

Appeal Number: ASA/05/12/11497
NASS Ref. Number: HO M1144378
Appellant's Ref. Number:



ASYLUM SUPPORT ADJUDICATORS
Christopher Wren House
113 High Street Croydon CR0 1QG
Telephone: 020 8588 2500
Fax: 020 8588 2519

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

Adjudicator	Ms Sehba Haroon Storey
Appellant (s)	SM
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 furnishes reasons for the adjudication given on Friday the 30th day of December 2005 allowing the above mentioned appeal.
2. The appellant, a 36 year old national of Zimbabwe, appeals against the decision of the Secretary of State who on 1 December 2005 decided to refuse her application for support under Section 4 of the Immigration and Asylum Act 1999 as amended (the 1999 Act), on the grounds that the appellant did not satisfy one or more of the conditions set out in regulation 3(2) 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 5 of the above mentioned Rules and I am satisfied that in 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 the appeal on the papers.
4. It is not disputed that the appellant is a failed asylum seeker whose appeal against refusal of asylum was finally determined on 23 May 2005. However by letter dated 24 October 2005, the appellant submitted what purports to be, a fresh asylum claim to the Asylum Coordination Unit of the Home Office. The appellant acknowledges that she is a failed asylum seeker but asserts that as a consequence of her immigration history in the UK, namely having claimed asylum in this country and now facing removal to Zimbabwe as a failed asylum seeker, she faces persecution at the hands of the Zimbabwean authorities upon her return. Relying upon the decision of the Asylum and Immigration Tribunal (AIT) in *AA (Zimbabwe)* [2005] UKIAT 00144 CG, the

appellant asserts that as a failed asylum seeker she is at risk of persecution for a Convention reason and should therefore be accorded refugee status.

5. In her grounds of appeal, the appellant seeks to rely upon ASA/05/11/10920 on the basis that a decision on whether her purported fresh claim will succeed or not, is not a decision which the Section 4 caseworker has any power to make and that in the circumstances she should be supported until the Home Office is in a position to make a decision on her said claim.
6. 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.
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) – (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. In relation to the entitlement of failed asylum seekers who have put in further representations by way of a purported fresh claim, NASS Policy Bulletin 71 states that it would not be reasonable to expect a person to leave the United Kingdom where –

“the person has submitted to the Secretary of State further representations which seek a fresh claim for asylum and these have not yet been considered. Support under Section 4 shall be provided in such cases unless it is clear to the NASS caseworker that the further representations *simply rehearse previously considered material or contain no detail whatsoever*” (emphasis added).

10. Where an appellant seeks to appeal against a decision to refuse him Section 4 support, the burden of proof is upon him to prove on a balance of probabilities that he meets the criteria for a Section 4 award.

11. Paragraph 353 of the Statement of Changes in Immigration Rules (HC395) as amended by HC1112 came into force on 25 October 2004 and states:-

“When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- (i) had not already been considered; and
- (ii) taken together with the previously considered material created a realistic prospect of success, notwithstanding its rejection....”

12. In ASA/05/04/9178 it was held that NASS caseworkers do not have the authority of Parliament to determine asylum and immigration matters and in particular that a NASS caseworker lacks authority to make decisions on the merits of a purported fresh claim.

13. There are two issues for me to determine in this appeal. These are:-

- (i) Is the appellant destitute; and
- (ii) Is the provision of accommodation necessary for the purpose of avoiding a breach of the appellant’s Convention rights within the meaning of the Human Rights Act 1998.

14. In relation to the appellant’s destitution, her application for support under Section 4 states that she previously applied for support in 2004 but this was refused as she was living with her partner in private accommodation. She states that she has now separated from her partner who was previously supporting her and she is therefore homeless and destitute. The respondent’s decision letter of 1 December 2005 does not take issue with the appellant’s claimed destitution. In the circumstances, I am satisfied that the appellant satisfies the requirements of Regulation 3(1)(a) aforesaid.

