



**FIRST-TIER TRIBUNAL  
ASYLUM SUPPORT**

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Appeal Number AS/12/05/28456  
UKBA Ref. 8/07/00093  
Appellant's Ref.

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

Tribunal Judge	<u>MR DAVID SAUNDERS</u>
Appellant	<u>MR SM</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 Thursday the 20<sup>th</sup> day of November 2014 allowing the above mentioned appeal.
2. The appellant, a 25 year old citizen of Eritrea, appeals against the decision of the Secretary of State who, on 17 May 2012, decided to discontinue his support under Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act") on the grounds that the appellant did not satisfy one or more of the requirements of Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 ("the 2005 Regulations").

**Background**

3. The appellant is a national of Eritrea. He was born on 18 May 1989 and is now 25 years of age. He arrived in the United Kingdom on 3 June 2008 and claimed asylum on the same day. His asylum claim was refused and his appeal rights were finally exhausted on 24 September 2010.
4. On 5 January 2011, the appellant applied for Assisted Voluntary Return (AVR) which was approved some seven days later. This application was withdrawn by the Home Office on 22 July 2011 as he had not taken any action. On 12 January 2012, he made a further application for AVR which was approved on

16 January 2012. This was withdrawn on 8 May 2012 as a result of his failure to proceed with this application.

5. In the meantime, the appellant made a series of applications for Section 4 support. His initial application was made on 12 January 2011 – following his first application for AVR – and was granted on 18 January 2011. This was discontinued on 29 July 2011 when he did not proceed with that application. An appeal against this decision was made and came before me in appeal AS/11/08/27260 on 18 August 2011. The appeal was dismissed.
6. The appellant then made a second application for Section 4 support on 19 September 2011. This was refused on 3 October 2011. No appeal was made against this decision. The appellant then made a third application – following his second application for AVR – on 24 February 2012. This was refused on 15 March 2012. The appellant appealed and on 10 April 2012, the appeal was allowed by Tribunal Judge Verity Smith. Judge Verity Smith made the following findings of fact:-
  - (a) that the appellant had made an application under AVR which was accepted by the then UKBA on 16 January 2012. It remained current;
  - (b) That, in the usual course of events, and in accordance with UKBA's policy, the appellant's eligibility will remain unchallenged for three months after his AVR application had been made. As the decision to discontinue his support had been made within that period, it was appropriate for his support to continue.
7. On 17 May 2012, the Secretary of State further reviewed the appellant's continuing entitlement to such support. She determined that, once again, the appellant was not taking all reasonable steps to leave the United Kingdom and discontinued his support on that date. The appellant appealed this decision and the matter came before Tribunal Judge Khan on 6 June 2012. Judge Khan dismissed the appeal and on 9 August 2012, the appellant applied to the Administrative Court for permission to bring judicial review proceedings.
8. On 18 October 2012 and 13 December 2012 the Administrative Court refused permission and on 19 December 2012 the appellant renewed his application to the Court of Appeal. On 3 September 2013, the Court of Appeal granted permission and on 23 June 2014, the parties agreed by consent to the Court remitting the matter to the First-tier Tribunal Asylum Support for hearing *de novo* by a judge other than Judge Khan. The matter comes before me upon this basis.
9. At the hearing before me the appellant did not attend and was unrepresented. On 10 November 2014 his representatives, Asylum Support Housing Advice (ASHA) of Manchester, wrote to the Tribunal and asked for the matter to be dealt with on the papers. I am satisfied that I have sufficient evidence before me to reach a decision and that the appeal can be dealt with fairly and justly in the absence of the appellant. The respondent was represented by Mr Little.
10. On 10 November 2014 the appellant submitted further representations purporting to be a fresh claim. By letter of the same day, ASHA state that the appellant is no longer taking all reasonable steps to leave the UK and that he relies upon his further representations as justification for such failure.

## **Legislative Framework**

11. 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.
  
12. Section 4(5) of the 1999 Act (as amended by Section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) allows the Secretary of State to make regulations specifying criteria to be used in determining –
  - (a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
  - (b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.
  
