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

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Appeal Number AS/11/12/27820
UKBA Ref. 07/09/01211
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 | Sehba Haroon Storey |
| Appellant | SRH |
| 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 made on Wednesday the 27th day of March 2013 dismissing the above mentioned appeal.

2. The appellant, a 22 year old national of Iraq, appeals against the decision of the respondent dated 1 December 2011, refusing to provide him with accommodation under Section 4(2) of the Immigration and Asylum Act 1999 (as amended) (the 1999 Act). The grounds for refusal are that he does not satisfy the criteria for the grant of section 4 support 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 argues that he is entitled to the provision of support under regulation 3(2)(e) of the 2005 Regulations because he has made an application to the European Court of Human Rights (ECtHR) under Article 34 of the European Convention of Human Rights (ECHR), including a request for interim measures under Rule 39 of the Rules of Court. He says that this entitles him to section 4 support pending the outcome of his application.

4. An Asylum Support Judge heard the appellant's appeal on 22 December 2011 and provided written reasons for his decision on 23 December 2011. The judge concluded that whilst the appellant was destitute, he had failed to discharge the burden upon him to demonstrate that the provision of accommodation was necessary in order to avoid a breach of the appellant's Convention rights within the meaning of the Human Rights Act 1998.

5. The Judge dismissed the appeal before him because he was not satisfied that the ECtHR application satisfied the second limb of the three-limb test set out by me in AS/11/04/26681 and AS/11/06/26857

6. On 1 March 2012, the appellant applied to the Administrative Court for permission to judicially review the decision of 22 December 2011 on the grounds that the statement of reasons dated 23 December 2011 contained a material error of law. On 6 September 2012, the Administrative Court agreed (by consent) to quash the tribunal decision and direct a hearing de novo. The Secretary of State agreed that in the event of the appeal being dismissed, she would continue to support the appellant for seven days after the final determination of his de novo hearing.

7. The hearing before me took place on 27 March 2013 and I now provide reasons for that decision.

**Asylum Case history**

8. The appellant is a failed asylum seeker. He arrived in the United Kingdom (UK) on 10 September 2007 and applied for asylum on 12 September 2007. His asylum application was refused on 15 October 2010 and on 29 November 2010, an Immigration Judge of the First-tier Tribunal Immigration and Asylum Chamber (FTT-IAC) dismissed his appeal against that decision. The appellant applied to the FTT-IAC for permission to appeal to the Upper Tribunal Immigration and Asylum Chamber (UTIAC), but permission was refused on 22 December 2010. He then sought permission directly from the UT-IAC, but permission was again refused on 25 January 2011 and the appellant became appeal rights exhausted on 28 January 2011.

9. The appellant did not apply to the Administrative Court for permission to seek judicial review of the decision of 25 January 2011. There is no evidence before me to suggest that he sought legal advice on the merits of doing so.

10. On 16 May 2011, the appellant's solicitors made further representations to the Secretary of State in support of a fresh claim for asylum. The Secretary of State rejected the representations on 15 June 2011 and concluded that as the submissions did not amount to a fresh claim, they did not attract a further right of appeal.

11. The appellant did not apply to the Administrative Court for permission to seek a judicial review of the decision of 15 June 2011. There is no evidence before me to suggest that he sought legal advice on the merits of doing so.

12. On 24 October 2011, the appellant lodged an application with the ECtHR pursuant to Article 34 of the European Convention on Human Rights (the Convention) to include a request for interim measures under Rule 39 of the Rules of Court. That application was a two page pro forma application, which did not identify the final decision by a UK court or tribunal, nor did it explain whether there was any other appeal or remedy available to him and if so, explain why he had not used it.

13. On 20 April 2012, the appellant was requested by the ECtHR to complete the official Court form for use in applications under Article 34. The form was completed, signed and dated 14 May 2012. It was sent by special delivery to the Court. It refers in a number of places to the refusal of 15 June 2011 being

the final decision by a national court or tribunal. In paragraph 15 of the form, the appellant identifies the alleged violation of the Convention as the possibility of his deportation to Iraq. In paragraph 18, in response to the question whether there was any other appeal or remedy available to him and if so, to explain why he has not used it, the appellant states:

> "The only option that has not been followed to conclusion is judicial review. However, without legal representation there has been no way to apply".

