



FIRST-TIER TRIBUNAL ASYLUM SUPPORT

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Private & Confidential

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Appeal Number AS/18/12/39001
UKVI Ref. E1425920

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

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| Tribunal Judge | MS SALLY VERITY SMITH |
| Appellant | MS CME |
| 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 Wednesday 9th January 2019 substituting my decision for that of the Secretary of State by determining that the appellant is eligible for support under Section 95 of the Immigration and Asylum Act 1999.
2. The appellant is a citizen of Nigeria, born 8 August 1989. She appeals against the decision of the Secretary of State dated 7 November 2018 that she was not eligible for Section 4 support on the grounds that she is not a failed asylum seeker because her claim for asylum had been implicitly withdrawn.
3. The appellant did not give evidence today. She was represented by Mr Lafferty of the Asylum Support Appeals Project. The respondent was represented by Ms Bello.

The respondent's position

4. Ms Bello confirms that the appellant arrived in the UK with entry clearance as a student on 19 February 2014 and was granted leave to remain as a student until April 2016. On 16 November 2016 she claimed asylum with her two children, a daughter born 9 December 2014 and a son born on 22 June 2016 as her dependents. Her third child is due on 21 January 2019.
5. On 28 March 2017, the appellant's solicitors wrote to the respondent withdrawing the appellant's claim for asylum.

6. On 24 April 2017, the respondent sent form ASL4757 to the solicitor and the appellant to sign and return confirming the appellant's withdrawal of her claim to asylum. Form ASL4757 was not returned to the respondent.
7. The appellant's asylum interview scheduled for 11 May 2017 was cancelled by the respondent because the appellant was poised to withdraw her claim for asylum (page 17 of the court bundle refers).
8. On 17 May 2017, the respondent issued form ASL4757 once more to the appellant and her solicitors. On the same day, the appellant advised UKVI by telephone that she was withdrawing her claim for asylum. However, no form ASL4757 was received, despite the respondent prompting the solicitors via email.
9. On 10 August 2017, the respondent recorded the appellant's claim as implicitly withdrawn.
10. On 4 August 2017, the appellant made an application for leave to remain outside the immigration rules invoking ECHR Article 8 based on her son's poor health.
11. On 3 April 2018, the application was refused and an appeal against that decision was adjourned on 8 June 2018 by the Immigration and Asylum Chamber (IAC) at the appellant's request in order that she might make further submissions in relation to her claim to asylum. The appeal remains outstanding.
12. On 19 September 2018, the appellant submitted further representations invoking ECHR Articles 2, 3 and 8.
13. On 19 November 2018, those representations were rejected without right of appeal.
14. On 30 October 2018, the appellant made her application for Section 4 support which was rejected on 7 November 2018 on the grounds that her claim for asylum had been withdrawn and she was not a failed asylum seeker.
15. In summary, Ms Bello confirms the respondent's position is as follows:
 - (a) the appellant's claim for asylum made on 16 November 2017 was implicitly withdrawn by UKVI on 10 August 2017;
 - (b) when she made her representations in relation to ECHR Article 8 on 4 August 2017 and ECHR Articles 2, 3 and 8 on 19 September 2018 her immigration status was that of an overstayer, not an asylum seeker or a failed asylum seeker;
 - (c) when those representations were rejected, the appellant remained an overstayer. The appellant's applications of 4 August 2017 and 19 September 2018 had not been recorded as claims for asylum by the respondent at any time;
 - (d) the appellant has not been an asylum seeker since 10 August 2017;
 - (e) the appellant has never been a failed asylum seeker.
16. Ms Bello confirms the appellant's appeal under ECHR Article 8 remains outstanding with the IAC. She confirms that the Notice of Hearing addressed to

the appellant's minor son is a clerical error by the IAC. The appellant is the main claimant in the matter, her two children are her dependents and that appeal is to be listed for full hearing following a case management review on 29 October 2018.

17. Finally, the appellant's destitution has not been demonstrated. Ms Bello accepts that the appellant has been supported by her local authority in the past and that that support came to an end because the local authority took the view that the appellant was eligible for asylum support. However, the appellant is about to have her third child and the father of her children could be reasonably be expected to support his family.