13. 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.
  
14. 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) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document 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) (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 Respondent's Decision**

15. The respondent says, in her discontinuation letter, that the appellant no longer meets any of the requirements of Regulation 3(2) of the 2005 Regulations. She claims that the appellant is not taking all reasonable steps to leave the United Kingdom. She relies upon the fact that the appellant applied for AVR to "Choices" at Refugee Action on 12 January 2012 but that this application was withdrawn by the Home Office on 8 May 2012 as the AVR team confirmed that his application was over three months old and had now expired.

### **The Appellant's Original Case**

16. The appellant, on the other hand, says in his grounds of appeal, that he remains eligible for Section 4 support because he is taking all reasonable steps to return to Eritrea. He disagrees with the conclusions reached by the respondent in her decision letter. He says that he has been to the Eritrean Embassy on two occasions to try and obtain a travel document and that on each occasion he was refused. The last occasion he attended was on 21 March 2012. He does not have a letter to demonstrate this but he does have a number of travel tickets, which were produced at his last appeal in *AS/12/3/28215*. He says that he will call his Reporting Centre to enquire about voluntary removal but he says that his enquiries reveal that they will not assist him without appropriate documentation. He will try and go to London again to arrange travel documents from his Embassy but he does not have the cash to travel there without difficulty.
17. The appellant's response to directions contains more detail. He, additionally, claims the following:-
- (i) he applied (unsuccessfully) for Assisted Voluntary Return on two occasions; and
  - (ii) sought to obtain the necessary documentation from the Eritrean Embassy on three occasions; and
  - (iii) sought advice from a number of related agencies including the then UKBA, Refugee Council and Refugee Action (the latter being the charity which manages the AVR Scheme).
18. I am referred to the respondent's own guidance to her caseworkers on applications under Regulation 3(2)(a) which reads as follows:-
- "to determine eligibility, a caseworker must consider:*
- *Whether the applicant has applied for Assisted Voluntary Return (AVR).*
  - *Whether the applicant has fully complied with the re-documentation process;*

- *Did the applicants provide evidence in support of an application for an emergency travel document (ETD)?*
  - *Was the applicant invited to a re-documentation interview? If so, did they attend and comply fully with it?*
  - *Is the applicant subject to a prosecution under Section 35 of the Asylum and Immigration (Treatment of Applicants, etc) Act 2004?*
  - *Whether the applicant could leave the UK sooner if they applied for AVR, rather than wait for a ETD via the Immigration Service Documentation Unit (ISDU)?"*
19. Once an application for AVR expires (after three months) support is ordinarily terminated unless the Home Office consider there to be "exceptional circumstances". Her guidance on the latter reads as follows:-

*"an example of an exceptional circumstance that may prevent an applicant from travelling or from taking actions to obtain travel documents might, for example, include:*

- *if Refugee Action – Choices do not return the applicant to his/her country of origin while the applicant's AVR application was extant, due to waiting for a logistical/financial reason to facilitate departures to the applicant's country of origin"*
20. The respondent acknowledges that the only means by which some who do not have a valid Eritrean passport (as in the appellant's case) can be removed to Eritrea is by the obtaining of an ETD. A person can only obtain an ETD from the Eritrean Embassy by providing one of the following:
- a) Documents faxed from family in Eritrea that shows proof of the applicant's nationality; or
  - b) The applicant's own Eritrean ID; or
  - c) Three witnesses, all of whom must be Eritrean nationals aged 40 years or above, or must in possession of their Eritrean ID and who all know the applicant personally.
21. The applicant's case is that he cannot meet the above requirements. He has no family in Eritrea that he knows of and, in any event, such family there are would be unlikely to be able to prove his identity as he left when he was five years old. He does not have his own Eritrean ID. He does not know three Eritreans over the age of 40 and resident in the UK and, in any event, there is no one who is currently prepared to provide evidence for him to the Eritrean authorities.

