Appeal Number: ASA/05/04/9178
NASS Ref. Number: 04/03/00018
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)	BW
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 Wednesday the 4th day of May 2005 substituting my own decision for the decision appealed against.

2. The appellant, a 37 year old national of the Democratic Republic of Congo (DRC), appeals against the decision of the Secretary of State, who on 15 April 2005 decided to refuse his 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 his notice of appeal, the appellant did not initially request an oral hearing. Subsequently however by letter dated 27 April 2005, Fisher Meredith Solicitors who are instructed by the appellant in connection with this appeal, requested that the appeal be determined at an oral hearing. This was agreed.

4. At the hearing before me, the appellant was not in attendance. I have been provided with an explanation for his absence. The appellant was represented by Mr Ranjiv Khubber of Counsel. The respondent was represented by Mr Dixon.

5. The appellant claimed asylum on 20 February 2004. His application was refused on 25 March 2004 and an appeal against that decision was dismissed by an Adjudicator on 9 June 2004. The appellant sought permission to appeal to the Immigration Appeal Tribunal (IAT) as it then was. This was refused on 6 October 2004. An application for statutory review pursuant to Section 101(2) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) was dismissed by the Honourable Mr Justice Wilson on 3 November 2004.

6. Thereafter, the appellant appears to have continued to receive NASS support until 11 February 2005 when the respondent notified him that his support was to be discontinued with effect from 21 February 2005, a period of 3 ½ months after the appellant had exhausted his appeal rights and entitlement to be supported by NASS. If there were any deficiencies in the rejection of his asylum claim or the decision of the Immigration Adjudicator, the appellant does not appear to have taken any steps to rectify the situation prior to instructing his solicitors to make further representations alleging a fresh claim on 23 March 2005.

7. I have before me a copy of the further representations dated 23 March 2005. In it, Fisher Meredith state that the appellant was not represented in his application before the IAT and accordingly was unable to draft detailed grounds of appeal. They submitted that the appellant's explanations had not been adequately taken into account by the Adjudicator who determined his appeal at first instance, (before whom the appellant was, according to Mr Khubber, represented by solicitor and Counsel), that the appellant was not interviewed in his first language nor was his interview record read back to him such that he had been denied an opportunity to correct any errors that had been recorded. They commented that the appellant had provided an explanation for some of the alleged inconsistencies in his evidence but that these had never been taken into consideration. They further submitted that the appellant was at risk on return to the DRC of treatment contrary to Article 3 of the ECHR and that there existed objective evidence, not previously considered, which demonstrates that there was a real risk of the appellant's human rights being breached if he were to be returned to the DRC.

8. Fisher Meredith's letter of 23 March 2005 was followed by a further letter of 14 April 2005 in which further documentary evidence was placed before the Integrated Casework Directorate (ICD) which was said to demonstrate that failed asylum seekers forcibly removed to the DRC were subjected to arrests, beatings and torture by the Security Services.

9. On 6 April 2005, the appellant made an application for Section 4 support from the respondent. By letter dated 15 April 2005, the respondent refused the application in the following terms:-

> "In taking this decision I have noted that the further asylum representations dated 23 March 2005, do not constitute a significant material change of circumstances or significant new evidence which directly relates to your claim, but rather a critique of the Adjudicator's decision. We particularly note that you had your Statutory Review dismissed on 3 November 2004. As a failed asylum seeker you are expected to be taking steps to return home. In the circumstances, I am not satisfied that it is necessary to provide support to avoid a breach of your human rights".

10. The decision letter of 15 April 2005 did not make reference to the further documentary evidence submitted by Fisher Meredith under cover of letter dated 14 April 2005.

