FIRST-TIER TRIBUNAL
ASYLUM SUPPORT
ADDRESS:
MR KB

2nd Floor
Import Building
2 Clove Crescent
London
E14 2BE
asylumsupporttribunals@hmcts.gsi.gov.uk
Telephone: 020 7538 6171
Fax: 0126 434 7902

Appeal Number AS/22/02/43794
Home Office Ref: B1990443

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

Tribunal Judge	SEHBA HAROON STOREY
Appellant	KB
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 (2008 Rules) and gives reasons for the decision made today, substituting my own decision for the decision of the Secretary of State dated 18 February 2022.

2. The appellant is a national of Grenada, born on 28 October 1994. He appeals against the Secretary of State's abovementioned decision to refuse him support under Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act") on the grounds that he does not meet the criteria for support set out in Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 ("the 2005 Regulations").

3. The appellant is currently in detention at HM Prison Huntercombe in Oxfordshire. Although he is being assisted by BID for Immigration Detainees and Migrants Organise, neither organisation is assisting him with his asylum support appeal. On his notice of appeal form, the appellant indicated his willingness to participate in a hearing in any format. This appeal is determined without an oral hearing on the evidence contained in the papers before me.

THE DECISION UNDER APPEAL

4. The Respondent states that the Appellant is not entitled to the provision of support under Section 4(2) of 1999 Act because his claim for asylum, made on 8

October 2005 as a minor, remains outstanding, and he is therefore not a failed asylum seeker. The Respondent was asked in directions to explain why the Appellant was not entitled to the provision of Section 95 support, if his asylum claim remain outstanding. The Tribunal was informed that for the purpose of Section 95 support,

> "*the Appellant must claim asylum as an adult in the UK to meet the criteria for Section 95 support*".

BACKGROUND

5. There is limited information before me on which to decide this appeal. The details below are taken from the Respondent's response Bundle.

6. The Respondent states that the Appellant entered the UK aged 6 on 16 July 2003 alongside his brother and grandmother. He entered on a 6 month leave to enter visa. In May 2005, the Appellant's grandmother was granted British Citizenship, although I have not been told why. On 8 October 2005, she raised an Article 3 Human Rights application for the Appellant and his brother, the basis of which is also not disclosed. It is said that "it was advised that both cases should be considered together" and that this delayed the decision-making process. I do not know who advised this or why. The appellant was almost 9 years of age at the time, but I do not know his brother's age.

7. The Respondent states that the decision to consider both cases together,

> *"delayed the decision-making process for quite some time as both applicants had pending prosecutions at one stage or another and so case work could not be completed until each applicant had no pending prosecutions."*

8. The first details provided of the Appellant's criminal activity are dated 16 August 2018, when he was convicted of drugs offences and sentenced to 20 months imprisonment. On 28 January 2020, he was served with notice of liability to deportation at his "home address". He was then almost 22 years of age.

9. On 11 September 2020, the appellant was convicted of conspiring/supplying class A controlled drugs and possession of a knife/bladed article in a public place. On 13 August 2021, it is said that he was sentenced to 45 months imprisonment and on 1 October 2021, the Appellant was again served with notice of liability to deportation, this time at his then solicitor's address.

10. On 30 December 2021, a decision was made by the Strategic Director for the Appellant's release from custody, subject to the availability of a suitable address. This is confirmed in the letter of 6 January 2022 (document 010 - 011). I have not been provided with details of how or why a decision was made to release the Appellant from custody subject to electronic monitoring, only 4 months into a 45 months sentence of imprisonment.

11. On 21 January 2022, the Appellant applied for Section 4(2) support and provided a proposed release address. This was rejected on 1 February 2022 as "deemed unsuitable" and section 4(2) support was refused on 18 February 2022. I do not know the address offered by the Appellant nor why it was considered unsuitable.

APPELLANT'S EVIDENCE
(Taken from his ASF1 (document 016 – 049))

12. The Appellant stated that he is presently in detention. He named Migrants Organise as his authorised representatives, however, the latter has advised the Tribunal that it is limited in terms of the services it is able to offer the Appellant and does not have funding to represent him in his asylum support appeal.

