Appeal Number: ASA/04/04/7863(1) ASA/04/04/7857 (2)
NASS Ref. Number: 01/11/1955/001 (1) 01/10/01043/001 (2)
Appellant's Ref. Number:

ASYLUM SUPPORT ADJUDICATORS
Christopher Wren House
113 High Street Croydon CR0 1QG
Telephone: 020 8688 3977
Fax: 020 8688 6075

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

Adjudicator	Mrs Sehba Haroon Storey
Appellant (s)	AS (1) SS (2)
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 Tuesday the 27th day of April 2004 dismissing the above mentioned appeals.

2. The first and second appellants aged 51 years and 66 years respectively appeal against the decision of the Secretary of State who on 5 April 2004 decided to discontinue support to the appellants 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 appellants 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. At the hearing before me, both appellants were represented by Counsel Mr Adrian Berry upon the instructions of Pierce Glynn Solicitors. The respondent was represented by Mrs Stevenson. Both appellants gave limited oral evidence through the interpretation of Ms Butterfield in the Polish language.

4. It is not disputed that the appellants applied for asylum as Polish nationals. Poland is one of 10 countries that will become a member of the EU and EAA on 1 May 2004. They are currently in receipt of asylum support and will continue to be so in receipt until 30 April 2004, whilst their asylum claims remain under consideration.

5. 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 Immigration and Asylum Act 1999 ("the 1999 Act") or a provision the 2002 Act.

6. 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.

7. 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.

8. Counsel, on behalf of the first and second appellants, submits that the respondent has a duty to continue to provide support to the appellants in order to avoid a breach of their rights under Articles 3 and 8 of the European Convention on Human Rights ("ECHR").

9. In relation to Article 3, it is the appellants' case that with effect from 1 May 2004, they will have no access to subsistence support and no access to food and resources for other essential needs. They suggest that it is unreasonable to assume that as they have accommodation available to them, they will not suffer from treatment contrary to Article 3. Counsel submits that the lack of resources for food constitutes treatment that is inhuman and degrading. Counsel refers to the case of *R (Teema) v Secretary of State* [2004] EWHC 295 (Admin) as authority for the proposition that an obligation such as that in paragraph 3 of Schedule 3 is to avoid a breach of Article 3 rather than to wait for one to occur.

10. In relation to Article 8 which provides that everyone has a right to respect for his private and family life, his home and his correspondence, Counsel submits that the withdrawal of support from the appellants' constitutes an interference made under a statutory provision which cannot be justified under Article 8(2) as in his view such interference is neither necessary in a democratic society nor proportionate to any aim.

11. The facts in relation to the first appellant are that she is 51 years of age and lives in accommodation which is the subject of a non secure tenancy. Solicitors for the first appellant have commenced judicial review proceedings and I am advised that for the time being, that accommodation remains open to her by virtue of those proceedings. I have had produced to me medical evidence which suggests that the appellant is in any event unfit for work and I accept this evidence. She is in receipt of subsistence only support. She has an outstanding asylum claim.

12. The first appellant has two sons and one daughter living in the United Kingdom, all of whom are asylum seekers. Her sons live in London with their respective partners and children and her daughter lives in Derby with her husband and children. I am told that one son is a builder by trade and the second son is a carpenter. There are no medical reasons likely to prevent either of them from obtaining employment on or after 1 May 2004.

13. The appellant tells me that she receives £38 per week by way of asylum support, £8 of which is used to purchase food. She confirmed that if she were unable to live in her own accommodation, she would be able to live with her children. She added that there have been periods since her arrival in this country in June 2000 when she has been without support and on these occasions her children have come to her aid, notwithstanding that they themselves have been in receipt of state assistance.

14. The second appellant is 66 years of age and lives with her son and his family. The son is a British Citizen but is unable to work for health reasons. However, the appellant's daughter in law has indefinite leave to remain in the UK. I have no evidence before me to suggest that she is incapable of work. As persons with a right to reside in the UK, the family unit has access to mainstream benefits. Additionally the appellant has a daughter who has been granted exceptional leave to remain. I am advised that the appellant's son in law is seeking employment but in the meantime, this family unit also has access to mainstream benefits.

15. The second appellant is in receipt of £38 by way of subsistence support only. She says that she uses her money to purchase special food for herself and some element of her support is spent on the purchase of hygiene products. When she has been able to do so, she has given money to assist her son with household bills. The second appellant confirmed that during a 10-12 month period when she was without support, she received assistance from all her family members, including financial support. She added that notwithstanding the expense of raising children, paying for their travel to school and the cost of learning to play musical instruments, she was satisfied that her children would support her if her own support were to come to an end on 1 May.

16. I now turn to the respondent's decision letter of 5 April 2004 wherein the respondent identifies three possible options available to the appellants:-

    1) The appellant's have the option to return voluntarily to their country of nationality under the Voluntary Assisted Return and Reintegration Programme ("the VARRP") ;
    2) They can remain in the United Kingdom as workers but must not commence employment until 1 May 2004. They will need to register under the Home Office Workers Registration Scheme;

    The letters continues that the respondent does not believe that there are any circumstances that exempt appellants from the provisions of Schedule 3 but invites them to make contact should they disagree.

