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

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Appeal Number : AS/12/07/28659
UKBA Ref. : 12/05/00411/002
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 | Mr Ian A Lewis |
| Appellant | CC |
| 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 ("the Rules"), and gives reasons for the decision made on 25th July 2012, after an oral hearing, allowing the appeal.

2. The Appellant is a national of Guinea, whose date of birth is given as 1st January 1989. She appeals under section 103 of the Immigration and Asylum Act 1999 against a decision of the Secretary of State dated 10th July 2012 refusing support under section 4 of the Immigration and Asylum Act 1999 (as amended).

3. In her Notice of Appeal the Appellant indicated that she wanted to attend an oral hearing of his appeal. The matter was duly listed.

4. The Appellant was unrepresented at the hearing. She participated in the hearing through a court-appointed interpreter: I ensured mutual understanding at the outset and no language difficulties became apparent during the course of the hearing. The Respondent was represented by Mrs. Crozier.

5. I have given careful consideration to all the evidence that is before me both oral and documentary. I have borne in mind that where an Appellant appeals against a decision to refuse section 4 support, the burden of proof is upon the

Appellant, to the civil standard of a 'balance of probabilities', to establish that she meets the criteria for support.

6. 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 Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 in the following terms:

> "*(1) ...*
>
> *(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.*"

7. The Respondent has not taken any issue in respect of destitution. The issue in the appeal is in respect of regulation 3(2).

8. Regulation 3(2) specifies the following conditions:

> *(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which is able to leave the United Kingdom, which may include complying with attempts to obtain a travel documents to facilitate his departure;*
>
> *(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;*
>
> *(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;*
>
> *(d) he has made an application for judicial review of a decision in relation to his asylum claim -*
>
> > *(i) in England and Wales, and has been granted permission to proceed pursuant 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.*"

9. I have noted the Appellant's immigration history as revealed in the documents. She arrived in the U.K. in May 2011; an application for asylum was made on 4th July 2011; the application was refused and the Appellant's appeal was dismissed by the Immigration and Asylum Chamber on 30th August 2011; the Appellant became 'appeal rights exhausted' on 20th September 2011. On 23rd April 2012 the Appellant made further representations to the Respondent claiming them to constitute a 'fresh claim' for asylum. The representations were supported by evidence and sought to address the adverse findings of fact made by the Immigration Judge that had heard the Appellant's immigration appeal. The Respondent rejected these representations both substantively and as not amounting to a 'fresh claim' by letter dated 9th May 2012. The Appellant's

representatives wrote a 'pre-action protocol' letter to the Respondent on *th June 2012 indicating that judicial review of the Respondent's decision would be sought were it not to be reconsidered. On the same day, 8th June 2012, the Respondent replied stating that in light of the pre-action protocol letter the Respondent's decision would be reconsidered. The Respondent reconsidered the Appellant's representations, but they were again rejected by way of letter dated 27th June 2012. A further 'pre-action protocol' letter dated 10th July 2012 was sent to the Respondent by the Appellant's representatives. The Respondent replied by letter dated 16th July 2012 stating that the decision of 27th June 2012 would be maintained.

10. In the meantime the Appellant made an application for section 4 support on 20th June 2012. (There had been an earlier application that was refused on 14th May 2012 but that is not a matter before the Tribunal presently.) At the time the application was made the Appellant was relying upon her then outstanding representations. However, by the date the Respondent refused the application – 10th July 2012 – those representations had been rejected by the Respondent. The Appellant now relies upon the pre-action protocol letter of 10th July 2012 and the contemplation of commencing judicial review proceedings in the High Court.

11. The Respondent replied to the pre-action protocol letter on 16th July 2012. It is the Appellant's evidence – see reply to Directions from Refugee Council dated 23rd July 2012 - and I accept it, that since receiving the letter of 16th July 2012 an application for LSC funding has been commenced, and I note further that the Appellant is due to see her immigration solicitors on 26th July 2012 to give further instructions in respect of the contemplated judicial review application.

12. I have reminded myself that in **NS [2009] EWHC 3819** it was held that it was not necessary for permission to apply to have been obtained in judicial review proceedings (the requirement of regulation 3(2)(d)) for regulation 3(2)(e) potentially to be engaged. Nonetheless, it is to be noted that beyond the essential principle that 3(2)(e) *might* be engaged, there is no meaningful guidance forthcoming as to how the regulation 3(2)(e) condition is to be considered in the context of judicial review proceedings that have not yet reached the permission stage.

