FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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Appeal Number: AS/17/01/36372
UKVI Ref: 06/12/00449/006
Appellant's Ref.

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

Tribunal Judge	John Aitken, Chamber President
Tribunal Judge	Sehba Haroon Storey, Principal Judge
Appellant	Mr. SK
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, and provides reasons for the decision given on Monday the 8th day of January 2018, dismissing the appeal.

2. The appellant is a national of Somalia, born on 1 January 1972. He appeals against the decision of the Secretary of State, dated 6 January 2017, to discontinue support provided under Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). Asylum Support ceased because the appellant no longer satisfied any of the conditions in Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 ("the Regulations"). In particular, it was said that the appellant had continued in receipt of Support having submitted an application to remain as a stateless person, but that application was refused on 20 October 2016.

3. The appellant was reminded that it was a condition of his support to:

    a) Comply with standards of behaviour specified by his accommodation provider, including not engaging in antisocial or violent conduct;

b) Comply with reporting requirements;
c) Reside at the accommodation provided by the respondent and not be absent without her permission for more than seven days and nights or for fourteen days and nights in a six month period; and
d) Comply with specified steps to facilitate his departure from the UK.

4. The discontinuance decision also specified the following additional grounds for discontinuance, namely that:

a) There were no outstanding AVR applications lodged with Choices Voluntary Return Service;
b) No evidence had been lodged with the Home Office that the appellant was unable to leave the UK by reason of a physical impediment to travel or for other medical reasons;
c) A viable route to Somalia was available;
d) The appellant had not been given permission to proceed with an application for judicial review;
e) He had no outstanding appeals concerning his Asylum Support.

IMMIGRATION HISTORY

5. The appellant claims to have arrived in the United Kingdom (UK) in 1995. He claimed asylum on 20 November 2006. His claim was refused on 18 December 2006, and an appeal against that refusal was dismissed on 20 February 2007. On 9 September 2011, the appellant's representatives made further submissions for asylum and humanitarian protection on the appellant's behalf. These were accepted as a fresh claim on 23 September 2011, but rejected with a right of appeal. On 17 November 2011, Judge Brunnen dismissed the appeal against a decision to remove the appellant from the UK to Somalia. In so far as is relevant to my decision, Judge Brunnen's judgment provides as follows:

" 37. There is in fact no evidence to confirm that the appellant has been in the UK for sixteen years. IJ Sarsfield did not find it credible that the appellant would have been brought illegally into the UK by a UN employee or that that employee would have maintained and accommodated the appellant in his own home for ten years. He found it incredible that the appellant could have lived in this man's house for all that time but did not know the address or the surname of the family. Although IJ Sarsfield did not make any explicit finding that the appellant had not been in the UK since 1995, he certainly did not accept that he had been. On the evidence before me I find that the appellant has not established that he has been in the UK for sixteen years. In view of his lack of credibility it is impossible to know how long he has been here, save that it is known that he was here by July 2006 when he was first convicted in a magistrate's court. I do not accept that he arrived here significantly earlier than that.

38. Since the evidence does not establish any content of the appellant's private life, it is impossible to be satisfied that his removal to Somalia would interfere with it in a sufficiently serious manner as potentially to engage Article 8. However, lest it should be thought that the conclusion is an error, I will make further findings.

39 – 40 . …

41. … since July 2006 he has appeared before the courts on 24 occasions. Most of these appearances were for being drunk and disorderly. However four were for using disorderly behaviour or threatening or abusive words likely to cause harassment, alarm or distress and one appearance was for battery, for which he was sent to

prison for three months. Whilst this is low level offending, the appellant has nevertheless caused a significant nuisance while he has been here.
42. … I find that the decision is proportionate.

43 – 44……..

Conclusion

45. For all these reasons I find that to remove the appellant to Somalia would not cause the United Kingdom to be in breach of its obligations under the Refugee Convention, that the appellant is not entitled to humanitarian protection under paragraph 339C, that the respondent's decision is not unlawful under Section 6 of the Human Rights Act 1998 and that the decision under the Immigration Rules should not have been exercised differently,.

Decision

The appeal is dismissed.*"*

6. Thereafter, the appellant's application for permission to appeal the decision of 17 November 2011 was refused on 9 December 2011 and the appellant became appeal rights exhausted on 22 December 2011.

