Appeal Number: ASA/05/08/9824
NASS Ref. Number: 03/10/02285
Appellant's Ref. Number:

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

Adjudicator: Mrs Sehba Haroon Storey

Appellant (s): VK

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 Tuesday the 23rd day of August 2005 dismissing the above mentioned appeal.

2. The appellant, a national of Iran born on 10 May 1967, appeals against the decision of the Secretary of State, who on 10 August 2005 discontinued his support under paragraph 7(A)(1)(ii) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) as amended by Section 9 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (the 2004 Act), on the grounds that the appellant has failed without reasonable excuse to take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily.

3. At the hearing before me, the appellant was represented by Counsel Mr Suterwala upon the instructions of Bury Law Centre. The respondent was represented by Mr Otu. The appellant did not attend the hearing. This was said be due to childcare and health problems.

4. It is not disputed that the appellant is a failed asylum seeker. He applied for asylum on 17 October 2003. This was refused on 24 November 2003. The appellant appealed against the decision to the Immigration Appellate Authority (IAA) and on 25 February 2004, an IAA adjudicator dismissed his appeal. The appellant then sought permission to appeal to the Immigration Appeal Tribunal (IAT) against the decision of the IAA adjudicator but his application was rejected on 14 July 2004. The appellant's appeal rights were therefore exhausted on 28 July 2004. Since that date the appellant has remained in the United Kingdom without lawful authority.

5. Section 94(5) of the Immigration and Asylum Act 1999 (the 1999 Act) however, states that where a failed asylum seeker's household includes a child who is under 18 and a dependant of his, for the purposes of asylum support, he is to be treated as continuing to be an asylum seeker while the child is under 18 and he and the child remain in the United Kingdom. As the appellant had one dependant child under the age of 18 in his household on 28 July 2004, he continued to be treated as an asylum seeker pursuant to Section 94(5).

6. Paragraph 1 of Schedule 3, however, states that a person to whom this paragraph applies shall not be eligible for support or assistance under a provision of the 1999 Act or a provision of the 2002 Act. This includes Section 94(5) aforesaid.

7. Paragraph 7(A)(1) of Schedule 3(as amended) applies to a person if –

(a) he –

(i) is treated as an asylum-seeker for the purposes of Part VI of the Immigration and Asylum Act 1999 (c. 33) (support) by virtue only of section 94(3A) (failed asylum-seeker with dependent child), or

(ii) is treated as an asylum-seeker for the purposes of Part 2 of this Act by virtue only of section 18(2),

(b) the Secretary of State has certified that in his opinion the person has failed without reasonable excuse to take reasonable steps –

(i) to leave the United Kingdom voluntarily, or

(ii) to place himself in a position in which he is able to leave the United Kingdom voluntarily,

(c) the person has received a copy of the Secretary of State's certificate, and

(d) the period of 14 days, beginning with the date on which the person receives the copy of the certificate, has elapsed.

8. Paragraph 7(A)(2) provides that paragraph 1 also applies to a dependant of such person.

9. Paragraph 3 of Schedule 3 however, states that paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that its exercise or performance is necessary for the purpose of avoiding a breach of a person's Convention rights.

10. I have before me a copy of the respondent's decision letter dated 10 August 2005. It is not disputed that the appellant is a person who is treated as an asylum seeker solely by virtue of his being a failed asylum seeker with a dependant child under 18. It is also not disputed (save for an argument as to procedural irregularity) that his case has been certified under paragraph 7A(1)(b)(ii) above, that he has received a copy of the Secretary of State's Certificate and that the period of 14 days, beginning with the date on which the person receives the copy of the Certificate, has elapsed.

11. In the opinion of the Secretary of State, the decision of 10 August 2005 does not violate the appellant's Article 3 and 8 rights because any resulting destitution and/or separation of the family is a consequence of the appellant's own actions in failing to take steps to leave the UK despite being warned of the consequences.

12. Counsel for the appellant offers three challenges to the decision of 10 August 2005, namely that:

    a) the appellant has complied with the requirements of paragraph 7A of Schedule 3 in that he has reasonable excuse for failing to take reasonable steps to place himself in a position in which he is able to leave the UK voluntarily;

    b) there has been procedural irregularity by the respondent who has failed to give due consideration to the representations received on behalf of the appellant; and

    c) to withdraw support from this family would amount to a breach of their Article 3 and 8 Convention Rights.

13. I have considered all the evidence, medical and general in nature, that has been submitted to me by both parties to this appeal. The burden of proof is upon the appellant to demonstrate reasonable excuse and the standard of proof is that of the balance of probabilities.