13. In section 8 of his asylum support claim form, the Appellant stated that since arriving in the UK, he had received support from someone, but he was unable to name the individual or provide his contact details, apparently owing to memory loss following concussion. He described the support as "cash in hand, construction and charity support [from] family and friends." In section 9, he declared that he did not have a national insurance number and provided no details of having undertaken any employment. He denied having applied for a visa to enter the UK (although the Respondent has stated that he entered the UK aged 6, on a 6 month leave to enter visa.) He claimed that he was suffering from mental and physical health problems and that these presented an impediment to his leaving the UK. He claimed that the provision of accommodation is necessary for the purpose of avoiding a breach of his Convention rights within the meaning of the Human Rights Act 1998.

14. In section 11A, the Appellant disclosed that he held a bank account with Barclays Bank but did not provide details of the account number, sort code or balance. He advised that he had credit cards and loans, but no further details were included. He stated that he had no money, no monetary or material assets in the UK or abroad and that he was not in receipt of welfare or benefits or "support" at any point in the past six months.

15. The Appellant stated that he was not taking any steps to leave the UK and did not satisfy any of the conditions set out in Regulation 3(2) of the 2005 Regulations. In section 21 of his claim form, he stated that he cannot leave the UK because:

> "Since being in the UK for about 21 years as a child, I've lived and adapted to living with family and friends going school and college getting Level 1, 2 in construction and IT course. Continued in Additional Information section …"

16. In section 27, headed "additional information", the Appellant stated,

> "Please note this is a Schedule 10 application."

17. In the same section, the Appellant disclosed that he had served three years and nine months in custody and his conditional release date (CRD) was 1 February 2022, subject to the availability of suitable accommodation. He maintained that he had provided "numerous addresses", none of which had been approved "for whatever reason" and he was therefore applying for bail accommodation.

18. In relation to his mental health, the Appellant said that he suffered from PTSD and anxiety, as a result of two road traffic accidents within five years, he had suffered physical injuries to his back, spine, and head, including post-concussion syndrome and short-term memory loss. This meant he could not remember his history since 2021 or the names of his family and friends who had provided him with "moral" support. As he was in custody, he did not have access to documentation and was unable to provide the information requested in the claim form.

Appellant's Documentary Evidence

19. Included in the Respondent's bundle of evidence (document 008) is a letter dated 13 October 2021, from the Appellant's allocated mental health nurse at HMP Huntercombe. She stated that the Appellant had a formal diagnosis of PTSD and reported experiencing flashbacks, anxiety, cold sweats and headaches. She further stated that the Appellant had reported he was diagnosed with post-concussion syndrome following a car crash and problems with short term memory loss.

THE LEGAL FRAMEWORK
The Immigration and Asylum Act 1999 (as amended)

20. Section 94(1) of the 1999 Act, defines an asylum seeker as a person who is not under eighteen and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined. A "claim for asylum" means a claim that it would be contrary to the United Kingdom's obligations under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from, or required to leave, the United Kingdom.

21. Section 95(1) of the 1999 Act, provides as follows:

> (1) The Secretary of State may provide, or arrange for the provision of, support for—
>
> (a) asylum-seekers, or
> (b) dependants of asylum-seekers,
>
> who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.

22. Section 94(5) provides that if an asylum-seeker's household includes a child who is under 18 and a dependant 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 18; and
> (b) he and the child remain in the United Kingdom.

23. Subsection (5) does not apply if, on or after the determination of his claim for asylum, the asylum-seeker is granted leave to enter or remain in the United Kingdom (whether or not as a result of that claim).

24. Section 4(2) of the 1999 Act (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), headed "failed asylum-seeker," allows the Secretary of State to provide, or arrange for the provision of, facilities for the accommodation of a person and his dependants if –

> (a) he was (**but is no longer**) an asylum seeker; and
> (b) his claim for asylum was **rejected**.

25. The explanatory notes to section 49 state:

"Section 49 gives the Secretary of State additional powers to support failed asylum-seekers. Section 4 of the 1999 Act currently provides that the Secretary of State may provide, or arrange for the provision of, accommodation of persons temporarily admitted to the United Kingdom or released from detention as specified in paragraphs (a), (b) and (c) of that section. However, the existing power does not allow the provision of accommodation to all categories of asylum-seekers whose claims for asylum have been rejected, should the Secretary of State decide to provide such accommodation in particular cases. Section 49 remedies this."

Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005

26. Regulation 3(1) of the 2005 Regulations provides that 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 -

    (i) 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 a travel document to facilitate his departure;
    (ii) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;
    (iii) 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;
    (iv) he has made an application for judicial review of a decision in relation to his asylum claim;
    (v) 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.