14. Under the heading, 'statement of the object of the application', the appellant requests the following relief:

> "The Court is kindly asked to request that UKBA suspend any removal directions, continue to protect me and allow me to remain in the UK."

15. In August 2012, the appellant again submitted further representation to the Secretary of State purporting to be a fresh claim. I have before me a letter dated 24 August 2012 from Iris Law Firm which states:

> " ... Unfortunately, the UKBA have refused your submissions and have not given you the right of appeal against this refusal. The only way to challenge this decision inside the UK is via judicial review. There must be sound grounds to challenge a decision by judicial review. We confirm that we shall carefully review your reasons for refusal in full. Please contact us if you have not received a copy of this from the UKBA so we can provide you with the same. If we are able to identify grounds for judicial review, it is likely that we can assist you in challenging this decision. However, if we cannot identify any grounds we would be unable to challenge this any further on your behalf.
>
> We shall of course inform you of the outcome of our investigations as soon as possible."

16. There is no evidence before me to suggest that the appellant or his solicitors applied to the Administrative Court for permission to seek judicial review of the Secretary of State's decision of August 2012. Nor is there any documentary evidence before me to suggest that Iris Law Firm reviewed the reasons for refusal as indicated in their letter or advised the appellant on the merits of challenging the decision by way of judicial review. I shall refer to this below when dealing with the appellant's oral evidence. In any event, I take the view that this is a post decision fact of which neither the Secretary of State nor the ECtHR were aware. As such, I am of the view that it is not relevant to the appeal before me.

## Asylum Support history

17. On 20 September 2007, the appellant was granted asylum support under Section 95 of the 1999 Act. This remained in force until 1 February 2011. In May 2011, having lodged his further representations, the appellant applied for accommodation under Section 4 of the 1999 Act. The application was refused on 16 June 2011. He renewed his application on 30 November 2011. This too was refused on 1 December 2011 and forms the subject of the current appeal.

18. Pursuant to the application for permission to apply for judicial review against the decision of the FTT-AS dated 23 December 2011, the appellant was granted interim relief in the form of section 4 support.

**The appellant's case**

19. The appellant accepts that he is appeal rights exhausted and that he has no outstanding appeals/applications before any UK court or tribunal or before the Secretary of State. He maintains that his application before the ECtHR remains outstanding and that he last received correspondence from them 3-4 months previously. He could not produce the letter nor tell me of its contents but maintained that his application remained outstanding. I reminded the appellant that his representatives were asked to provide all correspondence sent to and from the ECtHR in connection with his application, but that the most recent correspondence was his letter dated 17 May 2012. The appellant was unable to explain why the most recent correspondence was not before the tribunal.

20. I also explained to the appellant that his application to the ECtHR appeared to rely exclusively on the deterioration in the security situation in Iraq and the position taken by UNHCR and the ECtHR as at 22 October 2010. I asked him if he had any other grounds for seeking the protection of the ECtHR, other than the possibility of a risk of imminent harm resulting from indiscriminate violence on his return to Iraq. The appellant stated that he had advised his solicitors through an interpreter that his sole concern at the time of his application to the ECtHR, and today, was the risk to his personal safety arising from his problems as highlighted in his asylum claim. He maintained that the basis of his application was never "what is going on in Iraq but...my own problems". He added that the reasons for his reluctance to return to Iraq remained the same as when he left his country and that he has made this clear to his solicitors.

21. In relation to his most recent further representations sent via Iris Law Firm, the appellant said that following their letter of 21 August 2012, his representative had not made contact with him to offer any advice on the merits of seeking judicial review. Asked whether he had attempted to contact Iris Law Firm, he gave contradictory answers, stating finally that he had attempted to do so but his telephone calls had not been returned. He acknowledged that he had not sought advice from any other source on the merits of seeking judicial review.

