FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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Appeal Number AS/11/02/26112/JH
UKBA Ref. 11/01/01596
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	MAM
Respondent	Secretary of State for the Home Department

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 Friday the 4th day of March 2011 to remit the appeal and require the Secretary of State (SSHD) to reconsider the matter.

2. The appellant, a citizen of New Zealand, stated as born on 1 October 1960, appeals against the decision of the respondent who, on 1 February 2011, refused to provide her with accommodation under section 4(1)(a) of the Immigration and Asylum Act 1999 (the 1999 Act) on the grounds that the appellant 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. In her Notice of Appeal, the appellant requests a determination on the papers. I have considered her request with reference to rule 27 of the Rules and I am satisfied that within the particular circumstances of this case, an oral hearing is not necessary for the appeal to be disposed of justly. Accordingly, I proceed to determine this appeal under rule 27(2).

The Facts

4. The appellant entered the United Kingdom (UK) on 1 December 2008 on a visitor visa. She was accompanied by her daughter (born on 23rd August 2000). In keeping with the conditions attached to the grant of their visa, the appellant and her daughter have (excluding local authority accommodation) maintained and accommodated themselves without recourse to public funds. On 20 March 2009, the appellant's visa expired and on 28 May 2009, she applied to the SSHD for

leave to remain outside of the Immigration Rules, with particular reference to Article 8 of the European Convention on Human Rights (ECHR). That application was refused on 26 January 2010. Further requests for reconsideration of that decision were made on 4 February 2010, 6 February 2010, 9 March 2010 and again on 15 March 2010. On 29 September 2010 the appellant was informed that the SSHD had reviewed the decision of 28 May 2009 but had decided to maintain it on the grounds that there were no special compassionate circumstances that warranted a different decision. The appellant was reminded that she should leave the United Kingdom without delay.

5. On 3 November 2010 the appellant's solicitors applied on her behalf for discretionary leave to remain in the United Kingdom "*at least until such time as the care proceedings in regards to her daughter are fully and finally resolved*". In response, the appellant was served the appellant with an IS75 under section 120 of the Nationality, Immigration and Asylum Act 2002, requiring her to make a formal statement giving reasons why she should be allowed to stay in the UK and any grounds why she should not be removed or required to leave. On the same date, the appellant was granted temporary admission until further notice and reminded that she was liable to be detained. I am told that the IS75 and IS76 were served together by special delivery and delivered on 19 November 2010. Although I have been provided with confirmation of delivery of a special delivery item, I have no evidence to link this item with service of the IS75 and IS76 on this appellant. I note, however, that the appellant's solicitors do not dispute that these have been served upon her.

6. The respondent submits that no further grounds or any response has been received from the appellant, or from those representing her, since their communication of 19 November 2010 and that there are currently no applications or appeals outstanding.

7. I have received further evidence from the appellant's representatives concerning her current status in the UK and the position in relation to the care proceedings issued in Newcastle County Court. Nothing in that documentation suggests that the appellant has an outstanding application for leave pending before the SSHD.

The Care Proceedings

8. By letter dated 24 January 2011 to UKBA, the appellant's solicitors (there are two firms on record as acting for her in different proceedings), state that the appellant believes she and her daughter suffer from hypersensitivity to UV light requiring her to take a number of steps to protect them both from harm. It is said that travelling to the UK was one such step. I do not know whether the appellant disclosed this to the Entry Clearance Officer when applying for a visitor visa. Newcastle City Council, however, dispute that the appellant or her daughter suffers from any medical condition. The appellant's belief appears to have resulted in her detention under section 3 of the Mental Health Act 1983 and her daughter being taken into care, although it is not absolutely clear from the papers which came first.

9. I have before me a copy of the Northumberland Tyne and Wear NHS Trust's interview record of the hospital Manager's review concerning the appellant's detention. This confirms that the appellant was detained under Section 3 of the Mental Health Act 1983 from 17 May 2010 to 26 July 2010. I am informed that the Section was discharged on the basis that the appellant's belief that she and her daughter were hypersensitive to UV light was not a reason to detain her in hospital and there was no other evidence of mental illness.

10. The appellant's representatives advise that the appellant's daughter was taken into care by Newcastle City Council in March 2010. I understand that there have been a number of court hearings and interim orders since that date (although I have not seen any documentary evidence of this). On 21 September 2010 an Interim Care Order is said to have been made granting the local authority joint parental responsibility of the appellant's daughter. I am told that further hearings were scheduled to take place on 13 December 2010 and 23 February 2011 to review the Interim Care Order. I have not been informed what occurred on these dates but correspondence from the appellant's solicitors appear to suggest that care proceedings are continuing. In the meantime, the appellant is said to have contact with her daughter twice weekly for two hours on each occasion.