7. A second application by way of further submissions was lodged on 12 August 2013. These were rejected on 6 May 2015.

8. His third application for leave to remain as a Stateless person was lodged on 21 July 2016 and refused on 20 October 2016.

9. The fourth (and to date, the last) application for further leave to remain was made on 17 January 2017 on the grounds that he was a domestic worker who is also a victim of slavery or human trafficking. This application was rejected as invalid on 7 March 2017 because he did not pay the application fee and did not qualify for a fee waiver.

10. The appellant states that he now has new Immigration representatives, namely the Liverpool Law Clinic. By letter dated 5 January 2018, they indicate an intention to make a fifth application for further leave to remain based on twenty years residence and the appellant's statelessness. The solicitor states that she has not seen the appellant's file of papers, has not met the appellant and is unlikely to do so before "mid to late February 2018". Furthermore, she suggests that she will not make an application "that has no merit".

ASYLUM SUPPORT HISTORY

11. The appellant was granted Section 95 Support on 8 December 2006. This was terminated on 23 April 2007. He applied for Section 4 Support on 14 April 2009 and the application was approved on 24 April 2009. However, it appears that the offer of support was not taken up and the claim was therefore closed on 3 June 2009. The appellant applied again for Section 4 Support on 23 March 2010. The application was approved on 19 April 2010, only to be discontinued on 17 May 2011. A further application was made on 1 July 2011 and approved on the same date.

ASYLUM SUPPORT APPEALS

12. On 12 August 2011, the respondent discontinued support to the appellant because he no longer satisfied the conditions of Support under the Regulations. The appellant appealed to this Tribunal and argued that he was taking all reasonable steps to return to Somalia. On 31 August 2011, Tribunal Judge Saunders allowed his appeal on the basis that the appellant had taken "significant steps" to leave the UK and needed more time to take further steps. He added:

> "The *appellant must continue to be proactive in …attempting to return to Somalia, otherwise his support may well be in jeopardy when this matter is reviewed by the Secretary of State which may or may not be within the next three months. He has an obligation to pursue the obtaining of a travel document…to effect his return. The duty continues irrespective of the outcome of this hearing".*

13. On 11 July 2012, the respondent discontinued the appellant's support because he no longer satisfied the conditions of support under regulation 3(2) of the regulations. At the appeal hearing on 25 July 2012 before Tribunal Judge Briden, the respondent was not represented and the judge allowed the appeal on a technicality.

14. On 3 September 2012, the respondent discontinued support on a third occasion, again because the appellant no longer satisfied the conditions of support. Tribunal Judge Gandhi heard the appeal on 14 September 2012. Allowing the appeal, she found that the respondent had not shown what steps the appellant could reasonably take to leave the UK and that he was doing "*everything he can to leave*…"

15. On 7 July 2014, the respondent terminated the appellant's support on a fourth occasion, this time alleging that the appellant was in breach of his conditions of support. On 21 August 2014, Tribunal Judge Verity Smith found that the appellant was in fact in breach of his conditions because he was absent from his authorised address for two months and that the breach was persistent and unequivocal. She also had before her evidence of persistent drunk and disorderly behaviour, failure to attend court when required to do so and a suggestion, (which it appears was not challenged), that 40% of the weekly calls made to the local police station arose out of the appellant's behaviour. Judge Verity Smith found that the appellant had failed to demonstrate reasonable excuse for his behaviour. However, as he was homeless and destitute and his further submissions of 12 August 2013 remained outstanding, she remitted the appeal to the respondent for further consideration.

16. On 9 May 2015, the respondent discontinued support to the appellant for the fifth time because he no longer satisfied the conditions for receipt of section 4 support. This followed the rejection on 9 May 2015 of the appellant's further submissions of 12 August 2013. On 28 May 2015, Tribunal Judge Briden allowed the appeal because,

> "…the point has not yet been reached where it can be said that [the appellant] has not [been] taking all reasonable steps to leave the UK".

17. On 20 June 2016, the respondent discontinued support to the appellant for the sixth occasion, again, alleging that the appellant no longer satisfied the conditions for receipt of section 4 support. In particular, she said that the appellant had not demonstrated he was taking all reasonable steps to leave the UK.

