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/11/04/26681/JG
UKBA Ref. 09/04/00292
Appellant's Ref.

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

Tribunal Judge	Sehba Haroon Storey
Appellant	ZH
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 18th day of May 2011, dismissing the above mentioned appeal.

2. The appellant, a 24 year old national of Iraq appeals against the decision of the respondent who, on 19 April 2011, refused to provide him with accommodation under Section 4(2) of the Immigration and Asylum Act 1999 as amended (the 1999 Act) on the grounds that he does not satisfy 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 10 May 2011 and adjourned to 18 May 2011 to enable the appellant to produce further evidence crucial to his case. The appellant attended the first hearing and gave oral evidence through a Kurdish Sorani interpreter. By the date of the second hearing the appellant was in detention pending removal, apparently for working illegally, and was therefore not present to hear additional submissions from his representative Mr. Spencer of the Asylum Support Appeals Project (ASAP) and from Ms. Crittenden for the respondent.

The Facts

4. The appellant first applied for asylum in the United Kingdom (UK) on 17 March 2009. His application was refused on 14 April 2009 and an appeal against that decision was allowed by an Immigration Judge on 16 June 2009. Following a High Court review a reconsideration was directed but the appellant's appeal was dismissed on 12 February 2010. An application for permission to appeal to

the Court of Appeal against this decision was refused on 22 April 2010. The appellant submitted further submissions to the respondent on 9 March 2011 but these were rejected on 11 March 2011. There is no evidence before me to suggest that any steps were taken by the appellant to seek a Judicial Review of the rejection of these further submissions in the Administrative Court.

5. On 4 April 2011 the appellant applied to the European Court of Human Rights (ECtHR) alleging that his rights under Article 3 of the European Convention on Human Rights (ECHR) would be breached if he were to be returned to Iraq. It should be noted that at that date the appellant was not in detention and, so far as I am aware, no steps had been taken to enforce his removal.

6. On 19 April the appellant made an application for Section 4 support on the grounds that:-

   (i) he has submitted an application to the ECtHR;
   (ii) he is destitute;
   (iii) it is not reasonable to require him to leave the UK until a ECtHR decision has been made in his case;
   (iv) he requires support to avoid a breach of his ECHR rights.

7. The appellant's application was refused on 19 April 2011 and he appealed to the First-tier Tribunal - Asylum Support (FTT-AS) against that decision.

The European Court of Human Rights Application

8. 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 11 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...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.'

9. The ECtHR responded to the appellant's application by letter dated 6 April 2011. They informed the appellant that the court applies Rule 39 only when an applicant faces imminent risk of serious and irreparable damage. They added that the vast majority of cases in which Rule 39 is applied concerned deportation and extradition proceedings and involved complaints that the applicant will be at real risk of a violation of Article 2 (the right to life) or Article 3 (the right not to be subjected to torture and inhuman treatment) of the Convention, if returned to the receiving State. The letter continued that the court were unable to consider his request under Rule 39 until such time as he submitted complete copies of all the decisions made in his case, especially any letters from the Home Office, the Asylum and Immigration Tribunal decision and any Judicial Review or Appeal Judgments together with any medical reports available. The appellant was reminded that it was his responsibility to ensure that the documents were submitted before 1 June 2011, in the absence of which his claim would be closed. He was further reminded that should removal directions be issued in his case, these should be faxed to the court marked urgent.

10. The appellant submitted a complete set of documents to the Court on 13 May 2011 by post and a further set were sent by fax on 16 May 2011.

The Decision to Refuse Section 4 Accommodation

11. The respondent's refusal letter of 19 April 2011 confirms refusal of support for the following reasons:-

' You requested to be considered under requirement 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'.

The Grounds of Appeal

12. In his grounds of appeal, the appellant asserted that Section 4 accommodation should be provided to him by reason of:

(i) His outstanding further representations;
(ii) proof of submission of a Rule 39 application to the ECtHR;
(iii) other appeals in similar cases having been allowed, he should be granted support on the same basis.

The Legislative Framework

13. Section 4 of the 1999 Act (as amended by section 49 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 submits that the appellant's case is analogous to *R(NS) v First-tier Tribunal and SSHD* [2009] EWHC 3819 (Admin) (NS) wherein the Administrative Court ruled against the tribunal for its decision that Section 4 accommodation under Regulation 3(2)(e) was not available where permission to judicially review a decision had not been given by the High Court. He argues that there is therefore no requirement in law that in cases where an application has been made to the ECtHR, Section 4 accommodation can only be granted under Regulation 3(2)(e) if a Rule 39 indication has been made.

21. Furthermore, Mr. Spencer refers me to a number of previous FTT-AS decisions – AS/10/02/21776; AS/11/04/26608; AS/11/03/26298 and a fourth unreferenced decision – where the Tribunal Judge allowed the appeals in similar circumstances, accepting that it would be unreasonable to require the appellant to leave the UK pending a determination of their Rule 39 application. Whilst acknowledging that I am not bound by these decisions, he invites me to treat them as persuasive and not to depart from their reasoning unless there is good reason to do so. Referring to the first of these decisions, he cautions me against any consideration of the merits of the appellant's application lest I trespass into the jurisdiction of the ECtHR.

