



**FIRST-TIER TRIBUNAL
ASYLUM SUPPORT**

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Appeal Number AS/12/04/28185

UKBA Ref. 03/12/00056/006

Appellant's Ref.

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

Tribunal Judge	Ms Sally Verity Smith
Appellant	MR BS
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 Thursday the 19th day of April 2012, substituting my decision for that of the Secretary of State by determining that the appellant is eligible for support under Section 4 of the Immigration and Asylum Act 1999 as amended ("the Act").
2. The appellant, a citizen of the Iraq born on 1 January 1983, appeals against the decision of the Secretary of State who refused support under Section 4 of the Act on 16 March 2012 on the grounds that the appellant did not satisfy any of the conditions set out in Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 ("the 2005 Regulations").
3. The appellant gave his evidence today in Kurdish Sorani by way of an independent court interpreter. He was represented by Mr Eames of the Asylum Support Appeals Project. The respondent was represented by Ms Henriksson.
4. The appellant applied for Section 4 support on 14 March 2012 on the grounds that (a) he was destitute and (b) he satisfied Regulation 3(2)(e) by way of his outstanding application to the European Court of Human Rights (ECtHR). Support was refused by the respondent on 16 March 2012 in the following terms:

"You requested to be considered under requirement (sic) for support as you have made an application to the European Court of Human Rights,

however although you have provided evidence that you have submitted such an application and have provided an acknowledgment letter from the Court it does not show that your application has been accepted under the Rule 39 process.

In addition to the above it is noted that you have had the opportunity throughout the asylum process to raise any fears regarding risks of returning to your home country considered in full. You have not provided details as to the grounds of your appeal to the European Court of Human Rights. It is submitted that if you feel that you have strong reasons why you cannot be removed to your country of origin you should submit these to the UKBA for full consideration.

For the reasons outlined above it is considered that you do not meet the criteria for Section 4 asylum support and your application is rejected accordingly”.

5. The AST issued directions to both parties to this appeal on 13 April 2012.
 - (a) The appellant was directed to produce a complete copy of his Rule 39 application, all evidence which would show that his application had some merit, evidence which would show that he had exhausted all his domestic remedies before applying to the ECtHR, a copy of any response that he had sent to the ECtHR's letter of 1 March 2012, a copy of the letter of 2 February 2012 received from the ECtHR together with a written submission which set out all the reasons why it was believed that his Rule 39 application to the ECtHR at its present stage entitled him to support under Regulation 3(2)(e).
 - (b) The respondent was directed to provide evidence to support the assertion that the appellant had not exhausted his domestic remedies before applying to the ECtHR and a written submission which addresses the findings of the Principal Judge in the appeal AS/11/06/26857 of 18 August 2011 together with all reasons why it was believed that the appellant's Rule 39 application together with his Iraqi nationality did not render him entitled to support by virtue of Regulation 3(2)(e).

6. Ms Henrikkson, for the respondent, addressed me and confirmed the respondent's position as follows:

“The Principal Judge's decision in 26857 has considered HM Iraq which case has been remitted for reconsideration and this did not automatically qualify all Iraqi nationals for support and did not prevent the removal of failed asylum seekers. Applicants remain expected to provide evidence that there is a serious and individualised threat to their life and that by being returned they risk becoming a subject of that threat. In this case, the appellant had provided no such evidence. Furthermore, 26857 requires all applicants to have exhausted their domestic remedies before making an application to the ECtHR and all applications under Rule 39 have to be individualised and fully reasoned. The appellant had made no attempt to have his asylum claim judicially reviewed and the Home Office's position was therefore that the appellant had not exhausted his domestic remedies before approaching the ECtHR. Furthermore, UKBA has not received a Rule 39 indication or a notice of plausibility (sic) directing the UKBA not to remove the appellant. The Home Office also confirms that there are no removal directions set in this case in any event. The Home Office does not

consider it unreasonable for the appellant to leave the UK and he is therefore not eligible for support under Regulation 3(2)(e).

The Home Office confirms that the previous court ruling suspending removal of Iraqi nationals was lifted on 23 November 2010 and each case is now considered individually and on its own merits. UKBA submits a letter from the ECtHR dated 25 November 2010 confirming that."

7. The appellant addressed me with the assistance of his representative and confirmed that he had been represented by solicitors, Halliday Reeves, who had made two sets of further representations in relation to his claim to asylum on his behalf both of which were rejected, the first on 12 October 2010 and the second a year later on 11 October 2011. Solicitors had informed the appellant that they would not be pursuing a judicial review on his behalf. The appellant believes that there may have been a financial element to their decision but in any event he confirms that a judicial review was not made on his behalf. He confirms that by the time he applied for Section 4 support in March 2012 the deadline for applying for a judicial review of the UKBA's decision of 11 October 2011 had passed.
8. The appellant confirms that he made his application to the ECtHR on 30 January 2012 which application he pursued on 21 February 2012. The application was acknowledged by the ECtHR on 1 March 2012 at which point he was asked to provide further documentation to the ECtHR namely all domestic decisions made on his claim to asylum in the UK. The appellant sent these documents to ECtHR on 12 March 2012 and receipt of same was acknowledged by the court on 21 March 2012.
9. The appellant accepts that the case of *HM (Iraq)* is currently being reconsidered by the Upper Tribunal but that as his application to the ECtHR is made by way of ECHR Article 3 and Article 15.3 of the Qualification Directive, the level of individualisation required is not great, given that he comes from Iraq.
10. There is no other evidence from either party to this appeal.
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. 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.
13. Regulation 3 states as follows:
 - (2)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.