18. That appeal came before Tribunal Judge Rayner on 25 July 2016. He accepted that the respondent had demonstrated she had grounds on which to discontinue support. The judge also had before him evidence of a new application for further leave to remain as a "stateless person" made four days prior to the hearing – (evidence which the Presenting Officer described in closing submissions as "a single sheet of an [incomplete] application" and proof of postage that contained no address). The judge

nevertheless accepted that the appellant had made a valid application for further leave, which brought him within the criteria for support under regulation 3(2)(e).

19. On 6 January 2017, the respondent discontinued support to the appellant for the seventh time, pursuant to Regulation 3(2)(a) – (e) of the regulations. The appeal came before Tribunal Judge Penrose on 3 February 2017. He found that:

a) the appellant's clear intentions are to remain in the UK;
b) what is required is for the appellant to take "some steps to leave";
c) he has not made out a case that "there is no reasonable step which could be taken";
d) Medical evidence submitted does not demonstrate that he is unable to leave the UK;
e) there is no evidence that in the opinion of the Secretary of State there is no viable route of return to Somalia;
f) there is no evidence of a current judicial review application;
g) the provision of accommodation is not necessary for the purpose of avoiding a breach of the appellant's Convention rights because it is open to him to avoid the effects of destitution by taking some steps to leave the UK and thereby qualify for support under regulation 3(2)(a).

JUDICIAL REVIEW PROCEEDINGS

20. On 13 February 2017, the appellant commenced judicial review proceedings on the grounds that:

a) the available evidence shows that it is not possible for him to return to Somalia and therefore he cannot avoid the effects of destitution by leaving the UK;
b) the hearing before the Tribunal was unfair because the Secretary of State failed to place evidence concerning returns to Somalia before the Tribunal;
c) the Secretary of State has unlawfully left him in a position where he is at imminent risk of being homeless and unable to meet his essential living needs; and
d) the Secretary of State's decision to discontinue his support was irrational in the light of her position as regards returns to Somalia and she has acted unreasonably in failing to inform the Tribunal of that position.

21. On 14 February 2017, the Administrative Court granted the appellant interim relief, essentially section 4 Support. On 10 October 2017, the Court remitted the appeal by consent, for hearing *de novo.* The sealed Consent Order was served on the Tribunal on 9 November 2017. The terms of the Consent Order state that the appellant's solicitors and the Secretary of State's representatives agree that the Tribunal made an error of law. The tribunal did not take part in the judicial review proceedings and was not a signatory to the Consent Order. Under the terms of the Consent Order, the respondent must provide the appellant with section 4 support until at least seven days after the new decision in relation to this appeal. That period expires seven days from the date of promulgation of this decision.

THE DE NOVO HEARING

22. The Tribunal issued directions in the proceedings on 10 November 2017, and a notice of hearing for 11 December 2017 was issued to two firms of solicitors. Neither

appeared to know the appellant's whereabouts and the hearing was adjourned to 8 January 2018.

THE ORAL EVIDENCE

23. At the hearing, the appellant was represented by Ms. Gellner, of the Asylum Support Appeals Project (ASAP) on the instructions of the Liverpool Law Clinic. Mrs. Crozier appeared for the respondent.

24. In her opening remarks, Ms.Gellner informed us that she did not intend to argue the case under regulation 3(2)(a) because the appellant conceded that he is not taking reasonable steps to return to Somalia. The sole thrust of his appeal was therefore directed at the need for support to continue in order to avoid a breach of his Convention rights within the meaning of the Human Rights Act 1998 (as per regulation 3(2)(e))

25. The appellant gave oral evidence in English. He confirmed that in 2016 he made an application for recognition as a stateless person. The application form was provided by Red Cross in Derby, but he did not receive any advice and professional assistance to complete the application. The application was refused. He maintained that he has never seen any employee of Burton and Burton Solicitors or Bhatia Best solicitors, notwithstanding that the former represented him in proceedings before two First – tier Tribunal hearings, and the latter represented him before the Administrative Court in judicial review proceedings. He could not initially recall receiving any correspondence from either firm but added that he may have received one letter.

