**FIRST-TIER TRIBUNAL**
**ASYLUM SUPPORT**

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Appeal Number AS/13/07/30183/SB
UKBA Ref. 13/07/00586/001
Appellant's Ref.

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

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| Tribunal Judge | Ms Gill Carter |
| Appellant | MR AH |
| 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 Monday the 29th day of July 2013 in which I substitute my own decision for the decision appealed against with the effect that the appellant is entitled to the provision of support in accordance with Section 4(1)(a) of the Immigration and Asylum Act 1999 (as amended) (the 1999 Act).

2. The appellant, who is a 24 year old citizen of disputed nationality, appeals against the decision of the Secretary of State who, on 9 July 2013, refused his application for support under Section 95 of the 1999 Act.

3. The appellant attended the hearing and was assisted by an independent court interpreter in the Farsi language. He was represented by Mr Gray of the Asylum Support Appeals Project. The respondent was unrepresented.

### Preliminary Issues

4. In the decision letter of 9 July 2013 the respondent stated:

> *"We consider that this is not a decision to which Section 103(1) of the Act applies, and that there is therefore no right of appeal to an Asylum Support Adjudicator, but this matter is currently the subject of litigation".*

5. The question of the jurisdiction of this Tribunal was not pursued in the respondent's detailed written submissions and I find that, far from being the subject of current litigation, this question was in fact determined in 2006 by the Administrative Court in the case of *R (OAO SSHD) and CASA and Malaj [2006] EWHC 3059 (Admin)*. Applying the rationale in the above case I am satisfied that there is a right of appeal against this refusal of Section 95 support.

## Chronology

6. The following chronology is not in dispute. The appellant made an in-country asylum claim on 3 December 2007. On 14 May 2008 he should have attended an immigration interview in connection with that claim but, for reasons which are not material to this appeal, he did not attend as required. Accordingly, on 19 May 2008, the Home Office warned the appellant by letter to his last known address that his claim for asylum would "*be treated as withdrawn and consideration of it discontinued under paragraph 333C of the Immigration Rules*" unless an acceptable reason for failing to attend his asylum interview was provided within five working days. In the event the appellant did not receive or respond to this correspondence and the Home Office records show that on 27 May 2008 his asylum claim was duly treated as withdrawn. In September 2008 the respondent's then representatives, Fadiga & Co, wrote to enquire about the appellant's asylum claim and in response, on 21 October 2008, the Asylum and Appeals Team of the Home Office replied that the appellant's asylum claim had been withdrawn on 27 May 2008 as he was considered to have absconded.

7. Thereafter no matters of note are recorded until the appellant's arrest by the police on suspicion of being an immigration offender on 27 January 2013. The appellant was detained pending immigration removal following this arrest and indeed was served with removal directions on 7 February 2013. On the day prior to removal these directions were cancelled for further enquiries concerning the appellant's identity. On 4 April 2013, whilst the appellant was still detained, his legal representatives, Duncan Lewis Solicitors, faxed a letter to the Home Office. This letter gives the appellant's 2007 Home Office reference and states:

> *"Please note that our above named client wishes to make a claim for asylum. We would therefore request that you make the necessary arrangements in order for our client's claim to be made as a matter or urgency. We would be grateful if you could provide us with a date for his screening interview and advise us of any dates of any future interviews."*

8. The above letter has as yet received no response from the Home Office but, on 18 April 2013, the appellant was granted temporary admission. On 27 June 2013 he applied for support under Section 95 of the 1999 Act and it is the 9th July 2013 refusal of that application which gives rise to the present appeal.

## The Relevant Legislative Background

9. 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."*

10. 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"*.

11. 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".

12. 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) 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.*

13. Depending on the circumstances of a particular applicant the Secretary of State may also consider whether or not to provide support under Section 4(1) or 4(2) of the 1999 Act (as amended by Section 49 of the Nationality, Immigration and Asylum Act 2002 - the 2002 Act).

14. Section 4(1) as relevant to this appeal reads as follows:

*"The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –*

*(a) temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 to the 1971 Act;*
*(b) [not relevant to this appeal]; or*
*(c) [not relevant to this appeal]."*

15. Section 4(2) reads as follows:

*"The Secretary of State may 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."*

16. 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."*

17. 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 Competing Arguments**

The Home Office

18. The respondent's arguments are contained in the letter refusing support and in two sets of written submissions. The decision letter states that the appellant is not eligible to apply for asylum support since he is not currently an asylum seeker. The rationale is that the appellant's asylum claim was treated as withdrawn when he was deemed to be an absconder and that he would only again be considered as an asylum seeker after any fresh submissions that he had made had been approved and entered on the Home Office database. (That is to say recorded in *Nigatu* terms). Specifically it is stated that the submission of a new claim would not automatically lead to the appellant being classed as an asylum seeker.

