FIRST-TIER TRIBUNAL
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Appeal Number AS/18/04/37964
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IMMIGRATION AND ASYLUM ACT 1999
THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL)
(SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Tribunal Judge Ms Gill Carter

Appellant Mr YN

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 gives reasons for the decision given on Monday the 16th day of April 2018, dismissing the above mentioned appeal.

2. The appellant, a 55 year old citizen of Senegal, appeals against the decision of the Secretary of State who, on 29 March 2018, decided to discontinue support that had been provided to him under Section 4(1) of the Immigration and Asylum Act 1999 (as amended) (the 1999 Act).

3. The grounds for the decision are that, following a review and pursuant to a change in legislation and policy, the appellant no longer satisfies the criteria for that support. Although the appellant's destitution is acknowledged, it is argued that there is no legal or practical obstacle preventing him from leaving the U.K. and, in this way, avoiding any breach of his Convention Rights which may be occasioned by the withdrawal of support.

4. The appellant attended the hearing and was represented by Mr Gray of the Asylum Support Appeals Project. The Respondent was represented by Mrs Crozier. It was agreed at the outset that the hearing could fairly proceed by way of submissions only. The proceedings were contemporaneously interpreted to the appellant by an independent interpreter in the French language.

Background

5. The appellant's immigration history is lengthy but is, at least in part, relevant to his support position. He arrived in the UK on 7 September 2009 on a visa which was valid until 12 February 2010. On 11 May 2010 he was encountered by police, noted to be an over-stayer and served with a Removal Decision. On the same day the appellant submitted an application for asylum.

6. The CID printout shows a subsequent conviction for immigration offences. A Liability to Deportation Notice was served upon the appellant in HMP Bristol on 29 July 2010 and he was served with a Decision to Make a Deportation Order and Reasons for Deportation and Asylum Refusal Notice on 29 September 2010. He was granted an in-country right of appeal and, on 5 October 2010, he lodged such an appeal. This was dismissed at a First-Tier Tribunal (IAC) hearing on 16 November 2010. Permission to appeal further was twice refused and the appellant became appeal rights exhausted on 9 February 2011. A signed Deportation Order has remained in existence since 1 December 2010.

7. The appellant's first application for support under Section 4(1)(c) of the 1999 Act was submitted on 20 April 2011 and granted the following day. However, support was not taken up because immigration bail was refused. On 23 May 2011 a further application for Section 4(1)(c) support was granted and the appellant travelled to Section 4(1) accommodation in early July 2011, following a grant of bail by an Immigration Judge. Support and accommodation has been provided continuously to the appellant by the respondent since that time. It is the 29 March 2018 decision to discontinue that support which is the subject of the current appeal.

The Relevant Legislative and Policy Provisions

8. Section 4(1) of the 1999 Act, as amended, stated:

"The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –

(a) temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 to the Immigration Act 1971;

(b) released from detention under that paragraph; or

(c) released on bail from detention under any provision of the Immigration Acts".

9. On 15 January 2018 the power to provide support under Section 4(1) of the 1999 Act was repealed by Regulation 2(d)(i) of the Immigration Act 2016 (Commencement No. 7 and Transitional Provisions) Regulations 2017 (the Transitional Provisions Regulations). This brought into force Paragraph 1 of Schedule 11 to the Immigration Act 2016 (the 2016 Act), albeit limited to Section 4(1).

10. It was agreed that the appellant falls within a category of persons for whom Section 4(1) support is not automatically abolished, since he was being provided with Section 4(1) accommodation immediately before 15 January 2018 and thus attracts the transitional exemption set out in Paragraph 46(1)(a) of Schedule 11 to the 2016 Act.

11. The respondent has issued guidance to Home Office staff dated 16 February 2018 on the handling of transitional cases (the Transitional Cases Policy). The guidance states that, "*Each case should be considered on its individual merits, but as a general rule support should only continue to be provided where both the following circumstances apply:*

- *there is a genuine (legal or practical) obstacle that prevents [the supported person] from leaving the United Kingdom;*
- *The person is likely to suffer inhuman or degrading treatment as a result of not being provided with accommodation and the means to meet their essential living needs"*

12. Caseworkers are required to undertake a human rights assessment when considering the withdrawal of Section 4(1) support, which is set out in the guidance as follows:

"The first step in determining whether accommodation and/or support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR (see: R (Limbuela) v Secretary of State [2005] UKHL 66)…..
Where the decision maker concludes that there is no support from any ….sources then there will a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of Article 3 of the ECHR. However, if the person is able to return to their country of origin and thus avoid the consequence of being left without shelter or funds, the situation outlined above is changed. This is because of the following:

- *there is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (see: R(Kimani) v Lambeth LBC [2003] EWCA Civ 1150)*
- *if there are no legal or practical obstacles to return home, the denial of support … does not constitute a breach of Human Rights (see: R(W) v Croydon LBC [2007] EWCA Civ 266)"*

The Submissions

13. Mr Gray's submissions focussed on an apparent inconsistency with regard to the appellant's bail and support status. The relevant documents provided by the respondent (in addition to the CID printout) are: (i) the latest variation of bail conditions, which is dated 11 April 2018 (and appears to relate to a change in reporting office) and (ii) an IS96 Notification of Temporary Admission dated 17 April 2013.

14. Mr Gray argued that, since the appellant was apparently granted temporary admission in 2013, he must have been provided with support under Section 4(1)(a) or (b) since that time and not under Section 4(1)(c) as maintained by the respondent.