14. In support of 12a) above, it is said that the appellant and his wife suffer from depression and low back pain. The appellant is on medication for both these conditions. His wife has been under the care of a clinical psychologist and psychiatrist. Her medication ceased as a result of her pregnancy but she is now taking medication again. She suffers from anaemia. Her baby daughter was born with a congenital abnormality of the intestines which required surgery at 1 day of age. She may require further treatment. It is said that the medication prescribed to the appellant, causes side effects of nausea, headaches and sleepiness as well as anxiety and agitation. It is also said that the combination of his wife's condition, the requirement to be the family's main carer and his own medical condition is such that this prevented him from taking the steps required by the respondent.

15. The documentary evidence submitted in support of the appeal, includes four reports prepared by Bury Social Services. The first two reports relate to the appellant's older child born on 3 March 1999 and are dated 5 January 2005 and 1 August 2005. The third report concerns the appellant's younger child born on 7 January 2005 and is dated 2 August 2005. The fourth report is a care plan regarding the appellant's wife and is dated 15 June 2005. On the basis of these reports, I accept that the appellant's wife has mental health problems and suffers from depression.

16. In the report dated 5 January 2005, however, Social Services record the appellant advising them that his wife is "deeply missing her family and the supportive network that she had in Iran and this has impacted upon her mental health to the degree where she is withdrawn, low mood, lack of motivation and

loss of communication". The report concludes that "[a] return to the extended family may prove to be positive for [her]".

17. In the report dated 2 August 2005, Social Services record that the appellant's wife "is said to be deeply missing her extended family and has been reported to say that she would go back to Iran to be with them. It is believed that [her] depression is partially due to the separation from her family and it is therefore possible that the depression would lift were she to return to Iran".

18. The respondent requires the appellant to take reasonable steps to "place himself in a position in which he is able to leave the United Kingdom voluntarily". This would entail the appellant making contact with the International Organization for Migration (IOM) and to approach the Iranian Consulate with a view to obtaining passports for himself and his dependants, in preparation for when the family are able to return to Iran.

19. It is worthy of note that the appellant's ill health does not prevent him from using public transport and that he is able to take his children to school and collect them as well as undertaking the housework and caring for his children and his wife. Nor has it prevented him from giving instructions to his legal representatives. For the appellant to ensure that his support is not discontinued and his children are not taken into care, he could instruct Bury Law Centre to obtain passport application forms for him and his family and to submit these on their behalf to the Iranian Consulate. Alternatively, he could contact the IOM and seek their assistance with documentation through the Voluntary Assisted Return and Reintegration Programme (VARRP).

20. The appellant has not however done so, notwithstanding that according to the evidence upon which he seeks to rely, his wife is apparently willing to return to Iran and her mental health and depression is likely to benefit from such a move.

21. I have received detailed written submissions from Bury Law centre. They refer to Regulations 19(4) & (5) of the Social Security (Claims and Payments) Regulation 1987 (the 1987 Regulations) which provide for the situation where backdating of Income Support and Jobseeker's Allowance is permitted where a claimant applying for one or other of these benefits, fails to make a timely claim owing to learning, language or literacy difficulties, is deaf or blind or was sick and disabled, was caring for someone who is sick and disabled or was dealing with a domestic emergency. It is said that all these situations apply equally to the appellant's circumstances and by analogy, he too should benefit from the fact that one or more of these prevented him from taking the required action.

22. Quite apart from the fact that the 1987 Regulations relate to very different benefits, Bury Law Centre omit to mention that Regulation 19 states clearly that a claimant can only benefit from these circumstances where additionally "it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim". Whilst therefore I accept that the appellant has language difficulties, was sick and was caring for his wife and children and possibly dealing with a family emergency, I do not accept on the evidence

before me that it was not reasonably practicable for him to obtain assistance from another person to make contact with the Iranian Consulate or the IOM.

23. I have also given due weight to the appellant's interview of 3 March 2005, where he was asked what steps he had taken to leave the UK. The appellant replied, "I cannot take any steps as I cannot return to my country". Asked whether he had contacted the Iranian Authorities in order to obtain a passport, he replied, "No, I don't want to". Asked whether he had contacted the IOM to assist him in leaving the UK, he replied "No". And finally asked whether he intended to take any steps to leave the UK, the appellant again replied "No".