11. The appellant appealed on the grounds that:-

(i) It is not the role of the National Asylum Support Service (NASS) caseworkers to determine whether or not fresh representations amount to a fresh claim for asylum. It is the role of the Secretary of State having regard to paragraph 353 of the Immigration Rules, the submissions made in support of the fresh claim and the evidence previously considered;

(ii) NASS failed to take account of the Judgment in the application of R *(Nigatu) v Secretary of State for the Home* Department [2004] UKHC 1806;

(iii) NASS have failed to have adequate regard to the implications of refusing support to the appellant and that to do so would be a breach of his rights under Article 3 of the ECHR;

(iv) that until such time as the Secretary of State makes a decision on whether to accept the appellant's representations as a fresh claim or not as the case may be, the appellant should be entitled to receive Section 4 support.

12. Mr Khubber's principal submission is that NASS caseworkers do not have power to make a decision to terminate support on the basis of a preliminary assessment of the strengths of a purported fresh claim for asylum because they neither possess the requisite training, or experience on issues of substantive asylum law, in particular the complex analysis of fresh claims. Furthermore, he argued that a decision to terminate support on the basis of a preliminary assessment where a substantive decision is yet to be made, raises a possibility of a risk of contamination or undue influence/pressure on the actual decision makers within ICD and in the event that that decision is favourable to the appellant, the serious implications of the appellant having been forced into destitution in the interim.

13. Whilst noting that Asylum Support Adjudicators are creatures of statute, created to specialise in issues of asylum support, Mr Khubber suggested that if the respondent were correct in his analysis that NASS caseworkers can make preliminary assessments on purported fresh claims, Asylum Support Adjudicators would be required to address issues of substantive immigration law as part of the asylum support appeals process. This is a function, he argued, which has no basis in law.

14. In the alternative, Counsel argued that if the respondent is indeed entitled to terminate support on the basis of a preliminary assessment and the Adjudicator has jurisdiction to consider the question of the correctness of that decision, then the standard of proof for the respondent to meet must be equivalent to the "bound to fail" criteria set out in the decisions on certification under Section 96 of the 2002 Act as being clearly unfounded. See R (on the application of Razgar) v SSHD [1994]. Mr Khubber took the view that the respondent had failed to meet this standard in relation to the decision in question because the appellant's solicitors had put forward a number of arguments in their further submissions which were not considered by the Adjudicator, the IAT or the Administrative Court.

15. Finally, he asked me to accept that subsequent decisions of the IAT dealing with the issue of the risk faced by returned asylum seekers, have recognised that the situation within DRC has changed since the date of the last country guidance decisions on the Congo. Finally, with reference to NASS Policy Bulletin 71, Mr Khubber asks me to find that the respondent had erred in reaching his decision by not following his own guidance.

16. On behalf of the respondent, Mr Dixon referred me to the statement of the respondent in relation to NASS powers to make preliminary assessments. This states as follows:-

> "A decision on whether or not to accept that fresh applications constitute a fresh asylum claim are made by caseworkers in IND – applying the criteria of paragraph 353 of the Immigration Rules. It is true that under current administrative arrangements these decisions are not made by NASS caseworkers – though there is nothing to prevent them doing that in principle. A NASS caseworker is an officer appointed by the Secretary of State working in IND, in the same way as other IND caseworkers. The issue in this case, however, is whether, when a person is applying for Section 4 support on the basis of outstanding fresh representations, a NASS caseworker is entitled to make a preliminary assessment of the representations and refuse to provide support if it is clear that they are particularly weak – such as to mean there is no realistic prospect of the criteria of paragraph 353 being met. It is submitted that NASS caseworkers are entitled to do that. If the position were any different a failed asylum seeker would be able to maintain access to Section 4 support indefinitely because all he would have to do whenever one set of representations were rejected would be to forward another letter asking for reconsideration of his asylum claim".

17. As to whether or not Asylum Support Adjudicators have authority to consider whether a preliminary assessment conducted by NASS has been carried out in accordance with NASS policy, Mr Dixon took the view that an Adjudicator "probably could" do this but conceded that he did not have instructions to make submissions on this point. In fairness to Mr Dixon, I should record that he requested an adjournment in order to seek the respondent's instructions on Counsel's submissions. I refused his application on the basis that NASS have been aware for some time of these concerns and have had ample opportunity to make submissions on the point but have failed to do so.

18. 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.

19. 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.

20. 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) 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.