26. The appellant confirmed that in January 2017, he applied again for humanitarian leave. Once again, he said the form was provided by Red Cross, Derby. The application was rejected in March 2017 because he did not pay the application fee. He said that had he paid the fee, he believes the application may have been successful. He confirmed that he is now represented by the Liverpool Law Clinic and he intends to provide his new solicitor with evidence that he is a victim of human trafficking and slavery to enable her to submit an application on his behalf. Asked by Mrs. Crozier to identify the evidence he intended to pass to his solicitor, the appellant was unable to do so. He said that he had made one application for voluntary return but he was advised by AVR staff that there were no voluntary returns to Somalia. He also claimed to have been told that it was dangerous to return vulnerable individuals to Somalia, in particular those who had spent a lengthy period in the UK and that he could be killed if he was to return.

27. Since the commencement of judicial review proceedings, the respondent has provided him with accommodation and vouchers in Sheffield. He lives in shared accommodation with other asylum seekers who, he says, are provided cash by the Home Office. Referring to his claimed alcohol dependency, the appellant said that he exchanged food for alcohol with friends and other residents. He also claimed that he was receiving treatment for his alcohol dependency and wanted to stop drinking.
28. Finally, in response to questions from me, the appellant said he did not know that there was a process for returning voluntarily to Somalia but that even if he was able to return safely, he was not willing to do so.

SUBMISSIONS FOR THE RESPONDENT

29. Ms Crozier for the respondent, agreed that the sole issue for determination was the appellant's eligibility for asylum support under Regulation 3(2)(e). She reminded us that the appellant's nationality is not in dispute as the respondent, the Immigration

and Asylum Tribunal and the appellant all agree that he is a Somali national. She drew our attention to the number of applications made by the appellant for various types of leave and asked us to question his credibility and that of his multiple claims. She reminded us that the appellant is appeal rights exhausted and has no outstanding applications. Even if Liverpool Law Clinic are willing to assist him in his fifth application for leave to remain, which Mrs. Crozier considered unlikely given the absence of merit, the application would probably not be made before May 2018. In her submission, the appellant has failed to discharge the burden of proof that lies upon him.

SUBMISSIONS FOR THE APPELLANT

30. On behalf of the appellant, Ms. Gellner conceded that her client was not taking reasonable steps to return to Somalia, and had no intentions of doing so. She added that even when he signed up for and explored voluntary return through *Choices*, his motivation was a desire to keep his support going. Citing *R (on the application of Botan) v Secretary of State for the Home Department* [2017] EWHC 550 (Admin) (*Botan*) as authority, she argued that there is little prospect of the respondent forcibly removing the appellant to Somalia. She added that her enquiries suggested that in 2017, there were only two enforced and two voluntary returns to that country. She asked us to acknowledge that it is difficult to obtain travel documents for Somalia. Combined with the appellant's intention to submit a further application for leave to remain as a stateless person, Ms. Gellner sought to persuade us that the appellant comes within the category of persons who potentially benefit from *R (on the application of NS) v Social Entitlement Chamber of the First-tier Tribunal* [2009] EWHC 3819 (Admin) (*N(S)*). She accepted, when pressed, that her client currently lacked the evidence to support his claim, adding that his case had not been looked at yet by Liverpool Law Clinic. When asked whether in her professional opinion, regulation 3(2)(e) was designed to cover situations such as the appellant's, she was quick to acknowledge that it would have to be an exceptional case for regulation 3(2)(e) to come to the aid of someone whose application for further leave to remain was not even ready for submission.

31. Notwithstanding the acknowledged weaknesses in her client's case, Ms. Gellner submitted that regulation 3(2)(e) was not confined to a particular set of circumstances and that the appellant was a physically and mentally vulnerable individual who would suffer inhuman and degrading treatment if support was withdrawn and he became street homeless. Additionally, she argued that the appellant potentially could benefit from the dicta in *N(S)* although she did not develop this argument further.

THE BURDEN AND STANDARD OF PROOF

32. The burden of proof is upon the Secretary of State to demonstrate that there has been a relevant change in circumstances justifying the discontinuation of Support previously awarded to the appellant. Once discharged, the burden shifts to the appellant to demonstrate his continued entitlement to support. The standard of proof is always a balance of probabilities.