### **The Respondent's Case**

22. The respondent has replied to directions issued by this Tribunal in relation to this hearing on 24 October 2014. She repeats the history of the two applications made by the appellant for AVR. The respondent has no knowledge or evidence of any steps taken by the appellant to leave the UK other than these two applications.
23. In these directions, I specifically asked the Home Office to set out in detail the reasonable steps the appellant is expected to take to return to Eritrea taking

into account the possibility that it may not be possible for the appellant to take those steps. The respondent's response is as follows:-

*"There are many ways in which the appellant can show he is taking steps to leave the United Kingdom. These include:-*

**1. Action**

*The appellant can apply to Refugee Action Choices for Assisted Voluntary Return (AVR).*

**Evidence**

*Provide UKVI with a copy of the AVR applications. However, support may not be provided until Refugee Action Choices approve the application.*

**2. Action**

*The appellant can contact the Eritrean Embassy to obtain travel documents, with no assistance from the UKVI.*

**Evidence**

*A copy of the correspondence sent to the Eritrean Embassy and evidence that this was received, such as proof of receipt, fax transmission report or a written acknowledgement.*

**3. Action**

*The appellant can approach the authorities of Eritrea to obtain travel documents, with no assistance from the UKVI.*

**Evidence**

*A copy of the correspondence sent to the authorities of Eritrea and evidence that this was received, such as proof of receipt, a fax transmission report, or a written acknowledgement.*

**4. Action**

*The appellant can request the UKVI to approach the authorities of Eritrea and obtain travel documents on their behalf.*

**Evidence**

*A copy of the correspondence sent to UKVI requesting this and evidence that this was received, such as proof of receipt, a fax transmission report, or a written acknowledgement.*

**5. Action**

*A detailed chronology of the attempts made to contact the Eritrean Embassy or the authorities of Eritrea. The chronology should include:-*

- Dates and times of phone calls*
- Names and telephone numbers of individuals contacted.*

*Please note – the appellant is expected to pursue the Eritrea Embassies or the authorities of Eritrea. If the Embassy or the authority failed to return call or respond to letters sent by, or on behalf, of the appellant they are expected to follow this up. Contacting the Embassy/authority once or twice by phone or sending one or two letters/fax is not considered taking all reasonable steps to leave the UK/facilitate their departure.*

**6. Action**

*Comply with attempts to obtain travel documents to facilitate departure by attending appointments or interviews with UKVI officers and/or Embassy or High Commission to obtain travel documentation.*

**Evidence**

*UKVI should be able to obtain evidence to confirm that the appellant is complying with appointment/interviews from our own records.*

**7. Action**

*Purchase a one-way ticket to Eritrea or any other country that will receive you, or requesting a UKVI officer to do this at public expense.*

**Evidence**

*Copy of the ticket and proof of purchase.*

*As stated above, there are multiple actions a person can take to facilitate their departure to leave the UK. It is not considered that the appellant has exhausted all opportunities to leave the UK and, therefore, he has failed to demonstrate that he satisfies the criteria for Section 4 support under Regulation 3(2)(a) and is not considered to be eligible for Section 4 support."*

24. The respondent submits that there is no record or any evidence of the above steps having been taken by the appellant to return to Eritrea.

**Eritrea Country Guidance**

25. I have had regard to the decision of the Upper Tribunal Immigration and Asylum Chamber (UTIAC) in *MO (illegal exit – risk on return) Eritrea CG [2011] UKUT 190 (IAC)* determined on 27 May 2011 (*MO*). The head note of this decision indicates, that whilst it also remains the position that failed asylum seekers from Eritrea are not generally at risk of persecution or serious harm on return, on present evidence the great majority of returnees are likely to be perceived as having left illegally. This fact, save for very limited exceptions will mean that on return they face a real risk of persecution or serious harm.
26. The question is whether this is relevant to the question of the appellant taking all reasonable steps to return to Eritrea. Although it has not been raised in the appellant's asylum support appeals previously, it now forms the basis of further representations in relation to a purported fresh claim for asylum, which I will deal with subsequently.
27. In *MO*, the UTIAC considered the position of failed asylum seekers in the question of their return to Eritrea from paragraph 122 onwards. In an earlier Upper Tribunal decision of *MA*, the Tribunal rejected the view that Eritrean failed asylum seekers as such, were at real risk of persecution on return. In taking into account evidence from Amnesty International, Human Rights Watch and other sources, it was found that the Eritrean regime has become extremely suspicious of the outside world and, to use the Tribunal's own word, paranoid about any Eritrean associated with external influences and not fully committed to the national cause. However, (at paragraph 128), the UTIAC did not accept that claiming asylum of itself would particularly trouble the Eritrean authorities –

