



**Tribunals Service**  
Asylum Support Tribunal

**Asylum Support Tribunal**  
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Appeal Number : AST/08/02/17083  
NASS Ref. : 01/12/05106/003  
Appellant's Ref. :

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

Adjudicator	Ms Sally Verity Smith
Appellant	FR
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 Friday the 15<sup>th</sup> day of February 2008 allowing the above mentioned appeal.
2. The appellant, a citizen of Iran born on 14 July 1965, appeals against the decision of the Secretary of State who on 1 February 2008 decided to refuse support under Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act") on the grounds that the appellant does not satisfy Regulation 3 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. The appellant applied for asylum on 29 December 2001. This application was refused on 21 February 2002. An appeal against that decision was dismissed on 11 February 2003 and permission to appeal to the former Immigration Appeal Tribunal was rejected on 25 April 2003. The appellant was deemed appeal rights exhausted on 14 May 2003 and lost his support by way of Section 95 of the Act on 3 June 2003 for that reason.
5. The appellant made a successful application for asylum support under Section 4 of the Act on 4 March 2005 on the grounds that (a) he was destitute and

(b) he required support in order to avoid a breach of his ECHR rights as he had further representations in relation to his claim to asylum outstanding since 19 June 2003. His representations were refused in writing on 30 August 2007 but his support had already been discontinued when he was taken into custody on 5 April 2007.

6. The appellant reapplied for Section 4 support on 28 January 2008 on the grounds that (a) he was destitute and (b) he was entitled to Section 4 support as he was a foreign national ex-offender. The appellant applied for support by way of Section 4(1) of the 1999 Act and stated that the 2005 Regulations did not apply to him. The appellant, in his application, states that he falls into the category of persons described in Section 4(1)(c) as he was in custody between 25 April 2007 and September 2007 when he was served with a notice of intention to make a deportation order. He was detained on 3 October 2007 under schedule 3 of the Immigration Act 1971. The appellant states that he applied for and was granted bail on 5 December 2007 on condition that he reside at an address in Nottingham and report to Loughborough Reporting Centre every Friday. The appellant states that he meets the criterion for support by way of Section 4(1)(c) as he has been released on bail under the provisions of the Immigration Act. Furthermore, the appellant states that he is unable to leave the United Kingdom voluntarily (a) because of his bail conditions and (b) because he is awaiting deportation. The appellant states that he can no longer stay at his authorised address, that under his bail conditions he must give an address where he is residing and without Section 4 support he will be unable to provide a bail address.
7. The respondent refused the appellant's application for support on 1 February 2008 and it is against that decision that the appellant appeals today.
8. The respondent accepts the appellant's destitution but rejects the appellant's assertion that he is eligible for support by way of Section 4(1) and that he does not need to satisfy any of the criteria as set out in the 2005 Regulations. The respondent's position is that as a failed asylum seeker the appellant must satisfy the criteria as set out in Regulation 3(2) of the 2005 Regulations in order to be eligible for Section 4 support. Furthermore, the respondent notes that the appellant is awaiting deportation rather than taking voluntary steps to leave the United Kingdom. The respondent concedes that a decision to deport the appellant has been made against which decision the appellant has now appealed, that appeal having been heard on 30 January 2008 and the decision is still currently pending. The respondent's position is that the appellant has not provided any evidence to substantiate his claim that he is unable to leave the United Kingdom voluntarily, the appellant therefore does not satisfy the criteria for Section 4 support and his application is rejected accordingly.
9. In his grounds of appeal dated 4 February 2008 the appellant reiterates that he is applying for support under Section 4(1) of the 1999 Act. He states that Refugee Action in Nottingham was advised that the same application form should be used for applications under Section 4(1) of the Act as for those applying under the 2005 Regulations. Refugee Action had requested clarification of the policy on applications under Section 4(1). It had specifically asked the BIA about the procedure for a failed asylum seeker who had been in immigration detention and who had committed an offence in the UK. Refugee Action was advised by BIA that its policy is that such applicants would be considered under Section 4(1) and did not have to satisfy the criteria of the 2005 Regulations. The appellant therefore submits that his foreign ex-offender status "supersedes" his status as a failed asylum seeker and he is therefore

eligible for support by way of Section 4(1)(c) without having to satisfy the 2005 Regulations.