21. In relation to the entitlement of failed asylum seekers who have put in further representations by way of a purported fresh claim, 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.

22. 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.

23. I have given careful consideration to all the evidence that is before me, including all documents contained in the Secretary of State's bundle of evidence, responses received from both parties to directions and detailed submissions of both parties to the appeal.

24. There are four issues for me to determine in this appeal. These are:-

(i) Was the decision of the NASS caseworker to refuse to provide support under Section 4 on the basis of a preliminary assessment that the fresh claim application would not satisfy the requirements of paragraph 353 of HC395, when a decision had yet to be made on this issue by the Home Office ICD of the Immigration and Nationality Directorate (IND), in excess of his power/ was the decision therefore ultra vires?

(ii) Similarly, what is the scope of the jurisdiction of the Asylum Support Adjudicator on this issue, where a "full" decision has yet to be made by ICD IND?

(iii) In the event that I am minded to uphold the reasoning of the Respondent, are my actions intra or ultra vires? Does my decision in these circumstances amount to a breach of the appellant's right to a fair hearing under Article 6 of the ECHR in relation to his support appeal?

(iv) In the event that I am persuaded the NASS caseworker's decision is intra vires, what is the standard of proof that needs to be satisfied in order for the Respondent to show that a claimant of Section 4 support does not meet the requirements of the Regulations in order to be entitled to support?

25. The Statement of Changes in Immigration Rules (HC395) came into effect on 1 October 1994. Paragraph 346 of HC 395 states:-

Where an asylum applicant has previously been refused asylum during his stay in the United Kingdom, the Secretary of State will determine whether any further representations should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in paragraph 334 will be satisfied. In considering whether to treat the representations as a fresh claim, the Secretary of State will disregard any material which:

(i) is not significant; or
(ii) is not credible; or
(iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined.

26. The above rule clearly envisages that the Secretary of State for the Home Department (SSHD) alone can decide whether to treat further representations as a fresh application. Following the Court of Appeal Judgment in R v SSHD, ex parte Onibiyo, Lightman J in *R v Immigration Appellate Authority, ex parte Secretary of State for the Home Department* [1998] Imm AR 52 held that the Secretary of State alone has the authority of Parliament to decide what is or is not a fresh application, subject only to a challenge in judicial review proceedings on *Wednesbury* grounds. As Lord Bridge said in R v SSHD ex parte Bugdaycay [1987] 1AC 514, the basis of the decision must surely call for "the most anxious scrutiny".

27. Paragraph 2 of HC 395 makes reference to decisions involving applications for leave to enter or remain in the United Kingdom, and in compliance with the provisions of the Human Rights Act 1998, being made by Immigration Officers, Entry Clearance Officers and all staff of the Home Office IND. It makes no reference to NASS caseworkers.

28. Whilst Entry Clearance Officers fall within the remit of the Foreign and Commonwealth Office, Immigration Officers are employed by the Immigration Service which is a part of IND and of the Home Office in much the same way as NASS is a part of IND. The purpose of paragraph 2 of HC 395 must therefore have been to define the precise group of persons who have the authority of Parliament to make such decisions; otherwise it would have been unnecessary for Immigration Officers to warrant a separate mention as they would fall within "all staff of the Home Office Immigration and Nationality Directorate".

29. NASS argue that their caseworkers are officers appointed by the SSHD working in IND in the same way as other IND caseworkers and accordingly, they have the authority to consider and determine whether further representations constitute a fresh application for asylum even though it is conceded that under current administrative arrangements, these decisions are not being taken by them.

30. I do no dispute that NASS caseworkers are appointed by the SSHD nor that they are part of IND. For the reasons stated in paragraph 27 above however, I do not accept that they have the authority of Parliament to determine asylum and immigration matters anymore than the ICD could determine matters of asylum support. Indeed, the Home Office website describes the role of NASS as being the provision of "effective support to asylum seekers ...whilst their claims and appeals are being considered". It is further stated that "NASS was set up in April 2000 to exercise new powers under the [1999 Act] for the Home Office to support asylum seekers directly....[and] to support (via subsistence & accommodation) asylum seekers that came in after that date". I can find no authority to support the claim that they have power to substitute the functions of caseworkers within IND ICD.