22. Notwithstanding the above, Mr. Spencer asserts that the appellant's application is not without merit as it is based upon concerns expressed by both the ECtHR and UNHCR about the deterioration in the security situation in Baghdad and other governorates. He maintains that the appellant has exhausted his domestic remedies.

23. Finally, he submits that the appellant is entitled to the provision of accommodation under Section 4(1)(c) as he is currently in detention and intends to apply for bail.

Submissions for the Respondent

24. On behalf of the respondent, it is said that the appellant is not entitled to the provisions of section 4 accommodation until such time as the ECtHR gives a Rule 39 indication directing the UK government not to remove him to Iraq. It is conceded, however, that a Rule 39 indication has similar effect to a High Court

injunction and, once granted, has an immediate suspensive effect on removal and entitlement to section 4 accommodation under Regulation 3(2)(e) as it would not be reasonable to require him to leave the UK.

25. In relation to the applicability of *NS* the respondent maintains that the case has no relevance in the present appeal as the Administrative Court made no findings in the course of the judgment and simply remitted the case upon the Secretary of State's concession that the tribunal decision contained an error of law. Quite specifically, the Court had refrained from stating that those seeking judicial review were entitled to the provision of support.

26. On the specific facts of this case, the respondent submits that it is for the appellant to demonstrate that his application to the ECtHR has merit but that the appellant has failed to do so. I am reminded that the appellant relies entirely upon the position of UNHCR, which was considered and dismissed in *HM and Others (Article 15(c)) Iraq CG* [2010] UKUT 331 (IAC) (22 September 2010), and the 29 October 2010 position of the ECtHR that all removals to Iraq be suspended. Ms. Crittenden invites me to find that *HM* is good law, and in respect of the latter, she states that the ECtHR reversed their position on Iraq on 23 November 2010 and since that date have considered requests from Iraqi nationals on a individual basis. As such, she submits that the appellant's application to the ECtHR is without merit, unlikely to succeed and does not justify the provision of support for what could be some considerable time before the matter is determined.

The Decision

27. Dealing firstly with *NS*, I do not accept that this judgment is authority for the proposition that anyone seeking a judicial review of an asylum related application is entitled to the provision of Section 4 accommodation under Regulation 3(2)(e). The decision of the FTT- AS was quashed by Stadlen J because the tribunal were wrong to find that permission to apply for judicial review was a prerequisite to support being granted under this provision. At paragraph 14 he held that:

> " ..... it would be wrong for me on this application simply to give any kind of general ruling as to the correct interpretation of the regulation....because there is a variety of factual circumstances in which the regulation may fall to be applied, [and] it would be unhelpful rather than helpful for the court simply to give a wide ranging judgment which might not cover all the factual circumstances that could conceivably arise."

28. He also accepted (paragraph 12) that there are many cases of claimants whose appeal rights in an asylum case are exhausted who make representations which are entirely without merit for the sole purpose of seeking to delay the moment at which they are removed, and that as such consideration of the merits of the application in question is a valid consideration.

29. Applying the ratio of *NS* 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 merit.

30. Turning next to the limits of the FTT- AS jurisdiction, I rely upon the judgment of the Administrative Court in *Razai & Ors v. SSHD* [2010] EWHC 3151 (Admin) (a case concerning section 4(1)(c)) wherein Nicol J observed (paragraph

111(iv)(b)) that this tribunal's jurisdiction requires it to consider all relevant matters including the reasons why the SSHD took the decision that she did, as well as her policy and the representations of the parties to the appeal.

31. Clearly the respondent takes the view that the appellant's application to the ECtHR is without merit. Mr. Spencer disagrees. Applying *Razai,* I am satisfied that I am entitled to comment generally upon the merits of the application and its substance but not to engage in an evaluation of those merits. As such I am satisfied that the ECtHR, has reversed its October 2010 policy and no longer requires Contracting States to refrain from removing all Iraqi nationals to Iraq. In so far as the appellant relies upon this October 2010 policy, he is bound to fail.

32. I turn next to the appellant's reliance upon the UNHCR position on the risks faced by returnees to Iraq. The UNHCR position has remained largely unchanged since July 2009 and was dealt with at considerable length in *HM* by the Upper Tribunal and rejected. Whilst I am aware that permission to appeal has been granted by the Court of Appeal against that decision on the grounds that there is an arguable error of law, the decision remains good law and persuasive authority for this tribunal to apply until such time as it is reversed.

