Appeal Number: ASA/04/06/8228
NASS Ref. Number: 04/01/02644
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)	AAA
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 furnished on Wednesday the 7th day of July 2004 allowing the above mentioned appeal.

2. The appellant, a 30-year-old national of Eritrea appeals against the decision of the Secretary of State dated 21 June 2004. The decision letter states that the appellant having applied for asylum on 7 July 2003, was issued with a refusal letter dated 24 August 2003. The Secretary of State is unable to entertain the appellant's further application for NASS support as he does not appear to be an asylum seeker or a dependant of an asylum seeker as defined in Section 94 of the Immigration and Asylum Act 1999 ("the 1999 Act") and as such he does not qualify for support under Section 95.

3. The appellant was not informed in the decision letter that he had a right of appeal to an Asylum Support Adjudicator but submitted an appeal within the statutory time limit in any event. In his grounds of appeal, the appellant asserts that his asylum appeal was determined on 24 August 2003 but that an appeal against that decision was submitted by recorded delivery within the statutory time frame.

4. Accordingly, directions were issued to both parties on 30 June 2004 seeking further evidence upon which both parties relied. I have received extensive evidence from the appellant but none from the respondent.

5. In his notice of appeal, the appellant does not request an oral hearing. I have considered this 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 proceed to determine the appeal under Rule 6(2) of the Rules.

6. Regulation 3(1) of the Asylum Support Regulations 2000 (the 2000 Regulations) states that an asylum seeker or a dependant of an asylum seeker may apply to the Secretary of State for asylum support. An application for such support must, by virtue of paragraph 3(3), be made by completing in full and in English the form issued by the Secretary of State for the purpose. Section 3(4) states that the application "may not be entertained by the Secretary of State unless it is made in accordance with paragraph (3)". Other than by reason of a failure to complete the appropriate application form, there is no other basis upon which the Secretary of State may refuse to entertain an application for support.

7. Regulation 3(4) of the 2000 Regulations was amended by the Asylum Support (Amendment) (No. 3) Regulations 2002, which came into force on 8 January 2003. Regulation 3(4) as amended states –

> The application may not be entertained by the Secretary of State –
>
> a) where it is made otherwise then in accordance with paragraph (3); or
> b) where the Secretary of State is not satisfied that the information provided is complete or accurate or that the applicant is co-operating with enquiries made under paragraph (5).

8. Paragraph 3(5) of the 2000 Regulations states that the Secretary of State may make further enquiries of the applicant about any matter connected with the application. Accordingly, a decision not to entertain an application pursuant to the above amendment can only relate to providing incomplete or inaccurate information in response to enquiries made by the Secretary of State.

9. There are other statutory references to the Secretary of State having power to refuse to entertain an application. Regulation 21(1) deals with the effect of a previous suspension or discontinuation of support. This states that where an application for support is made by an applicant who has previously had his asylum support suspended or discontinued under Regulation 20, but where there has been no material change of circumstances since the suspension or discontinuance, the application "need not be entertained unless the Secretary of State considers that there are exceptional circumstances which justify its being entertained". I have no evidence before me that this applies to the appellant.

10. The only reference contained in the 1999 Act to a refusal to entertain an application is found in Section 103(6). This states that if an appeal is dismissed, no further application by the appellant for support under Section 95 is to be entertained unless the Secretary of State is satisfied that there has been a material change in circumstances. Clearly, this provision and Regulation 21 are designed to apply to persons who have previously had their asylum support

suspended or discontinued and have had their appeal against that decision dismissed by an Asylum Support Adjudicator. I have no evidence before me that this applies to the appellant either.

11. Section 103(1) and (2) define the circumstances in which an appeal may be brought before the asylum support adjudicators. Section 53 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), seeks to amend this provision. The current provisions contained in the 1999 Act make no reference whatsoever to any of the classes of persons excluded from receiving support under Regulation 4, not having an entitlement to appeal to an asylum support adjudicator. The amended version however does stipulate at sub-section (4)(b) that a right of appeal does not exist in relation to discontinuance cases where the person concerned is no longer an asylum seeker or the dependant of an asylum seeker. It should be emphasised that Section 53 has not as yet come into force.

