



Tribunals Service
Asylum Support Tribunal

Asylum Support Tribunal
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Appeal Number : AST/08/06/17777
UKBA Ref. : 03/07/01555/002
Appellant's Ref. :

IMMIGRATION AND ASYLUM ACT 1999
ASYLUM SUPPORT APPEALS (PROCEDURE) RULES 2000

Adjudicator	Ms Sally Verity Smith
Appellant	BJ
Respondent	Secretary of State

REASONS STATEMENT

1. This Reasons Statement is made in accordance with Rule 13 of the Asylum Support Appeals (Procedure) Rules 2000 ('the Rules'), and gives reasons for the Adjudication given on Wednesday the 18th day of June 2008 allowing the above mentioned appeal.
2. The appellant, a citizen of Libya born on 5 September 1966, appeals against the decision of the Secretary of State who on 3 June 2008 decided to refuse support to the appellant on the grounds that he is excluded from support under Section 95 of the Immigration and Asylum Act 1999 ("the Act") as he is not an asylum seeker.
3. The appellant gave his evidence today in Arabic by way of independent court interpreter Mr Sorouji. He was represented by Ms Hickey of the Asylum Support Appeals Project. The respondent was represented by Mr Quesada.
4. The appellant applied for asylum on 5 March 2003. This application was refused on 1 May 2003 and an appeal against that decision was dismissed on 5 December 2003. Permission to appeal to the former Immigration Appeal Tribunal was granted on 26 February 2004 but the appellant's appeal was dismissed once more on 25 May 2004. The appellant was deemed appeal rights exhausted on 11 June 2004 but continued to receive support by way of Section 94(5) of the Act and the presence in his household of his three minor children born in 1997, 1998 and 2001. A fourth child was born in 2005 and added to the appellant's list of dependants.
5. The appellant's support by way of Section 94(5) of the Act continued until he left the UK of his own volition on 15 December 2007 and travelled to Sweden where he claimed asylum once more. The appellant was returned to the UK by

the Swedish authorities under the terms of the Dublin Convention on 25 April 2008 together with his wife and their four dependant children. The appellant applied for asylum on 25 April 2008 and for Section 95 support on 29 April 2008 which latter application was refused on 3 June 2008 and it is against that decision which the appellant appeals today.

6. Mr Quesada, for the respondent, confirms the appellant's applications for asylum and support. The respondent's decision currently under appeal is predicated on the appellant's immigration status as a failed asylum seeker. The respondent's position is that the appellant is not an asylum seeker or the dependant of an asylum seeker and is therefore not entitled to support by way of Section 95 of the Act. The respondent states that the appellant might be eligible for support by way of Section 4 of the Act and attaches the eligibility criteria for that support.
7. The appellant lodged his appeal on 9 June 2008 stating that he had made an application for asylum on 25 April 2008 which was refused on 30 April 2008 making him a failed asylum seeker. In the alternative, he has dependant children and therefore relied on Section 94(5), namely he was someone who was to be treated as an asylum seeker for the purposes of support. The appellant states that he is aware that his previous claim for asylum had failed and confirmed that he had left the UK on 15 December 2007 with his family and had returned to the UK on 25 April 2008 at which time he had made his second claim for asylum based on further evidence.
8. The appellant submits:
 - (i) a letter prepared by the Border Agency for the Directorate of Immigration in Sweden dated 13 February 2008 confirming that the United Kingdom will accept the appellant and his family "for the further consideration of their asylum application under the terms of Article 16(1)(e)";
 - (ii) a form IS 82AR-353 issued to him by the Immigration Service dated 3 May 2008 which confirms that the appellant has "applied for asylum in the UK";
 - (iii) a form IS86 issued to him by the Immigration Service on 25 April 2008 which confirms that the appellant has "made a claim for asylum or a claim that it would be contrary to Article 3 of the European Convention on Human Rights for you to be removed from, or required to leave, the United Kingdom";
 - (iv) a letter from the Border Agency dated 4 June 2008 confirming that the appellant's letter before claim of 2 June 2008 was received on 4 June 2008 and has been referred to a caseworker within the Border Agency;
 - (v) a letter from the Border Agency dated 30 April 2008 confirming that the appellant's application of 25 April 2008 does not amount to a fresh claim. The appellant has no further right of appeal within the UK but may exercise a right of appeal after he has left the UK;
 - (vi) a letter of 2 June 2008 prepared by his solicitors and addressed to the Border Agency Judicial Review Unit confirming that they require an indication within the next 7 days, namely by 9 June 2008, as to whether the Border Agency is prepared to undertake a review of its

decision of 30 April and 10 May 2008 and if an indication is not received by 9 June 2008 that such a review will be undertaken, the appellant will proceed with an application for Legal Aid with a view to applying for judicial review against the decisions of 30 April and 10 May 2008 without delay.

