FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

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Appeal Number : AS/22/01/43710

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

Principal Judge	Mrs Sehba Haroon Storey
Appellant (s)	**AJ**
Respondent	Secretary of State
Intervener	Asylum Support Appeals Project

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 on Friday 11 March 2022, substituting my own decision for the decision of the Secretary of State dated 26 January 2022.

2. The appellant is a national of Afghanistan, born on 1 January 1999. 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 was unrepresented and attended in person.

4. This case has been identified as a "landmark" case because it provides guidance on the correct procedure required for an asylum claim to be treated as implicitly withdrawn. In view of the importance of this issue, the Tribunal made a number of attempts to encourage the appellant to secure representation, either through his own immigration solicitors or if he was unable to do so, to access free representation through the Asylum Support Appeals Project (ASAP). He did not in the end instruct them.

5. Prompted by a concern that in the context of a case raising an issue of general importance, the appellant was unrepresented and had not responded to Tribunal efforts to facilitate free representation, ASAP sought to intervene with a view to

providing a 'proper contradictor' to the respondent's position on this important legal issue. (See *HM (Iraq) v Secretary of State for the Home Department* [2011] EWCA Civ 1536). The appellant and respondent were invited to comment on ASAP's application but declined to do so. In the absence of any opposition, but primarily in the interests of justice, I granted the application under Rule 5(3)(d) 2008 Rules on 7 March 2022. Permission was limited to allowing ASAP to make submissions on the legal issues arising in the case. ASAP was represented at the hearing by Counsel, Mr Connor Johnston of Garden Court Chambers.

6. The respondent was alerted that this appeal is designated a landmark case and as such was encouraged in directions to allocate a Presenting Officer for the hearing. This was to ensure that the respondent was given an opportunity to address ASAP's lengthy submissions, respond to any matters that may arise in the course of the unrepresented appellant's oral evidence at the hearing and to address deficiency in the Secretary of State's evidential bundle. Most regrettably, I was informed that a Presenting Officer was unavailable to attend the hearing. I do not know whether any consideration was given to instructing counsel to appear for the respondent, as has been done in a number of recent landmark cases. Despite having been sent the Intervener's written submission, the respondent also failed to offer any response in writing.

7. The appellant was assisted by an official interpreter appointed by the Tribunal and gave his evidence in Dari.

BACKGROUND

8. The appellant arrived in the UK on 30 October 2017. He was over 18 years of age at the time. He applied for asylum on arrival at Dover and following a period in temporary accommodation whilst his claim was processed, he was granted section 95 support on 28 November 2017 and allocated accommodation at an address in Oldham.

9. On 30 May 2018, the respondent sent the appellant a Third Country Grounds letter (Document 003 – 004 of the respondent's bundle of evidence) advising that under paragraph 345E Statement of Changes in Immigration Rules (HC667) and the Dublin III Regulation (Council Regulation (EC) No. 604/2013 of June 2013), he was returnable to Sweden and that the Swedish authorities had accepted responsibility for examining his asylum claim. The letter was said to include details of how and when he could appeal the decision to remove him to Sweden, but this information is not included in the bundle sent to me. Furthermore, although a copy of the 30 May 2017 letter is included in the respondent's bundle, it does not show the address to which it was sent.

10. On 22 July 2018, the appellant was removed from the Third Country Unit process because the deadline for removing him from the UK had been missed and the Secretary of State therefore accepted responsibility for processing his substantive asylum application. I do not know if, how or when this information was communicated to the appellant because it is not included in the respondent's bundle of documents before me.

11. On 16 July 2019, the respondent wrote to the appellant inviting him to attend an asylum interview in Liverpool on 23 July 2019. The invitation letter (see Document 010) was sent to the appellant's address in Oldham, with a copy to his then solicitors. The letter advised that if for any reason he failed to attend the interview without providing an explanation before or immediately afterwards, his

asylum claim "may be treated as withdrawn in accordance with paragraph 333C of the Immigration Rules."

12. The appellant did not attend the interview and made no communication with the respondent.

13. On 7 August 2019, the respondent sent the appellant an absconder notification letter at the Oldham address. He was informed in this letter that a letter was previously sent to him on 24 July 2019, advising that his claim for asylum would be withdrawn under paragraph 333C unless an acceptable reason (including documentary evidence) for failing to attend his interview was provided by 7 August 2019. It stated that as no response was received from him to the letter of 24 July 2019, a decision was made to "**treat [his] claim for asylum as withdrawn …and consideration of it will be discontinued**." The letter went on to state that if he had any reasons to remain in the UK he must state them 'as soon as reasonably practicable' as delay in the absence of good reason, could result in loss of appeal rights '**if we refuse your claim** .'