The appellant's position

18. Mr Lafferty addressed me and confirmed the appellant's position as follows:
 - (a) by application of Paragraph 333C of the Immigration Rules, her claim for asylum could not have been
 - (a) explicitly withdrawn as neither the appellant nor her solicitor had signed the relevant form, namely ASL4757;
 - (b) impliedly withdrawn as none of the conditions for implied withdrawal applied: she had not failed to attend her asylum interview, but rather that interview had been cancelled by the respondent; she had not left the UK without authorisation prior to the conclusion of her claim to asylum; she had not failed to complete an asylum questionnaire as requested by UKVI.
 - (b) her claim for asylum is no longer under consideration by the respondent: it was rejected on 10 August 2017, not withdrawn;
 - (c) she is a failed asylum seeker;
 - (d) by application of Section 94(5), however, she remains entitled to be *treated* as an asylum seeker by the virtue of the two dependent minor children in her household.
19. Mr Lafferty submits that he is supported in his argument *by R (VC) v Newcastle City Council and SSHD [20011] EWHC 2673 Admin* in which it was held that an applicant for asylum retained the right to be treated as such by application of Section 94(5) despite a claim for asylum being rejected if she had a dependent minor child in her household at all times. The presence of a dependent minor child in her household allows an applicant to retain the status of an asylum seeker. The entitlement to be treated as such, once established, can only come to an end when the youngest child turns 18 or the applicant leaves the UK.
20. There is no other evidence from either party to this appeal.

The Legal Framework

21. Paragraph 333(c) of the Immigration Rules reads as follows:

If an application for asylum is withdrawn either explicitly or implicitly, consideration of it may be discontinued. An application will be treated as explicitly withdrawn if the applicant signs the relevant form provided by the Secretary of State. An application may be treated as impliedly withdrawn if an applicant leaves the United Kingdom without authorisation at any time prior to the conclusion of their asylum claim, or fails to complete an asylum questionnaire as requested by the Secretary

of State, or fails to attend the personal interview as provided in paragraph 339NA of these Rules unless the applicant demonstrates within a reasonable time that that failure was due to circumstances beyond their control. The Secretary of State will indicate on the applicant's asylum file that the application for asylum has been withdrawn and consideration of it has been discontinued.

22. Section 94(1) of the Immigration and Asylum Act 1999 defines an asylum seeker as a person who is not under eighteen and has made a claim for asylum that has been recorded by the Secretary of State but which has not been determined.

Section 94(3) states that the claim for asylum is determined at the end of such period beginning (a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or (b) if the claimant has appealed against the Secretary of State's decision on the day on which the appeal is disposed of, as may be prescribed.

Section 94(4) states that an appeal is disposed of when it is no longer pending for the purposes of the Immigration Acts or the Special Immigration appeals Commission Act 1997.

Section 94(5) states that if an asylum seeker's household includes a child who is under eighteen and a dependent of his, he is to be treated (for the purposes of this part) as continuing to be an asylum seeker while –

- (a) the child is under eighteen, and
- (b) he and the child remain in the United Kingdom

Findings of Fact

23. I make the following findings on balance from the evidence before me:
- (a) the appellant arrived in the UK on 19 February 2014;
 - (b) her two children were born in the UK after her arrival;
 - (c) she made her claim for asylum with her two children as her dependents on 16 November 2016 which application was recorded as such by the respondent;
 - (d) she made an application for leave to remain invoking ECHR Article 8 on 4 August 2017, an appeal against which refusal remains outstanding;
 - (e) she made further submissions invoking ECHR Articles 2, 3 and 8 on 19 September 2018, which were rejected without right of appeal on 19 November 2018;
 - (f) neither the application of 4 August 2017 nor the application of 19 September 2018 were recorded as claims for asylum by the respondent;
 - (g) the appellant's solicitors wrote to the respondent on 28 March 2017 confirming that the appellant wished to withdraw her claim for asylum of 16 November 2016;
 - (h) the respondent sent form ASL4757 to the appellant and her solicitors on multiple occasions;
 - (i) form ASL4757 was never returned to the respondent;
 - (j) the appellant's claim for asylum is therefore not explicitly withdrawn;
 - (k) the appellant's claim for asylum was recorded as implicitly withdrawn by the respondent on 10 August 2017;
 - (l) the appellant's claim for asylum is not implicitly withdrawn by application of Paragraph 333C of the Immigration Rules as the appellant has not:
 - (i) left the UK without authorisation

- (ii) failed to complete an asylum questionnaire as requested
- (iii) failed to attend a personal interview
- (m) the appellant's claim to asylum is no longer under consideration by the respondent;
- (n) she continues, however, to be entitled to be *treated* as an asylum seeker by virtue of Section 94(5) and the presence in her household of her dependent minor children, both whom were born before she made her claim for asylum;
- (o) the respondent's decision currently under appeal does not raise the issue of destitution. The appellant will be aware that the respondent may make inquiries as to her children's father's financial responsibilities to their children.

24. Appeal allowed.

Signed : SALLY VERITY SMITH
Tribunal Judge, Asylum Support
SIGNED ON THE ORIGINAL [Appellant's Copy]

Dated : 15 January 2019