The application for Section 4 accommodation

11. The appellant applied for Section 4 accommodation on 28 January 2011. Accompanying that application was a letter from her solicitors emphasising that the application was a request for support under section 4(1)(a) of the 1999 Act. It was confirmed that the appellant was a person on temporary admission seeking accommodation in order to avoid a breach of her ECHR rights. It was said that she was living in temporary accommodation provided by a charitable organisation in Sunderland but that prior to this she had resided in private rented accommodation in Newcastle for which she paid £245 per week. The application form included a declaration that neither the appellant nor her daughter had any income or access to any other accommodation, that they were destitute and that:

> "[She] is in the UK under IS96 temporary admission and is involved in Care proceedings ...According to NASS policy under Section 4 of the IAA 1999 [she] is entitled to provision of support under Section 4(1)(a) of the Section 4 policy. This is to avoid a breach of her human rights as outlined by the ECHR while waiting for the outcome of the Care proceedings".

12. The accompanying letter (referred to above) included the following additional statements in support of the appellant's claim:-

- that the SSHD was empowered to provide facilities for the provision of accommodation to those on temporary admission in the UK;
- that there is no express legal requirement for the appellant to meet the test of destitution or to satisfy Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulation 2005 (the 2005 Regulations);
- that Section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) was relevant in as much as UKBA is now under a duty to have regard to the need to safeguard and promote the welfare of children when taking decisions about the provision of support; and
- that the appellant has a fresh application for leave pending with UKBA.

The decision to refuse section 4 accommodation

13. The respondent's refusal letter of 1 February 2011 states the following by way of reasons for refusal of accommodation:-

"The UKBA has the power to provide support under section 4(1) but it does not have a duty to exercise these powers and does not routinely do so. The circumstances of the above applicant case are not exceptional and therefore support will not be provided under section 4(1).

The Secretary of State does not provide support under section 4(1)a of the Immigration and Asylum Act 1999 to asylum seekers or failed asylum seekers. Support can be provided to eligible asylum seekers under sections 98 and 95 of the 1999 Act whilst their claim remains outstanding. Failed asylum seekers, who have exhausted all rights of appeal, can also claim limited support in the form of accommodation and essential living needs under section 4(2) of the 1999. Both these forms of support are subject to a destitution test. Support may also be provided under section 4(1)c of the 1999 Act to those released on bail from immigration detention."

Grounds of appeal

14. In her grounds of appeal, the appellant accepts that the SSHD has power to provide support under section 4(1)(a) of the 1999 Act, but that there is no duty upon her to exercise this power. It is said, however, that the appellant's situation is exceptional and that the SSHD should exercise her power differently pursuant to the provisions of the ECHR and Section 55 of the 2009 Act. The appellant is now said to be destitute and living in temporary emergency accommodation provided by the local authority, pending this decision. In particular, it is said that the SSHD has failed to discharge her duty under Section 55 aforesaid to have regard to the best interests of the appellant's child, who would suffer a detriment if the appellant were to become destitute and homeless through denial of support.

Response to Directions and further submissions

15. Pursuant to directions issued by the Tribunal, I have received additional documentary evidence and submissions from both parties. I do not consider it necessary to detail each document and submission individually. Suffice to say that I have taken them into consideration in reaching my decision.

16. It is the respondent's case that:

    (i) the SSHD has not published any guidance or policy on the exercise of the power to provide support under section 4(1)(a) of the 1999 Act;

    (ii) the SSHD has the power to provide support under section 4(1)(a) but is under no duty to exercise such power and does not routinely do so;

    (iii) when considering whether the appellant was destitute, it was noted that she owned a car worth £1,500 which she does not use. No explanation was provided as to how she can afford to pay road tax and insurance on the vehicle and her reasons for not wishing to sell her car were not credible;

    (iv) the appellant has no confirmed medical condition;

(v) the refusal to provide support to the appellant will not disproportionately affect her relationship with her daughter as the child is currently in local authority care;

(vi) the appellant has no asylum or leave to remain applications outstanding with the UKBA. She has been served with IS75 and IS76 by special delivery and no response has been received;

(vii) the appellant is an overstayer and it is not considered that there are any exceptional circumstances justifying the provision of support under section 4(1)(a);

(viii) any potential destitution is self-inflicted as the applicant has remained in the United Kingdom without valid leave since 2007.