17. In their further submissions dated 20 April 2004, the respondent confirms that there is no requirement upon the appellants' to return to Poland and that they may remain in the United Kingdom beyond 1 May 2004 should they wish to do so. The letter reiterates the respondent's belief that withdrawal of the appellants' subsistence support will not result in them been left destitute in circumstances that would breach the ECHR. It confirms that were such circumstances to exist, arrangements can be made to extend the support provided to them beyond 30 April "if that is necessary to avoid a breach of her ECHR rights".

18. I have given careful consideration to all the evidence that is before me including the legal submissions of both parties to these appeals.

19. On the basis that both appellants possess the nationality of Poland, and EAA state with effect from 1 May 2004, they are ineligible for asylum support from that date unless the withdrawal of support is likely to result in a breach of their Convention rights or their rights under the Community Treaties.

20. In relation to Article 3, the threshold for a finding that treatment amounts to "inhuman and degrading treatment", is a high one. 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 of Schedule 3 of the 2002 Act. In *R (T) v Secretary of State* [2002] EWCA CIV 1285, the Court of Appeal declined to find a breach of Article 3 where the claimant had shelter, sanitary facilities and some money for food. The availability of assistance from relatives, friends, or the United Kingdom's active voluntary sector are also factors to be taken into account in assessing the likelihood of a breach under Article 3.

21. On the facts before me, both appellants have access to adequate shelter and sanitary facilities. They do not however have the financial means to provide for their sustenance after 1 May. The evidence in relation to the first appellant is however, that her two sons possess skills, which are in short supply in the United Kingdom and I am satisfied that it is reasonably foreseeable that they will be able to obtain work on or shortly after 1 May 2004 to enable them to support themselves, their dependants and the first appellant. In the light of the fact that these families contain minor children, I do not accept that support from other sources will not be available to protect their interests. It is in my view too speculative to presume that ill treatment on the level required by *Pretty* is likely to be reached on 1 May 2004 in the particular circumstances of this case.

22. In relation to the second appellant, I note that she too has access to shelter and sanitary facilities. Unlike the first appellant, her children are either British citizens or have indefinite leave to remain in the United Kingdom with full access to mainstream benefits. Her evidence is that her children have in the past provided her with food and shelter and I am satisfied on the basis of that evidence that she will not be without essential provisions with effect from 1 May.

23. In relation to Article 8, Counsel submits that if the denial of support to an asylum seeker impacts sufficiently on the asylum seeker's private and family life, which extends to the individuals physical and mental integrity and autonomy, the Secretary of State will be in breach of the negative obligations imposed by Article 8(1) unless he can justify his conduct under Article 8(2).

24. In relation to the two cases before me, I do not consider that there is any satisfactory evidence to show that the family members concerned, upon whom the appellants' are reliant, would not be able to get either immediate work or access to mainstream benefits. However, I recognise that there may be some cases where the potential workers may encounter difficulties in obtaining immediate work and in some cases a period of time prior to obtaining employment may be of such duration as to cause some difficulties. If it were to be the case that a significant number of such family members were unable to obtain work immediately after 1 May 2004, I consider it to be arguable that the Secretary of State should in that situation recognise these difficulties by making provision for their support to be available for a period in the region of 14-28 days. This is a matter upon which it would be proper for the Administrative Court to issue guidance. By contrast, the Asylum Support Adjudicators, is a statutory tribunal whose jurisdiction is limited to consideration of the facts in individual cases.

25. I take the view that paragraph 3 of the said Schedule places upon the Secretary of State a duty to conduct a balancing exercise in such cases and to demonstrate that this has been done. Whilst it may be sufficient to discharge that duty by stating that the Secretary of State can see no evidence of a likely breach of the ECHR, an explanation of the nature of the exercise and the conclusions reached would greatly assist in the determination of these appeals by Asylum Support Adjudicators. In the two cases before me, it is not clear whether a balancing exercise was conducted but on the basis that the Secretary of State invites any potential breaches to be brought to his attention and confirms the possibility of extended support beyond 30 April 2004, I accept albeit on a fine balance that the Secretary of State has discharged his duty under paragraph 3. In future decisions however, I would hope to see greater demonstration of a balancing exercise having been conducted.

26. On the totality of the evidence before me, and on the particular facts of the two cases before me, I am not minded to make a finding that there has been an interference with the appellant's private or family life. There may however be other cases where family support is not available, where a likelihood of a finding in favour of an appellant in respect of Article 8 may be justified in the absence of proper consideration by the Secretary of State.

27. Counsel has asked me to comment upon the suggestion in the standard refusal letters that an appellant has the option of returning to their country of nationality as a means of avoiding destitution. I have no hesitation in finding that under the Immigration Acts, an appellant who has an outstanding asylum claim is entitled to remain in the United Kingdom until such time as that claim has been finally determined in accordance with the UK's international obligations. Accordingly, such a suggestion is otiose since it rests on an

assumption that the asylum claim has no foundation. I am particularly concerned to note that no mention is made in the decision letter of the fact that departure from the United Kingdom will result in an appellant's asylum claim or outstanding appeal being treated as abandoned. The letter assumes that all persons affected by paragraph 5 Schedule 3 decisions are economic migrants likely to be satisfied with the right of free movement and the right to work in the EU community. No doubt this too is a matter upon which the Administrative Court will give consideration and issue guidance in particular whether those with an outstanding claim should nevertheless remain entitled to asylum support. However, that is not a matter upon which this tribunal is able to adjudicate.

28. The appeals of both appellants are dismissed.

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