14. The letter of 7 August 2019, concluded by alerting the appellant that persons who require but no longer have leave to enter or remain are liable to removal from the United Kingdom under section 10 of the 1999 Act, as amended by the Immigration Act 2014. He was warned that he may be detained or placed on reporting conditions, and if he did not leave the UK as required, he would be liable to enforced removal to Afghanistan, and could be removed via a transit point in an EU Member State.

15. No communication was received from the appellant in response.

16. On 15 August 2019, the respondent called SERCO to ascertain if the appellant still lived at his Oldham address (Document 014) and was informed that he left the property on 3 September 2018. The Case Information Database (CID) notes included in the respondent's evidential bundle do not record details of how SERCO was able to state the appellant's date of departure with such precision, or why if this date is correct, SERCO did not inform the respondent of the appellant's departure in September 2018.

17. On 16 August 2019, the respondent conducted further enquiries and established that the appellant was no longer residing at the Oldham address; he was not responding to telephone calls on the number listed on CID; and was not reporting. Contact was also made with the appellant's former solicitors by email. They confirmed that they were no longer instructed and that they had notified the respondent of this previously on 31 July 2019. (Document 016).

18. In supplementary response to directions, it is stated that the appellant's asylum claim "was withdrawn as an absconder on 21 August 2019". I have not seen documentary evidence of this or that the appellant's case file or CID were updated to show his asylum claim as implicitly withdrawn due to absconding.

19. The appellant submitted further representations on 19 January 2021. I do not know the precise language used, or whether the further grounds were in addition to or instead of his original claim for asylum. He also applied for asylum support by completing form ASF1. This is the same form used to apply for section 95 and section 4 support. It is headed "Asylum support section 4 application – imminent". In Section 1 of the form the appellant stated he was applying for "04" support but he also stated he was applying for section 95 "accommodation and subsistence." The application was dated 24 January 2022 and included evidence of destitution.

It was received by the Home Office on 25 January 2021 and refused on 26 January 2021 under Regulation 3 of the 2005 Regulations.

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

20. Where below words are in bold, that is my own emphasis. 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.

21. An "asylum seeker" is defined by Section 94(1) of the 1999 Act as a person who is not under eighteen and has made a claim for asylum which has been **recorded** by the Secretary of State and which has **not been determined**. A "claim for asylum" is defined as 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.

22. Section 94(3) provides that a 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.

23. 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**.

24. 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

25. 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

26. Paragraph 333C of the Immigration Rules sets out the circumstances in which it is appropriate to treat an asylum claim as either explicitly or implicitly withdrawn. It provides as follows (emphasis added):

> *"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 … 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."*

27. Paragraph 339NA of the Immigration Rules provides that before a decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on their application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview. The personal interview may be omitted in any one of eight circumstances. These circumstances do not include where an applicant has absconded. Paragraph 339NA further stipulates that the omission of a personal interview shall not prevent the Secretary of State from taking a decision on the application**.** Where the personal interview is omitted, the applicant and dependants shall be given a reasonable opportunity to submit further information.

Home Office Policy Instructions 'Withdrawing asylum claims' (Withdrawal Policy) (emphasis added).

28. Version 6.0 of the above policy instructions, published for Home Office staff on 7 May 2020, sets out three underlying policy objectives in treating an asylum claim as withdrawn, namely to:

    - *maintain the integrity of the asylum process by focusing efforts on those claimants whose behaviour demonstrates they are serious about pursuing their asylum claim;*
    - *treat claims as withdrawn where the claimant shows no real interest in pursuing their claim by failing to comply with the process, absconding or leaving the UK without permission before a decision; and*
    - *demonstrate a commitment to make sure genuine refugees are given the protection they need quickly whilst robustly pursuing removal action against those who make unfounded claims and subsequently abscond.*

29. The Withdrawal Policy devotes three pages to consideration of mental capacity of claimants, including a learning disability, cognitive disorder or a physical or mental impairment within the meaning of the Equality Act 2010. It also contains a reference to Council Directive 2005/85/EC (the Procedures Directive) of 1 December 2005, which lays down minimum standards on procedures in Member States for granting and withdrawing refugee status. (see below). Significantly, the guidance requires that "all correspondence must be placed on the Home Office file and file minutes and Home Office databases must be updated to show that the asylum claim has been implicitly withdrawn."

