FIRST-TIER TRIBUNAL ASYLUM SUPPORT

2nd Floor
Anchorage House
2 Clove Crescent
London
E14 2BE

Telephone: 020 7538 6171
Fax: 020 7538 6200

Appeal Number AS/11/06/26857/JH
UKBA Ref. 07/11/01432
Appellant's Ref.

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

Tribunal Judge	Ms Sehba Haroon Storey
Appellant	MMA
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 Thursday the 18th day of August 2011, substituting my own decision for the decision appealed against.

2. The appellant, a 22 year old national of Iraq, appeals against the decision of the respondent dated 25 May 2011 to discontinue the provision of accommodation under Section 4(2) of the Immigration and Asylum Act 1999 as amended (the 1999 Act) on the grounds that the appellant no longer satisfies the criteria set out in Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (the 2005 Regulations).

3. The case was part heard on 27 July, 17 August 2011 and 18 August 2011 and a decision was handed down at the final hearing. I now provide the Reasons for that decision.

4. The appellant attended all three hearings and was assisted by an interpreter in the Kurdish Sorani language. He was represented by Mr. Spencer of the Asylum Support Appeals Project (ASAP). The respondent was represented by Mr. Cooper at the first hearing and by Mr. Jack at the subsequent hearings.

The Facts

5. The appellant first applied for asylum in the United Kingdom (UK) on 13 November 2007. His application was refused on 24 August 2009 and on 10 September 2009 his instructed solicitors declined to act further on his behalf

because in their opinion his appeal lacked merit. The appellant made an application to appeal out of time against the decision of 24 August 2009 but on 22 September 2009 permission was refused by the Asylum and Immigration Tribunal (AIT), in part because the grounds did not indicate any reasonable prospect of success. The appellant sought advice from the Immigration Advisory Service (IAS) on the merits of pursuing a judicial review of this decision but IAS declined to represent him. In July 2010 he was assisted by Miles Hutchinson and Lithgow Solicitors in making further submissions by way of a fresh claim for asylum but these were rejected by the Secretary of State for the Home Department (SSHD) on 3 August 2010 and his solicitors declined to represent him further in judicial review proceedings.

6. On 21 January 2011 the appellant again made further submissions by way of a fresh claim but these too were rejected by the SSHD on 22 March 2011. There is no evidence before me to suggest that any steps were taken by the appellant to obtain advice on the merits of judicially reviewing the rejection of these further submissions. He is now outside the 3 month time limit for seeking permission from the Administrative Court.

7. On 28 March 2011 the appellant applied to the European Court of Human Rights (ECtHR) under Article 34 of the European Convention on Human Rights (ECHR) alleging a violation of Article 3 if he were to be returned to Iraq. He also applied for interim measures under Rule 39 of the Rules of the Court. The appellant is not, nor has he been, in detention and as far as I am aware, the SSHD had not taken any steps to enforce his removal to Iraq.

8. On 28 April 2011 the appellant was found to have satisfied the criteria for section 4 support and was offered accommodation in Cleveland because he appeared to the SSHD to be destitute. This was discontinued on 25 May 2011.

<u>The European Court of Human Rights Application</u>

9. The appellant's two page application to the ECtHR seeks relief under Article 34 of the ECHR and interim measures under Rule 39 of the Rules of Court. Under "Statement of Facts" the appellant states that on 22 March 2011 the United Kingdom (UK) took a final decision to reject his application for asylum and deport him to Iraq but that no date has been set for his removal. Under "Statement of Alleged Violations of the Convention and/or protocols and of relevant arguments" the appellant asserts as follows:-

> '6. The applicant is alleging that his/her deportation by the authorities of this country to Iraq violates his/her rights in breach of Article 3 of the Convention.
>
> **Violation of article 3**
>
> 7. Taking into account all current information about the deterioration in the security situation in Baghdad and other governorates in Iraq as well as UNHCR's letter to this Court dated 9 November 2010, whereby the UNHCR reaffirms the continued validity of UNCHR's Note issued in **July 20(10)** on the Continued Applicability of the April 2009 UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers......* It is my opinion that a deportation to Iraq is a breach of the obligations of this country according to

article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

8. In a reasoned Rule 39 decision dated 22 October 2010 the ECtHR indicated to the 'Government of Sweden that it considered appropriate to apply Rule 39 in respect of any Iraqi' who challenges his or her return from Sweden to Baghdad. The court referred to the deterioration in the security situation in Baghdad and other governorates in Iraq and the UNHCR request not to deport Iraqis back. We hope this also applies to the other countries of Europe.

Statement of the Object of the Application

9. Following all of the above, the court is kindly asked to request the Government of this country to suspend the decision to transfer the A/N person to Iraq.'

10. The appellant's application was initially incomplete and additional documentary evidence requested by the ECtHR was submitted on 23 May 2011.