13. In my judgement, in the absence of more specific guidance from the High Court, it is appropriate to have regard to the substance of the Respondent's Section 4 Instructions in considering a section 4 appeal grounded upon a claim that a pre-protocol letter has been sent. In the context of regulation 3(2)(e) the Instruction states, in part:

> *"An important consideration is whether the applicant can be expected to leave the UK to avoid a breach. 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 AIT 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.*

*These are examples only. Other circumstances may also give rise to a breach and Case Owners must consider each case on its own facts."*

14. I note that the guiding principle is the reasonableness of the expectation that a person be expected to quit the U.K. rather than await the outcome of some pending matter. Further in considering such reasonableness it appears that the decision-maker is not to descend to a detailed analysis of the outstanding matter, but may have regard in brief terms to whether or not it is a matter with some substance – i.e. not manifestly unfounded or disclosing no claim.

15. Mrs. Crozier emphasised that the pre-action protocol letter had been considered and rejected by the letter of 16th July 2012. She opined that it was frequently the case that pre-action protocol letters were not followed up by the lodging of applications for judicial review. As things stood the Appellant had, she submitted, neither any outstanding representations, and had not lodged an application in the courts: there was nothing to which regulation 3(2)(e) might relate. Mrs. Crozier confirmed, upon inquiry, that she considered as a matter of principle a person falling in the hiatus between the rejection of a pre-action protocol letter and the lodging of a judicial review application at the High Court could not engage regulation 3(2): such a circumstance could not found an application for support, and indeed, in her submission, such a circumstance justified discontinuing support.

16. I unhesitatingly reject Mrs. Crozier's submissions in this regard. 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 Mrs. Crozier's 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.

17. I turn then to the particular circumstances of the Appellant's case. Both the Respondent's decision letter of 27th June 2012 and the Appellant's pre-action protocol letter of 10th July 2012 helpfully set out the background to the Appellant's case and the substance of her further representations. In essence her asylum claim was based upon being the victim of domestic violence; her account was rejected by the Immigration Judge; she sought to address the basis of rejection in her further submissions by filing medical evidence supporting her contention that she had injuries consistent with a history of assault, and opinion evidence from a counsellor as to the reliability of her disclosures concerning her claimed history of domestic violence.

18. The Respondent has given lengthy consideration to these representations in the letter of 27th June 2012. The Appellant's representatives have responded with lengthy and detailed submissions in the pre-action protocol letter. The Respondent's response of 16th July 2012 says no more than that the case has

been reviewed, it had been considered with due anxious scrutiny, and the decision of 27th June 2012 is maintained.

19. I am satisfied that the Appellant and her representatives are dissatisfied with the outcome, and further I find on a balance of probabilities that the Appellant and her representatives do indeed intend to pursue a judicial review application. This is not a case where unmeritorious matters have been advanced simply to frustrate the process of removal or otherwise to secure advantage in support terms.

20. It is not for me to adjudicate upon the prospects of the contemplated judicial review application – or even the prospects of the application for LSC funding. My consideration of such matters is to go no further than considering whether the matters raised by the Appellant are to be characterised as being manifestly unfounded or disclosing no claim. I consider the documents indicate that there are real issues of unresolved substance between the parties in respect of the Appellant's asylum case. I recognize that it might be said that the Respondent has evaluated the evidence and the facts in a manner to which she is entitled and that her rejection of those facts is not readily impugnable on a 'point of law' in a judicial review application; on the other hand I recognize that there may be scope for arguing that the Respondent's approach to the medical evidence and expert opinion is unsustainable. It is not for me to answer these possible issues. Be that as it may am satisfied that there is sufficient substance in the contemplated judicial review challenge that it cannot be characterized as being manifestly unfounded or disclosing no claim, and that it would not be reasonable to expect the Appellant to quit the U.K. at least until such time as her judicial review claim has been resolved against her interests – whether that be by way of abandonment because of a lack of funding, or dismissal by the High Court, or otherwise.

21. It is to be noted that this is not a finding that the judicial review enjoys any particular prospect of success – but rather that it may not be summarily dismissed as manifestly of no merit.

22. Accordingly, in all of the circumstances I find that the Appellant has satisfied me that she meets the condition of regulation 3(2)(e) by reference to her contemplated judicial review claim further to the arguments set out in her pre-action protocol letter.

23. I allow the appeal pursuant to section 103 of the 1999 Act.

Mr Ian A Lewis
Tribunal Judge, Asylum Support

***SIGNED ON THE ORIGINAL*** [Appellant's Copy]

Dated 25 July 2012