THE DOCUMENTARY EVIDENCE

33. We have considered all the evidence that is before us, including the Secretary of State's bundle of evidence. We have had regard to all the documents contained

therein, notwithstanding that we may not refer to specific documents below. We have had particular regard to the letter dated 1 February 2017 from the appellant's then General Practitioner in which the doctor states that the effects of becoming homeless would have a profound effect on the appellant's asthma. There is no reference to the appellant's claimed alcohol dependency or any other medical condition.

34. In a letter dated 19 December 2017, presumably obtained to support his appeal before this tribunal, the appellant's new General Practitioner (since February 2017) refers to the appellant's problems with asthma, recent problems with falls, injuries and maintaining balance and a problem with alcohol misuse and probable dependency.

35. I have also read the letter from Liverpool Law Clinic, dated 5 January 2018, three day before the hearing. I note that the solicitor in question does not possess the appellant's file of papers from his previous representatives, has not met him to take instructions and is unable to see him before mid – February 2018. It is unlikely that she will be in a position to prepare a further application on the appellant's behalf before April 2018.

THE LEGISLATIVE FRAMEWORK

36. In so far as is relevant, Section 4 of the 1999 Act (as amended by section 49 the Nationality, Immigration and Asylum Act 2002 and section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004) provides:-

Accommodation for persons on temporary admission or release

'(1) […not relevant]
(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—

(a) he was (but is no longer) an asylum-seeker, and
(b) his claim for asylum was rejected.

37. Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 ("the Regulations"), which came into force on 31 March 2005, lays down the criteria to be followed in respect of failed asylum-seekers and their dependants and provides:

"Eligibility for and provision of accommodation to a failed asylum-seeker

'(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-

(a) that he appears to the Secretary of State to be destitute, and
(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.

(2) Those conditions are that—

(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain travel documents to facilitate his departure;

(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;

(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;
(d) he has made an application for judicial review of a decision in relation to his asylum claim –

(i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998; or
(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994; or

(iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980; or

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."

38. Section 103 of the 1999 Act as amended provides a right of appeal to the First-Tier Tribunal (Asylum Support). So far as is relevant, this states:

'(1) […not relevant]

(2a) if the Secretary of State decides not to provide accommodation for a person under section 4, or not to continue to provide accommodation for a person under section 4, the person may appeal to the First-Tier Tribunal.

(3) On an appeal under this section, the First-Tier Tribunal may –

(a) require the Secretary of State to reconsider the matter;
(b) substitute its decision for the decision appealed against; or
(c) dismiss the appeal.'

GUIDANCE FROM THE COURTS

39. In *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), the leading Country Guidance case on Somalia, the Upper Tribunal (UT) considered a large body of evidence on the political situation in Mogadishu, Somalia. Whilst recognising the presence of some element of risk, they held that such risk could be avoided or reduced by the taking of some reasonable steps. Notwithstanding the presence of risk, they found as fact that large numbers of Somali Diaspora were voting with their feet and returning to Somalia via several safe routes of return, namely Istanbul, Nairobi and the Middle East and that these flights are generally fully booked. They were further satisfied that as a general rule, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) will not face a real risk of persecution or risk of harm on returning to Mogadishu. In particular, he will not be at real risk, simply on account of having lived in a European location for a period of time.

40. Furthermore, the UT found evidence that Mogadishu was experiencing an economic boom and that Somali Diaspora may now return to live in Mogadishu without facing a real risk of destitution. In their judgment, it was for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.

41. The case of *Birmingham City Council v Clue* [2010] EWCA Civ 460 (*Clue*) concerned the exercise of a power or the performance of a duty by local authorities to support persons illegally present in the United Kingdom. Dyson LJ, giving the lead judgment, held [at 62] that where there is a legal impediment to an applicant returning to their country of origin, local authorities (and the Asylum Support Tribunal by analogy), cannot properly justify a refusal to provide assistance. In his judgment, if an arguable application for leave to remain on Convention grounds can only be pursued from within the United Kingdom, this presents a legal impediment to their return. In such circumstances, he found it difficult to conceive how assistance could properly be refused.