30. Under the heading "*absconds before substantive interview*" the Withdrawal Policy provides that claimants who fail to maintain contact before they are invited to an asylum interview may have their claim treated as implicitly withdrawn if they have been advised in writing that they will be required to attend an interview as part of the asylum process and, that failure to attend will result in the withdrawal of the claim. This warning is said to be provided in the Screening Interview Form, the routing letters (ICD 3070 (RT1), ICD 3072 (RT2), ICD 3391), and the 'Point of Claim' leaflet issued to asylum claimants.

31. The Withdrawal Policy requires decision makers to confirm that there is evidence on the Home Office file that the warning has been recorded as having been issued before treating the claim as implicitly withdrawn. Where there is no evidence of notification, the implicit withdrawal procedure cannot be applied until a claimant is notified. In this situation an invite to asylum interview letter may be issued and if they fail to attend that interview the claim treated as withdrawn.

32. The Withdrawal Policy further requires that in order to determine whether failure to attend the substantive asylum interview should be treated as an implicit withdrawal, or if the interview should be rebooked, a failure to report to substantive interview letter (ASL.3724) must be sent immediately to the claimant and an ASL.4826 covering letter with a copy of the ASL.3724 sent to their representative (if applicable) to establish why the claimant did not attend. The deadlines this policy sets for a response to this letter are 5 working days in non-detained cases or 24 hours in all detained cases. "Where no explanation is received by the deadline, the asylum claim must be treated as implicitly withdrawn." (Page 15). If an explanation is received within the deadline, decision

makers are required to consider whether there is sufficient evidence to show that failure to attend was due to circumstances beyond the claimant's control and decide whether to rebook the interview or treat the claim as implicitly withdrawn. The onus is on the claimant to provide an acceptable explanation for non-attendance, for example reliable evidence of illness or travel disruption.

33. The Policy stipulates that if the claimant is not represented and no valid address has been provided, decision makers must serve the ASL.3724 letter to file and hand it the claimant when they are next encountered. The deadline for submitting an explanation for failure to attend an interview will be set from the date the letter was served to file. When the claimant is located they must be handed the original letter along with an explanation of what has occurred.

34. Under the subheading 'Recording the application as Implicitly Withdrawn', the Policy instructs decision makers that copies of all correspondence *must* be placed on the Home Office file and file minutes and Home Office databases must be updated to show that the asylum claim has been implicitly withdrawn. In cases where it is clear that an asylum claim has been withdrawn incorrectly, the Policy instructs that the withdrawal decision *must* be cancelled and the appellant and their representative informed that the claim will be considered substantively.

Home Office Instructions 'Immigration Bail'(Immigration Bail Policy)

35. Version 7 of the Immigration Bail Policy, published on 15 January 2021, provides guidance to decision makers on how to process applications for support under Schedule 10 to the Immigration Act 2016. Under the heading, "*Other categories of migrant likely to meet the Article 3 test,"* the guidance provides as follows:

> *There are a small number of migrants who are likely to require accommodation under paragraph 9 to avoid a breach of their Article 3 rights, if they do not have accommodation or the means of obtaining it. They will have at one time claimed asylum but are not eligible to receive accommodation under sections 95, 98 or 4(2) of the 1999 Act. These are:*
>
> - *people who have withdrawn their asylum claim, including where the claim has been treated as impliedly withdrawn under paragraph 333C of the Immigration Rules, but have since made further submissions and the submissions are still outstanding – if it is decided to treat the further submissions as a fresh claim for asylum the person will be eligible to receive support under section 95 or 98 of the 1999 Act*
> - *people who have withdrawn their asylum claim but are taking reasonable steps to leave the UK or are temporarily unable to take those steps because of a physical impediment or some other medical reason*
> - *people who were refused asylum and exhausted their appeal rights before they reached 18 years of age and who are not eligible to receive support under the Children Act 1989 or equivalent legislation in Scotland, Wales and Northern Ireland.*

Procedures Directive

36. 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 Procedures Directive. Article 20 of the Procedures Directive, headed "Procedure in the case of implicit withdrawal or abandonment of the application," provides as follows:

> *1. When there is reasonable cause to consider that an applicant for asylum has implicitly withdrawn or abandoned his/her application for asylum, Member States shall ensure that the determining authority takes a decision to either discontinue the examination or reject the application on the basis that the applicant has not established an entitlement to refugee status in accordance with Directive 2004/83/EC.*
>
> *Member States may assume that the applicant has implicitly withdrawn or abandoned his/her application for asylum in particular when it is ascertained that:*
>
> *(a) he/she has failed to respond to requests to provide information essential to his/her application in terms of Article 4 of Directive 2004/83/EC or has not appeared for a personal interview as provided for in Articles 12, 13 and 14, unless the applicant demonstrates within a reasonable time that his/her failure was due to circumstances beyond his control;*
>
> *(b) he/she has absconded or left without authorisation the place where he/she lived or was held, without contacting the competent authority within a reasonable time, or he/she has not within a reasonable time complied with reporting duties or other obligations to communicate. For the purposes of implementing these provisions, Member States may lay down time-limits or guidelines.*
>
> *2. Member States shall ensure that the applicant who reports again to the competent authority after a decision to discontinue as referred to in paragraph 1 of this Article is taken, is entitled to request that his/her case be reopened, unless the request is examined in accordance with Articles 32 and 34.*
>
> *Member States may provide for a time-limit after which the applicant's case can no longer be re-opened.*
>
> *Member States shall ensure that such a person is not removed contrary to the principle of non-refoulement.*
>
> *Member States may allow the determining authority to take up the examination at the stage where it was discontinued.*

APPELLANT'S EVIDENCE AND SUBMISSIONS
Documentary Evidence

37. I have received a number of letters in support of the appellant's appeal. The first is a letter dated 3 February 2022 from the Vicar of the parishes of St. Oldham and St. Thomas. He confirmed that the appellant is known to him and was

"discovered" sleeping in the park by a member of the congregation. He said that the appellant had been attending St. Thomas' Church for a number of years and that he is worried for the appellant's mental health. He described him as currently homeless, destitute and "extremely vulnerable".

38. The second letter is written by JA and dated 28 January 2022. JA provided his name, full postal address including post code and telephone number. He stated that he has financially supported the appellant since July 2020 by giving him £10 a month but can no longer do so.

39. The third letter dated 26 January 2022, is from a parishioner of St. Thomas' Church. He has not provided his name or address but has given a telephone number. He confirmed that the appellant was known to him since 2018 as a fellow parishioner of St. Thomas' Church and that since July 2021, he has allowed him to shower and stay for short periods in his house, but he can no longer do so.

40. I have also seen a handwritten document which appears to have been submitted with his asylum support application. In it, the appellant's states that he remained at the Oldham address until "end of year 2018" and details his movements thereafter from January 2019. He also provided names of the persons from whom he received financial help and addresses where he was temporarily accommodated. He states that he is currently homeless although a friend will allow him to take a shower in his home.

Appellant's Oral Evidence

41. The appellant told me that he is of no fixed abode. The Manchester address provided in section 2 of his notice of appeal form is his friend's home address, which the friend had allowed him to use for appeal correspondence purposes only. I was told, however, that his friend was now refusing to hand over his correspondence to him and the appellant asked that the Tribunal correspond with him by email.

42. He informed me that after he moved into the Oldham accommodation, he received a letter from the Home Office informing him that because of a "Dublin matter" he had no right to remain in the UK. He acknowledged that he had made an unsuccessful asylum claim in Sweden and he was therefore scared that he would be held in detention and returned to Sweden, from where he believed he could be returned to Afghanistan, where he "faced danger to [his] life." He said that his fear of being returned led to a deterioration in his mental health and depression and he therefore left the Oldham address at the end of December 2018 and went into hiding.

43. The appellant said that "after a while" he returned to the Oldham address only to find it occupied by others. "Then the money stopped" and in January 2019, he became homeless. He said that a friend provided him with accommodation from January 2019 to April 2019. This was followed by a period of street homelessness.

44. He stated that he has experienced mental health problems since 2018 and detailed these as panic attacks, severe anxiety, constantly looking over his shoulder for fear people were coming for him, and insomnia. He adds that these had led to him attempting self-harm and suicide.

45. The appellant said that it was his conversion to Christianity that led him to make further representations through a new solicitor. He could not recall the date these

were made but thought it was either 2020 or 2021. He was also confused about the date of the Third Country Grounds letter sent to him on 30 May 2018 (see paragraph 9 above) which he thought was received in 2017. The appellant said that he had been interviewed by the Home Office "about 2 – 3 weeks ago" in connection with his further representations but a decision had not yet been communicated to his solicitor.

46. In closing submissions, the appellant said that he was an asylum seeker in need of protection. He needed food and shelter and could no longer continue sleeping in parks and relying on help from friends and charities.