22. On the issue of working whilst in receipt of section 4 support, the appellant said that he believed he had a work permit, but that he had not engaged in paid employment whilst in receipt of section 4 support. He maintained that the day he was found working in a pizza shop, was in fact his first day of training as a chef. He said that he intended to contact UKBA on completion of his training but that he was unable to do so owing to the untimely arrival of UKBA investigation officer(s), apparently only one hour after he reported for training. Since the visit from UKBA officers, the appellant has not engaged in paid or unpaid employment and no action has been taken against him.

**The respondent case**

23. During the course of judicial review proceedings, it was submitted in the Secretary of State's summary grounds of defence dated 13 June 2012, that:

> "For the avoidance of doubt, the Secretary of State does not accept the three-stage test. In so far as the Secretary of State has made any concessions in this and/or earlier cases, such as

AS/11/04/26681 and AS/11/06/26857, which are inconsistent with the position set out in these summary grounds of defence, they are withdrawn."

24. Guidance on how regulation 3(2) (e) should be interpreted and applied by Case Owners is contained in a document produced by the Secretary of State, entitled 'Section 4 Support Instructions'. This states that Case Owners must consider applications for support under regulation 3(2) (e) on a case-by-case basis and that, an important consideration is whether the applicant can be expected to leave the UK without this breaching their Convention rights.

25. In relation to applications to the ECtHR, Chapter 60 of the UKBA Enforcement Instructions advises caseworkers that the making of an application does not in itself require the suspension of removal but where the Court has made a Rule 39 indication, removal must be deferred immediately.

26. In response to directions, the Secretary of State submitted that the appellant's appeal should be dismissed because:

a) He had not exhausted all domestic remedies;
b) His application to the ECtHR was in a pro forma style and general in nature and by implication, not individuated and fully reasoned;
c) The reference to *HM (Iraq) & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1536 was irrelevant because the case "had now been dismissed and it is concerned that applicants remain expected to prove that there is a serious and individualised threat to their life and that by being returned, there is a real risk of them becoming subject to that threat"; and
d) In any event, the appellant was not destitute, as he had been found working in a pizza shop.

27. At the hearing, Mrs. Jones appearing for the Secretary of State, placed reliance upon the refusal letter, the submissions made in response to directions in paragraph 26 above and asked me to find that the appellant was not destitute as he had permission to work and was in fact working whilst in receipt of section 4 support. Further, she added that the appellant had failed to discharge the burden upon him to prove that his application before the ECtHR remained outstanding.

## The Legislative Framework

28. Section 4 of the 1999 Act (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002 and section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) provides:-

**Accommodation for persons on temporary admission or release**

(1) 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) released from detention under that paragraph; or
(c) released on bail from detention under any provision of the immigration Acts.

**Failed asylum-seeker**

(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if -

(a) he was (but is no longer) an asylum-seeker, and
(b) his claim for asylum was rejected.

29. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, (2005 Regulations) provides:

(1) Subject to regulations 4 and 6, 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) 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 to Part 54 of the Civil Procedure Rules 1998,

(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 or

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

(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.

30. Section 103 of the 1999 Act provides a right of appeal to the First-Tier Tribunal (Asylum Support). So far as is relevant, this states:

> (1) ...(not relevant);
>
> (2a) If the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to the First-tier Tribunal.
>
> (3) On an appeal under this section, the First-tier Tribunal may –
>
> (a) require the Secretary of State to reconsider the matter;
> (b) substitute its decision for the decision appealed against; or
> (c) dismiss the appeal.

31. By Article 34 ECHR, any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols may apply to the ECtHR and Contracting Parties must not hinder in any way the effective exercise of this right.

32. Rule 39 of the Rules of Court (which deals with interim measures) provides at sub-paragraph (1) that where appropriate, the President of the ECtHR:

> ' may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.'