particularly if the persons involved were able to demonstrate some pro-regime activity. The UTIAC found that returnees cannot be perceived as having committed an act of disloyalty merely by having claimed asylum in the UK.

28. The UTIAC in *MO* distinguished between those persons who left Eritrea before or after August/September 2008. If they left Eritrea before this date, then it considered that the decision in *MA* still applies and these persons are unlikely to be found to have established a real risk of persecution or serious harm on return. It is significant that the appellant arrived in the United Kingdom on 3 June 2008 so the view is that he can safely return home.

### **The Appellant's New Case**

29. Since this appeal was relisted, there has been a further development. The appellant's representatives now say that he is no longer taking all reasonable steps to leave the United Kingdom. This is confirmed by ASHA's letter of 10 November 2014. They rely simply upon the fact that the appellant has now lodged further representations in relation to a fresh claim for asylum.
30. I have been provided with the following documentation:-
- a) a copy of the further representations dated 10 November 2014 and drafted by the Greater Manchester Immigration Unit. These run to six pages and include references to case law (including the case of *MO*) and other documentation.
  - b) A copy of a letter from the Home Office Further Submissions Unit in Liverpool dated the same date, confirming that these have been submitted and passed to an asylum caseworker. The appellant is told that he will be notified by post of this decision "in due course".
31. Mr Little confirmed that there was no evidence to indicate that these representations had been considered as at the date of the hearing. He does not dispute that they have been received.

### **Consideration and Burden of Proof**

32. I have considered all the evidence before me, including all the documents contained in the Secretary of State's bundle of evidence, the appellant's grounds of appeal, the documents that he has produced in response to the most recent directions and the submissions made by his representatives. I have also listened to the submission of Mr Little.
33. The appellant will only remain eligible for Section 4 support if he continues to satisfy the criteria set out in Regulation 3 of the 2005 Regulations, as set out above. This is a two-stage test. Firstly, he must demonstrate that he is destitute and secondly that one or more of the requirements set out in Regulation 3(2) relates to him. The question of his destitution is not, however, in issue in this appeal.
34. The burden of proof in this appeal is on the respondent who has to demonstrate on the balance of probabilities, that the appellant is no longer qualified to receive section 4 support. However, if the appellant raises new matters (as in this appeal) then the burden reverts to the appellant.



### **Decision on Original Issue**

35. The issue in this appeal is whether the appellant continues to fall within Regulation 3(2) (a) of the 2005 Regulations.
36. I must determine this issue on the evidence before me. I note that, on 10 April 2012, the date when the appellant's previous appeal was allowed, it was accepted that he was taking all reasonable steps to return to Eritrea.
37. However, the issue before me concerns the appellant's situation at the date of decision on 17 May 2012. It is his claim that he has not been able to meet the requirements set out above because he does not have the documents required, cannot obtain them and has little or no access to family or contacts able and willing to assist him.
38. The Secretary of State has set out seven specific steps that the appellant could take to try to obtain an appropriate ETD. Apart from the fact that the appellant made two abortive attempts to arrange for AVR in 2011 and 2012, there is nothing in the evidence before me to show that he has made any further applications – or taken any of the seven steps suggested by the Home Office.
39. The onus is on the appellant to take all reasonable steps to leave the United Kingdom. In my view, it is not unreasonable to expect him to contact the UKVI to take any of the steps set out in paragraph 23 above. Apart from earlier claimed attempts to visit the Eritrean Embassy (which he has outlined), there is no recent evidence that he has taken steps to contact the Eritrean Embassy or seek assistance from the UKVI to purchase a one-way ticket to Eritrea at public expense.
40. It is also open to him to apply to Refugee Action's "Choices" section for AVR on a third occasion. If he has experienced difficulty approaching the Eritrean authorities to obtain travel documentation, he could ask for assistance from the UKVI to approve these agencies to obtain travel documents on his behalf.
41. The decision in *MO* does not, in my view, prevent an Eritrean who has sought asylum in the United Kingdom who wishes to return voluntarily to his country of origin, from doing so. Concerns as to whether he may be persecuted, are matters that would have been determined during the course of the appellant's original asylum application. It is not for me to interfere with that decision and so I cannot find that any of the steps that the appellant could take are likely to place him at risk on return.
42. Perhaps not surprisingly, the appellant's representatives have now indicated in their most recent submission that the appellant is no longer taking all reasonable steps to leave the United Kingdom. This is consistent with my findings on the evidence that I have set out above. I do not, therefore, find that the appellant meets the requirements of Regulation 3(2) (a) of the 2005 Regulations.

