

Appeal Number: ASA/04/05/8025
NASS Ref. Number: 04/04/02101
Appellant's Ref. Number:



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

Adjudicator	<u>Mrs. Sehba Haroon Storey</u>
Appellant (s)	<u>JT</u>
Respondent	<u>Secretary of State</u>

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 Friday the 14th day of May 2004 remitting the above mentioned appeal.
2. The appellant, a 51 year-old national of Malawi, appeals against the decision of the Secretary of State dated 28 April 2004. The decision letter states that the appellant is not an asylum seeker as defined by Section 94 of the Immigration and Asylum Act 1999 (the 1999 Act) and that in the light of this the appellant's application for Section 95 support need not be entertained.
3. In her 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.
4. Regulation 3(1) of the Asylum Support Regulations 2000 (the 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. Subsection 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.

5. 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”.
6. The only reference contained in the 1999 Act to a refusal to entertain an application can be found at 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.
7. I do not know when the appellant applied for support. The respondent has failed to comply with directions issued by the Deputy Chief Asylum Support Adjudicator on 7 May 2004 to provide a copy of the appellant’s application form. The respondent was also requested to furnish submissions detailing the basis upon which a decision was made that the appellant is not an asylum seeker as defined by Section 94 of the 1999 Act. As is common in such cases, however, the Secretary of State has elected to ignore these directions, no doubt in the belief that the decision to refuse to entertain the application is in accordance with the law.
8. I do not share that view. There being no basis disclosed for the Secretary of State being entitled to refuse to entertain an application, in this particular case, I shall go on to consider whether the appellant is entitled to support under Section 95.
9. Section 94(1) of the 1999 Act defines an asylum seeker as a person who is not under the age of eighteen years and who has made a claim for asylum which has been recorded by the respondent but which has not been determined. A claim for asylum includes a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention for the claimant to be removed from or required to leave the United Kingdom.
10. The appellant and her representatives have complied with directions and I have before me a copy of the appellant’s application to the Secretary of State dated 1 February 2002. I have also had sight of a copy of the acknowledgement of that application by the respondent dated 8 March 2002.
11. In the appellant’s letter of application, her representatives detail the basis of her request to be granted leave to remain in the United Kingdom. They state that if the appellant is returned to Malawi, “she will be subjected to inhuman and degrading treatment by society with no provision of protection available

from the state. It is likely that if she returns home she will have no accommodation and no means of feeding herself.”

12. That is the language of Article 3 of the Human Rights Convention. It is true, the words used do not identify any agent of persecution or of inhuman and degrading treatment, but Strasbourg jurisprudence can be engaged even when an Article 3 source of harm is unidentifiable. See *D v UK* (1997) 24 EHRR 423. Whether the appellant’s application has merit, is not a matter for me or for NASS to determine. That question has to be decided by the appropriate authority with responsibility for determining asylum and Article 3 applications. Pending a final determination of her application, the appellant satisfies the definition of asylum seeker contained within Section 94 and she is therefore entitled to make an application for support under Section 95.
13. It is sometimes argued by NASS that a person who applies for support under Section 95, who is considered not to be an asylum seeker, is not entitled to appeal to an asylum support adjudicator under Section 103. That is not my understanding.
14. Regulation 4 of the Regulations, defines 3 classes of persons who are “excluded from support”. A person falls within this paragraph if at the time when the application is determined –
 - (a) he is a person to whom interim support applies; or
 - (b) he is a person to whom Social Security benefits apply; or
 - (c) he has not made a claim for leave to enter or remain in the United Kingdom, or for variation of any such leave, which is being considered on the basis that he is an asylum-seeker or dependant of an asylum-seeker.
15. 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 (not yet in force) seeks to amend this provision. The current provisions make no reference whatsoever to any of the above classes of excluded persons not having an entitlement to appeal to an asylum support adjudicator. However, the amended version clearly stipulates 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. Even here however, the withdrawal of appeal rights does not attach to a decision that the person concerned is not qualified to receive the support for which he has applied.
16. I am therefore satisfied that had the Secretary of State intended to introduce legislation depriving persons who fall under regulation 4(c) of a right of appeal to an asylum support adjudicator, they would have done so in Section 53 of the 2002 Act. The absence of such provision clearly indicates the will of Parliament and the legislators that such persons are entitled to appeal.
17. In the circumstances, even if the appellant’s application of 1 February 2002 did not constitute an application under either the 1951 Refugee Convention or

Article 3 of the Human Rights Convention, she would still, in my opinion, have been entitled to a decision attracting a right of appeal to an Asylum Support Adjudicator under Section 103(1) of the 1999 Act.

18. On the totality of the evidence before me, I am satisfied that the appellant is an asylum seeker having submitted an Article 3 application to the Home Office upon which a decision remains outstanding. Subject to an assessment of her means and present circumstances, she may be entitled to the provision of Section 95 support.
19. In the circumstances, I remit this case to the Secretary of State for the appellant's application for support to be given proper consideration.

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