FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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Appeal Number : AS/16/09/35812
UKVIA Ref. :
Appellant's Ref. :

IMMIGRATION AND ASYLUM ACT 1999
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Tribunal Judge	Mr Ian A Lewis
Appellant	RG
Respondent	Secretary of State

STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Rules"), and gives reasons for the decision made on 23 September 2016, after an oral hearing, allowing the appeal.

2. The Appellant is a national of Ukraine born on 3 October 1990. She appeals under section 103 of the Immigration and Asylum Act 1999 against a decision of the Secretary of State dated 31 August 2016 to refuse support under section 95 of the Immigration and Asylum Act 1999 (as amended).

3. Included as a dependant in both the Appellant's application for support and in the appeal is her daughter (born on 18 April 2008).

4. In her Notice of Appeal the Appellant indicated that she wanted to attend an oral hearing of her appeal. The matter was duly listed.

5. The Appellant was represented at the hearing by Ms Gellner of ASAP. The Respondent was represented by Ms Bello. The Appellant participated in the hearing through an interpreter: I ensured mutual understanding at the outset and no language difficulties became apparent during the hearing. In the event, it was unnecessary to hear oral evidence from the Appellant: the hearing proceeded by way of helpful discussion and submissions, and I am grateful for the cooperative approach taken by both representatives.

6. I have given careful consideration to all the evidence that is before me. I have reminded myself that where an Appellant appeals against a decision to refuse section 95 support the burden of proof is on the Appellant, to the civil standard of a 'balance of probabilities', to show that she meets the criteria upon which support is granted.

7. Pursuant to section 95 of the Immigration and Asylum Act 1999, destitution will be established if the Appellant and her dependents "*cannot obtain both (a) adequate accommodation, and (b) food and other essential items*", or will become unable to do so within 14 days.

8. The Appellant and her daughter last arrived in the UK on 24 May 2016. The Appellant claimed asylum on arrival. She claimed that she was fleeing domestic violence at the hands of her husband. Her asylum claim remains pending consideration. An application for section 95 support was made by way of form ASF1 signed on 26 May 2016. The Appellant made reference in her application form to a number of bank accounts including in particular one held with the Pivdennyi Bank with a balance given as approximately 25,000 Hryvnia ('UAH'). After further enquiry, including inviting the Appellant to provide valuations of her jewellery and other electronic goods, the Respondent refused the application for support.

9. The Respondent was not satisfied that the Appellant was destitute. The decision was based primarily upon the Appellant's possession in the UK of gold jewellery, a laptop, an iPad, and two mobile telephones. The Respondent took as a starting point the Appellant's own estimates as to value amounting to £1395-£1635. The Respondent also calculated a destitution threshold of £44.55 per night, and concluded as such that the Appellant's assets "*would last [her] for approximately*" 31 days at the lower end of the range of estimated value or 36 days at the upper end.

10. I pause to note that a destitution threshold calculated at £44.55 per night would amount to £623.70 (i.e. 14 days).

11. The Respondent's decision letter also made reference to the Appellant's visa application of 19 December 2014 "*confirm[ing] you owned a flat in Ukrain*e", and noting that the Appellant had failed to provide evidence to show that she would be unable to "*liquidate this asset*". Reference was also made to the fact that the Appellant had had in her possession business cards for a London property agent, a jewellery consultant, and a dentist.

12. During the course of discussion with the representatives it was possible to reach common ground that the Respondent's decision-maker had erred in her approach to the destitution threshold. The decision-maker had taken into account as a constituent part of her calculation the subsistence level of support that the Appellant and her daughter would receive if granted section 95 support. This however is a different, lower, figure from that required to be taken into account under the Respondent's 'Assessing Destitution' Instruction. The Instruction requires the decision-maker to take into account when considering a

new applicant requiring both accommodation and subsistence the sum of £70.80 for a lone parent over 16, and additionally the sum of £88.84 for a child under 16. Taking these figures alongside the bed-and-breakfast rates relied upon by the Respondent by way of the regional rate for board and lodgings, the destitution threshold should properly have been calculated at £635.64.

13. Whilst I note that Ms Gellner did not accept the rate for board and lodgings at £34 per night, she did not have available any supporting documentary evidence in this regard, whereas the Respondent had filed three examples of accommodation in Cardiff on an accommodation website with room rates variously given as being from £17 per person, £31 per room and £30 per room.