(3) 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) he has made an application for judicial review of a decision in relation to his asylum claim;
- (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.

14. The respondent's Section 4 Instructions of 14 June 2011 state:

"An important consideration is whether the applicant can be expected to leave the UK to avoid a breach [of the ECHR]. 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 representations which are outstanding. Support under Section 4 can 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.

- 15. I have considered all the evidence before me carefully on a balance of probabilities.
- 16. The appellant's eligibility for support by way of Regulation 3(1)(a) is not disputed.

17. I make the following findings:
- (a) that the appellant's application to the ECtHR was acknowledged by that Court on 1 March 2012, that he was given a deadline of 26 April 2012 to submit all domestic decisions made on his claim to asylum in order to complete his application, that the appellant did so on 12 March 2012 which was acknowledged by the ECtHR on 21 March 2012.
 - (b) that the appellant has completed his application to the ECtHR and that no further evidence is required by that court in order that it might consider the appellant's application.
 - (c) that the respondent's response to directions is surprising, asserting as it does that the appellant might only be eligible for support under Regulation 3(2)(e) by way of his application to the ECtHR in the event that the ECtHR had issued interim measures under Rule 39. Given that the respondent has not issued removal directions to the appellant it is unclear how or why the respondent expects the ECtHR to have issued interim measures under Rule 39. The respondent appears to be implying that the appellant cannot satisfy Regulation 3(2)(e) until interim measures are issued and given that that will ultimately be within the gift of the UKBA (as these interim measures can only be triggered by removal directions) it is unclear how the respondent might expect someone in the appellant's position to prevent his destitution.
 - (d) I have considered the Principal Judge's decisions in *26681* and *26857*, which are not binding on me. I accept that in those decisions the Principal Judge found that it was not essential that an interim order be issued by the ECtHR for 3(2)(e) to be satisfied as she accepted that it was not a prerequisite that removal directions had been set.
 - (e) I have considered the requirement for the appellant to have exhausted his domestic remedies before applying for relief from the ECtHR and accept that (i) it is for the ECtHR to indicate whether an application to that court is satisfactory, not for this Tribunal, and that in any event (ii) the appellant has exhausted domestic remedies. He remained with the same solicitors for well over a year during which time two sets of further representations in relation to his claim to asylum had been submitted and rejected. Following consultation with his solicitors, a judicial review application was not made and the time for doing so has now expired.
 - (f) I therefore accept, on the evidence before me, that the correspondence between ECtHR and the appellant is now concluded and that the ECtHR has all the information required from the appellant and that his application remains pending with the ECtHR with no further action for the appellant to take for the time being.
 - (g) I have considered the respondent's submissions and find that I am not required to find that the appellant's application to the ECtHR has been approved but simply that it has been sent and I am satisfied that it has. Second, as requested, I then considered the merit of the appellant's application to the ECtHR and applied the case law in *Birmingham City Council v Amalea Clue and SSHD and Shelter [2010] EWCA Civ 460* and accept that an application to the ECtHR will not qualify for Section 4 support where it is "obviously hopeless or abusive" or "entirely without merit".
 - (h) I give weight to the letter from the ECtHR to the FCO dated 22 October 2010 which states that it considers it appropriate to apply Rule 39 in respect of any Iraqi who challenges his or her return from the UK to Baghdad.
 - (i) I give weight to the ECtHR's letter to the FCO dated 23 November 2010 (page 75/82 of the court bundle) which confirms that all applications

received from any Iraqi who challenges his or her return to Baghdad will be considered on an individual basis.

- (j) I find the appellant's application to the ECtHR to be outstanding. I find that it is unreasonable to expect the appellant to take steps to return to Iraq while his application remains outstanding at the ECtHR. I find that the appellant satisfies the criteria for Section 4 support by way of the respondent's own guidance for Regulation 3(2)(e) as set out at paragraph 14 above.
18. It is always open to the respondent (i) to show that the appellant's application to the ECtHR is entirely without merit or hopeless or abusive and (ii) to expedite matters at the ECtHR if appropriate.
19. I substitute my decision for that of the Secretary of State and determine that the appellant satisfies the criteria for Section 4 support by way of his outstanding application to the ECtHR.

Signed Ms Sally Verity Smith
Tribunal Judge, Asylum Support

Dated 24 April 2012

SIGNED ON THE ORIGINAL [Appellant's Copy]