42. Of particular relevance to asylum support appeals under Regulation 3(2)(e), are the comments of Dyson LJ's [at 66] that:

> " ….*when applying Schedule 3, a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not "obviously hopeless or abusive" …. Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of an application, which has already been rejected."*

43. In *N (S)*, Stadlen J had this to say [at 12] concerning the eligibility for section 4 Support under Regulation 3(2)(e):

> *"……There is in the ordinary course an obligation under the rules on a person who wishes to apply for judicial review to send a pre-action protocol letter to the Secretary of State, giving him an opportunity to explain his views and think again. It was pointed out to me, it seems to me on its face with some force, that a difficult question might arise if a claimant who required accommodation under section 4 was put in a position of there being a conflict between his need or her need to comply with the pre-action protocol letter requirement on the one hand and there being an absolute bar against complying with the requirement of 3(2)(e), where representations had been held not to amount to a fresh claim until and unless a claim for judicial review had been issued. On the other hand, as appears in discussion of these issues in two authorities which were placed before me, difficult questions may arise. It is notorious that there are many cases of claimants whose appeal rights in an asylum case are exhausted who make representations which are entirely without merit for the sole purpose of seeking to delay the moment at which they are removed. Questions may arise as to how that fact is to be taken into account in the question of what is the approach to be adopted on an application for section 4 accommodation where there is a challenge, either actual or anticipated, against a decision that fresh new representations do not amount to a fresh claim.*

44. In *R (on the application of Botan) v Secretary of State for the Home Department* [2017] EWHC 550 (Admin) (*Botan*), Lang J considered the lawfulness of the appellant's detention pending his enforced removal to Somalia. Having examined the leading UK authorities on Somalia (including *MOJ* aforesaid), the current conditions (as at March 2017) and the August 2016 Memorandum of Understanding, signed between the UK Government and the Somali Government, Lang J concluded [at 54] that none of the legal authorities supported the contention that the Somali Government had refused to accept enforced returnees. Ms. Gellner relied on the judgment [at 92] to support her submission that there had only been two removals to Somalia in 2017.

FINDINGS OF FACT AND REASONS

45. In arriving at our findings of fact, we have taken into account the totality of the evidence before us, in particular, the Secretary of State's refusal of asylum and Support; the decisions of the FTT tribunal judges referred to above; subsequent decisions of the Secretary of State on humanitarian and statelessness grounds; the concluded judicial review proceedings against the February 2017 judgment of this Tribunal; the oral evidence of the appellant; all medical and other documentary evidence and the submissions of both representatives.

46. We make the following findings of fact:

a) The appellant is a failed asylum seeker. His appeal against refusal of asylum has been finally determined and he has exhausted his appeal rights.

b) He is a Somali national born on 1 January 1972.

c) There is no record of his entry into the United Kingdom or any evidence of his presence here until July 2006.

d) Two Immigration Judges have considered the appellant's asylum and protection claims. They did not find the appellant a credible witness and rejected his account that he was smuggled into the UK by UN officials who then kept him in their home until they left the UK. The appellant has not produced any credible evidence in support of this claim. On the evidence before us, we reject as highly improbable his claimed period of stay in the UK and manner of entry. We find that the appellant did not arrive in the UK much before July 2006.

e) The appellant has a long criminal history. He has been arrested on more than twenty-four occasions largely for public order offences. He has taken up a great deal of police time and public resources. The vast majority of his criminality relates to his problems with alcohol consumption and violent and unsocial behaviour.

f) In relation to his claim that he has resided in the UK for over 20 years, the appellant was not able to persuade Immigration Judges in 2006 that he had arrived in the UK as claimed and he has not produced any credible corroborative evidence to support his claim. We reject his claim of 20 years residence as highly improbable and incredible. In the face of this, it is difficult to see how he could persuade anyone that a claim based on length of residence, has any merit.

g) Regulation 3(2)(a) requires a claimant for section 4 Support to demonstrate that they are taking *all reasonable steps*. Over the past seven years, the appellant has managed to persuade Asylum Support Judges that he was taking such steps to leave the UK in preparation for a departure from the UK. We find as fact that these steps were minimal, designed solely to secure section 4 support (as acknowledged by Ms. Gellner) and that at no stage did he genuinely intend to leave the UK.

