact of destitution upon her would be so severe that it may put her health at risk.

My findings

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. It is not in dispute that the fresh representations which initially formed the basis for the grant of Section 4 support have 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 her. In this case only Regulation 3(2)(e) was argued.

19. The appellant's grounds of appeal relied on the outstanding pre-action protocol letter. It was agreed in opening submissions that a negative response to this correspondence has now been received. The question remaining before me was therefore solely whether or not the appellant's present position demonstrates a continuing entitlement to support under Regulation 3(2)(e).

20. 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).

21. 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".*

22. 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."*

23. 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), dated 12 April 2013, 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."

24. Ms Dixie argued that I should be persuaded by a previous decision of Tribunal Judge Lewis. On 25th July 2012, in appeal AS/12/07/28659 at this Tribunal, Judge Lewis rejected submissions, similar to those relied upon by Ms Hogben, in the following terms:

> *"The relevant guidance – the Section 4 instructions – are drafted so broadly that they do not admit of the exclusion of any particular set of circumstances as a matter of principle. Each case must be considered on its own facts. Further, it seems to me that ... [the] submission ignored the reality that the pre-action protocol letter is part of a process, which may or may not lead up to the lodging of a judicial review application: some element of hiatus in the process* is inevitable but does not inevitably indicate that the process has terminated".

25. It seems to me that Judge Lewis, far from finding (as Ms Dixie seemed to propose) that support must always continue between the rejection of pre-action protocol arguments and the issue of any application in judicial review proceedings because it is all one process, is simply restating the proposition in *NS* (which is reflected in the respondent's Section 4 guidance instructions) namely that, in considering eligibility for support under Regulation 3(2)(e), each case must be considered on its own facts.

26. Judge Lewis acknowledges that a pre-action protocol letter *"may or may not lead up to the lodging of a judicial review application"*. I see nothing in *NS* or in Judge Lewis's conclusions to support an argument that the criteria for Regulation 3(2)(e) must inevitably be fulfilled at every stage of the three-month period during which judicial review proceedings could theoretically be lodged. Even if I am wrong as to the meaning of Judge Lewis's judgment, it is my conclusion that, as there are a range of factual circumstances which may bring an appellant within Regulation 3(2)(e), so there are various stages in the contemplation of an application for permission to apply for judicial review which may or may not satisfy Regulation 3(2)(e).

27. In the case heard by Judge Lewis Legal Services Commission funding had been granted and the appellant had an appointment with her solicitor booked for the day after the support appeal hearing. In the case before me there are two items of written evidence from Barnes Harrild and Dyer which speak of a possible judicial review action. Firstly, in the 24th February pre-action protocol correspondence and covering letter, they warn that, should they not receive a positive response within 14 days, then they will be compelled to lodge a judicial review application. Secondly, in their letter of 17th February, they speak of the three month time limit within which to bring judicial review proceedings, their intention to issue a pre-action protocol letter and that, if the Secretary of State does not respond (by which I presume they mean does not respond positively), then they will apply for legal aid to cover the costs of the judicial review proceedings.

28. The appellant gave a helpful update in answer to my questions. She had last seen her solicitor about two months ago. At that time, he had told her that he was going to apply for legal aid to appeal against the decision to refuse her fresh representations. However, she did not recall completing any forms. She had been advised by her solicitor that he would write to the Home Office and

"leave the matter to court" if there was no response. The solicitor would write to her when he had received a response and had not as yet contacted her.

29. Ms Dixie asked me to make a finding that the appellant's judicial review proceedings were not manifestly unfounded or, in the terms of *Birmingham City Council v Clue [2010] EWCA CID 460,* not "*obviously hopeless or abusive*". Had I been asked to make this finding at a time when the pre-action protocol letter was still outstanding, I would likely have found that the correspondence met this, albeit fairly low, test. However, attempts to apply such a finding to any future proceedings (even based on the arguments indicated at the pre-action stage) must be approached with some caution since I would be speculating on the content of a judicial review application that does not yet exist (even in draft form) and without sight of the Home Office letter which rejected the pre-action protocol arguments.

30. 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 her asylum application or to remove her to Eritrea. 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".*

31. As matters stand, the appellant is someone who has had her asylum claim and five sets of further submissions turned down. There is no record of any challenges to these earlier decisions by way of judicial review. With regard to her present situation, she has not heard from her solicitor for at least two months, there is no indication that legal aid funding has been granted and, as recently as 17th February 2014, such an application was spoken of in the future tense by her solicitor. There are many stages leading up to the lodging of a judicial review application, not least advice on merit, the approval or rejection of funding and the drafting and lodging of the application itself within the statutory time limit. An application may fall at any of these hurdles or, as happens in many cases, it may simply be decided not to pursue the matter after unsuccessful pre-action protocol correspondence.

32. At the moment the appellant's plans for judicial review are not sufficiently tangible to represent a legal or practical obstacle to prevent her from taking steps to leave the United Kingdom. It is open to her solicitor to expedite any judicial review application, should this be considered appropriate, but as of now her asylum claim has been fully examined and determined and, in these circumstances, it would be reasonable to expect her to make arrangements to return to Eritrea. In this way she can avoid the effects of destitution and thereby any potential breach of her convention rights. Regulation 3(2)(e) is thus not currently satisfied.

33. Ms Dixie raised questions over difficulties in the removal of the appellant. These are mentioned in the pre-action protocol correspondence but are not in my view material to the appellant's support position, since the issue is not whether the appellant can be removed but rather whether or not she can be expected to co-

operate with the Home Office in taking voluntary steps to leave (and in so doing render herself eligible for Section 4 support until she leaves).

34. I have also considered the appellant's state of mental health. The evidence in this regard comes from a discharge summary from the Bethlem Royal Hospital after an admission between 19th and 26th April 2013 as an informal psychiatric patient. The appellant had been seen at the Accident and Emergency Department of the Mayday General Hospital on 22nd March 2013 after reports that she tried to hang herself with a belt, believing that the Home Office had rejected her asylum application. The April 2013 admission occurred when the appellant was brought to the hospital by the police after wandering on a dual carriageway in what is said to appear to be an attempt to end her life. This incident is also said to have occurred after the appellant had been told by the Home Office that her asylum application had been unsuccessful.

35. The discharge summary noted that the appellant was a high risk to self, but not in the context of mental illness, and was of moderate to high vulnerability due to her lack of financial and social support. The summary concluded that there was no evidence of mental illness, and that the appellant had suffered an acute stress reaction. She was discharged, having been provided with a ticket to return to her last known address in Birmingham and £10 for food. There is no evidence that the appellant has been in contact with mental health services since that time.

36. I find therefore that the appellant is a person who does not suffer from ongoing mental illness, but who has reacted in an acute and risky way to stress and in particular to two of the many negative decisions made in her asylum claim. This is a matter of no little concern. However, any worsening of her mental state due to the effects of destitution may be remedied by her as discussed above and does not itself give rise to an entitlement to support under Regulation 3(2)(e) in the absence of any other obstacle preventing her from taking steps to leave the U.K..

37. Since I have found that the appellant does not currently satisfy the Regulation 3(2)(e) criteria, her appeal is dismissed. There is nothing in this decision which would prevent her from reapplying to the Home Office for support when and if her judicial review application is sufficiently far advanced to satisfy either Regulation 3(2)(d) or Regulation 3(2)(e).

Ms Gill Carter
Deputy Principal Tribunal Judge, Asylum Support

SIGNED ON THE ORIGINAL [Appellant's Copy]

Dated 17 March 2014