Appeal Number: ASA/04/10/8719
NASS Ref. Number: 01/08/02105
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)	TA
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 20th day of October 2004 substituting my own decision for the decision appealed against.

2. The appellant, a 43 year old Polish national, appeals against the decision of the Secretary of State who on 24 September 2004 decided to discontinue subsistence and accommodation support to the appellant and her four children aged 7, 13, 16 and 17 years, with effect from 11 October 2004. The decision was made pursuant to Paragraph 5 of Schedule 3 of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act") on the grounds that having attained the status of a national member of the European Union (EU) and the European Economic Area (EEA) she is no longer eligible for support.

3. The appellant has received assistance from Fursdon Knapper Solicitors and Refugee Action with preparation for this appeal. The former act for her in connection with her asylum application. At the hearing before me however the appellant was not represented. She appeared in person and was assisted through the interpretation of Mrs Withey in the Polish language. The respondent was represented by Presenting Officer Ms Kerr.

4. It is not disputed that the appellant is a Polish national. Poland is one of the ten countries that became a member of the EU and EEA on 1 May 2004.

5. The appellant claimed asylum on 7 August 2001. Her appeal against refusal of that claim was allowed by an Adjudicator of the Immigration Appellate Authority (IAA) on 10 December 2002. The Secretary of State for the Home Department was however granted permission to appeal to the Immigration

Appeal Tribunal (IAT) on 22 February 2003 and a substantive hearing of that appeal, scheduled to take place on 20 September 2004, was adjourned, apparently at the request of the appellant's solicitors. I have seen a copy of the Immigration Appeal Tribunal directions notice dated 21 September 2004, addressed to Fursdon Knapper Solicitors requiring service of an amended skeleton argument and a fresh bundle of evidence within 14 days of the hearing on 20 September 2004. I understand that these directions have been complied with and a further date of hearing is awaited. In the circumstances, the appellant remains an asylum seeker within the meaning of Section 94 of the Immigration and Asylum Act 1999 ("the 1999 Act").

6. The appellant applied for subsistence and accommodation support for herself and her dependants in August 2001. This was approved and support has been provided continuously. Between 1 May 2004 and 10 October 2004, support has been provided on a temporary basis whilst NASS conducted an assessment into the appellant's circumstances and more particularly whether support should continue to be provided.

7. As part of the process of assessment, Mr Paul Thompson of NASS interviewed the appellant on 9 June 2004. The appellant confirmed that she suffered from asthma, migraines, back pain, muscle and women's problems. She added that she was in constant pain and gave a list of her prescribed medication. She confirmed that her youngest son age 7 was born with cerebral palsy for which he required regular injections. He was due to have a splint fitted in the hope of correcting his disability. Her other three children enjoyed good health.

8. The appellant confirmed that notwithstanding her ill health, she had undertaken voluntary work in the past and, since been informed that she should become self-supporting, she had enquired about employment at the local job centre and responded to advertisements in newspapers with a view to finding work. She had however been advised by her solicitor and Counsel not to register for employment until she has received a decision on her asylum claim. The appellant confirmed that family members resident in London were unable to assist her as they had problems of their own. She was seeking to improve her prospects of employment but was not in the position to maintain and accommodate herself without assistance from NASS.

9. According to Ms Kerr, no further action was taken on the appellant's claim until 8 September 2004, when the appellant was informed by letter (written by Mr. Thompson), that the respondent did not consider it necessary to continue her support in order to avoid a breach of her human rights. She was advised that both she and her eldest son had good prospects of finding employment and that NASS expected her to become self-supporting by 9 October 2004.

10. Included in the Respondent's bundle of evidence, is a letter written by Mr. Thompson to the appellant dated 11 June 2004. I am told by NASS that this letter was never sent to the appellant and I have been asked to ignore it. I am however unwilling to do so given that the contents indicate the view that was taken by the decision maker, of the appellant's case immediately following her

interview. In his letter, Mr. Thompson details the information provided by the appellant at the interview and concludes his letter as follows:-

> "On the basis of this information, I have decided that your support should continue until such time that your claim is finally determined. This is because I believe that you are not in a sufficient position to undertake employment as there is no one to look after your children especially A and I feel it would be an unfair burden on T who is hoping to attend university. Also I think your health would be a hindrance what with your pending operation ...".