**Relevant Caselaw**

33. As decided in AS/11/04/26681 and AS/11/06/26857, for an appellant (who has an outstanding ECtHR application) to demonstrate entitlement to section 4 support under regulation 3(2)(e), the onus is upon them to show that they have:

> a) exhausted all domestic remedies;
> b) lodged an application to the ECtHR that is individuated, fully reasoned, supported by all relevant documentation and has substance as opposed to being merely fanciful or speculative; and
> c) raised the possibility of an imminent risk of serious and irreparable damage in the event of a return to their country of origin, which may or may not include a request for interim measures under Rule 39.

34. In relation to the requirement to exhaust all domestic remedies, the ECtHR in *Sufi and Elmi v UK* 8319/07 [2011] ECHR 1045 (28 June 2011) (*Sufi)* (paragraph 205), held that:

> (i) the burden of proof is on the respondent to demonstrate that an effective remedy is available in theory and in practice at the relevant time;
> (ii) the remedy is accessible, capable of providing redress in respect of the applicant's complaints; and
> (iii) offers reasonable prospects of success.

35. However, mere doubts as to the prospects of success of national remedies do not absolve an applicant from the obligation to exhaust those remedies. Accordingly, subject to the availability of an effective domestic remedy, the FTT-AS is entitled to require applicants to demonstrate that they have attempted to access this before resorting to the ECtHR.

36. It was, however, accepted in *Sufi* (paragraphs 203-205) that there might be instances where an applicant can show that they have been advised by counsel that an appeal offers no prospects of success, or by providing relevant domestic case-law or other suitable evidence, that an available remedy, which has not been used, was bound to fail. Where an appellant seeks to advance this argument, the burden is upon them to produce evidence of the same.

37. Regarding the assessment of merit, a number of judgments of the higher courts have provided guidance on the correct test to be used when assessing further representations/fresh claims and an applicant's entitlement to section 4 accommodation from UKBA or a local authority:

- In *R (NS) v First-tier Tribunal and SSHD* [2009] EWHC 3819 (Admin), Stadlen J held that support should be provided unless the outstanding application was "entirely without merit" (paragraph 12);
- In *Birmingham City Council and Clue and SSHD and Shelter v Clue* [2010] EWCA Civ 460, Dyson LJ said that an applicant would not qualify where the outstanding application was "obviously hopeless or abusive" (paragraph 66);
- In Lloyd Jones J in *R(AW) v Croydon and Hackney* [2005] EWHC 2950, considered the test to be whether the application was manifestly unfounded (paragraph 74); and
- In *Binomugisha v Southwark London Borough Council* [2006] EWHC 2254, Nicol QC (sitting as a Deputy Judge of the High Court) set the test as "utterly hopeless" (paragraph 53).

38. Applying the ratio of these judgments to the present case, I do not accept that the mere making of an application to the ECtHR entitles the appellant to Section 4 accommodation. He must demonstrate first that his application has arguable merit.

39. The appellant in AS/11/06/26857 was successful because consideration was given to the statement of the President of the ECtHR (issued in January 2011), that where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the ECtHR, removals to that country should be suspended. The appellant in AS/11/06/26857 was an Iraqi national and the Court of Appeal had granted permission to appeal in the Iraq Country Guidance case of *HM and Others* (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) *(HM1)* on the grounds of procedural impropriety and the possibility of article 15(c) of the Qualification Direction being revisited. In the light of this, the Presenting Officer for the Secretary of State conceded in the course of closing submissions in AS/11/06/26857 that the appellant's application before the ECtHR had some arguable merit and that it would not be reasonable to require him to leave the UK.