Immigration Rules

27. There are no specific time limits within which the Respondent must reach a decision on an asylum case. Her obligations about the time in which asylum decisions must be made are set out in Immigration Rule 333A, which provides:

    "The Secretary of State shall ensure that a decision is taken on each application for asylum as soon as possible, without prejudice to an adequate and complete examination.

    Where a decision on an application for asylum cannot be taken within six months of the date it was recorded, the Secretary of State shall either:

    (a) inform the applicant of the delay; or

(b) if the applicant has made a specific written request for it, provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame."

Council Directive 2005/85/EC - Minimum Standards on Procedures in Member States for granting and withdrawing refugee status

28. Following the UK's Withdrawal Agreement from the European Union, EU legislation which applied directly or indirectly to the UK before 31 December 2020 has been retained in UK law as a form of domestic legislation known as 'retained EU legislation'. This includes the Asylum Procedures Directive. Article 23 of Directive 2005/85/EC (headed 'Examination procedure') provides as follows:

"1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:
(a) be informed of the delay; or
(b) receive, upon his/her request, information on the timeframe within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that timeframe.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs."

Section 55 of the Borders, Citizenship and Immigration Act 2009

29. Section 55 of the 2009 Act provides that:

"(1) The Secretary of State must make arrangements for ensuring that –
(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom…

(2) The functions referred to in sub-section (1) are –
(a) any function of the Secretary of State in relation to immigration, asylum or nationality;
(b) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)".

Home Office policy on Children's Asylum Claims

30. Version 4 of the above policy, published on 31 December 2020, defines an unaccompanied asylum-seeking child as one who is:

    (a) under 18 years of age when the claim is submitted;
    (b) claiming in their own right;
    (c) separated from both parents; and
    (d) is not being cared for by an adult who in law or by custom has responsibility to do so.

    The policy states that being unaccompanied is not necessarily a permanent status and may change, particularly if the child has family members in the UK.

31. An accompanied asylum-seeking child (AASC) is one who is being cared for either by parents or by someone who in law or custom has responsibility to do so.

32. The policy provides guidance to Home Office staff on how to process and assess asylum claims from children. Whilst it primarily deals with claims from unaccompanied asylum-seeking children (UASC), it also covers children who may be accompanied, but are making an asylum claim in their own right.

33. The policy intentions are set out at page 9 of the guidance, namely to ensure that, *inter alia*,

    - immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK, including that the best interests of the child are a primary consideration at all times, and the welfare of the child is paramount at all times with the child being cared for by appropriate adults or agencies with safeguarding responsibilities being met;
    - protection is granted swiftly to those who need it;
    - information about the asylum claim is collected in an appropriate way with decisions made promptly and communicated to the child in a way that acknowledges their age, maturity and particular vulnerabilities.

34. Under the heading "*When a child turns 18 before a substantive interview*" (page 49) the policy states:

    "When a child turns 18 before the substantive interview If the child's 18th birthday passes before a substantive asylum interview has been conducted, they are legally an adult, however, staff must, wherever possible, follow best practice for children's cases. …"

Home Office Transition at Age 18 Instruction

35. Chapter 1.1 of this instruction reminds Home Office officers that they have a statutory duty to children to ensure their interests are a primary, although not the only consideration and that their asylum applications are dealt with in a timely fashion. It further requires officers to carry out their functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK and cautions officers not to apply the actions set out in the instruction either to children or to those with children without due regard to Section 55. The instruction directs officers to the Home Office instruction '*Every Child Matters;*

Change for Children' (see below). which sets out the key principles they need to consider in all immigration related activities.

36. Chapter 2 of the Transition at age 18 Instruction, is headed "Support Arrangements When UASC Turns 18". It states that (emphasis added):

> "Many UASC will continue to be eligible for assistance from their Local Authority under Leaving Care legislation. A person will usually be eligible to Leaving Care support if he/she has been supported by the Local Authority for more than 13 weeks before their 18th birthday under Section 20 of the Children Act 1989 …*To note: A person who is eligible to receive Leaving Care support is not eligible for asylum support. This is because asylum support is a residual support entitlement that only applies if the person has no entitlement to any other form of support.*
>
> *If, however, UASC are not eligible to receive Leaving Care support they may be eligible for asylum support under Section 95 of the Immigration and Asylum Act 1999, provided they would be otherwise destitute and meet specific requirements.* …"