RESPONDENT WRITTEN SUBMISSIONS

47. The respondent submits that:

    a) The appellant is accepted as destitute;
    b) He is not a failed asylum seeker because his asylum claim has been implicitly withdrawn;
    c) As such, he does not satisfy the eligibility criteria for and provision of accommodation to failed asylum-seekers under Section 4(2) of the 1999 Act (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and Regulation 3(2) of the 2005 Regulations;
    d) He has made further representations that remain outstanding; and
    e) He has not taken up an invitation to apply for Schedule 10 support.

    The respondent does not address that the appellant may be an asylum seeker.

INTERVENER'S SUBMISSIONS

48. I am grateful for the Intervener's eight-page written submission, and for instructing counsel Mr Johnston who drafted them at less than 48 hours' notice. On behalf of the Intervener, he seeks to argue a contrary proposition to that decided in *HS v SSHD* AS/21/03/42880 (*HS*), which broadly supports the position of the respondent in implicitly withdrawn case, that where an asylum claim is withdrawn under paragraph 333C of the Immigration Rules, no formal decision is taken on the asylum claim. *HS* decided that a person whose asylum claim is implicitly withdrawn is neither an asylum seeker entitled to the provision of section 95 support or a failed asylum seeker eligible for section 4(2) support. In summary, Mr Johnston submits that:

    a) Regard should be had to the constitutional principle that 'Public authority power cannot be used to abrogate fundamental common law values, at least unless that is required or empowered by clear primary legislation': see Fordham's *Judicial Review Handbook* at §35. In this case, the common law value in question is that of access to the court.

    b) The word 'rejected' in section 4(2) of the 1999 Act should be given its ordinary meaning. Thus, a claim that had been 'rejected' could include a claim that had been implicitly withdrawn under rule 333C and as such, subject to satisfying the conditions in regulation 3, a person whose claim for asylum had been treated as implicitly withdrawn may be entitled to section 4(2) support. The appropriate starting point, he said, is the 'ordinary meaning' of words: see *R v Secretary of State for the*

Environment, Transport and the Regions, Ex parte Spath Holme Ltd [2001] 2 AC 349, at [397] per Lord Nicholls.

c) The Immigration Rules cannot be determinative of the true interpretation of the words used in primary legislation in s4(2) of the 1999 Act.

d) To interpret 'reject' in section 4(2)(b) solely as a refusal of the asylum claim on the merits, was to adopt too narrow a construction and represented a departure from the ordinary meaning of the words of the statute. The narrow construction deprived an applicant for support of a vitally important safeguard of procedural fairness, namely a right of appeal to the First-tier Tribunal. Clear words in primary legislation would be needed, he said, to support a construction which leaves an applicant for support with no right to appeal. In the absence of such words, the context and purpose of section 4(2) militates in favour of a broader construction. See *R (on the application of CXF) v Central Bedfordshire Council* [2018] EWCA Civ 2852, [2019] 1 W.L.R. 1862 at [20] per Leggatt LJ

d) The statutory purpose of the power contained in s4(2) Immigration and Asylum Act 1999 was described by Collins J in *R (Nigatu) v Secretary of State for the Home Department* [2004] EWHC 1806 (Admin) at [20] as being to 'act as a safety net and it means also that the Secretary of State would not be permitted to refuse any support if to do so would result in a breach of the individual's Human Rights'.

e) On *HS,* the statutory context in which the word 'rejected' was used by Lord Hughes in *MS (Uganda) v Secretary of State for the Home Department* [2016] UKSC 33 at [21] was very different to the present case. Likewise, the use of the words 'reject' and 'refuse' by Lord Kerr in *ZO (Somalia) v Secretary of State for the Home Department* [2010] UKSC 36 at [17]-[19] was in a very different context. The meaning of the word 'rejected' was not under consideration in *MS* or *ZO* and nothing said in these cases precluded the interpretation relied on by the Intervener in this case.

f) On Council Directive 2005/85/EC of 1 December 2005, Mr Johnston accepted that Article 20 provides for a procedure in the case of implicit withdrawal or abandonment of asylum applications that is reflected in rule 333C of the Immigration Rules and that the terminology used in Article 20(1) mirrors the narrow interpretation of the word 'rejected' preferred by the respondent. However, he did not accept that this interpretation should be used in relation to the domestic law under consideration in this case. Relying on the *Marleasing* principle of interpretation (*Marleasing SA v La Comercial Internacionale de Alimentacion SA*, Case C/106/89, [1990] ECR I-4135), he contends that EU Law does not require phrases in domestic legislation to be construed identically to the way they are construed under EU Directives. Rather it requires them to be construed so as to 'achieve the result' pursued by the Directive.