40. Since then, there have been a number of relevant decisions of the higher courts on whether it is appropriate for removals to be suspended where there is a pending appeal of an UTIAC Country Guidance determination. In *Qader, R (on*

*the application of) v Secretary of State for the Home Department* [2011] EWHC 1765 (Admin) (*Qader*), Mr Ockleton (sitting as a Deputy Judge of the High Court) said (at paragraphs 33 – 35) that:

a) there are many reasons why permission may be granted by the Court of Appeal in an UT-IAC Country guidance case, one of which is to allow a higher court to give its approval to a process or decision that is being challenged;

b) a decision endorsed as Country Guidance by the President of the UT-IAC does not lose its force by being challenged, or even by permission to appeal it being granted by the Court of Appeal;

c) unless or until it is overturned on appeal or replaced by other guidance, it remains in the highest degree relevant to the issues that a decision-maker needs to take into account;

d) The country guidance system has been endorsed by Parliament in s105 of the Nationality, Immigration and Asylum Act 2002 (as amended), and by the Court of Appeal, and appears to be regarded with the highest respect by the Courts in Strasbourg and Luxembourg. It is therefore undesirable to render the system wholly ineffectual simply on the basis of a challenge.

41. That passage was endorsed by the Court of Appeal in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 ( Burnton LJ, Kay LJ and Gross LJ (paragraph 50)) (*SG (Iraq)*).

42. *HM1* was re-heard and determined by the UTIAC on 13 November 2012 *(HM and others* (Article 15(c)) Iraq CG [2012] UKUT 409 (IAC) (*HM2*). In so far as is relevant to this appeal, the three member panel, headed by Collins J held *inter alia* that:

a) Nothing in the further evidence available to the UT indicates that the conclusions the Tribunal in HM1 reached about country conditions in Iraq were wrong;

b) The evidence does not establish that the degree of indiscriminate violence characterising the current armed conflict taking place in the five central governorates in Iraq is at such a high level that substantial grounds have been shown for believing that any civilian returned there would solely on account of his presence there face a real risk of being subject to that threat;

c) Nor does the evidence establish that there is a real risk of serious harm under Article 15(c) for civilians who are Sunni or Shi'a or Kurds or have former Ba'ath Party connections;

d) The conclusions in *MK (documents - relocation) Iraq CG* [2012] UKUT 126 (IAC) on internal relocation alternatives in the KRG are confirmed. The evidence is now sufficient to establish the existence of a Central Archive maintained by the Iraqi authorities which provides a way for Iraqi nationals to obtain identity documents from abroad or within Iraq .

e) There is no real risk of detention or treatment contrary to Article 3 ECHR if a national of Iraq is compulsorily returned on either a

current or expired Iraqi passport. Nor is there such risk if such a person chooses to make a voluntary return with a laissez-passer document which can be issued by the Iraqi embassy in the UK.

43. *HM2* is now the subject of a challenge before the court of Appeal. In their Order dated 15 April 2013 granting permission, their Lordships Kay LJ and Moses LJ state that as per the Court of Appeal decision in *SG (Iraq),* the Country Guidance in *HM2*, remains valid until it is overturned.

44. Since *HM1*, the ECtHR has considered whether the situation in Iraq gives rise to a generalised risk of violence contrary to Article 3 and has rejected it. See *Al Hamdani v. Bosnia and Herzegovina* - 31098/10 [2012] ECHR 229 (7 February 2012) (*Al Hamdani).*

## Discussion

*Destitution*

45. In the course of the previous tribunal hearing, the judge found as fact that the appellant was destitute. The Administrative Court granted the appellant interim relief and directed the Secretary of State to provide him with section 4 accommodation and support. Shortly before this hearing, I was informed by the UKBA caseworker that the appellant had been found working in a pizza shop whilst in receipt of section 4 support. The Secretary of State did not stop providing support, possibly because she had agreed to continue doing so until the final determination of his appeal.

46. At the hearing, the appellant sought to persuade me that the day he received a visit from UKBA officers at the Pizza shop was in fact his first day of training for employment as a chef. He claimed that he had only been in training for one hour and that he had fully intended to inform UKBA of his employment upon completion of his training. He invited me to contact the Pizza shop and to view the CCTV footage, which he said would confirm his version of events.

47. Mrs. Jones suggested in closing remarks that the appellant possibly continues to have permission to work but she was unable to produce any evidence to support this submission. As I understand it, strict conditions apply to the grant of permission to work and once granted it extends only until the asylum application is finally determined. For failed asylum seekers, the entitlement to seek permission to work is available only where further representations purporting to be a fresh claim have been outstanding for 12 months from the date of application. On the facts before me, I am not satisfied that since becoming appeal rights exhausted the appellant has met the conditions for a grant of permission to work, and in the absence of further evidence, I am unable to find that he has the consent of the Secretary of State to do so.