Every Child Matters - Change for Children – Statutory Guidance

37. This guidance is issued by the Respondent under section 55(3) of the 2009 Act. It calls for recognition that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved and that every effort must be made to achieve timely decisions for them. At paragraph 2.7, the guidance states that children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

RESPONDENT WRITTEN SUBMISSIONS

38. In response to directions issued by Judge Verity Smith, seeking the Respondent's explanation for her failure to consider the Appellant's eligibility for Section 95 support, (given the assertion that his claim for asylum remains outstanding with UKVI since 8 October 2005) the Respondent submitted that:

> "a) For the purpose of Section 95 support the Appellant must claim asylum as an adult in the UK to meet the criteria for Section 95 support. If the Appellant's asylum application is refused, the Appellant would also not be entitled to Section 4(2) support as a failed asylum seeker on the same grounds, in that the asylum claim was lodged when the Appellant was a minor and that is why the Appellant has been advised to submit a Bail 409 application for Schedule 10 support;
> b) As stated, any application submitted for Schedule 10 support by the Appellant would be considered as there is no avenue of support under either Section 95 or Section 4(2);
> c) As stated, any application for Section 95 or Section 4(2) would be refused as the Appellant's asylum claim was lodged as a minor. The Appellant is welcomed [*sic*] to submit as application for Schedule 10 support."

The respondent does not address whether the Appellant claimed asylum as the dependant of an adult asylum-seeker, an accompanied minor or as an UASC.

FINDINGS OF FACT

39. I make the following findings of fact:

a) The appellant entered the UK at the age of 6 years, on 16 July 2003, with his grandmother and brother on a 6 month leave to enter visa;
b) On a date between 16 July 2003 and 8 October 2005, the grandmother was granted British citizenship. It has not been suggested by the Respondent, and I so find, that the appellant was not included in that application as the grandmother's dependant;
c) On 8 October 2005, his grandmother, who by now was a British Citizen, raised an Article 3 Human Rights application for the Appellant and his brother The Appellant was a 9 years old minor at the date of application;
d) There is no evidence before me that the appellant was accommodated under the care of a local authority as an UASC at any point, or that he received any form of asylum support as the dependant of an adult asylum seeker or that he received any other form of welfare support;
e) Since his arrival in the UK, and excluding any periods in detention, the appellant has lived with and was supported by family and friends;
f) The Appellant has two convictions (as disclosed by the Respondent), the first for drugs offences on 16 August 2018, and the second for conspiring/supplying class A controlled drugs and possession of a knife/bladed article in a public place on 11 September 2020;
g) There is no evidence before me of any prosecution/conviction prior to 2018, when the appellant 22 years of age, that is to say for a period of 13 years following the date the Appellant made his Article 3 Human Rights claim;
h) Notwithstanding the service of two notices of liability to deportation on 28 January 2020 and 1 October 2021, no attempt has been made to deport the Appellant to Grenada;
j) No decision has been taken by the Respondent on the Appellant's claim for 17 years and 6 months, of which 9 years were whilst he was a minor and for a further 8 years and 6 months since he reached the age of majority.

DISCUSSION

40. The Respondent asserts (see paragraph 38 above) that entitlement to asylum support under Part VI of the 1999 Act is available only to a person "who claims asylum in the United Kingdom as an adult". As the Appellant was a child when he made his Article 3 claim, it is the Respondent's case that he remains a child for all purposes, for the entire duration of the claim and after the claim is determined. It is said that irrespective of whether the Appellant attains the age of majority before or after his claim is determined, he can never qualify for Section 95 or Section 4(2) support.

41. I reject that submission, for the following reasons:

a) The appellant was an accompanied child on 8 October 2005, when his grandmother made an Article 3 claim on his behalf. The Respondent has not sought to suggest that the appellant was cared for by a local authority under Section 17 or Section 20 of the Children Act 1989. On the evidence before me (paragraph 15 above), I accept that he remained looked after by family and friends.

b) There is no evidence before me that the appellant was included as a dependent in a claim for Section 95 support made by his grandmother or another adult. In the circumstances, I am satisfied that prior to 2 February 2022, the appellant has not applied for or received Section 95 Support.