10. The AST issued directions to the respondent on 8 February 2008. The respondent was asked for a written submission which confirmed the advice she purportedly gave the appellant, namely that the 2005 Regulations do not apply to him. Furthermore a written submission which addressed the applicability of Regulation 3(2)(e) to the appellant's outstanding appeal of 30 January 2008 was requested together with a written submission which explained precisely how the appellant might satisfy Regulation 3(2)(a) in light of (i) his appeal of 30 January 2008 and (ii) the IOM's current position on not accepting applications from applicants subject to deportation orders.
11. The respondent replied in writing on 13 February 2008 as follows. First, the 2005 Regulations do not apply to the appellant as the appellant has no outstanding further representations which prevent him from leaving the United Kingdom. The appellant is a failed asylum seeker who should be taking all reasonable steps to leave the UK. No documentary evidence has been provided to show that the latter is the case. The respondent concedes that the appellant has an outstanding appeal but this is not an asylum related appeal. The appeal is being lodged against a decision to deport the appellant which, if allowed, would prevent the Immigration Service from deporting the appellant. The appellant has not shown any evidence of his attempt of facilitate his departure from the UK as he is required to do so as a failed asylum seeker. Furthermore, the appeal of 30 January 2008 does not preclude the appellant from taking reasonable steps to leave the UK. The respondent confirms that persons who have been issued with a deportation order cannot apply to the Assisted Voluntary Returns Team at the Home Office for a voluntary repatriation with the assistance of the International Organisation for Migration ("IOM"). The respondent's position is that the appellant has a right to leave the UK at any time and if the appellant was to make himself available to the Immigration Service this would be accepted as taking reasonable steps and the Immigration Service would assist the appellant in his departure. There is no documentary evidence which suggests that the appellant cannot leave the UK due to his outstanding appeal. Furthermore there is no evidence to suggest that the appellant must remain in the UK until his sentence expiry date of 4 April 2008. The respondent's position is that the appellant must satisfy the criteria by way of the 2005 Regulations but has failed to do so.
12. The AST issued directions to the appellant on 8 February 2008 requesting a written submission which addresses why he is to be treated as a non failed asylum seeker for the purposes of Section 4 support to include a copy of the BIA advice confirming the appellant's grounds of appeal, written confirmation that he is not a failed asylum seeker, written confirmation that his bail conditions permit him to change address without prior permission from the appellate authority, written confirmation that his bail conditions do not permit him to leave the UK, written confirmation that he is not currently entitled to leave the UK voluntarily pending the outcome of his appeal of 30 January 2008.
13. The appellant applied in writing on 12 February 2008 and confirmed that he is a failed asylum seeker. The appellant states that his position is that he is eligible for support by way of Section 4(1) as he a foreign national ex-offender which status "supersedes" his status as a failed asylum seeker. The appellant states it is unreasonable to expect him to leave the UK voluntarily or to leave the UK while his appeal remains pending. He submits a letter from his solicitor dated 11 February 2008 which confirms that the appellant was granted bail by the AIT, that his bail renewal hearing is on 2 April 2008, that the AIT, following a bail

variation hearing would grant the appellant bail subject to the appellant notifying the AIT of his change of address at which time it would be necessary to authorise that change of address. Furthermore, the appellant is currently awaiting the outcome of his appeal hearing which was held on 31 (sic) January 2008. This appeal was in respect of both the decision to deport the appellant as well as the decision to refuse the appellant's fresh claim for asylum which decision attracted a right of appeal to the AIT. The appellant submits a copy of his grounds of appeal to the AIT which clearly refer to an appeal both against the decision to refuse asylum and the decision of the notice of his deportation.

14. The appellant submits a copy of an internal email circulated by Refugee Action's policy department reporting on a response from the BIA of 7 January 2008:

- (1) "Foreign nationals convicted of an offence in the UK can apply for Section 4 support under Section 4(1) of the 1999 Act if they are being released from detention. They do not have to establish their destitution, nor do they have to fulfil any of the 3(2) Regs criteria.
- (2) So I asked BIA if a failed asylum seeker who is in immigration detention and who has committed an offence in the UK can choose on which basis to apply for Section 4 support.
- (3) The reply from Policy is that they will assess such applicants as foreign national ex-offenders. This means that they do not have to establish their destitution, nor do they have to fulfil any of the 3(2) Regs criteria."

15. The appellant submits the BIA's guidance, version 9, issued on 17 December 2007 regarding Section 4 which state that:

"Section 4 support can also be provided to those on temporary admission or who are released on bail. The Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 do not apply in such cases."

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

16. The law which governs this appeal is as follows:

Section 4 of the 1999 Act states:

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.

17. Section 49 of the Nationality, Immigration and Asylum Act 2002 ("the 2002") Act amends Section 4 of the 1999 Act as follows:

"Failed asylum seeker

- (1) The following shall be added at the end of section 4 of the Immigration and Asylum Act 1999 (accommodation for a person on temporary admission or release) –
- (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 dependent of a person for whom facilities may be provided under subsection (2).
- (4) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94)-
  - (a) asylum seeker
  - (b) claim for asylum, and
  - (c) dependent.”