31. I remind myself that the provision of a right of appeal to failed asylum seekers refused Section 4 Support was enacted in the 2004 Act. HC395 was laid before Parliament on 23 May 2004. Had Parliament intended to confer upon NASS caseworkers the power to make preliminary assessments of purported fresh claims for asylum, they have had ample opportunity to do so in the past 12 months by amending paragraph 2 of HC 395. They have not sought to do so. Indeed, the only reference to a NASS caseworker having authority to do this exists in NASS Policy Bulletin 71, which was drafted in March 2005 by NASS themselves. Whilst NASS may if they so choose, adopt a policy that is more generous to applicants, they cannot limit the rights of asylum seekers to due process and "the most anxious scrutiny" by denying them proper consideration of their further representations by persons equipped with the necessary experience and training to make the requisite decisions.

32. I am therefore satisfied that the respondent exceeded his powers in reaching the decision in question and that in the circumstances their decision of 15 April 2005 is ultra vires.

33. Further, and in the alternative, I am satisfied that Policy Bulletin 71 only confers authority upon NASS caseworkers to refuse Section 4 support where the further representations "simply rehearse previously considered material or contain no detail whatsoever". In the decision under appeal however, NASS determined that the further representations dated 23 March 2005, (they made no reference to the letter of 14 April 2005 which contained extensive evidence) did not constitute "a significant material change of circumstances or significant new evidence which directly relates to the appellant's claim". This, in my view, goes beyond the remit of Policy Bulletin 71 in as much that a determination that further applications contain "no detail whatsoever" is vastly different to a determination, even a preliminary one, that the evidence submitted is not significant. The latter requires an assessment of the evidence, which in my view NASS caseworkers are not authorised to make.

34. In relation to the jurisdiction of Asylum Support Adjudicators to determine the *vires* of NASS decisions, I am satisfied that as NASS caseworkers lack authority to make decisions on the merits of purported fresh claims, the question of ASA jurisdiction to reconsider such decisions does not rise. If NASS were to make such decisions in place of ICD caseworkers, an appeal against these would fall to be allowed.

35. I recognise the increasing demands upon NASS from some failed asylum seekers who submit repeated further representations and who argue that they continue to be entitled to Section 4 support so long as those representations remain outstanding. I do not accept that *Nigatu* intended that such persons should be able to access support indefinitely, nor do I accept that the effect of my decision is likely to have that result. All that is required is for the initial decision, of the type currently being made by NASS, to be made instead by an ICD caseworker, followed by a refusal of Section 4 support. Were that approach to be taken, the ASA jurisdiction would be limited to consideration of the issue of destitution and the appellants compliance with conditions set out in regulation 3(2) of the 2005 Regulations.

36. Returning to the appellant's grounds of appeal, I have dealt at length with ground (i). I am satisfied that NASS have taken full account of the Judgement of *Nigatu* and Policy Bulletin 71 was the result of that consideration. I am satisfied that they gave due consideration to the appellant's rights under Article 3 of the ECHR in so far as these relate to the issue of support. Neither NASS nor the ASA have jurisdiction to consider the risk on return of a failed asylum seeker.

37. I do not accept the submission that "until such time as the Secretary of State makes a decision on whether to accept the appellant's representations as a fresh claim or not as the case may be, the appellant should be entitled to receive Section 4 support". A preliminary decision by an IND ICD caseworker that further representations do not amount to a fresh claim for asylum would in my opinion be quite sufficient to determine the appellant's claim to Section 4 support.

38. In the light of my findings, a determination of points (iii) and (iv) of paragraph 24 and the points raised by Counsel and recorded in paragraphs 14 and 15 above are not necessary.

39. In all the circumstances, I am satisfied that the appellant is entitled to the provision of Section 4 support until such time as a decision, albeit a preliminary one, is reached on his further representations by an IND ICD caseworker.

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