h) We accept that the appellant may have a problem with alcohol dependency, as suggested in his GP's letter of December 2017. There is no earlier reference to such dependency in the medical evidence before us. We find that the earliest commencement date is therefore likely to be February 2017, when the appellant first registered with his current GP. We note that the previous GP made no reference to alcohol dependency or to any related treatment.

i) We find that the appellant has been referred to the Alcohol Misuse Service in Sheffield for treatment for probable alcohol dependency. We accept that he has

made good progress towards reducing his alcohol intake and that he is committed to his treatment. There is also medical evidence to support a diagnosis of moderate/severe asthma for which he is appropriately medicated. There is no evidence that his asthma is uncontrolled by the medication. Regulation 3(2)(b) was not argued before us. It is clear that neither condition is sufficiently severe to bring him within regulation 3(2) (b).

j) It is agreed that regulation 3(2)(c) is not applicable in this appeal because in the opinion of the Secretary of State (and a number of airlines that fly passengers to Mogadishu regularly, including Turkish Airlines), a Safe route of return is available to Somalia. In fairness, regulation 3(2)(c) was not argued before us.

k) We are satisfied that the appellant has no outstanding applications before the respondent and any future applications are unlikely to be made before April 2018. As the appellant does not currently have any qualifying pending applications, he find that he cannot benefit from regulation 3(2)(d) or *N(S).*

l) We find that the only avenue available to the appellant to secure section 4 Support is regulation 3(2)(e). We accept that he is destitute. We do not accept that his intention to see a solicitor at the Liverpool Law Clinic sometime in mid - February 2018 and thereafter to apply for leave to remain as a stateless person at some point in the future, entitles him to support under Regulation 3(2)(e). We note that his fifth application for leave to remain was refused in March 2017, and that he has taken no steps to seek legal assistance to launch a sixth application in the past ten months. His claim to being stateless has already been examined by the respondent and rejected. Any repetition is, in our judgment, simply a delaying tactic and obviously hopeless and abusive.

m) We are satisfied that the appellant has no incentive to make any further applications. It is only when the appellant's support is threatened with termination that he takes action to seek help from old and new solicitors. In our judgment, his mission is to delay his removal and to extend his stay in the UK in the hope that the respondent will allow him to remain on the basis of long residence.

DISCUSSION

47. Notwithstanding Ms. Gellner's helpful concession that Regulation 3(2) (a) – (d) are not in issue before us, we make the following observations.

Taking all reasonable steps

48. It is incumbent upon unsuccessful asylum seekers who are appeal rights exhausted to demonstrate that they are taking all reasonable steps to return to their country of origin, before they can establish entitlement to section 4 Support. In our judgment, it would be quite wrong for the respondent to discontinue Support under Regulation 3(2)(a) without specifying what other reasonable steps are available, but not yet taken up, having regard to the appellant's country of nationality. It would also assist the process if the respondent was to provide any country information available.

49. At the very least, we find that reasonable steps include (but are not limited to):

a) Establishing, where available, independent voluntary routes of return;
b) Registering for voluntary return with *Choices*, even if the evidence suggests that enforced removals to the country of nationality are not effective;
c) Collecting evidence independently to support the claimed nationality (where challenged or not established) or seeking assistance to do so from charities working on the ground in the country of nationality;

d) Approaching an embassy to obtain travel documents;
e) Where there is no embassy in the UK, seeking assistance to approach the embassy nearest to the UK;
f) Keeping appointments arranged independently or by the Home Office;
g) Requesting financial assistance, if required, to cover the cost of return; and
h) Assisting the respondent's efforts to affect a voluntary return.

50. Where there is something specific an appellant is expected to do but has not done, the respondent must provide details in the discontinuance letter, or in response to directions, when requested to do so. It would be quite wrong for the respondent to simply cite Regulation 3(2)(a), without identifying further, what more could reasonably be done. It would be equally wrong for Asylum Support judges to allow or remit an appeal because the decision maker has failed to provide a comprehensive list of all reasonable steps. Doubtless, every case will be different and what appears reasonable in respect of one country, may not be reasonable for another. Asylum Support judges must decide the appeal only after having considered all the available evidence.