The Decision to Refuse Section 4 Accommodation

11. On 25 May 2011 the appellant's section 4 support was discontinued on the grounds that the appellant had ceased to be eligible for support because he no longer satisfied at least one of the conditions in regulation 3(2) of the 2005 Regulations. The SSHD noted that the appellant had made an application to the ECtHR but considered that:

(i) He had not provided the UKBA with details of the grounds of his appeal to the ECtHR;
(ii) If the appellant considered there were strong reasons why he could not be removed to Iraq, he should have raised these with the SSHD first for further consideration before seeking redress with the ECtHR;
(iii) Merely submitting an application to the ECtHR is insufficient to prove eligibility for section 4 support under regulation 3(2)(e); and
(iv) The ECtHR have not made a Rule 39 indication granting interim measures.

The Grounds of Appeal

12. On 1 June 2011 the appellant appealed to the First-tier Tribunal - Asylum Support (FTT-AS) on the grounds that:

(i) He had exhausted all domestic remedies and his application to the ECtHR was the only remedy available to him to prevent his removal to Iraq;
(ii) Removal to Iraq would breach his human rights;
(iii) Only the ECtHR could assess the merits of his application;
(iv) So long as his ECtHR application remained pending, he continued to be eligible for section 4 support; and

(v) The SSHD had discontinued section 4 support notwithstanding that there had been no change in his circumstances since support was granted on 28 April 2011.

The Legislative Framework

13. 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.

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

15. 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.

16. 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.

17. 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.'

Discussion

18. 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.

19. 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 a Rule 39 indication has been made by the Court, removal must be deferred immediately.

Submissions for the Appellant

20. On behalf of the appellant, Mr. Spencer initially requested in written grounds that I depart from the guidance given in AS/11/04/00292, a case concerning an Iraqi national who had applied to the ECtHR under Article 34 ECHR alleging a violation of Article 3 if returned to Iraq. That appeal was dismissed because the appellant had not exhausted all domestic remedies. In paragraph 35 I had said that in order for applicants who have outstanding ECtHR applications to demonstrate entitlement to section 4 support under regulation 3(2)(e), the onus is upon them to show that they have:

    (i) exhausted all domestic remedies;
    (ii) 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
    (iii) 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.

21. At the hearing, Mr Spencer revised his position on AS/11/04/00292 and submitted that it was not necessary to fully reconsider this judgment. He acknowledged that exhaustion of domestic remedies was a requirement of the ECtHR. However, in relation to point (ii), he argued that the appellant's application, brief though it was, contained all essential information required by the ECtHR but that the FTT-AS was entitled to look at the merits of that application in order to decide whether support under section 4 was necessary to avoid a breach of the appellant's human rights. In doing so, he took the view that unless the SSHD could show that the appellant's application was manifestly unfounded, entirely without merit, or obviously hopeless or abusive, support should be provided. As such, in his submission, it was sufficient for the appellant to demonstrate that the application to the ECtHR had *some* merit.

22. However, in relation to point (iii) aforesaid, Mr. Spencer argued that it was not necessary for an appellant to raise the possibility of imminent risk on the basis that this could only be demonstrated once removal directions had been set by the SSHD as that was entirely outside the appellant's control. In support or his arguments Mr Spencer produced a large bundle or supporting documentation and authorities upon which I shall comment later where relevant and necessary.

Submissions for the Respondent

23. The respondent was represented by Presenting Officer Mr Cooper at the first hearing and by Mr Jack at subsequent hearings. Mr Cooper argued that this

case was not fundamentally different to AS/11/04/00292 which was considered good law by the SSHD as it had not been challenged. He argued that the appellant had not exhausted all domestic remedies as there was no evidence to suggest that he had sought to judicially review the refusal of 22 March 2011. In Mr. Cooper's submission, the Article 34 application to the ECtHR was not fully reasoned or individuated and, as no removal directions had been set, there was no imminent risk. He asked me to find that the application was likely to be fanciful and speculative and bound to fail.

24. Mr. Jack expanded upon Mr. Cooper's submissions and emphasised that the appellant had failed to judicially review the decision of the SSHD rejecting his further submissions. He confirmed that the respondent was continuing to remove failed asylum seekers from Iraq on scheduled flights but that there had been no charter flight since Silber J suspended the removal of 17 Iraqi nationals on Charter Flight no. PVT010 on 21 June 2011. He conceded, however, that if the Court of Appeal had granted permission to appeal in *HM (Iraq) and another v SSHD* (Court of Appeal ref: C5/2010/2842) (*HM (Iraq)*) on the issue of Article 15(c) and indiscriminate violence, it could not be said that this appellant's application to the ECtHR was without merit. What was lacking, he argued was exhaustion of domestic remedies but this could be remedied by the appellant making a fresh claim based on the grant of permission in *HM (Iraq).*

The Decision

25. I am satisfied that paragraph 35 of AS/11/04/00292 (see paragraph 20 above) sets out the correct test to be applied in cases where appellants with outstanding applications before the ECtHR seek to establish entitlement to section 4 support under regulation 3(2)(e).

Domestic remedies

26. In relation to the requirement to exhaust all domestic remedies, the ECtHR held in *Sufi and Elmi v UK* 8319/07 [2011] ECHR 1045 (28 June 2011) (*Sufi*) (paragraph 205) that 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, that the remedy is accessible, capable of providing redress in respect of the applicant's complaints and offers reasonable prospects of success. 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.