11. I do not know why Mr. Thompson's letter of 11 June 2004 was not sent to the appellant. Nor am I aware of any other letter having been sent to her following the interview. What is clear is that the practical effect of the NASS letter of 8 September 2004 was to continue the appellant's support beyond the date of the appellant's hearing before the IAT on 20 September 2004, a date that must have been known to the respondent.

12. In her grounds of appeal, the appellant states that in order to obtain a work permit, she would need to withdraw her asylum claim, which she considers unreasonable. The appellant's solicitor and Plymouth Refugee Action have made various representations on the appellant's behalf stating that she is unable to register under the Workers Registration Scheme (WRS) because to do so would result in her asylum appeal being treated as abandoned. Fursdon Knapper Solicitors state in their letter of 19 October 2004 to Refugee Action that Counsel in this case has advised that the appellant should not withdraw her asylum claim. Counsel had emphasised that the family were successful in their appeal before the IAA where an Adjudicator had concluded that they were entitled to full refugee status. Had it not been for the Secretary of State's decision to appeal against that determination, the appellant and her dependants would not be in the position in which they now find themselves.

13. I have also received submissions from Mr. Simon Bentley on behalf of the respondent. He acknowledges that the effect of paragraph 2 of the Immigration (European Economic Area) and Accession (Amendment) Regulations 2004 is that registration under the WRS means that any outstanding appeal under Section 82 of the 2002 Act is to be treated as abandoned. However, he submits that this factor does not mean that the appellant's asylum support needs to continue to avoid a breach of her human rights. That is because, in the respondents view, the appellant is able to take up employment and thereby avoid any possibility of being left destitute in circumstances that would breach her human rights. He further submits that even if the appellant were unsuccessful in the appeal before the IAT, given that she is now an EEA national, there is no longer any intention to set removal directions against the appellant and that as such, her appeal before the IAT is purely academic. Nevertheless, he concedes that were she to be successful before the IAT, the appellant is likely to be granted indefinite leave to remain in the United Kingdom and would then have access to mainstream welfare benefits.

14. I have given careful consideration to all the evidence that is before me including documentary evidence submitted by both parties or on their behalf, the medical evidence submitted by the appellant on the day of hearing and the evidence and submissions of the appellant and Presenting Officer Ms Kerr.

15. Paragraph 1 of Schedule 3 of the 2002 Act states *inter alia* that a person to whom this paragraph applies shall not be eligible for support or assistance under a provision of the 1999 Act.

16. The said schedule renders ineligible for such support a person who has the nationality of an EEA state other than the United Kingdom or if he is the dependent of such a person.

17. Paragraph 3 of the said Schedule however contains the following provision:

"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) a persons Convention rights, or
b) a person rights under the Community Treaties.

18. The schedule lists exceptions where the Withholding and Withdrawal of Support Provisions do not apply. Paragraph 2(1)(b) states that paragraph 1 of the Schedule (ineligibility for support) does not prevent the provision of support or assistance to a child. On the basis that unaccompanied asylum seeking children are not affected by schedule 3 in any event, the reference in paragraph 2(1)(b) must therefore relate to minor children who form part of a family unit.

19. During the course of the hearing, the appellant was examined by at length. Her evidence was consistent and given in an honest and forthright manner. I am satisfied on a balance of probabilities that she gave a truthful account of her circumstances, and those of her family and friends. I find her a credible witness. I accept that notwithstanding her health problems, the demands upon her time in terms of childcare and taking her son to his clinic and hospital appointments, and the low demand in the employment market for persons of her limited experience, she is nevertheless anxious to work and support herself. Her only concern, and that of her representatives is that registration under the WRS would result in her asylum appeal being treated as abandoned. This is not therefore a case of an appellant or her representatives citing health and social problems as a reason for failure to become self- supporting.

20. The appellant therefore has limited choices available to her. If she wishes to continue with her asylum appeal, she cannot register under the WRS and must find other means of supporting herself and her dependants. Alternatively, she could register for employment, abandon her asylum appeal and with it the possibility that were she to succeed before the IAT, she would be granted indefinite leave to remain together with entitlement to mainstream benefits, advantages which are not available to her as an EEA national.

21. On the totality of the evidence before me, I find as fact that the appellant does not have any family or friends in a position to offer her maintenance or accommodation in the United Kingdom even on a temporary basis. Such relatives and friends as she possesses, have limited incomes and are in receipt of state benefits. I accept that she has received advice in the strongest possible terms from her solicitor and Counsel that her asylum claim has considerable merit and that she should not therefore register for employment under the WRS as to do so would result in serious prejudice to her claim.