17. On behalf of the appellant, it was submitted (in addition to the points detailed above), that this Tribunal should have regard to the case of *ZH (Tanzania) (FC) (Appellant) v SSHD (Respondent)* [2011] UKSC 4, a case concerning a challenge against the decision to remove the parents of a child from the UK. In that case, it was held that in determining the obligation under Section 55 of the 2009 Act, the SSHD was under an obligation to have due regard to the best interests of any child affected by her decision.

The Legislative framework

18. 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.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2).

(4) .....

(5) The Secretary of State may make Regulations specifying criteria to be used in determining –

(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.'

19. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, which came into force on 31 March 2005, lays down the criteria to be followed in respect of failed asylum-seekers and their dependants and 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-

.....'

20. 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 dismiss the appeal.'

21. In so far as is relevant, Section 55 of the Borders, Citizenship and Immigration Act 2009 states:-

'(1) The Secretary of State must make arrangements for ensuring that –

(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom; and
(b) (not relevant).

(2) The functions referred to in sub-section (1) are –

(a) any function of the SSHD in relation to Immigration, Asylum or Nationality;
(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) ...(not relevant)'

22. In so far as is relevant, Section 117 of the Mental Health Act 1983 (as amended) provides:

> (1) This section applies to persons who are detained under section 3 above .....and then cease to be detained and (whether or not immediately after so ceasing) leave hospital.
>
> (2) It shall be the duty of the Primary Care Trust or Local Health Board and of the local social services authority to provide, in co-operation with relevant voluntary agencies, after-care services for any person to whom this section applies until such time as the Primary Care Trust or Local Health Board and the local social services authority are satisfied that the person concerned is no longer in need of such services; but they shall not be so satisfied in the case of a community patient while he remains such a patient.

23. Article 8 of European Convention on Human rights (ECHR) provides the following:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Discussion

24. In response to directions, the respondent submits that:

> "The SSHD has not published any guidance on the exercise of the power to provide support under section 4(1)(a) of the [1999 Act]. The [UKBA], has the power to provide support under section 4(1)(a) but it does not have a duty to exercise these powers and does not *routinely* do so." (Emphasis added).

25. The submission omits any reference to the fact that although regulations laying down the criteria to be followed in section 4(1)(a) claims have not been made, regulations have been made in relation to claims made by failed asylum-seekers and their dependants under Section 4(2) (paragraph 19 above refers). Furthermore, the SSHD has prescribed a form for use in section 4(2) applications as well as for bail address applications under section 4(1)(c), together with detailed instructions in place in the form of a section 4 policy document laying down criteria to be used in the assessment of such applications.

26. The SSHD has not sought to argue that because regulations have not been made under section 4(1)(a), the power conferred by this provision cannot be exercised. Such an argument would be ill-founded in any event because the statute does not mandate that regulations must be made in order for the SSHD to exercise her power. In any case, (on the strength of what was stated in the letter of refusal sent to the appellant) the SSHD accepts that the power to provide accommodation to those temporarily admitted under the 1971 Immigration Act is being exercised on a

discretionary basis, applying the "exceptional circumstances" test, albeit not "routinely".

27. As Lord Slynn of Hadley observed in *Saadi & Ors, R (on the application of) v Secretary of State for the Home Department* [2002] UKHL 41 at [11], when exercising the power conferred by section 4, the SSHD is entitled to adopt a policy in relation to the procedures to be followed, and to change that policy from time to time. However, Lord Slynn went to say that this was subject to the proviso that such policy must not conflict with relevant principles of law.

28. Such principles of law surely include the axiom that public authorities must act in a fair, open and transparent manner and ought to deal straightforwardly and consistently with the public. As Laws LJ observed in *Nadarajah & Abdi v. SSHD* [2005] EWCA Civ 1363, at [68]:

> "In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. ...and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is ....a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest....."

29. In the present case, the respondent's practice of determining section 4(1)(a) applications for accommodation by applying the exceptional circumstances test is neither open nor transparent. Neither applicants nor the tribunal know what the SSHD regards as an exceptional circumstance. In the absence of such basic information, applicants are left in the dark and may have difficulty formulating their claims or appeals if refused. Equally, this tribunal cannot look again at the decision of the SSHD - and if appropriate, substitute its own decision - without knowledge of the criteria employed to assess the application and the information upon which the decision is based. The tribunal's jurisdiction is not limited solely to the issue of an appellant's eligibility for accommodation. As Nicol J observed in *Razai & Ors v. SSHD* [2010] EWHC 3151 (Admin) at [111(iv)(b)] (a case concerning section 4(1)(c)), this tribunal's jurisdiction is wider and 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. That is somewhat difficult without knowledge of the evidence considered by the SSHD and the criteria applied to it by her.