15. The significance of this distinction is that (as set out in the Transitional Cases Policy) the Secretary of State provided support under Section 4(1)(a) or (b) when a person was destitute, had no avenue to any other form of support and *"..the provision of support [was] necessary to avoid a breach of their human*

rights". By contrast, support under Section 4(1)(c) was provided when a person was unable to access a bail address through any other means in order to facilitate an application for bail to the First Tier Tribunal (IAC).

16. Mr Gray conceded that there was no documentary evidence to demonstrate that support was ever granted under Section 4(1)(a) or (b), but he argued that this was implied by the decision to continue to provide support after the grant of temporary admission. He asserted that the Secretary of State must, at that time, have been satisfied that support was necessary to avoid a breach of the appellant's human rights and that the burden of proof therefore now fell on the Secretary of State to demonstrate what had changed since that time.

17. Mr Gray emphasised the unusual factual matrix of this case and concluded that the Secretary of State had failed to discharge the burden of proof and thus that the appeal should succeed. At the very least, Mr Gray argued, the matter should be remitted for further enquiry by the Secretary of State into the temporary admission and support position.

18. Mrs Crozier maintained that Home Office records indicate the appellant to have remained continuously on immigration bail since 2011 (the somewhat anomalous April 2013 temporary admission document notwithstanding). She points to the Deportation Order, which remains in force and the evidence of a bail variation as recently as April 2018. The Home Office records also indicate that the appellant's support provision was never reviewed after the 2011 grant of Section 4(1)(c) support until the change in legislation and policy that led to the 29 March 2018 discontinuance decision. There is nothing on the Home Office file to suggest that the appellant's bail or his Section 4(1)(c) support came to an end in April 2013.

19. She asserted that, even if the appellant had been supported in the past under Section 4(1)(a) or (b), such arguments would now be academic since, post 15 January 2018, all persons temporarily admitted to the UK or released from detention are subject to a single framework of immigration bail. The Home Office Transitional Cases Policy, which sets out the process for reviewing and (where appropriate) discontinuing support previously provided under Section 4(1), applies equally to all such cases.

My Decision

20. In this case the appellant's destitution was accepted and thus the key issue for the hearing was whether or not, by taking steps to return to Senegal, the appellant could be expected to remedy any breach of his Convention Rights occasioned by the withdrawal of support.

21. It was agreed at the outset of the hearing that this was a case to which the transitional provisions apply. It is important to note that this exemption from the abolition of Section 4(1) support does not guarantee that the appellant continues to be entitled to this support. The effect is merely that his support did not automatically cease on 15 January 2018 and he retained a right of appeal against any subsequent decision to discontinue that support.

22. This is a discontinuance of support and I accept therefore that the burden of proof rests initially with the respondent. The standard of proof is that of a balance of probability. I do not, however, accept that the respondent must be put to proof of a change in unknown and theoretical exceptional circumstances which are alleged to have given rise to a grant of Section 4(1)(a) or (b) support. Assertions of support by implication are insufficient. I find that it is abundantly

clear from the paperwork that the 2011 grant of support under Section 4(1)(c) was never reviewed and that no grant of support under an alternative provision was ever issued. Rightly or wrongly support continued under Section 4(1)(c) until the 29 March 2018 discontinuance.

23. Even if I am wrong in this and support was granted under Section 4(1)(a) or (b), any such grant would have been erroneous since the appellant was at the material time a failed asylum seeker and the respondent's policy was that Section 4(1)(a) and (b) support was not available to persons who could bring themselves within other support provisions - in this case Section 4(2).

24. I further conclude that the remittal of this matter to the Secretary of State for reconsideration serves no purpose. Even had there been a grant of Section 4(1)(a) or (b) support, such support would now fall for review in the same way and under identical provisions as Section 4(1)(c) support.

25. Support under Section 4(1) is provided at the Secretary of States discretion, as confirmed in *Razai [2010] EWHC 3151 (Admin)* at paragraph 24. As such, the Secretary of State is at liberty to issue policies to caseworkers to guide them in exercising this discretion. Such policies may be reviewed from time to time, as occurred in February 2018 in response to the abolition of Section 4(1) support.

26. There was no dispute that the respondent's Transitional Cases Policy applies in this case. Mr Gray pointed out that the Secretary of States policy does not in itself have legislative force. This I accept. However, the Secretary of State's policy reflects existing case law in concluding that there is no duty under the European Convention to support persons who are freely able to return to their country of origin and that, if there are no legal or practical obstacles to such return, the denial of support does not constitute a breach of Convention Rights – see *R(Kimani) v Lambeth LBC [2003] EWCA Civ 1150* and *R(W) v Croydon LBC [2007] EWCA Civ 266.*

27. The appellant's support has been reviewed by the Secretary of State in the context of changes to legislation and policy. It was concluded that he is no longer entitled to Section 4(1) support because he is able to resolve any potential breach of his Convention Rights arising from destitution by returning to Senegal. Mr Gray conceded during the course of the hearing that there are no current legal or practical obstacles to prevent the appellant's departure from the U.K.

28. On the basis of the above I am satisfied that respondent's decision is correct in law. Should the appellant commence all reasonable steps to leave the UK, he may apply to the respondent for support under Section 4(2), given his status as a failed asylum seeker.

29. Taking all of the evidence and submissions into account, I conclude that the appellant is no longer entitled to support under Section 4(1) and his appeal is accordingly dismissed.

Ms Gill Carter
Deputy Principal Judge, Asylum Support
SIGNED ON THE ORIGINAL COPY [Appellant Copy] Dated 19/4/18