Inability to leave the UK

51. In *R (on the application of the SSHD) v Chief Asylum Support Adjudicator* [2006] EWHC 1248 (Admin) Holman J held that the proper approach to Regulation 3(2)(b) was a careful and deliberate two-step approach. First, it is necessary to consider whether an appellant is unable to leave the UK. If they are unable to leave, it is necessary to continue to the next step and determine whether that inability to leave is:

(a) by reason of a physical impediment to travel or
(b) some other medical reason.

The application of Regulation 3(2)(b) does not provide for any test of whether it was undesirable or unreasonable for an appellant to leave the UK but simply whether he is unable to do so.

52. Ms. Gellner has rightly conceded Regulation 3(2)(b). On the very limited medical evidence available, it cannot be said that the appellant's moderate/severe asthma controlled by medication reaches the requisite level of severity such that it presents an inability to leave the UK. The same can be said of the appellant's probable alcohol dependency.

Viable route of return

53. In *Rasul, R (on the application of) v Asylum Support Adjudicator & Ors* [2006] EWHC 435 (Admin), Wilkie J held that the opinion of the Secretary of State for the purpose of regulation 3(2)(c), is a policy decision which is taken in respect of a whole country and is not a decision related to a particular individual or the journey to be undertaken. Where Regulation 3(2)(c) is in issue, the Asylum Support judge is limited to considering whether that opinion is truly held.

54. Given the Memorandum of Understanding (MOU) signed in August 2017 by the Somali government and the UK, we are satisfied that the respondent is able to enforce returns to Somalia. We are unclear what enquiries Ms. Gellner made to support her claim that during 2017, only two enforced and two voluntary returns to Somalia were effective. It is clear from *Botan* [at 92] that as at March 2017, there were two successful enforced returns. We do not know how many voluntary returns there were from the UK but the country guidance information on Somalia suggests that flights to Mogadishu via Istanbul and other routes are generally full of returnees to Somalia. This would tend to suggest that there are many more voluntary returns to Somalia than Ms. Gellner has

been able to establish. Additionally, on the evidence before us, in particular *MOJ*, the current UTIAC Country Guidance case on Somalia, we accept that worldwide voluntary returns to Somalia have been possible since at least 2014 for those genuinely seeking to return to Somalia. We are not aware that the Somali Authorities have ceased to honour the MOU and in the circumstances, we are satisfied that in the opinion of the Secretary of State there is a viable route of return to Somalia irrespective of the number of enforced removals to that country.

Application for judicial review of an asylum claim

55. Regulation 3(2)(d) is very specific and applies only to cases where permission to proceed to judicial review has been granted by a relevant court of the UK. The appellant's last application for stateless leave to remain was refused in October 2016. He did not apply for permission to commence judicial review proceedings. Accordingly, he cannot benefit from this provision.

Avoiding a breach of a person's Convention rights

56. In N(S), Stadlen J recognised the difficult position of the genuine appellant who has not reached the stage in potentially meritorious judicial review proceedings of issuing a pre-action protocol letter to the Secretary of State. He held that there should be no bar to such an appellant receiving section 4 Support under Regulation 3(2)(e). He distinguished the meritorious appellant from the notorious claimant who makes representations that are entirely without merit for the sole purpose of seeking to delay the moment at which they are removed. In our judgment, the appellant falls squarely under the latter description.

57. A mere possibility that an appellant intends to make an application for further leave to remain is insufficient to engage regulation 3(2)(e). On the facts before us, there is no disagreement that the appellant is a Somali national. The appellant has consistently failed to produced any credible evidence that his national government has refused to acknowledge his status. He cannot therefore argue that he is stateless.

58. There is no credible evidence before us that he is a victim of human trafficking. His claim to be trafficked by UN officials, has already been rejected by two Immigration Judges and we have no hesitation in rejecting it also. Given the appellant's history of multiple unmeritorious applications and his failure to produce any corroborative evidence before us, we find as fact that any potential claim is likely to be hopeless and abusive. Accordingly, he has failed to demonstrate entitlement to the protection afforded by regulation 3(2)(e).

59. The appeal is dismissed.

Signed: Mr John Aitken
Chamber President, Social Entitlement Chamber Dated 23 February 2018

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

Signed: Ms Sehba Haroon Storey
Principal Judge, Asylum Support

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