30. The appellant says she requires section 4(1)(a) accommodation because:

    (i) she is destitute and support is required in order to avoid a breach of her rights under Articles 3, 8 and 6 ECHR, while awaiting the outcome of care proceedings;

    (ii) the SSHD has a duty under the 2009 Act to have regard to the need to safeguard and promote the welfare of her daughter; and

    (iii) the appellant has an outstanding application for leave before the SSHD.

31. The SSHD responds that the appellant is not destitute as she admits to ownership of a vehicle and to state that as the child is currently in care, it is considered that the UKBA duty of care has been fulfilled. Finally, the respondent's position is that there are no outstanding applications.

Destitution

32. It is submitted on the appellant's behalf that there is no express legal requirement for her to meet the test of destitution or to satisfy regulation 3(2) of the 2005 Regulations. The submissions are silent on why the appellant should not continue to be subject to the condition of entry as a visitor to maintain and accommodate herself and her dependant without recourse to public funds. Nor is it explained why she is unable to access funds from abroad, possibly by selling one of the properties she is said to have admitted to owning in New Zealand (her letter of 26 May 2009 to the SSHD), and thus continue to be self sufficient. Also relevant to the issue of destitution, is the fact that the appellant has assets in the UK, in particular a vehicle said to be worth £1,500, which is currently not in use but which she is unwilling to sell.

33. In *R(K) v London Borough of Lambeth* [2003] EWCA Civ 1150, the then Lord Phillips MR observed that the position of a foreign national awaiting a determination of her claim to a right of residence in the UK could not be equated with that of an asylum seeker who may have a well-founded fear of persecution and who may yet establish that she has refugee status. He held at [26] that:

> "there is no obvious reason why [the foreign national] should expect to receive support from this country, rather than her home State, pending the determination of her claim to a right of residence"

Later at [49], Lord Phillips emphasised that "a State owes no duty under the ECHR to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home." Whether the appellant is free to return to New Zealand given that her daughter is currently in local authority care, remains unclear.

34. Also relevant to the issue of destitution is the disclosure by the appellant's solicitors in response to directions, that the appellant has made a conscious choice to seek section 4(1)(a) accommodation from the SSHD as opposed to accessing aftercare services from the Northumberland Tyne and Wear NHS Trust, pursuant to section 117 of the Mental Health Act 1983. In their letter of 14th February 2011, they that:

> "We understand that no offer of after care services has ever been made. [The appellant] does not believe that she suffers from any mental illness and is fearful of readmission and the potential administration of forced medication; she has therefore avoided to the extent it is possible any formal contact with social services or the mental health services. It is by virtue of her beliefs (or in the view of the authority her mental health condition) that *she is unwilling to engage with the provision of any services under s117 [of the Mental Health Act 1983] (MHA) (emphasis added).* It therefore does not present a realistic alternative option of support."

35. Section 117 provides that aftercare services must be delivered (free of charge) to patients detained under Section 3 following release. The responsibility for providing aftercare services rests with the patient's Primary Care Trust or Local Health Board or the local social services authority. Services provided under section 117 can include financial assistance and accommodation. A person who falls within the scope of section 117 must be assessed before discharge and in contrast to section 4(1)(a) of the 1999 Act, the local authority has a duty to provide the services identified.

36. I note however, that the SSHD did not cite this as a reason for refusal of section 4(1)(a) accommodation and the appellant has not therefore had an opportunity to address the point, save in response to directions. As such, it may be inappropriate to express any concluded view in relation to this, save to say that it cannot be open to the appellant to argue that she is destitute in circumstances where she has chosen to reject the provision of support by a public body that may have a statutory duty to provide her the same.

37. The appellant's representatives are therefore correct to the limited extent that there are currently no statutory or regulatory provisions requiring section 4(1)(a) applicants to prove destitution as there are in respect of section 4(2) applications by failed asylum-seekers. However, in the light of the judgment in *R(K) v London Borough of Lambeth,* I am satisfied that the requirement to prove destitution does apply to applications under section 4(1)(a).