15. As to the second issue, this is dependent upon how the appellant’s further representations by way of a fresh claim for asylum are to be treated. This was recently considered by the Administrative Court in *AW, R (on the application*

of –v- London Borough of Croydon) and A, D and Y, R (on the application of –v- London Borough of Hackney and the Secretary of State for the Home Department [2005] EWHC 2950. In paragraph 35 of his Judgment, Mr Justice Lloyd Jones confirmed the well-established principle that:

“If there are no legal or practical obstacles to prevent a failed asylum seeker returning to his country of origin, the denial of support by the Secretary of State or a local authority would not constitute a breach of that person’s Convention rights. He has the choice to return to his country of origin. Neither Article 3 nor Article 8 imposes a duty on the United Kingdom to provide support for a failed asylum seeker when there is no impediment to his returning to his own country”.

16. Recognising that in many cases there may be obstacles to such a return, the learned Judge confirmed the approach taken by Mr Justice Andrew Collins in *R (Negatu) –v- Secretary of State for the Home Department [2004] EWHC 1806*. In paragraph 69, Jones J observed:

“It seems to me that pending a decision by the Secretary of State on whether the further representations constitute a fresh claim, the Secretary of State will not be bound in every case to provide support under Section 4 where the other requirements of that Section are met. In my view it will be open to him, or to NASS, to decline to do so, for example on the grounds that the further representations are manifestly unfounded, or merely repeat the previous grounds or do not disclose any claim for asylum at all. ... A public body required to decide whether the provision of support is necessary for the purpose of avoiding a breach of Convention rights will not in every case be required to treat further submissions as a sufficient basis for the provision of support pending a decision by the Secretary of State that they do not constitute a fresh claim.”

17. That approach is, in my view, wholly consistent with the approach taken in *ASA/05/07/9572* and in all subsequent decisions concerned with treatment of purported fresh claims.
18. For reasons that are not known to me, Jones J was alerted to the decision in *ASA/05/04/9178* (a much earlier case) but neither Counsel for the Claimants nor Counsel for the Secretary of State alerted him to the decision in *ASA/05/07/9572*. Whilst therefore noting the comments of Jones J in relation to *ASA/05/04/9178*, it is worth emphasising that this case ceased to be applied in asylum support appeals in July 2005. With effect from that date, the approach taken is that of *ASA/05/07/9572* and, as recommended by Jones J, requires the decision maker to consider the claim advanced on a case by case basis. Where the further representations “simply rehearse previously considered material or contain no detail whatsoever” the respondent is considered entitled to refuse support under Section 4.
19. In relation to the present appeal, the decision maker was required to consider the contents of the appellant’s further representations dated 24 October 2005 by way of a purported fresh claim. In his decision letter of 1 December 2005, the respondent states that the AIT’s determination in *AA* does not afford the

appellant the protection of the Convention because that decision concerned the risk faced by failed asylum seekers returned involuntarily to Zimbabwe and that there is nothing to prevent the appellant from returning to her country of nationality on a voluntary basis.

20. I have given careful consideration to all the evidence that is before me, including all documents and submissions received from both parties to the appeal.
21. As a failed asylum seeker, the appellant is liable to be detained and removed from the United Kingdom at any time at the discretion of the respondent. The absence of such a decision having been taken is not in itself evidence that the appellant is not under threat of enforced removal by the respondent. The AIT in *AA* determined that in the light of the circumstances prevailing in Zimbabwe at the present time, a Zimbabwean citizen unwilling to return voluntarily thereto has a well founded fear of persecution for a Convention reason and is accordingly entitled to the protection of the Convention.
22. That view was reinforced in *LK (AA applied) Zimbabwe* [2005] UKAIT 00159 notwithstanding the submission made to the AIT that the Secretary of State had suspended enforced returns to Zimbabwe with effect from 14 October 2005.
23. On the basis therefore that the decision in *AA* applies to rejected asylum seekers of Zimbabwean origin subject to enforced and involuntary return, and given that the appellant is a failed asylum seeker who is unwilling to return to Zimbabwe, I find that she is entitled to the benefit of the Judgment in *AA*. I understand that the respondent is seeking to appeal *AA* and *LK* to the Court of Appeal. Whilst that may be so, these decisions represent the current law and must be applied.
24. In the circumstances, I find that the letter of 24 October 2005 does contain sufficient material or information likely to result in it being treated as a fresh claim by the Secretary of State. Accordingly, it would not be reasonable to expect the appellant to leave the United Kingdom whilst her further representations are being considered and she is therefore entitled to the provision of Section 4 support.
27. Appeal allowed.

Signed:..... Date:.....
Chief Asylum Support Adjudicator