48. The burden of proof is upon the appellant to prove that he satisfies the requirements of regulation 3(1) (a) of the 2005 Regulations, namely that he is destitute. The appellant has had ample opportunity to request the proprietor of the said Pizza shop to provide him with a copy of the CCTV footage or a letter of support to confirm his account of events. He has not done so. I do not find his evidence credible and I reject it. I find as fact that the appellant has engaged in employment whilst in receipt of asylum support. However, in the absence of further evidence from the Secretary of State, I am unable to make any findings concerning the length of his employment or the extent of his earnings.

49. On the facts before me, in particular, given the absence of any sanction/action against the appellant for working whilst in receipt of asylum support, I accept, albeit on the slimmest of balances, that the appellant is destitute within the meaning of regulation 3(1)(a). I do not accept that he has permission to work.

*The three- limb test*

50. I note the submission made in the course of judicial review proceedings before the Administrative Court in this case that the Secretary of State does not accept the three-limb test. The matter was concluded, however, by way of a consent order and thus the Court did not have an opportunity to address whether or not the three-limb test is correct. The Secretary of State has failed to challenge the test in any other proceedings to date. In the course of this re-hearing, she has not sought to advance any objections to the test and indeed, her written and oral submissions in the course of this hearing address each of the three limbs in some detail. In the absence of a challenge before this tribunal, and in the absence of a finding by the Administrative Court that the three-limb test is incorrect, I consider it appropriate to proceed to apply the said test to this case.

*Domestic remedies*

51. On the facts of this case, I am satisfied that the appellant has not exhausted domestic remedies. Unlike the appellant in AS/11/06/26857, this appellant has not produced a credible explanation for why he failed to seek judicial review of the UTIAC decision of 25 January 2011 or the Secretary of State's rejection on 15 June 2011 of his further representations. I note the acknowledgment in his ECtHR application that he has not pursued judicial review because "without legal representation there has been no way to apply". I do not accept that he has been "without legal representation". I find as fact that he has had several solicitors represent him since his arrival in the UK. However, I have seen no correspondence from any amongst them advising on the merits of pursuing judicial review and there is no evidence of any attempt to seek legal aid. As stated above, mere doubts as to the prospects of success of national remedies do not absolve an appellant from the obligation to exhaust those remedies.

52. In contrast to AS/11/06/26857, this appellant has failed to satisfy me on a balance of probabilities that he exhausted all domestic remedies before resorting to ECtHR proceedings. He has failed to produce evidence that prior to making this application he was advised by counsel/legal advisers that an appeal offered no prospects of success. Furthermore, he has failed to provide relevant domestic case-law or other suitable evidence, that an available remedy which had not been used was bound to fail.

*Individuated and fully reasoned application*

53. The second limb of the test is made up of 3 elements, namely:

i) Is the application individuated and fully reasoned?
ii) Is it supported by all relevant documentation? and
iii) Does it have substance as opposed to being merely fanciful or speculative?

54. I have read the appellant's original pro forma application to the ECtHR and his subsequent confirmation of the same on the correct form. In my judgement, having regard to the jurisprudence of the ECtHR, I find that the original pro forma application contained sufficient information to satisfy sub-category i) above. This is because he was seeking to rely primarily on the presence of generalised indiscriminate violence in Iraq which he contends placed him at real

risk of being subjected to serious harm if returned, solely on account of his presence on Iraqi territory. As such, as per *Sufi* (paragraph 225), he was not required to demonstrate that he would be specifically targeted by reason of factors particular to his personal circumstances.