c) Much turns on the interpretation of Section 94 of the 1999 Act. In my judgement, there is nothing in Part VI that supports the Respondent's submission that entitlement to Section 95 support is limited to a person "who claimed asylum in the United Kingdom as an adult". These words do not appear in the text of Part VI, nor in any guidance or policy issued by the Respondent and cannot be read into Section 94. The latter provision states only that for the purposes of entitlement to Section 95 support, an asylum seeker is "not under eighteen". This is because the very specific support needs of under eighteen years olds, cannot be catered for in Section 95 accommodation. Thus, so long as an asylum seeker remains under eighteen years of age, they cannot receive Section 95 support because Parliament has made provisions for a better, safer system of support through local authorities. But once the claimant transitions to 18 or above, they may satisfy the criteria for Section 95 support, if their claim for asylum remains outstanding and there is no other support available to them.

d) The notion that somehow a person in the position of the Appellant, who applied for asylum as a minor aged 9 years, whose claim was properly made and recorded, but which has remained outstanding for 17 years and 6 months, can never qualify for any form of asylum support after reaching 18 is frankly absurd. Not only does this run counter to the Respondent's statutory duty conferred by Section 55 to safeguard and promote the welfare of applicants during their minority, like the Appellant, but it completely ignores the Respondent's own policies concerning the processing of a child's asylum claim and the need, wherever possible, to follow best practice for children's cases even when the child turns 18 before the substantive interview has been conducted.

e) The above approach is reinforced in Chapter 2 of the Home Office *Transition at Age 18 Instruction,* which provides that a person in local authority care who has been supported by a local authority for more than 13 weeks before their 18th birthday under Section 20, will continue to be eligible for assistance from their local authority under Leaving Care legislation. However, if they are not eligible to receive Leaving Care support, "they may be eligible for asylum support under Section 95 of the Immigration and Asylum Act 1999, provided they would be otherwise destitute and meet specific requirements. …" That would simply not have been added to the instructions if the Respondent's submission that Section 95 support is available only to a person who claims asylum in the United Kingdom as an adult, was correct.

f) For the same reason, I reject the Respondent's submission that if the Appellant's asylum application is refused, he would not be entitled to Section 4(2) support as a failed asylum seeker because his asylum claim was lodged when he was a minor. In my judgement, provided a person is no longer a minor on the date

they claim Section 4(2) Support, and they meet the requirements of Regulation 3(1) and satisfy one of the conditions in Regulation 3(2) of the 2005 Regulations, they would be entitled to Section 4(2) support as a failed asylum-seeker.

g) Schedule 10 to the Immigration Act 2016, provides for the provision of facilities for the accommodation of persons on immigration bail. It is a discretionary provision and refusal does not attract a right of appeal. Whilst the Appellant may be able to apply for Schedule 10 accommodation, following a provisional decision to release him from custody subject to electronic monitoring, in my judgement he does not need to do so because he remains an asylum seeker entitled to the provision of Section 95 Support.

h) In relation to the Appellant's outstanding asylum claim, the Respondent has acknowledged that a decision on the Appellant's claim continues to remain outstanding 17 years and 6 months after the date it was formally recorded. Section 55 requires the Respondent to discharge her statutory duty to safeguard and promote the Appellant's welfare and in particular, to ensure that information about his claim was collected in an appropriate way with a decision on the claim made swiftly. Although I accept that there are no specific time limits set by UK legislation within which the Respondent must reach a decision on an asylum case, Rule 333A of the Immigration Rules envisages 6 months to be a reasonable time within which to do so. Whilst, I am not required to decide whether a delay of 17 years and 6 months is unreasonable, or whether the Respondent has established compliance with her Section 55 duty; the guidance *Every Child Matters - Change for Children;* the Home Office policy on *Children's Asylum Claims* and in Home Office *Transition at Age 18 Instructions,* I would be astonished if such a delay was considered reasonable by anyone.

MY DECISION IN THIS CASE

42.. I substitute my own decision for the respondent's decision of 18 February 2022. The appellant is entitled to the provision of section 95 support on the grounds that his claim for asylum remains outstanding a staggering 17 years and 6 months after it was made. He is not presently entitled to the provision of section 4(2) support because he is not a failed asylum seeker.

43. I note that the appellant applied for s4(2) support on Form ASF1 (document 016 - 030) and completed parts 1- 28. A claim for section 95 support requires only the completion of parts 1 – 18 of the same form. In the circumstances, I direct that his completed ASF1 claim form is treated as an application for section 95 support.

Signed: **Dated: 8 April 2022**

S.H. Storey

Principal Judge
FTT – SEC Asylum Support