



Tribunals Service
Asylum Support Tribunal

Asylum Support Tribunal
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Appeal Number : AST/08/02/17248
NASS Ref. : 05/05/00291/003
Appellant's Ref. :

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

Adjudicator	Mr David Saunders
Appellant	JN
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 Thursday the 13th day of March 2008 allowing the above mentioned appeal.
2. The appellant, a 33 year old citizen of the Democratic Republic of Congo, appeals against the decision of the Secretary of State who, on 18 February 2008, refused his application for support under Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act") on the grounds that the appellant is not destitute within the meaning of Regulation 3(1)(a) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 ("the 2005 Regulations").
3. In his Notice of Appeal, the appellant confirms that he does not require an oral hearing of his appeal. I have considered the appellant's request with reference to Rule 5 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 proceeded to determine this appeal under Rule 6(2) of the Rules.
4. It is not disputed between the parties that the appellant is a failed asylum seeker who arrived in the United Kingdom with his wife, Ms GK. He made an in-country application for asylum on 3 May 2005 including his wife as a dependant. The claim was refused and any rights of appeal exhausted by 25 May 2007. The appellant then made further representations in relation to a fresh claim for asylum on 2 August 2007. Up until July 2007, the appellant and his wife received support – in respect of both accommodation and subsistence - under Section 95 of the 1999 Act. On 13 February 2008, the appellant made an

application for Section 4 support upon the grounds that he was destitute and that he required support in order to avoid a breach of his human rights – based upon the further representations that he had made. This application was refused upon the grounds that the respondent did not consider the appellant to be destitute on 18 February 2008. He appeals that decision.

5. Section 4(2) of the 1999 Act as amended by Section 49 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) allows the Secretary of State to provide, or arrange for the provision of, facilities for the accommodation of a person and his dependants if –
 - (a) he was (but is no longer) an asylum seeker, and
 - (b) his claim for asylum was rejected.
6. Section 4(5) of the 1999 Act (as amended by Section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) allows the Secretary of State to 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.
7. The criteria to be used in determining eligibility for, and provision of accommodation to a failed asylum-seeker under Section 4 are set out in Regulation 3 of the 2005 Regulations. These came into force on 31 March 2005.
8. Regulation 3 states as follows:
 - (1)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) (not relevant to this appeal);
 - (c) (not relevant to this appeal);
 - (d) (not relevant to this appeal);

(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.

9. The respondent says, in her refusal letter, that whilst it is accepted that the appellant's further representations lodged on 2 August 2007 satisfy Regulation 3(2)(e) of the 2005 Regulations, she does not consider that the appellant is destitute. The reason for this is a letter obtained from the appellant's solicitors, Messrs Hopkin Murray Beskine of London, who have indicated that the London Borough of Haringey have provided accommodation and subsistence support to the appellant's wife – and that the accommodation provided to her is available for the appellant in the room provided to Ms GK. It is said that Section 4 support is provided in the form of self catering accommodation with vouchers to purchase food and essential toiletries. The request to offer support on a subsistence only basis within that section is, therefore, declined.
10. The appellant, on the other hand, relies upon detailed submissions made by his solicitors. There is no material dispute of fact. I have set out the chronology of the appellant's asylum and asylum support claims above. After their Section 95 support was discontinued, the appellant and his wife sought shelter with a friend in London – sleeping on the living room floor of his one bedroom flat. The couple were then referred to Haringey Social Services. On 18 January 2008, Haringey completed an assessment concluding that the appellant's wife suffered severe mental health problems and that, as a result, the Local Authority have accepted a duty to provide accommodation and subsistence support for Ms GK under Section 21 of the National Assistance Act 1948 ("the 1948 Act").
11. The appellant then sought further assistance from Haringey in respect of his own needs. I have been provided with a copy of their letter of 11 February 2008 to the appellant's solicitors whereby they have accepted that he is his wife's carer. The appellant argues that it is Haringey's duty to provide care and attention to his wife which could only be met if sufficient support is provided to enable the appellant and his wife to live together. Haringey have agreed to carry out a carer's assessment which is still outstanding. However, they have indicated that they consider that they have no power to provide the appellant with either accommodation or subsistence support, irrespective of the outcome.
12. Since 28 January 2008, Ms GK has been provided with accommodation in a bed-sit in London N4. She receives a weekly subsistence payment of £30. The appellant has stayed with her. However, Haringey's position is that he must apply for support under Section 4. They do not object to him living in the accommodation with his wife until that application has been determined but consider that they would be acting unlawfully to make subsistence payments. The couple have no other income. It is claimed that the sum of £30 per week is insufficient to buy food or other household essentials.
13. The appellant's solicitors argue that destitution for the purpose of Section 4 is related to Section 95(3) of the 1999 Act which states as follows:-
 - (3) For the purpose of this section, a person is destitute if –
 - (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met);
 - or