33. In a recent (circa January 2011) statement, the President of the ECtHR emphasised that:

> " ... the European Court is **not** an appeal tribunal from the asylum and immigration tribunals of Europe.... Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases.
>
> For the Court to be able effectively to perform its proper role....requests for interim measures should be individualised, fully reasoned, be sent with all relevant documentation including the decisions of the national authorities and courts, and be sent in good time before the expected date of removal...
>
> **Member States** provide national remedies with suspensive effect which operates effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk. Where a leas case concerning the safety of return to a particular country of origin is pending before the national courts or the Court of Human Rights, removals to that country should be suspended. Where the Court requests a stay on removal under Rule 39, that request must be complied with."

34. There may be a significant number of exceptional and meritorious cases before the ECtHR but this is not one of them. Not only does the appellant's application fail to meet the requirement that requests for interim measures should be "individuated [and] fully reasoned" but I am satisfied that he has not exhausted his domestic remedies. The appellant states in his application to the ECtHR that a final decision to reject his asylum claim and return him to Iraq was made on 11 March 2011. That statement is false. The decision of 11 March 2011 is in fact a decision by UKBA to reject the appellant's further representations purporting to be a fresh claim. The appellant has not attempted to judicially review the validity of that decision and has until 11 June 2011 to do so. Nor, I am told, has any decision been made to return him to Iraq. He has not therefore exhausted his domestic remedies. As such, I am satisfied that his application

does not meet the requirements of the ECtHR and the respondent's decision to refuse Section 4 accommodation is confirmed.

35. As a general rule, (and drawing to some extent on the approach taken by Tribunal Judge Lewis in AS/10/02/21776) I find that in order for applicants who have an outstanding ECtHR application to demonstrate entitlement to Section 4 support under Regulation 3(2)(e), the onus is upon them to demonstrate 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;
    (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.

36. An applicant who fails to meet the above requirements is unlikely to succeed in their application for Section 4 accommodation.

37. Correspondingly, in deciding an application for Section 4 support under Regulation 3(2)(e) based on an application to the ECtHR the respondent should ensure that the above matters are fully addressed.

38. An applicant refused support may appeal to the FTT-AS and the Tribunal Judge will consider all relevant matters including the reasons why the respondent has rejected their claim, without embarking upon an evaluation of the merits of the application.

39. During the course of the hearing, I invited both representatives to comment upon the decision of the ECtHR in *Al-Moayad v Germany* (Application no. 35865/03) and whether it had any relevance in this case and future similar cases. I considered it particularly relevant in the light of the appellant's recent detention and the possibility that steps may be taken to remove him to Iraq.

40. Ms. Critenden for the respondent submits that *Al-Moayad* is authority for the proposition that there is no bar to removal of a failed asylum seeker in the absence of a Rule 39 indication from the ECtHR. Mr. Spencer contends the opposite. I note that in paragraph 125 of the Court's judgment it states that:

> "...acts or omissions by the authorities of a respondent State intended to prevent the Court taking a decision on a Rule 39 request.....may amount to a violation of a State's obligations under Article 34..."

41. In the light of the above, it would appears that the ECtHR requires UKBA not to remove applicants once they have been served with notice of a "plausibly asserted" application for a Rule 39 indication and not, as UKBA contend, the Rule 39 indication itself. Coupled with the acceptance in *NS* that an applicant should not be prevented from arguing a meritorious case by being denied Section 4 accommodation (paragraph 12), I am satisfied, subject to paragraph 34 above, that a Rule 39 indication is not a prerequisite to the grant of Section 4 accommodation under Regulation 3(2)(e).

42. There is one further point which concerns me, although it was not addressed by either representative during the course of their extensive submissions. It relates to the recent statement of the President of the ECtHR (paragraph 33

above refers) in particular the section addressed to Member States that where a lead case concerning the safety of return to a particular country of origin is pending before the national courts, "removals to that country **should** be suspended" (emphasis added). I am aware that the Court of Appeal has granted permission to appeal in *HM,* which is the most recent Country Guidance case on Iraq. I do not know the grounds upon which permission has been granted, nor whether the UK government has given consideration to the comments of the President that removals should be suspended. That is a decision which only the Secretary of State can make and if after giving consideration to the statement, the Secretary of State is of the view that removals should be suspended, Iraqi nationals may be entitled to the provisions of Section 4 accommodation pursuant to Regulation 3(2)(c) on the grounds that they are unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available. I therefore draw the Secretary of State's attention to the above statement and trust that if a decision has not already been made, it is made quickly and made public as a matter of urgency.

43. Finally, in relation to Mr. Spencer's request that the appeal be allowed under Section 4(1)(c), I note that the appellant has not made an application to the respondent for a bail address, although I am told he intends to do so. That application must be dealt with expeditiously and if refused, the appellant may appeal to the FTT-AS. Until such time as the respondent refuses his application, I have no jurisdiction to hear any corresponding appeal.

44. For the reason given above, this appeal is dismissed.

Signed Sehba Haroon Storey
Principal Judge, Asylum Support

Dated 23 May 2011

SIGNED ON THE ORIGINAL [Appellant's Copy]