38. In the circumstances, on the evidence before me, I consider it questionable whether the appellant was in fact destitute as claimed. Even if destitution could be established, it is open to the SSHD to argue (as has been submitted) that in the light of the availability of local and foreign assets, and the duty conferred by section 117 aforesaid, the appellant is intentionally destitute. There is however, no evidence before me that the SSHD made any enquiries of the Northumberland Tyne and Wear NHS Trust to establish whether a duty to provide aftercare services under section 117 exists.

Section 55 of the 2009 Act

39. The representatives submit that it is in the best interest of the appellant's daughter that the mother be accommodated under section 4(1)(a) because without such support, she would not be able to maintain contact with her daughter whilst she remains in care.

40. The representatives place reliance on *ZH (Tanzania) (FC) (Appellant) v SSHD (Respondent)* [2011] UKSC 4 in which Lady Hale gave the lead judgment. This case concerned a challenge against a decision to remove the foreign national (and failed asylum-seeker) mother of two children who were UK nationals and the court were concerned with whether it is reasonable to expect the children to live in another country. Lady Hale held at [29] that "the best interest of the child" broadly means "the well-being of the child" and that these were "a primary consideration", not "*the* primary consideration" still less "the *paramount* consideration" [25]. As such, she held at [26] that:

> "This did not mean (as it would do in other contexts) that identifying their best interests would lead inexorably with a decision in conformity with those interests. Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them. The important thing, therefore, is to consider those best interests first."

41. I consider that SSHD has made insufficient enquiries into the status of the care proceedings which is a relevant factor. It may well be that the appellant's daughter was taken into care solely by reason of the appellant having been sectioned or the reasons may relate to earlier concerns over her mental health which subsequently were found not to justify her continuing detention under section 3. If the former, it may be that the Newcastle City Council would not oppose the daughter's return to

the appellant's sole responsibility. In that case, there may be no impediment to the appellant and her daughter freely returning to New Zealand where they enjoy full rights as nationals of that country.

42. If the reasons relate to concerns over the appellant's mental health or some other factor(s), the SSHD will need to address the appellant's arguments concerning both Article 8 and section 55 of the 2009 Act. In particular, she ought to consider whether the grant of section 4(1)(a) accommodation to the appellant is in the daughter's best interests and whether it is reasonable to deny the appellant accommodation, if as a result, she would not be able to take effective part in the care proceedings or enjoy contact visits with her daughter.

43. Nor has the SSHD taken note of her November 2009 guidance on promoting the welfare of children. Paragraph 2.7 of the 'Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children' issued under section 55 of the Borders, Citizenship and Immigration Act 2009, requires the SSHD to adhere to the following five principles:

- Every child matters even if they are someone subject to immigration control.
- In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.
- Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
- Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.
- Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

44. There is no evidence before me to suggest that the SSHD has in fact applied the above guidance and taken the wishes of the child into account. No proper enquiry appears to have been made into the current position concerning all aspects of the care proceedings, including the twice-weekly contact visits between the appellant and her daughter (or if it has, this has not been disclosed to me). Without having done so the SSHD cannot demonstrate that she has had regard to the best interests of the appellant's daughter and treated them as a primary consideration as required by *ZH (Tanzania)*.

The appellant's outstanding application

45. The appellant's representatives consider that there is an outstanding application before the SSHD. The latter disagrees. UKBA have produced evidence of the delivery of a special delivery item and suggest that this relates to the final decision. Had the receipt been accompanied by the letter sent to the appellant, endorsed with the address for service and the special delivery reference number, I would have been satisfied that there is no outstanding application before the SSHD. As it is, I cannot find on a balance of probability that a final decision has been served. Even assuming that there is an outstanding application, which may not be the case, in the light of the comments of Lord Phillips aforesaid, this does not of itself entitle the appellant to section 4(1)(a) accommodation.

ECHR

46. The appellant argues that the decision of the SSHD violates her rights under Articles 3, 8 and 6 ECHR. I take the view that submissions made on her behalf do not demonstrate that Article 3 has any application to her case. I do not therefore propose to deal with this argument in any great depth. Suffice to say that the threshold for Article 3 is a high one and the appellant has not demonstrated that refusal of section 4(1)(a) accommodation would reduce her and her daughter to the state of degradation required to engage Article 3.

47. The appellant submits that the ECHR guarantees a right to a fair hearing, one aspect of which, she argues, is to have a reasonable opportunity to present her case within the care proceedings under conditions that do not place her at a significant disadvantage. In this respect section 2 of the Human Rights Act 1998, requires the SSHD to take into account decisions of the European Court of Human Rights (ECtHR). One case in point is Ciliz *v The Netherlands* [2000] FLR 469, where the ECtHR held that it was incompatible with Article 8 for the immigration authorities to pre-judge and pre-empt family law contact proceedings and that the parent's involvement in those proceedings was "obviously of essential importance." Again, there is no suggestion in the respondent's submission that this factor has been considered.