24. I find as fact that the appellant was capable of instructing his legal representatives to make approaches to the Iranian Consulate on his behalf for replacement documentation and possibly also the IOM. The appellant's reluctance to do so is however evident from his responses to the questions asked of him and recorded in paragraph 23 above. Notwithstanding that he has exhausted all legal processes of appeal and failed to prove to the requisite standard that he is at risk of persecution or treatment contrary to his human rights if he returns to Iran, the appellant has clearly demonstrated that he is not willing to take any steps to do so.

25. In the circumstances, I find that the appellant has failed without reasonable excuse to take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily and that his failure has little to do with his circumstances or those of his dependants and everything to do with his wilful and deliberate determination to avoid a return to Iran.

26. In support of their second argument as set out in paragraph 12 b) aforesaid, it is said that the Asylum Support adjudicator who heard and determined the appellant's appeal on 5 August 2005, remitted the case to the respondent to enable him to consider representations received on behalf of the appellant and to make "a reasoned decision covering all of the appellant's circumstances". It is submitted that the decision of 10 August 2005 does not in fact deal adequately with the representations made on the appellant's behalf and that in the circumstances, the decision is unlawful on grounds of procedural irregularity.

27. Whilst I accept that where representations have been invited, it is just and proper that these should be given due consideration, it is equally important for appellant's and their representatives to comply with the time limits for furnishing such submissions. Furthermore, those submissions must be made either by the appellant himself or a person authorised to represent him in connection with his asylum and immigration matters. Such a person must fall within the general provisions of paragraph 84 of the 1999 Act as amended by Section 37 of the 2004 Act. To suggest that members of the medical profession, whatever their distinguished qualifications, or members of the general public, no matter how worthy, can individually submit representations to the Prime Minister (or the Secretary of State for that matter) on behalf of an appellant and effectively bring a legal process to a halt, is nothing short of preposterous. That is however what is being submitted in this case, namely that the Secretary of State should not have continued with the process of certification because representations had been made by Mr & Mrs K and Dr D

and further that the decision of 10 August 2005 is unlawful because an inadequate response has been made to these individuals.

28. I reject this argument and find that the Secretary of State is obliged only to respond to such submissions as are made within the seven day period permitted and only where representations are made by the appellant himself or an authorised representative within the meaning of Section 84 of the 1999 Act.

29. Where representations are made out of time, it is a matter for the Secretary of State's discretion whether he chooses to take these representations into account. A sensible approach in my view would be that where a timely decision has been made by the respondent on the basis that no representations have been received within the 7 day time limit, representations received subsequently need not be taken into account. It will then be open to an appellant to rely upon these at any subsequent appeal to the Asylum Support adjudicator and for the latter to determine what weight, if any, should be given to the late submissions. Where however, the respondent delays the making of a decision and late representations are received prior to that decision being taken, it would seem to me to be fair and just for the respondent to take these into consideration before making a decision.

30. I therefore accept that the late representations made by the Bury Law Centre, should have been considered by the Secretary of State before making their decision to discontinue support on 22 July 2005. The fact that they did not do so, (I do not know why NASS were unaware that these representations had been made), rendered the decision of 22 July 2005 unlawful. In the circumstances, the previous adjudicator was correct to remit the appeal to the Secretary of State for reconsideration.

31. I am aware however, that representations were also made on the appellant's behalf by his constituency Member of Parliament (MP). MP representations are in a different category to representations made by an appellant or his representative in response to the respondent's request for information as part of the relevant process. The appellant's MP is of course at liberty to make representations on his constituent's behalf at any time. It is a matter entirely for the Secretary of State whether or not he chooses, in the light of MP representations, to halt the legal process complained of. Whilst therefore it may be relevant to await the Secretary of State's response to MP representations in any given case, this will depend upon the individual circumstances of that case, but cannot in my view be used as an argument for bringing the legal process to a halt.

32. On the basis of the evidence before me, I am satisfied that any procedural irregularity which may have resulted in the decision of 22 July 2005 being unlawful was corrected upon remittal of the previous appeal and detailed consideration having been given to the representations of the Bury Law Centre and the representations made by Ivan Lewis MP. I do not accept however that a failure to deal with the submissions of Dr D and Mr & Mrs K in the decision letter renders the decision of 10 August 2005, unlawful.

33. With regards to paragraph 12 c), I heard lengthy submissions from Counsel in addition to the written submissions of Bury Law Centre on the likely effect of

the respondent's decision upon the appellant's Article 3 and 8 Convention rights. It is not my intention to rehearse those arguments here. Suffice to say that I have taken them fully into account. Counsel for the appellant referred me to the decision of *SSHD v Limbuela, Tesema and Adam [2004] EWCA Civ 540* and directed me particularly to the judgment of Laws LJ at paragraph 95 wherein it is stated that,

> "... if the evidence establishes clearly that charitable support in practice is not available, and that [the appellant] has no other means of "fending for himself", then the presumption will be that severe suffering will imminently follow. He has done enough to show that he is "verging" on the necessary degree of severity, and that Article 3 is accordingly engaged."