22. I find that the appellant is entitled to pursue her appeal. That is a right afforded to her by law and an entitlement exercisable from within the UK. Given the obvious benefits that a successful outcome would bring, noting in particular that the IAA have determined that she is entitled to refugee status, I do not consider it unreasonable that the appellant should wish to act upon the advice of her legal representatives.

23. The appellant states that she has not received any financial support from the respondent save for emergency support tokens to the value of £190.50 for the period up to and including 10 October 2004. She was to have been evicted from her NASS accommodation thereafter but for reasons that are unclear to me, she has continued to remain in this accommodation. Possibly, this may be because the accommodation provider is reluctant to evict a single mother of 43 and her 4 children including one disabled child of 7. She tells me that she has received some form of financial support from a local agency, the identity of which she was unable to confirm, but added that this was of a temporary nature and that, if the service provider were compelled to evict her, she and her 4 children would be homeless and without any means of support.

24. On the basis that the appellant currently has accommodation and appears to be receiving some form of charitable support, I do not accept as foreseeable that she and her dependant children will suffer inhuman and degrading treatment contrary to Article 3 of the European Convention of Human Rights (ECHR). In reaching this finding, I remind myself that the threshold for a finding in favour of Article 3 is a high one and requires that a person must be verging on the condition described in *Pretty v United Kingdom* [2002] 2 SER 97 for there to exist an obligation to provide support under paragraph 3 Schedule 3.

25. I do however consider that a case has been made out under Article 8 in relation to the appellant's right to respect for and protection from interference with her home, and her private and family life. On the facts of this case, as detailed in Mr. Thompson's letter of 11 June 2004, and noting that there is a real prospect of an early resolution of the appellant's appeal before the IAT, I do not accept that an interference with the appellant's Article 8 rights is either necessary or proportionate.

26. In *M v London Borough Islington* [2004] EWCA 235, the Court of Appeal considered a case concerning the accommodation needs of a child and his mother who had an outstanding Article 8 appeal before the IAT. Buxton LJ, held that where a Children Act power is exercised through assistance to an

adult, the power, even though it is a power to assist the child, is taken away by paragraph 1 of Schedule 3 if the adult in question falls within one of the ineligible classes. If the result of this leads to a breach of Convention rights, paragraph 3 of Schedule 3 requires reversion to the original position.

27. Applying this decision to the case before me, I accept that the effect of paragraphs 1 and 5 of Schedule 3 is not only to render ineligible for support the appellant but also her four dependant children. As Section 2(1)(b) requires that paragraph 1 does not prevent the provision of support or assistance to a child, consideration must be given to how the child is to be accommodated and supported. The only possibilities on the facts before me are that the children are taken into the care of the local authority or the Secretary of State continues to support the family in order to avoid a breach of their Convention rights.

28. Much turns upon the outcome of the appellant's appeal before the IAT. If the appellant is successful, she will be entitled to indefinite leave to remain and access to mainstream benefits. If she is unsuccessful she will cease to be an asylum seeker. It is open to both the appellant's representatives and the respondent to seek an expedited hearing. That, to me, appears to be the crucial date. I am satisfied that Mr. Thompson, the interviewing officer and caseworker, clearly took the view on 11 June 2004 that the appellant's circumstances were such that her support should continue until her asylum claim is finally determined. He reached that conclusion within two days of having interviewed her and maintained support until 10 October 2004. I can see no reason why he should have sought to do so other than for reasons expressed in his letter. The appellant's circumstances have not changed nor are they likely to do so in the foreseeable future.

29. On the totality of the evidence before me, I am satisfied that in the particular circumstances of this case, it is reasonable for the appellant to rely upon the advice of her legal advisors and to continue to pursue her asylum appeal before the IAT in preference to registration under the WRS. The appellant is ineligible for support by virtue of paragraph 1 of Schedule 3. However, on the basis of paragraph 3 of the said schedule support may nonetheless be provided to avoid a breach of the person's rights under the ECHR. Given my finding that a breach of Article 8 is likely to occur as a result, it is my decision that the appellant should continue to receive Section 95 support up to and including the date of promulgation of the decision of the IAT of her asylum appeal.

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