48. I note it is not in dispute that the appellant has an established family life as the natural mother of her daughter with whom she has lived since the child's birth and with whom she continues to maintain twice weekly contact. That is sufficient to establish a protected family life right within the meaning of Article 8(1). It is also well established that the private life aspect of Article 8 may be engaged in a case which involves physical or mental health (*Bensaid v. United Kingdom* [2001] 33 EHRR 10) and that mental health must be regarded as a crucial part of private life associated with the aspect of moral integrity. (see *Pretty v United Kingdom* [2002] EHRR 1). I have no knowledge of what, if any, consideration has been given to this aspect.

49. Within the scope of Article 8, the ECtHR has frequently made use of the concept of positive obligations, the assumption being that the national authorities may be under an obligation actively to respect the individual's rights protected under Article 8 and not just the negative obligation to abstain from interference. The decision making process followed by the SSHD has to be such as to demonstrate respect for private and family life. If there is a failure in this regard, the interference resulting from the decision will not be in accordance with the law.

50. In this case, Article 8 principles require the SSHD to apply section 4(1)(a) in a manner that is accessible, predictable and foreseeable. If the SSHD fails to do so, for instance by failing to have in place a clear and accessible policy for the determination of applications, there will be a lack of respect for Article 8 rights. Any decisions made in the absence of the same will not be in accordance with the law.

The Decision

51. On the totality of the evidence before me, and for the reasons above stated, I am satisfied that the SSHD has given inadequate consideration to what is a complex claim for section 4(1)(a) accommodation. Whilst I take the view that the appellant is not destitute, there is no guidance in place to suggest that the test of destitution applies to section 4(1)(a) applications. If the SSHD wishes to apply such a test, she must say so.

52. Nor, in my opinion, has it been demonstrated that proper consideration has been given to the welfare of the child. If, as is suggested, the appellant's circumstances

are not considered sufficiently exceptional to warrant the grant of section 4(1)(a) accommodation, section 55 of the 2009 Act places the SSHD under a duty to explain how she exercised that duty *vis a vis* the best interests of the child and why she reached the decision she did. Neither the decision letter of 1 February 2011 nor the subsequent submissions meets this standard.

53. The SSHD does not dispute that a policy does not exist for this purpose and accordingly, in my judgment, the decision in this case is not in accordance with the law within the meaning of Article 8(2).

54. The SSHD will be aware that there has been a substantial increase of late in applications under section 4(1)(a) by persons who are neither asylum - seekers nor failed asylum - seekers. Despite this, the negative decision letters issued by UKBA are all in standard format and refer to sections 4(2), 95, and 98 of the 1999 Act – none of which have any relevance to section 4(1)(a) applications. These decisions are plainly wrong and currently are being remitted to the SSHD for reconsideration. In the absence of the SSHD making known the criteria being used to determine these applications, including whether the test of destitution applies, and reflecting this in the refusal letters, the tribunal will continue to remit these cases.

55. The power given to the SSHD to grant accommodation to such persons was created by Parliament and must not be treated as discretionary or elective. Applying the reasoning of Sedley LJ in *Mirza & Ors, R (on the application of) v. SSHD* [2011] EWCA Civ 159 at [25]:

> " ... it is there for a purpose which Parliament has made part of its legislative policy and is to be exercised accordingly except where there is a lawful reason not to do so."

Section 4(1)(a) has been in force for 11 years. It is high time the SSHD made known the criteria used to determine applications under this provision so that decisions are in accordance with the law.

56. Having regard to all of the above, and noting that the appellant is currently in temporary local authority accommodation, I am of the opinion that the correct decision in this case is to remit the appeal to the SSHD and require her to reconsider the matter. In doing so, the SSHD is encouraged to consider the merits of introducing regulations or expanding the current section 4 policy, so as to encompass section 4(1) in its entirety in the interest of clarity, accessibility and consistency of decision making by UKBA caseworkers.

57. In reaching the above findings and making the decision to remit the appeal for reconsideration, I make no judgment on the merits of the appellant's case and nothing I have said should be taken as suggesting that she is entitled to succeed.

Signed:

Sehba Haroon Storey
Principal Judge, Asylum Support **Date:** 4th March 2011