19. The decision letter further states that there is no entitlement to support under Section 4(2) in the circumstances but that the appellant may be eligible to apply for support under Section 4(1)(a).

20. The Home Office submissions suggest that the effect of treating an asylum claim as if it is withdrawn is not the same as if an asylum claim was *"determined in either the negative or the positive"*. It is said that the effect of treating an asylum claim as withdrawn is to mean that there is no longer a claim requiring determination in any way at all.

21. It is concluded therefore that an applicant for support who is in the appellant's position cannot satisfy either the S94 definition of an asylum seeker or the Section 4(2) definition of a person whose claim for asylum has been rejected. Section 4(1)(a) support however may be offered to plug this gap and to ensure that the minimum standards of the EU Reception Directive are met.

22. In relation to the appellant's 4 April 2013 representations prepared by Duncan Lewis Solicitors, it is said that the making of such submissions does not

automatically entitle the appellant to support under Section 95 of the 1999 Act, but rather that, applying paragraph 353 of the Immigration Rules, the 4 April 2013 correspondence falls to be considered as further submissions which still await consideration as to whether or not they constitute a fresh asylum claim.

23. The respondent's submissions conclude that, bearing in mind the above unresolved correspondence, the Secretary of State *"would be minded to grant accommodation under Section 4(1)(a) of the 1999 Act in this case upon a fresh application for such support being made. This is on the understanding that any such fresh application would demonstrate that the appellant is still destitute."*

The Appellant

24. The appellant's arguments were prepared in writing on his behalf by the British Red Cross and presented at the hearing by Mr Gray. Direct evidence from the appellant was not required, although he availed himself of the opportunity offered at the hearing to explain the dire circumstances in which he finds himself both in terms of support and accommodation.

25. It is argued that the appellant falls squarely within the Section 94(1) and Section 94(3) definition of an asylum seeker for the purposes of support. The appellant is over 18 and his 2007 claim for asylum was recorded by the Secretary of State. This 2007 claim has not been determined, since the appellant has never received a substantive decision on it. The respondent's own submissions are quoted in this regard and in particular the sentence which states *"If a claim for asylum has been withdrawn it cannot be said to have been determined as neither a positive or negative decision has been taken on it".*

26. Further it is said that the appellant has notified the Home Office by his solicitor's letter of 4 April 2013 that he wishes to re-register a claim for asylum and that appeal *29350* (heard by Judge Saunders at this Tribunal on 21 January 2013) is similar-fact authority for the proposition that an asylum seeker, whose claim has been deemed withdrawn for non-attendance at an substantive interview, should still be treated as an asylum seeker for the purposes of Section 95 support if he attempts to make a further application.

27. In the alternative it is argued that, if the letter of 4 April 2013 is considered as further submissions by application of paragraph 353 of the Immigration Rules, then the paragraph 353 test must be found to be already met since nothing in the original 2007 asylum claim has as yet been considered.

28. In any event it is argued that paragraph 353 of the Immigration Rules provides the detail as to how the statutory regime is to be implemented and should not be advanced by the Secretary of State as a basis for undermining the Section 94 statutory definition of an asylum seeker for the purposes of Section 95 support.

29. The Secretary of State's interpretation of the effect of paragraph 333 of the Immigration Rules is further challenged. Specifically it is said that this paragraph merely allows the Secretary of State to cease the consideration of an asylum claim where there is an implied or explicit withdrawal, but that the asylum claim itself remains extant and that in this case the letter of 4 April 2013 has had the affect of renewing it. The appellant, it is concluded, finds himself in the same position in 2013 as he did in 2007.

## My Findings

30. This is an application for support and therefore the burden of proof falls upon the appellant. In this case the appellant's arguments are insufficient to persuade me that he currently fulfils the criteria for entitlement to Section 95 support and I accept the respondent's submissions in this regard. Entitlement to support under Section 4(2) has not been argued by the appellant and I further accept the respondent's position that the appellant cannot, at the present time, bring himself within Section 4(2) for the purposes of support.

31. I note, however, the Secretary of State's concession that the appellant, subject to satisfying the criteria of destitution, should be provided with support under Section 4(1)(a) by virtue of his temporary admission status. For reasons which I set out below I find that the appellant is not required to fill out a fresh application for support in order for these arrangements to be put in place and I find that he is entitled to S4(1)(a) support.