12. It is accepted that a person who has ceased to be an asylum seeker is no longer entitled to the provision of Section 95 support (save where Section 94(5) applies) and is therefore outwith the jurisdiction of the Asylum Support Adjudicators. Where the appellant accepts this position, the appeal will be treated as invalid. If however, the appellant disputes that his asylum claim has been finally determined, I consider it in the interests of justice that a preliminary hearing take place to determine the facts in issue with a view to establishing jurisdiction. Should the appellant fail to establish that he is an asylum seeker, the appeal proceeds no further. If however evidence is adduced which confirms that there is either a decision or an appeal pending, I take the view that an appeal does arise to the Asylum Support Adjudicators.

13. In establishing this procedure, I have taken careful account of the fact that an appellant issued with a decision in these terms may be destitute and has no other recourse for redress other than to bring the matter before the ASA. It is therefore in the interests of justice that a cost-effective procedure be established to ensure that persons are not left destitute as a result of an administrative error on the part of NASS. Regrettably, such errors occur all too often.

14. The facts of this case are that the appellant was refused asylum on 24 August 2003. The refusal letter records, that the appellant had applied for asylum on the grounds that he had a well founded fear of persecution in Eritrea, and had in addition raised issues under Articles 2, 3 and/or Protocol 6 to the 1950 Rome Convention for the Protection of Human Rights and Fundamental Freedom (ECHR). That application was refused together with his request for humanitarian protection. The accompanying letter to the appellant's solicitors advised that this was not an appealable decision under Section 82 of the 2002 Act but otherwise gave no explanation as to why this refusal of asylum did not attract a right of appeal.

15. The appellant's solicitors duly wrote to the Home Office and reminded them that a decision as defined by Section 82(2)(d) of the 2002 Act had been made and that the appellant accordingly was entitled to a right of appeal. A notice

of appeal was submitted by recorded delivery on 8 September 2003. The post office have confirmed that the said letter was duly delivered to the Home Office.

16. Thereafter, the facts are a little hazy but it is evident that the appellant was refused support sometime in September/November 2003 and an application for judicial review was lodged by White Ryland Solicitors on the appellant's behalf. As a result, NASS accepted that the appellant was in fact entitled to support and on the basis of this assurance, judicial review proceedings were withdrawn.

17. I am therefore at a loss to understand why having accepted that the appellant was an asylum seeker in November 2003, NASS have now determined that he is no longer an asylum seeker. NASS have not assisted my determination of this issue in that they have yet again failed to provide an appeal bundle in support of the decision made and ignored directions issued by me on 30 June 2004. I am assured that no discourtesy is intended notwithstanding that this is now a regular occurrence and I regret to say a foregone conclusion.

18. The onus is upon the appellant to satisfy me that he is an asylum seeker within the meaning of Section 94 of the 1999 Act. Having established his entitlement to asylum support, it then falls upon the Secretary of State to demonstrate that the appellant's asylum claim has been fully determined. On the basis of the above statutory authorities, I take the view that this requires something more than just a statement from NASS that the appellant's asylum claim has been recorded as refused.

19. On the totality of the evidence before me, I am satisfied that the appellant has discharged the burden upon him to demonstrate that the decision made on 24 August 2003 was an appealable decision and that his representatives have lodged an effective appeal by recorded delivery which has been proved to have been delivered to the Home Office. The Secretary of State has produced nothing.

20. In the circumstances, I am satisfied on a balance of probability that the appellant is entitled to appeal against the decision of 24 August 2003 and that he has not had his appeal heard by an Adjudicator. As such, he remains an asylum seeker entitled to the provision of support.

21. The appeal is allowed.

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