14. However, of more concern to Ms Gellner was the Respondent's reliance on the value of the personal possessions of the Appellant. Regulation 6 of the Asylum Support Regulations 2000 identifies the assets that the Secretary of State "*must take into account*" when determining whether a person is destitute as being "*(a) cash; (b) savings; (c) investments; (d) land; (b) cars or other vehicles; and (f) goods held for the purpose of a trade or other business*" (see regulations 6(4) and (5)). Regulation 6(6) adds "*The Secretary of State must ignore any assets not mentioned in paragraph (5)*". Accordingly, on the basis of the Regulations, the Respondent's decision-maker should properly have ignored the assets upon which adverse reliance was placed in the refusal letter.

15. Ms Bello very fairly acknowledged that the reasons in the decision letter in this regard could not be reconciled with the requirements of the Regulations.

16. I have noted in this context that the Respondent's Instruction does not preclude taking into account personal possessions. Paragraph 2.1 of the Instruction, having referred to regulation 6(5) then states:

"***Any assets not mentioned above must be ignored****. However, jewellery and other personal possessions are usually excluded from the consideration of assets unless they are collectively worth £1000 or more.*"

17. The justification for potentially including personal possessions that are cumulatively worth in excess of £1000, notwithstanding the clear wording of regulation 6(6), is not articulated in the Instruction, and Ms Bello was unable to obtain any instructions to assist. (It is for this reason that Ms Bello invited me to consider the appeal by reference to the Regulations rather than the Instruction.) I find that I must indeed have regard to the Regulations, and I find that I am unable to reconcile either this aspect of the Instruction, or the approach of the decision-maker in this particular case to the Appellant's personal possessions, with the terms of the Regulations.

18. Necessarily this means that I find the Respondent's primary reason for refusing the Appellant support to have been in error in having regard to assets which should have been disregarded by the decision-maker in determining the issue of destitution.

19. Although the Respondent did not in the decision letter make reference to the balance in any of the Appellant's bank accounts, this was a matter raised in the Directions issued by the Tribunal. In response the Appellant has identified nil balances in all but one of the accounts that she declared when making her application, and has provided supporting evidence in this regard. The one exception is the account ending …2171.

20. In her written response to the Directions issued by the Tribunal the Appellant asserted that whilst this account was in her name it was in fact her daughter's account: it was said that it was against the law for children to have a savings account in Ukraine so it was held in the Appellant's name, her daughter knew the account existed, and the money in it was for her.

21. Notwithstanding these assertions Ms Gellner did not seek to argue that this bank account should be excluded from consideration as being that of the Appellant's daughter. She realistically recognised and acknowledged that the account was in the Appellant's name, and it was evident that she had had access to it in the UK as demonstrated by recent purchases using a debit card in Cardiff.

22. Further, and in any event, it is to be noted that by virtue of regulation 6(4)(c) and regulation 6(5) of the 2000 Regulations any savings available to a dependent of the principal applicant must be taken into account by the Respondent when determining the issue of destitution.

23. In such circumstances it is not necessary for me to reach any particular conclusion as to the 'ownership' of the money in the account, but for completeness I note the following. Firstly, in the Appellant's application she declared the account as being an asset belonging to her (ASF1 at section 9), and declared no such assets in respect of her dependent daughter (section 19). Secondly, the history of transactions on the account suggest significant sums being deposited shortly before travelling to the UK, which on its face does not suggest use as a savings account so much as an account boosted with the intention of having funds available in the UK. Had it been necessary for me to resolve this issue I would have required some considerable persuasion before concluding that this was not in reality the Appellant's account rather than a savings account set up for the benefit of her daughter.

24. Be that as it may, after careful consideration of the available translation of an earlier statement in respect of the same account, and the most recent untranslated statement, it was common ground that the available balance was UAH19,010 55, which at an exchange rate of UAH33.7 to £1.00 was equivalent to £564.11 – which was below the 'destitution threshold'.