34. The case of *Limbuela* concerned Section 55 of the 2002 Act and entitlement to asylum support where a claim for asylum was not made as soon as reasonably practicable. The appellants in Section 55 cases had submitted their asylum claims post arrival in the United Kingdom instead of as soon as reasonably practicable as statute requires. They were nevertheless awaiting a lengthy process involving consideration of their application by the respondent, and where this resulted in a refusal, the exercise of a right of appeal and possible subsequent proceedings. If refused asylum support, they had no entitlement to any other form of support from the State whilst they awaited an outcome of their application as they were lawfully and legitimately entitled to do. That is not however the situation in Section 9 cases where an appellant has exhausted the appeals process and has no lawful basis upon which to remain in the United Kingdom.

35. Furthermore, I am satisfied that in relation to Section 9, it cannot be said that the appellant has "no other means of fending for himself" given that compliance with the requirement to document himself and take reasonable steps to place himself in a position in which he is able to leave the United Kingdom voluntarily, would result in support being reinstated to the appellant and his family.

36. As stated by Laws LJ in *Limbuela*, we must distinguish between breaches of Article 3 which consist in violence by state servants, and breaches which consist in acts or omissions by the state which expose the claimant to suffering inflicted by third parties or by circumstances. Laws LJ argued that a breach consisting of violence by state servants was absolutely forbidden but a decision made in the exercise of lawful policy, which may expose the individual to a marked degree of suffering, not caused by violence but by the circumstances in which he finds himself in consequence of the decision, is lawful, "unless the degree of suffering which it inflicts (albeit indirectly) reaches so high a degree of severity that the court is bound to limit the state's right to implement the policy on Article 3 grounds". He continued that "a person is not degraded ... if his misfortune is no more – and of course, no less – than to be exposed to suffering (not violence) by the application of legitimate government policy".

37. On the facts and evidence before me, I am satisfied that the decision of the respondent dated 10 August 2005 to withdraw support from the appellant was

made in the exercise of lawful government policy likely to expose the appellant and his family to a degree of suffering which falls short of the severity described in *Pretty v United Kingdom 35 EHRR 1.* In the circumstances, I find that the appellant's Article 3 rights and those of his dependants have not been breached.

38. I then go on to consider whether there is a likelihood of a breach of the appellant's and his family's Article 8 Convention rights. Counsel refers me to the respondent's letter to the Bury Law Centre wherein it is accepted that the withdrawal of support may result in the separation of the parents from their children in particular the youngest child of the family who is currently being breast fed by her mother. Counsel does not accept that proper consideration has been given to the appellant's rights under Article 8. He asks me to consider the framework of analysis set out by the House of Lords in *R-v-SSHD ex parte Razgar [2004] UKHL 27.* He submits that the respondent's decision constitutes an interference by a public authority with the exercise of the appellant's right to respect for his private and family life and that such interference is neither necessary nor proportionate.

39. In *Razgar*, Lord Bingham set out a number of pertinent questions which need to be addressed when analysing whether there is a likelihood of a breach of an appellant's Article 8 Convention rights. In adopting his framework of analysis, I have made modifications in order to accommodate the different context of asylum support decisions.

40. The questions that need to be addressed in asylum support appeals are:

(1) Will the proposed withdrawal of support be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference 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?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

39. In relation to question (1) therefore, I am conscious of the fact that one of the likely consequences of a decision under Paragraph 7A of the Schedule, is that the 2 children of the family may be accommodated by the Local Authority under Section 20 of the Children Act or taken into care under Section 31. A family in this position is not eligible for Local Authority support under Section 17 of the Children Act or Section 21 of the National Assistance Act 1948. The only circumstance in which a Local Authority would be able to accommodate the family together would be if this was necessary to avoid a breach of the

family's ECHR rights.

40. Whilst this is a matter entirely for the discretion of the Local Authority, it is not beyond the bounds of possibility that they may decline to accommodate the appellant and his wife on the grounds that whilst taking the children into care inevitably engages Article 8 of the Convention, such a decision may be justified under Article 8(2) as necessary to protect the rights of the children. It is arguable that it is the act or omission of the appellant that places the child in a position where they are at risk of being deprived of shelter and sustenance.

