Appeal Number: ASA/04/04/7885
NASS Ref. Number: 02/12/03077/001
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)	RB
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 Thursday the 29th day of April 2004 remitting the above mentioned appeals.

2. The appellant is a 28 year old Lithuanian national. He lives in NASS provided accommodation with his wife and two-year-old son. They also receive subsistence support. The appellant appeals against the decision of the Secretary of State who on 5 April 2004 decided to discontinue support to the appellant with effect from 1 May 2004 pursuant to paragraph 5 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") on the basis that with effect from that date, the appellant will cease to be eligible for asylum support, having attained the status of a national member of the European Union ("EU") and the European Economic Area ("EEA").

3. The appellant was represented by Counsel Mr Simon Cox upon the instructions of the Refugee Legal Centre. The respondent was represented by Mrs Clark. The appellant was not called to give oral evidence. He was assisted in understanding the proceedings by Mrs Cuckson in Lithuanian.

4. It is not disputed that the appellant applied for asylum as a Lithuanian national. Lithuania is one of the 10 countries that will become a member of the EU and EAA on 1 May 2004. The appellant and his dependants are currently in receipt of asylum support and will continue to be in receipt until 30 April 2004.

5. The appellant's asylum claim was refused on 14 December 2002. The Secretary of State certified the claim under Section 115 of the 1999 Act as a

consequence of which the appellant had no right of appeal. The appellant claimed judicial review of the certificate but this was dismissed on 16 April 2003. He was granted permission to appeal to the Court of Appeal but this too was dismissed on 11 November 2003. The present position is that the appellant has lodged a timely petition for leave to appeal to the House of Lords which was acknowledged on 19 April 2004 but which is yet to be determined. I am advised that if the House of Lords find an error in law on the issue of principle, the certificate will be quashed and the appellant would have a right of appeal to an Adjudicator from the refusal of leave to enter. The Court of Appeal having dismissed his appeal, the appellant and his dependant's remain asylum seekers entitled to support by virtue of Section 94(5) of the Immigration and Asylum Act 1999 ("the 1999 Act").

6. 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.

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

8. Paragraph 3 of the said Schedule however states:

"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.

9. 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.

10. I am advised that the appellant is a labourer who is able and willing to work subject to employment being offered to him on 1 May 2004. His wife is in the early stages of pregnancy and unwell. She is not therefore fit for work. Whilst the appellant fully intends to obtain employment at the earliest opportunity, he is concerned that he may not be able to do so in which case the family, including a two year child, will be homeless and without financial means of support. It is said on the appellant's behalf that he does not have family and friends upon whom he can rely save for one cousin who lives in London but who is unable to provide support. I have no further details of the appellant's cousin's circumstances.

11. The respondent's decision of 5 April 2004 is a standard notification of withdrawal of asylum support letter. It makes no specific mention of the

existence of a minor child, nor whether the Secretary of State has given consideration to any continuing duty to support the child, or the likelihood of a breach under the European Court of Human Rights ("ECHR") occurring as a result of his decision. The letter does however state that the Secretary of State does not believe there are any circumstances in the appellant's case that exempt him from the provisions of schedule 3, but invites the appellant to contact NASS should he disagree with this position.

12. I have before me a very large bundle of documents, some of which were received on 28 April but a large number arrived half an hour before the scheduled time of hearing. Mrs Clarke, who had been engaged in hearings all morning, did not have an opportunity to read the papers or indeed make any considered submissions upon the arguments submitted. This is in no way intended as a criticism of her as few representatives would be able to digest over 100 pages of documents and legal submissions in 30 minutes.

13. Mr Cox's submissions can be summarised as follows:

a) NASS have failed to consider the application of paragraphs 2 and 3 of Schedule 3;
b) NASS have no power to stop providing asylum support for the appellant's child on the basis that the status of the child as an eligible person is not effected by Lithuania joining the EU or EEA;
c) Section 122 of the 1999 Act requires support for children to be provided by way of support "for the child as part of the eligible persons household" and that as such NASS is under a duty to provide asylum support to all members of the household;
d) The withdrawal of support from 1 May 2004 constitutes a breach of the appellant's rights under Article 8 of the ECHR and the eviction of the appellant's family from their home and withdrawal of all support is an interference with his right to respect for their home and their private and family life. Such interference is neither lawful nor proportionate;
e) The withdrawal of support discriminates on grounds of nationality contrary to EU law because Schedule 3 does not prevent the provision of support to a British citizen;
f) The withdrawal of support from the appellant before he has had an opportunity to become self-supporting constitutes a breach of EC law in particular directive 90/364;
g) The denial of support breaches the appellant's right to a decision on whether his removal would breach Article 3 of the ECHR and it is therefore a denial of Parliament's protection of his rights under that Article and a breach of the procedural guarantees under Article 3.