25. As regards the Appellant's home in the Ukraine, Ms Bello acknowledged that the decision-maker had not apparently had regard to the timescale in which any such asset might be realisable, irrespective of any issue between the parties as to the Appellant's ability to effect a sale in circumstances where she claimed the property was owned by her husband from whom she had fled. It was not clear whether, or to what extent, the decision-maker had taken into account the following passages from the Respondent's Instruction:

> "*An asset can be temporarily disregarded if it is clearly going to take time to realise, such as in certain cases the selling of a property. In determining whether to temporarily disregard the asset, the Case worker must consider:*
>
> *- the general state of the market in question (e.g. the property market):*
>
> *- the personal circumstances of the applicant, or dependant if appropriate (e.g. ill health)*
>
> *- the efforts made by the applicant or dependant to realise the asset.*"

26. Further, it was common ground that it was reasonable to infer that it was more likely than not that the Appellant would not be able to realise any property asset within the next 14 days in order to avoid destitution, even if she were in a position to authorise a sale of her home in Ukraine.

27. The Appellant had previously been in the UK with her daughter as a visitor for 2 months from December 2014 and about 4 months from December 2015. On these occasions she had stayed with her sister and had received the financial support of her own husband. The Respondent did not raise any issue in respect of the possibility of the Appellant avoiding destitution by staying with her sister presently, although a query in this respect was raised in the Directions issued by the Tribunal on 19 September 2016. The Appellant has provided a letter from her sister in response to those Directions in which it is explained that because the Appellant has left her husband the Appellant's sister's own husband is disapproving and not prepared to offer support. The Appellant's sister is financially dependent upon her husband and in any event does not wish to create tension in her own marriage. Ms Bello did not seek to pursue this issue any further at the hearing – in any event an issue not raised by the Respondent in the refusal.

28. Ms Bello – sensibly and realistically - did not seek to suggest that the Appellant's possession of business cards acquired during her previous visit to the UK significantly impacted on the issues that remained in the appeal in light of the above analysis.

29. Accordingly in all the circumstances I reject the reasoning in the Respondent's decision letter, which both miscalculates the 'destitution threshold' and takes into account assets that should properly have been disregarded.

30. I substitute my own decision for that of the Respondent, and find, on a balance of probabilities, that the Appellant and her daughter are presently destitute in that they have inadequate funds to meet their accommodation and basic living needs for the next 14 days.

31. It may be that in due course the Respondent will wish to return to the issue of the 'realisability' of the Appellant's home in Ukraine. If this be so then the parties may need to give consideration to the potential overlap in this issue with the basis of the Appellant's asylum claim, which appears to raise a conundrum

as to the approach to be taken by the decision-maker (and possibly in turn the Tribunal). It is not ordinarily the role of the Respondent's Asylum Support Unit, or in turn of this Tribunal, to evaluate a first instance asylum claim. Moreover the standard of proof applicable in evaluating an asylum claim – reasonable likelihood – is a lower standard than that applicable in determining entitlement to support – the usual civil standard of a balance of probabilities. The provision of support to an asylum seeker who genuinely needs it, is an important measure to enable an asylum seeker to pursue his or her claim, and is an essential part of the protection mechanism of the genuine refugee. In such circumstances it might arguably be considered to run contrary to the system of protection if a decision-maker, or this Tribunal, were in effect to evaluate the substance of an asylum claim applying the civil standard of proof and reach a conclusion that an asylum seeker was not entitled to support – and thereby interfere with that person's ability to present his or her asylum claim – in circumstances where the same asylum seeker would not need to establish his or her substantive asylum claim – that relates to the substantially the same facts - to the same standard of proof in order to be granted asylum.

32. Both parties may wish to give some further thought to this apparent conundrum, and in particular whether the answer may be that a decision-maker should not reach a conclusion on the 'realisability' of the asset of the former matrimonial home - if the ability to effect such a sale is possibly inhibited by the state of the Appellant's relationship with her husband - until such time as the substance of the asylum claim has been determined, unless by analogy to the approach adopted in Section 4 cases with reference to further submissions the claim and evidence relating to both the asylum claim and the issue of destitution may be characterised as clearly abusive or manifestly unfounded.

33. Be that as it may, for the reasons already given, the appeal is allowed: the Appellant is presently entitled to the provision of support in accordance with section 95 of the Immigration and Asylum Act 1999.

Mr Ian Lewis
Tribunal Judge, Asylum Support

SIGNED ON THE ORIGINAL **[Appellant's Copy]**

Dated 23 September 2016