27. It was, however, accepted in *Sufi* (paragraphs 203-205) that there may 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 this is argued before the FTT-AS, the burden is upon the appellant to produce evidence of the same.

28. On the specific facts of this case, I am satisfied that the appellant has exhausted his domestic remedies. I have had produced to me correspondence from various legal representatives confirming that the appellant was prevented from appealing out of time to an Immigration Judge against the refusal of his original asylum claim; that he was refused legal aid and could not obtain representation; and that he was advised that in the light of the judgment of the

Upper Tribunal in *HM (Iraq)* judicial review was not a remedy available to him. His further representations were rejected in the light of *HM (Iraq)* and he could not have pursued judicial review of that refusal as *HM (Iraq)* remained the leading authority and permission to appeal to the Court of Appeal was not granted by Pill LJ until 15 April 2011. As the appellant was seeking to rely upon the UNHCR's 2009 position (re-affirmed in 2010) that the level of indiscriminate violence against civilians in Iraq was such that it was not safe to return failed asylum seekers, an application to the ECtHR was the only remedy remaining available to him in March 2011.

Individuated and fully reasoned application

29. The requirement that requests for interim measures be "individuated, fully reasoned, be sent with all relevant documentation including the decisions of the national authorities and courts..." is set out in a statement issued by the President of the ECtHR. The President further warns that the widespread distribution of application forms to potential applicants should not be seen as a substitute for "proper legal representation in compliance with these requirements".

30. I have had produced to me a copy of the appellant's application to the ECtHR. Save for the appellant's name, date of birth and nationality, the remainder of the document is essentially a pro-forma and virtually identical to every other such application seen at this tribunal. Mr. Spencer submits that such applications are by their very nature brief and that lengthy applications are discouraged by the ECtHR. That may be so, but I do not accept that the request to submit a summary where the application exceeds 10 pages should be read as suggesting that non-specific submissions will be accepted by the Court. Nevertheless in the particular circumstances of this case, and bearing in mind the jurisprudence of the ECtHR, I am prepared to accept that the appellant's application substantively meets this test. This is because the appellant's application relies on the presence of generalised indiscriminate violence in Iraq which he contends places him at real risk of being subjected to serious harm if returned, solely on account of his presence on the territory of that country or region. As such, he is not required to demonstrate that he would be specifically targeted by reason of factors particular to his personal circumstances: see *Sufi* paragraph 225.

Assessment of merit

31. Regarding the assessment of merit, a number of judgments of the higher courts have provided guidance on the correct test to be applied to further representations/fresh claims when assessing an applicant's entitlement to support from UKBA or a local authority. In *R(NS) v First-tier Tribunal and SSHD* [2009] EWHC 3819 (Admin), Stadlan 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 an applicant would not qualify where the outstanding application was "obviously hopeless or abusive" (paragraph 66); Lloyd Jones J in *R(AW) v Croydon and Hackney* [2005] EWHC 2950, considered the test to be manifestly unfounded (paragraph 74); whilst Nicol QC (sitting as a Deputy Judge of the High Court) in *Binomugisha v Southwark London Borough Council* [2006] EWHC 2254, set the test as "utterly hopeless" (paragraph 53).

32. In my opinion, the test used in AS/11/04/00292 namely that the application must have substance as opposed to being merely fanciful or speculative, is

consistent with each of these formulations. What is clear from these judgments is that the application in question must have *some* merit in order for the appellant's claim for support to succeed and to that limited extent, it is perfectly proper for the FTT-AS judge to consider the merits of the ECtHR application.

Imminent risk

33. Turning then to the requirement to raise at least the possibility of imminent risk on return, I do not accept Mr. Spencer's submission that imminent risk on return can only be demonstrated once removal directions have been set. Had that been the case, this appeal would not have succeeded, since no removal directions have in fact been set in this case.

34. I note that permission to appeal *HM (Iraq)* to the Court of Appeal was granted by Pill LJ on 15 April 2011 although the grounds were not known to the parties or the FTT-AS until 18 August 2011. Whilst the Order of Pill LJ states that permission was granted primarily on grounds of procedural impropriety, his Lordship did add that a ruling on this may impact on the merits and article 15 (c) may also be argued. As such, Mr. Jack on behalf of the respondent conceded that it can no longer be said that the appellant's application before the ECtHR is without some merit.

35. On the basis that the appellant has demonstrated exhaustion of domestic remedies and raised the possibility of a risk of imminent harm resulting from indiscriminate violence, coupled 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, I am satisfied that it would not be reasonable to require the appellant to leave the UK pending the decision of the Court of Appeal in *HM (Iraq).* In the circumstances, the appellant is entitled to the provision of section 4 support under regulation 3(2)(e) to avoid a breach of his human rights.

Ms Sehba Haroon Storey
Tribunal Judge, Asylum Support
SIGNED ON THE ORIGINAL [Appellant's Copy]

Dated 24 August 2011