55. However, before he can fully satisfy the second limb, he must demonstrate that his application also complies with the requirements of sub-categories ii) – iii) above. I note that in paragraph 19 of his application, the appellant asks the ECtHR to "request UKBA to suspend any removal directions". On the evidence before me, I am satisfied that this statement is misleading and inaccurate as it implies that the UK government have taken steps to remove him to Iraq. I have seen no evidence that the Secretary of State has issued removal directions, now or at any time. I therefore find that the appellant misrepresented the facts of his case to the ECtHR with the aim of presenting his situation as one requiring a degree of urgency where none existed. This casts doubts upon his credibility and of those who were assisting him. Accordingly, I am satisfied that he did not provide the ECtHR with all relevant documentation, in particular, a copy of his removal directions, because this document did not exist.

56. For reasons which I will explain below, I am further satisfied that the appellant's application to the ECtHR was in fact fanciful and speculative and had no realistic prospect of success.

*Assessment of merit*

57. It is apparent from an examination of the ECtHR procedures that for an Article 34 application to be deemed admissible it must be lodged within 6 months of the final domestic judicial decision and the applicant must be able to demonstrate that they have exhausted all domestic remedies. The ECtHR has made it clear that failure to comply with either one of these requirements will result in a finding of inadmissibility by the Court.

58. The appellant in this case stated in his 14 May 2012 application that the decision dated 15 June 2011 is the final decision in his case. Thus, whilst his application to the ECtHR was lodged within 6 months of this date, it is conceded by him that he did not seek a judicial review of this negative decision. Applying the principles in *Sufi* to the facts of this case, I am satisfied that the appellant is unable to demonstrate:

- That he has attempted to issue judicial review proceeding before resorting to the ECtHR;
- that he has been advised by counsel that an appeal offered no prospects of success; or
- by providing relevant domestic caselaw or other suitable evidence, that an available remedy which has not been used was bound to fail.

59. In AS/11/06/26857, it was conceded by the Presenting Officer that in the light of permission to appeal being granted by the Court of Appeal in *HM1*, together with the statement of the President of the ECtHR issued in January 2011 (that where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the ECtHR, removals to that country should be suspended), it could not be said that the appellant's application before the ECtHR was without some merit.

60. *HM1* was decided by the Court of Appeal on 13 December 2011 and was remitted to the Upper Tribunal on the grounds of procedural irregularity. It follows, therefore, that as at 22 December 2011, when this appellant's appeal first came before the tribunal, there was no longer a lead case pending before the national courts or the ECtHR concerning the safety of return to Iraq and the basis of the Secretary of State's concession in AS/11/06/26857 no longer applied.

61. As at today's date, the position is no different. Permission to appeal has been granted against HM2 (see paragraph 43 above) but the Court of Appeal has stated that the Country Guidance remains valid. This, coupled with the judgment of the ECtHR in *Al Hamdani,* that the situation in Iraq is not so serious as to cause, by itself, a violation of Article 3 if the appellant were to be returned there, leads me to conclude that the appellant's application before the ECtHR does not have any arguable merit.

*Imminent risk*

62. Turning then to the requirement to raise at least the possibility of imminent risk on return, I find that for the reasons stated above, the appellant has not discharged the burden upon him to do so. He has not exhausted his domestic remedies prior to issuing his application with the ECtHR. He has implied to the Court that he is at risk of deportation or removal when, on the evidence before me, which I accept, there are no removal directions in place and no deportation order has been issued by the UK government. Furthermore, the UK Courts and the ECtHR do not hold the view that it is unsafe for Iraqi nationals to return voluntarily to Iraq.

## Decision

63. The appellant is appeal rights exhausted and cannot satisfy any of the conditions of regulation 3(2) of the 2005 Regulations. He is therefore not entitled to the provision of section 4 accommodation and support. In particular, he is not entitled to the provision of section 4 support under regulation 3(2) (e) to avoid a breach of his human rights. The appellant's circumstances have been fully considered and rejected by the Secretary of State and by the FTT-IAC and the UTIAC. On the evidence before me, his application to the ECtHR is without arguable merit and therefore unlikely to succeed.

64. For the above reasons, the appeal is dismissed.

Signed S.H. Storey
Principal Judge, Asylum Support

Dated 2013

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