41. In *Johansen v Norway (1996) 23 EHRR 33*, the European Court laid down the following guiding principles to be followed in all care proceedings:

> (i) Taking a child into care should normally be regarded as a temporary measure to be discontinued as soon as circumstances permit;
>
> (ii) Any measures taken to implement a decision to place a child in temporary care should be consistent with the ultimate aim of reuniting the natural parent and child;
>
> (iii) Therefore a fair balance must be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child;
>
> (iv) When assessing whether a fair balance has been struck, particular importance attaches to the best interests of the child which, depending on their nature and seriousness, may override those of the parent;
>
> (v) In particular, a parent cannot be entitled under Article 8 to have measures taken that would harm the child's health and development.

42. In principle therefore, an appellant who retains a right of access to and contact with their children, even where the child is placed in care, who is permitted to make regular visits and is consulted about the children's future, would in my opinion have some difficulty arguing that their Article 8 rights had been violated. This is particularly so, given that support for the family could be reinstated upon the appellant taking steps to place himself and his family in a position in which he is able to leave the United Kingdom voluntarily. If he fails to do so, he cannot plead the protection of Article 8 anymore than Mr O'Rourke was able to in the Strasbourg case of *O'Rourke v United Kingdom (Application No 39022/97)* for failing to take advantage of a night shelter and temporary accommodation, electing instead to remain homeless and on the streets over a period of 14 months.

43. I am satisfied that the appellant has an extant family life. In relation therefore to questions (1) and (2) of paragraph 40, I remind myself that the two children are extremely young in age and the youngest is little more than eight months old and is being breast fed. The various reports prepared by Social Services, suggest that there are some concerns surrounding the wellbeing of the eldest child and the mother's ability to cope with the stress of caring for them. There is however no suggestion that the children are at risk or that, but for the Section 9 proceedings, Social Services would consider taking the children into care. In the circumstances, I accept that were they to do so on the basis of the appellant's refusal to take reasonable steps to place himself in a position in

which he is able to leave the United Kingdom voluntarily, the consequences of that interference would be of such gravity as to attains the minimum level of severity required by *Costello-Roberts v United Kingdom (1993) 19 EHRR 112*, to engage Article 8 of the Convention.

44. With regards to questions (3) and (4) of paragraph 40, within the context of the present appeal, I am satisfied that the decision is in accordance with the law. I am also satisfied that the decision is necessary in a democratic society in the interests of an effective and legitimate policy of immigration control, the economic well-being of the country and for the protection of the rights and freedoms of others.

45. It is argued on the appellant's behalf that the withdrawal of support from the family and in particular the possibility that the children may be taken into care is neither necessary nor proportionate.

46. I do not accept Counsel's submission. Failed asylum seekers and their families who have no lawful basis upon which to remain in this country are required and expected to take such steps as may be necessary to leave the United Kingdom. Parliament has determined that where they do so, they will continue to be supported at public expense. Where they do not so cooperate, there is no duty upon the State to continue to support them and their families in the face of what in this case has been found to be a deliberate attempt to obstruct and delay the family's return to Iran where legal process has determined it would be safe for them to do so.

47. Having found that any interference with the appellant's private and family life and that of his dependant's is in accordance with the law, and necessary, I must go on to consider the issue of proportionality. The answer to question (5) in the words of Lord Bingham, "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment ...".

48. I remind myself that but for the appellant's wilful refusal to place himself and his family in a position in which they are able to leave the United Kingdom voluntarily, the family would continue to be entitled to receive asylum support until such time as the family are able to leave the UK. I note that both the respondent and Social Services have indicated that cooperation with the process of documentation would result in reinstatement of asylum support.

49. The respondent is entitled to require the appellant to take steps to leave the United Kingdom. In the particular circumstances of this case, the only unreasonable conduct appears to me to be the appellant's wilful refusal to take steps to document himself knowing that in doing so he runs the risk of his children being taken into care. At the risk of repetition, the appellant is not entitled to remain in the United Kingdom any longer. The Secretary of State, an IAA Adjudicator and the IAT have individually considered the merits of the appellant's case in accordance with the requirements of this country's legal processes which include the Human Rights Act 1998. They are satisfied that the appellant is not at risk of persecution or treatment contrary to his human rights if he returns to Iran. If he wishes to avoid destitution and his children being taken into care, the remedy is in his own hands. In all the circumstances,

I am satisfied that the decision of the respondent is both legitimate and proportionate.

50. The question of whether the appellant is liable to prosecution under Section 35 of the 2004 Act for failure to cooperate with removal procedures is not a matter within my jurisdiction.

51. Accordingly, I uphold the Secretary of State certificate and dismiss the appeal.

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