14. I have given careful consideration to all the evidence before me including the lengthy legal submissions of Mr Cox and such comments as Mrs Clarke felt able to make. I take the view that Counsel has presented an arguable case in relation to the needs of the child and the requirement placed upon the

respondent, to ensure that notwithstanding the provisions of paragraphs 1 and 5 of Schedule 3, that a child is not left unsupported and that the decision to withhold support does not result in a breach of the appellant's ECHR rights.

15. The respondent states in his decision of 5 April 2004 that the appellant has the option to return voluntarily to his country of nationality under the Voluntary Assisted Return and Reintegration Programme ("the VARRP"). Mr Cox submits that this is an interference with the appellant's rights under English law to have his petition determined by the House of Lords.

16. I take the view that the determination of the appellant's petition before the House of Lords is not a pending appeal for the purposes of the Immigration Acts and accordingly, as at today's date the appellant has exhausted his appeal rights. If and when the House of Lords grant the appellant's petition, he does not have a right of appeal within the meaning of the said Immigration Acts. I accept however that in the absence of any attempts to remove the appellant and his family from the United Kingdom, they are entitled to remain in the United Kingdom pursuant to Section 94(5). Accordingly, the appellant, having exhausted his appeal rights no longer has an entitlement to remain in the United Kingdom pending an outcome of his Article 3 claim.

17. The appellant and his dependants are at liberty to remain in the United Kingdom as an EU national provided they are self-supporting from 1 May 2004. The appellant accepts that he is fit and healthy and able to work, and likely to be able to secure employment reasonably quickly. In the circumstances, I do not accept as foreseeable that they will suffer inhuman and degrading treatment on or after 1 May 2004, contrary to Article 3. In reaching this finding I remind myself that the threshold for a finding in favour of Article 3 is a high one. It requires that a person must be verging on the condition described in *Pretty v United Kingdom* [2002] 2 SER97, for there to exist an obligation to provide support under paragraph 3 Schedule 3 to the 2002 Act. Nor do I consider that a case has been made out under Article 8 in relation to the physical and moral integrity of the appellant and his wife.

18. The position of the child however is very different. I accept Counsel's submission that in drafting SS94(5) and 122 of the 1999 Act, together with Section 2(1)(b) of Schedule 3 to the 2002 Act, Parliament cannot have intended that children should be left without any means of support. 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 Immigration Appeal Tribunal. 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.

19. Applying that 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 and his wife but also his two-year-old child. As Section 2(1)(b) requires that paragraph 1 does not prevent the provision of support or assistance to a child, consideration must then be given to how the child is to be accommodated and supported. It seems to me that there are only two possibilities :

    1) The child is cared for by the local authority; or
    2) The Secretary of State gives serious consideration to whether the operation of Schedule 3 is likely to result in a breach of the Convention rights of the appellant and his wife.

20. On the basis of the evidence before me, I am satisfied that the appellant has an arguable case under Article 8 for the protection of his right to respect for his home, and his family life. Clearly if the child could only be accommodated by being taken into care, that would not only break up the family unit but it is clearly not in the best interests of the child for him to be separated from his mother and father at such a tender age. If that is the result, then accommodation should be reinstated to this family until such reasonable opportunity has been afforded to the appellant to obtain employment and alternative accommodation sufficient to enable him to support himself and his dependants. The respondent may however, consider that subsistence support need only be reinstated in respect of the child.

21. I have chosen to remit this case for further consideration in preference to substituting my own decision. This is because, notwithstanding the comment in the Secretary of State's further submissions, that consideration has been given to whether the decision breaches the appellant's Convention rights, I am not satisfied that the Secretary of State has conducted a balancing exercise pursuant to the requirements of Article 8. It is apparent that both the refusal letter and the further submissions tendered on the Secretary of State's behalf are, subject to minor alterations, standard letters. I therefore require the respondent to conduct the necessary exercise and to reach a considered decision on the various arguments raised by Counsel. If having done so, the outcome is to uphold the present decision, then the appellant should be given a fresh decision notice against which he will have a further right of appeal to the Asylum Support Adjudicators.

22. In the meantime, whilst that consideration is being conducted and with particular reference to the letter dated 29 April 2004 from Freda Challoner, Director of NASS, I expect the appellant's support to be reinstated in full.

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