9. The AST issued directions to the respondent asking for a copy of any decision made on the appellant's immigration application of 30 April 2008, a copy of the letter which was said to be attached to the IS 82AR – 353 form, a copy of the fresh claim made by the appellant upon re-entry to the UK, confirmation as to whether the letter prepared by the appellant's solicitor of 29 May 2008 has been received by the Border Agency and, if so, the present status of the same or a copy of any response issued thereto and documentary evidence which would clarify whether the support and accommodation provided to the appellant since his re-entry to the UK was provided under Section 98 or Section 95 or some other provision.
10. The respondent replied in writing on 16 June 2008 and confirmed that the Border Agency did not have a record of the appellant submitting an immigration application on 30 April 2008 but confirmed that "the appellant did make a fresh claim for asylum on 25 April 2008 which was rejected as a multiple application". The Border Agency is unable to provide a copy of the appellant's fresh claim made upon re-entry to the UK as the Border Agency asylum file is "in transit". Furthermore, the respondent confirms that the appellant's letter of 2 June 2008 has been received by the Border Agency and is currently being considered by the Border Agency and will be answered shortly. Finally, the respondent confirms that the appellant has been provided with Section 98 support since 1 May 2008.
11. In her appeal bundle, the respondent makes the following submission:

"It is noted that in the grounds of appeal the appellant relies on Section 94(5) of the Act. It is not disputed that the appellant's family contains dependant minors and therefore it is not disputed that the appellant satisfies Section 94(5)(a). However, it is submitted that Section 94(5) does not apply by virtue of Section 94(5)(b) of the Act. By the appellant's own admission, he and his family did leave the UK thereby invalidating the application of Section 94(5) of the 1999 Act.

On 25 April 2008 the appellant and his family arrived at Heathrow Terminal 3 from Sweden ... where they submitted an application for a fresh claim for asylum. On 3 May 2008 the appellant was refused leave to enter the UK and a decision was made in accordance with paragraph 353 of the Immigration Rules that this application does not amount to a fresh claim and that the appellant has no in-country right of appeal.

It is therefore submitted that the appellant remains ineligible for Section 95 support although, as relayed in the initial refusal letter, it is considered that the appellant may be eligible for Section 4 support, although no such application has to date been submitted to the UK Border Agency. Although the appellant may have submitted a judicial review, this does not constitute an ongoing asylum appeal for the purposes of the provision of Section 95 support."

There is no other evidence from either party to this appeal.

12. I remind myself that the purpose of asylum support is to provide support for asylum seekers and their dependants who are destitute.

Section 94(1) of the Act defines an asylum seeker as –

“...a person who is not under eighteen and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined.

“claim for asylum” means a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom.”

Section 94(3) –

For the purposes of this Part, a claim for asylum is determined at the end of such period beginning -

- (a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or
- (b) if the claimant has appealed against the Secretary of State’s decision, on the day on which the appeal is disposed of.

Section 94(4) –

An appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration Appeals Act 1997.

Section 94(5) –

If an asylum seeker’s household includes a child who is under 18 and is a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum seeker while –

- (a) the child is under 18; and
- (b) he and the child remain in the United Kingdom.

13. I have considered all the evidence before me on a balance of probabilities and make the following findings:

14. First, I find that the burden is on the appellant to demonstrate that he has made an application for asylum as defined by Section 94(1) of the Act. I have considered the appellant’s evidence today and give weight to the IS86 issued by the Immigration Service on 25 April 2008 which clearly states:

“5. You have made a claim for asylum or a claim that it would be contrary to Article 3 of the European Convention on Human Rights for you to be removed from, or required to leave, the United Kingdom.”

I have also considered the form IS 82AR-353 issued to the appellant by the Immigration Service dated 3 May 2008 which confirms that the appellant has “applied for asylum in the UK”

I therefore find that the appellant's claim made on his return to the UK from Sweden on 25 April 2008 is a claim to asylum as defined by Section 94(1) of the 1999 Act.

15. Second, the burden to demonstrate that the application for asylum is no longer under consideration is on the respondent and I accept her evidence today that the appellant's application of 25 April 2008 has been refused by the respondent.
16. Third, I have considered the applicability of Section 94(5) of the Act. While I might accept that Section 94(5)(b) applied to the appellant's eligibility for Section 95 support on his departure for Sweden on 15 December 2007, I cannot find that Section 94(5)(b) applies to the appellant's applications for asylum and support made since his return on 25 April 2008. The appellant's application for asylum of 25 April 2008 may have been refused by the respondent but Section 94(5)(a) applies: Section 94(5)(b) will only apply if the appellant leaves the UK once more.
17. Fourth, I cannot accept the respondent's assertion that the appellant fails to satisfy the requirements for section 95 support but might satisfy the requirements for section 4 support. If the respondent accepts that the appellant is a failed asylum seeker, which is a *sine qua non* for section 4 support, then she must accept the appellant's eligibility by way of section 94(5) given the continued and continuing presence in his household of his four dependent children. The appellant cannot be a failed asylum seeker post 25 April 2008 if he were never an asylum seeker since that date.
18. Fifth, for the reasons given above, I find that the appellant is entitled to be treated as an asylum seeker as defined by Section 94(5) of the Act.
19. Appeal allowed.

Signed
Asylum Support Adjudicator

Date