18. Section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (“the 2004 Act”) amends section 4 of the 1999 Act further as follows:

“Failed asylum seekers: accommodation

- (1) At the end of section 4 of the Immigration and Asylum Act 1999 (provision of accommodation for failed asylum seekers, &c.) add-
  - “(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. Pursuant to Section 4(5) the respondent introduced the 2005 Regulations on 31 March 2005. Regulation 3 of the 2005 Regulations 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) 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.

20. The respondent's Section 4 Instructions of 16 April 2007 state:

"An important consideration is whether the applicant can be expected to leave the UK to avoid a breach [of the ECHR]. It would not be reasonable to expect a person to leave the UK in the following circumstances (this list is not exhaustive):

- The applicant has submitted to the Secretary of State further representations and these have not yet been considered. Support under section 4 can be provided in such cases, unless it is clear that the further representations simply rehearse previously considered material or contain no detail whatsoever.
- The applicant has submitted a late appeal against the Secretary of State's decision to refuse asylum and the AIT is considering whether to allow the appeal to proceed out of time.

These are examples only. Other circumstances may also give rise to a breach and EO Caseworkers must consider each case on its own facts."

21. First, I will consider the applicability, or otherwise, of the 2005 Regulations on the appellant's application for Section 4 support. In a nutshell, the appellant's position is that the 2005 Regulations do not apply to him, that his status as a foreign national ex-offender "trumps" his status as a failed asylum seeker. The respondent's position, on the other hand, is that the appellant's status as a failed asylum seeker "trumps" his status as a foreign national ex-offender. I understand from a BIA open letter to the National Asylum Support Forum dated 14 February 2008 that this may be subject to a policy change in the future.

22. I find that support may be granted to people who are not failed asylum seekers

by virtue of Section 4 of the 1999 Act without the need to satisfy any eligibility criteria. Section 4 of the 1999 Act specifies that the respondent may provide support to those who are on temporary admission, those released from detention and those released on bail.

23. I have then considered the amendment to Section 4 of the 1999 Act by way of Section 10 of the 2004 Act, namely Section 4(5)
24. I find that Parliament's intention in amending the 1999 Act in this way was to allow the respondent to make regulations specifying criteria to be used in determining whether or not to provide support to failed asylum seekers. Had that not been the intention, the amendment to Section 4 and the creation of the 2005 Regulations would be otiose.
25. I find that the 2005 Regulations apply to all failed asylum seekers requesting Section 4 support and impose the need to satisfy eligibility criteria on that category of applicants. The 2005 Regulations identify the criteria that a failed asylum seeker must meet in order to be eligible for support. The powers conferred on the respondent by virtue of Section 4(5) of the 1999 Act cannot be disregarded.
26. I find that where an applicant for support is not a failed asylum seeker s/he does not need to satisfy the 2005 Regulations. However where the applicant is a failed asylum seeker, s/he is currently required to satisfy the criteria under the 2005 Regulations. In summary, I find that the appellant's status as a failed asylum seeker currently "trumps" his status as a foreign ex-offender.
27. I have therefore proceeded to consider the appellant's eligibility for support by way of the 2005 Regulations.
28. The appellant's eligibility by reason of Regulation 3(1) is accepted by the respondent.
29. With regard to Regulation 3(2)(a), I have considered the respondent's submission that the appellant "has the right to leave the United Kingdom at any time" and might make himself available to the Immigration Service for his voluntary removal. In order for the respondent to demonstrate her case on this point, I would have required sight of the authority for the position that the appellant is effectively free to circumvent deportation proceedings by leaving the UK voluntarily as I accept that IOM will not entertain his application to do so. Furthermore, I would have required written confirmation from the criminal justice authorities that the appellant was free to leave the UK before his sentence expires on 4 April 2008.
30. With regard to Regulation 3(2)(e), I am asked specifically to consider whether the respondent is under a duty to provide asylum support to the extent that this is necessary to avoid a breach of the appellant's ECHR rights. It is important to note that Regulation 3(2)(e) is concerned with the potential violation of the appellant's rights by way of the respondent's decision to refuse support and not by way of any BIA decision to remove or deport him to Iran.
31. I give weight to the appellant's evidence that his appeal of 30 January 2008 was in respect of both the decision to deport him to Iran as well as the decision to refuse his fresh claim for asylum.
32. Having considered all the evidence before me carefully on a balance of probabilities, I allow this appeal by application of Regulation 3(2)(e), the

respondent's Section 4 Instructions of 16 April 2007 and the appellant's outstanding appeal of 30 January 2008.

33. Appeal allowed.

Signed .....  
Asylum Support Adjudicator

Date .....