- (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.
14. I have been referred to the respondent's own Policy Bulletin 4 where it is said that the expected level of income for a couple making a fresh application for support is £98.22 – the test of destitution for both mainstream asylum support under Section 95 and (hard cases) support under Section 4 having substantial authority in the decision of the Court of Appeal in *R (AW & Others) v Croydon LBC and others* [2007] EWCA Civ 266.
15. It is said that the respondent's decision is unlawful because –
- (a) The respondent has failed to consider whether the appellant and Ms GK have sufficient means to meet their essential living needs so as to be destitute within the terms of Section 95(3)(b) of the 1999 Act.
- (b) The respondent has failed to have regard to her own policy guidance in Policy Bulletin 4. Had she done so, it is said that it would have been inevitable to conclude that the appellant is destitute – the couple's income being £30 per week and not £98.22.
- (c) In concluding that the appellant has accommodation available, the respondent has misinterpreted Haringey's position that they are "not preventing him from remaining pending his application for support under Section 4".
16. Insofar as subsistence only support is concerned, it is said that the appellant is not seeking support upon this basis. Haringey have refused him accommodation as well as subsistence – refer to their letter of 11 February 2008 – and that they have said only that they would not prevent him from staying together with his wife "pending" the application under Section 4. A separate letter (dated 12 February 2008) indicates that they are willing to liaise with the respondent in providing a joint package for accommodation and subsistence for the household as a whole, if the application succeeds. It is considered that there could be shared funding – a common arrangement made in respect of Section 95 support. I am referred to the Court of Appeal decision in *O v London Borough of Haringey* [2004] EWCA Civ 535 in this respect
17. In response to directions, I have also received a submission from the respondent whereby she states that she remains of the view that the appellant is not destitute as he is being provided with support in the form of the sharing of the accommodation provided to his wife by the Local Authority. Section 4 does not have the power under the 1999 Act, so it is said, to offer support on a subsistence only basis. I am referred to the respondent's own Policy Bulletin 82 at paragraph 9.2 to 9.3 (inclusive) which states that if Local Authorities determine, following a Community Care Assessment, that an adult dependant has a care need then the Local Authority should provide a supporting care package for the adult and, in some cases, other close family members such as, in this case, the appellant as her spouse. They should also consider whether or not the support of other adult dependants be necessary for the welfare of the adult with care needs – by reference to Section 21(2) of the 1948 Act. It is accepted that the appellant falls within Regulation 3(2)(e) of the 2005 Regulations.