32. Dealing now with the submissions in turn, I do not accept that the Secretary of State has by reference to the appellant's asylum claim not being *"determined either in the negative or positive"* conceded that the Section 94 definition of an asylum seeker is met. It is true that the wording of this submission is confusing and possibly somewhat clumsy, but to accept it as a concession as argued by the appellant's representatives would be to read this statement out of the context of the respondent's submissions as a whole.

33. Neither do I accept that I should be persuaded by the findings of Tribunal Judge Saunders in appeal *29350*. Not only am I not bound by the conclusions of my judicial colleague, but the above appeal was specific to its own facts containing as it did some significant concessions by the Presenting Officer to the effect that the particular appellant fulfilled the definition of an asylum seeker. No such concessions have been made in the present case.

34. Turning now to the implications of action taken under paragraph 333C of the Immigration Rules, I find the wording of that paragraph to be clear when it states that the consequence of an applicant failing to attend the personal interview within the asylum process is that the Secretary of State may treat his asylum application as impliedly withdraw. Only because the application for asylum is treated as withdrawn in this way is the Secretary of State's consideration thereof discontinued. To suggest, as was argued on the appellant's behalf, that the effect of paragraph 333C is to discontinue the Secretary of State's consideration of an asylum claim, but to leave the asylum claim somehow pending is, in my view, to interpret paragraph 333C in a way that is not borne out by its text.

35. I further reject the assertion that to have regard to paragraphs 333C and 353 of the Immigration Rules is to accord these Rules primacy over the primary support legislation contained in the 1999 Act. In order to apply the Section 94 definition of an asylum seeker, I cannot fail to have regard to the appellant's immigration position and paragraphs 333C and 353 are merely components which, amongst others, inform the picture of the appellant's immigration status, against which his entitlement to support must be assessed.

36. Having satisfied myself that the Secretary of State deemed the appellant's 2007 asylum claim to be impliedly withdrawn, I turn to the argument that the appellant should be found to satisfy the Section 94(3) definition of an asylum seeker because he has not received a decision on this asylum claim and therefore his claim cannot said to have been determined.

37. I see no reason to look beyond the normal daily usage of the word "withdrawal". The Oxford English dictionary suggests a definition of removal, retraction or taking away, which accords with my understanding. Thus, if the appellant's asylum claim has been treated as if it has been withdrawn, it is not longer awaiting determination and nor has it received a substantive response. Rather there has been a recorded claim for asylum but, once it is deemed withdrawn, there is no longer any such claim. Hence, in support terms, the respondent is, in my view, correct to conclude that the appellant satisfies neither Section 95 nor Section 4(2).

38. What then of the 4th April 2013 letter from Duncan Lewis Solicitors? This correspondence is far from clear in the sense that it states that the appellant *"wishes to make a claim for asylum"* rather than to re-open such a claim. All that can be certain about it at this stage is the statement from the respondent which sets out that *"The Secretary of State has made no assessment of the appellant's further submissions. They are outstanding and will be decided within normal timescales".*

39. The appellant therefore finds himself in the hands of his immigration caseworker, who is considering but has not yet determined whether the appellant has a fresh claim in accordance with paragraph 353 of the Immigration Rules. I am invited to conclude that, given the circumstances of his case, the appellant is bound to satisfy such a test. This is not a matter which falls within my jurisdiction to determine but rather is the province of the Home Office primary decision maker.

40. That said, the appellant cannot be expected to remain in a situation of destitution whilst he awaits such a decision. This position is recognised in the concession that the Secretary of State would be minded to grant Section 4(1)(a) support upon receipt of a fresh application demonstrating that the appellant is still destitute. As far as the appellant's destitution is concerned, I find that this is not in doubt. His application for support was made on 27 June 2013 and is therefore only one month old. It was supported by evidence of destitution and I note that destitution was not questioned by the Secretary of State as at the 9th July 2013 refusal decision. There has been no suggestion in any submissions that the appellant is anything other than destitute.

41. I accept that the appellant originally applied for support under Section 95 and not under Section 4(1)(a). However, I am also mindful that, in contrast to the past position, precisely the same application form is required regardless of whether the application is for support under Section 95 or Section 4(2) or Section 4(1)(a). I find therefore that the requirement for a further application for support is merely a bureaucratic exercise, which is not based on a statutory requirement and which would have the undesirable affect of disadvantaging an already vulnerable applicant.

42. Given that entitlement to support under Section 4(1)(a) is conceded by the Secretary of State subject to proof of destitution and that I have found in the appellant's favour on this point, I substitute my decision for that of the Secretary of State with the effect that Section 4(1)(a) support should be provided forthwith.

Ms Gill Carter
Deputy Principal Tribunal Judge, Asylum Support

***SIGNED ON THE ORIGINAL*** [Appellant's Copy] Dated 31 July 2013