### **Decision on the Question of the Further Representations**

43. The appellant's appeal is now predicated upon the basis that he falls within Regulation 3(2) (e) of the 2005 Regulations because he has made further representations by way of a fresh claim for asylum, which remain outstanding.

44. The evidence before me suggests that the further representations lodged with the Liverpool Further Submissions Unit on 10 November 2014, contain new material, are (arguably) reasoned and remain outstanding. The representations detail new evidence concerning the appellant's political memberships, his method of exit and the amount of time spent outside of Eritrea. The appellant also relies on more recent country guidance caselaw of the Upper Tribunal (including that dealt with in *MO*), which postdates the determination of his asylum claim.
45. In *R (on the application of NS) -v- (1) First-Tier Tribunal (Social Entitlement Chamber) (2) SSHD [2009] EWHC 3819 (Admin)*, the Administrative Court held that in each case where an appellant submits further representations purporting to be a fresh claim, the Tribunal must consider whether or not it would be reasonable to expect the applicant to leave the United Kingdom, so long as the representations remain outstanding.
46. The Home Office's most recent Section 4 instructions deal with how further representations in relation to a fresh claim for asylum should be dealt with in the context of Regulation 3(2)(e). The relevant section reads as follows:

**“11.1 Further Submission**

*Applicants whose case is being managed by the Case Assurance and Audit Unit (CAAU) are required to make any further submissions by appointment and in person at the Liverpool Further Submission Unit. Applicants whose case is being managed by a regional asylum team are required to make any further submissions in person at a specified reporting centre in their region. For further information on lodging further submissions, refer to the AI on Further Submissions.*

*Some applicants may submit an application for Section 4 support on the basis that they have made further submissions, which are still outstanding. The existence of the submissions, combined with the fact that the person does not have access to accommodation and the means to live (or will shortly be in this position) may mean that support needs to be provided in order to prevent a breach of their human rights. Section 4 support, version 29.*

*The relevance of the further submissions in these cases is that they constitute the factor that may demonstrate that the applicant cannot be expected to take reasonable steps to leave the United Kingdom – and so avoid the consequences of being left destitute in circumstances that would otherwise lead to a breach of their human rights.*

*It is therefore important that a caseworker makes every effort to consider the further submissions at the same time as consideration is given to the section 4 application – in order to check that the further submissions are not clearly abusive, manifestly unfounded or repetitious.”*

In my view, the further representations that have been lodged with the Liverpool Further submissions unit do not appear to be on their face, abusive, manifestly unfounded, or repetitious. They rely upon more recent caselaw and recently acquired documentation.

47. In the circumstances, I consider that it would be a breach of the appellant's human rights if he were deprived of support whilst his further representations are being considered and remain outstanding.
48. I find that the appellant falls within Regulation 3(2) (e) of the 2005 Regulations. Accordingly, I allow this appeal. The appellant is entitled to the provision of support under Section 4 of the 1999 Act.

Mr David Saunders  
Tribunal Judge, Asylum Support

Dated 25<sup>th</sup> November 2014

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