18. I have considered all the evidence that is before me, to include all the documents contained in the Secretary of State's bundle of evidence, along with the detailed documentation and submissions made by the appellant's solicitors. In particular I directly refer to the letters written by Haringey Council to the appellant's solicitors dated 11 and 12 February 2008 together with a further letter dated 29 February 2008. I have also had regard to the community care assessment of the appellant's wife, Ms GK provided to me and the detailed submissions made by both the appellant and the respondent in written form in relation to this appeal. I have seen Witness Statements from the appellant and his solicitor, Mr Chataway together with documents seeking to show destitution. The appellant will become eligible for Section 4 support if he satisfies the criteria set out in Regulation 3 of the 2005 Regulations that I have set out above. This is a two-stage test. He has to both demonstrate that he is destitute and that one or more of the requirements of Regulation 3(2) relate to him. The burden of proof falls upon the appellant to prove he qualifies upon the balance of probabilities.
19. The only matter that I have to consider is as to whether or not the appellant is destitute – it not having been disputed that the appellant meets the requirements of Regulation 3(2) of the 2005 Regulations.
20. There has to be concern here because the effect of the Local Authority decision only to provide assistance to the appellant's wife under the 1948 Act effectively "splits up" the family unit. Be that as it may, the simple issue that I have to decide is whether or not the appellant is entitled to Section 4 support applying the law to what appears, on the face of it to be a largely agreed set of facts that I have set out above. It is well established that the test of destitution is referable to Section 95(3) of the 1999 Act. This effectively splits the requirements of destitution into two categories. First, there is the question of whether or not there is adequate accommodation for the appellant. It is arguable that by allowing the appellant to remain in the room used by his mentally ill wife as her carer that he has adequate accommodation but I do not believe that this is the case. Haringey Council's position could be interpreted as tolerating his presence in the accommodation without any legal right to assist his wife. I do not consider that this could be described as "adequate" for the purposes of the 2005 Regulations because it could be terminated at any time. Even if I were wrong about that, there is clear evidence that the appellant's essential living needs are not being met. I accept the argument that the provision of subsistence support for the appellant's wife would be insufficient to provide food and other household essentials for both the appellant's wife and the appellant himself. Whilst it does fall below the threshold set out in Policy Bulletin 4, that is not necessarily, in my view, the complete test but it does go some way to illustrate the difficulty which the appellant would face should he remain in the room occupied by his wife on a permanent basis. I am, therefore, satisfied that the appellant meets the requirements of Regulation 3(1)(a) of the 2005 Regulations and is destitute for this purpose.
21. This brings me to a further point raised by the appellant's appeal. It is clarified – despite what is said in the decision letter – that the appellant is not seeking support on a subsistence only basis. He is looking for accommodation as well and hopes, in view of Haringey's indication in their letter of 12 February 2008, that there will be liaison between the Border and Immigration Agency and Haringey Council with regard to a joint package for the appellant and his wife. This is said (and I agree) to be a common arrangement made in respect of

Section 95 support and I referred to the decision of *O v Haringey* which I have mentioned before in this respect.

22. I have no jurisdiction to make decisions with regard to the type of support that should be provided by the respondent or, indeed, whether any support should be provided by the Local Authority – Haringey Council – under the National Assistance Act 1948. I can only decide whether or not the appellant – either by substituting my decision for the decision appealed against or by dismissing the appeal – is entitled to Section 4 support or, if necessary, consider it appropriate to send the case back to the Secretary of State so that it can be reconsidered. My powers are limited by Section 103(5) of the Immigration and Asylum Act 1999 (“the Act”) as inserted by Section 53 of the Nationality Immigration and Asylum Act 2002 which was extended from Section 95 decisions to Section 4 decisions by Section 10(3) of the Asylum & Immigration (Treatment of Claimants, etc) Act 2004.
23. I, therefore allow this appeal. I substitute my own decision for the decision appealed against in that I consider that the appellant is entitled to the provision of support under Section 4 of the 1999 Act.
24. I do have one matter of concern which I consider that I ought to mention. In providing Section 4 support for the appellant on his own then this will inevitably mean that the family unit will be split up. This is a case where this is a very sick and mentally ill woman who would, no doubt, benefit from the presence of her husband (the appellant) in order to aid her recovery from very sad and unfortunate events which she claims to have encountered in the DRC. Although it cannot form part of my decision in this appeal, I would strongly urge both the Local Authority and the Border and Immigration Agency to combine in order to find an appropriate solution to this problem.

Signed
Asylum Support Adjudicator

Date