g) The power to provide accommodation to those on immigration bail under paragraph 9(2), Schedule 10 Immigration Act 2016 (the old section 4(1)), which is the option the Respondent suggests the appellant should rely on, requires the individual to be on immigration bail. Second, it is discretionary.

h) Lastly, on behalf of the Intervener, Mr Johnston submits that if

Parliament had intended the word 'rejected' to require a negative decision on the asylum claim, a similar wording to that contained in section 94(1) and (3) would have been adopted. He submits that a broad construction of s4(2) is appropriate and that the word 'rejected', used in this context, is broad enough to embrace both a negative decision on the substantive merits of an asylum claim and a decision to discontinue consideration of an applicant's asylum claim in line with rule 333C of the Immigration Rules. The fact that Parliament settled on a more general form of words suggests that a broader interpretation was intended. There is no binding authority to preclude the broader interpretation, which in his submission, accords with the ordinary meaning of the word 'rejected' and no reason of principle or policy to suggest that this interpretation is anything other than that which Parliament intended.

FINDINGS OF FACT

49. I make the following findings of fact:

a) The appellant entered the United Kingdom on 30 October 2017, when he was two months short of 19 years of age. He applied for asylum at the port and was provided with section 95 support in Oldham, where he resided until December 2018.

b) On 30 May 2018, the respondent served him with a Third Country Grounds letter, advising that he was returnable to Sweden and that the Swedish authorities had accepted responsibility for examining his asylum claim. I do not know whether it was served by post or personal service. The appellant accepts that he received the letter of 30 May 2018. I do not know if he was also served with the enclosures listed in that letter because these were not in the respondent's evidential bundle. In the absence of any evidence being produced to prove that the enclosures were delivered/sent, I cannot find that they were.

c) The respondent states that the appellant and/or his solicitor were sent a second letter dated 22 July 2018, advising that he had been removed from the Third Country Unit process and that the United Kingdom would accept responsibility for processing his asylum claim. The appellant made no reference to having received this second letter. The respondent has failed to produce a copy of it in the respondent's evidential bundle. In the absence of any evidence being produced to prove that it was sent, I cannot accept that it was.

d) In the alternative, if it was sent, I find for the reasons given in (e) below, that the appellant did not receive it.

e) I also accept that the appellant's reason for absconding was, as stated in his oral evidence, his fear of being returned to Sweden, as per the respondent's letter of 30 May 2018, which he received. Had the letter of 22 July 2018 also been received, he would have had no reason to fear a return to Sweden because the second letter reversed the decision made on 30 May 2018.

f) I accept the appellant's evidence that he vacated his authorised accommodation in late December 2018, and not in September 2018, as stated by SERCO. There is no evidence before me that SERCO or the respondent were aware that the property had been vacated prior to the

respondent's telephone enquiry of 16 August 2019, to check if the appellant still resided there.

g) The appellant was sent a letter to his Oldham address inviting him to an asylum interview in Liverpool on 23 July 2019. His solicitor was also notified. Copy letters are included in the respondent's evidential bundle. He did not receive them because he had already absconded from the address.

h) The appellant failed to attend his interview and did not contact the Home Office with an explanation for such failure.

i) The respondent asserts that a second letter was sent to the appellant on 24 July 2019, advising that his claim for asylum would be withdrawn under paragraph 333C unless an acceptable reason (including documentary evidence) for failing to attend his interview was provided by 7 August 2019. A copy of this letter is not included in the respondent's evidential bundle. In the absence of a copy, I cannot accept that it was sent. In any event, even if it was sent, the appellant no longer resided at this address.

j) On 7 August 2019, the respondent sent the appellant an absconder notification letter, again to the Oldham address. He was informed a decision had been made to treat his claim for asylum as withdrawn and consideration of it would be discontinued. (Document 035).

k) The respondent first made enquiries of SERCO on 15 August 2019, to ascertain if the appellant still lived at his Oldham address. SERCO informed the respondent on that date that the appellant left his Oldham address on 3 September 2018. There is no evidence before me that SERCO or any other authorised agent checked the address on or around 3 September 2018 to confirm whether it was still occupied by the appellant. In the absence of evidence to demonstrate how SERCO came by this information, or why it did not communicate it to the respondent until almost a year later, I am unable to accept it as accurate. I prefer the appellant's evidence that he left the Oldham address at the end of December 2018.

l) On 16 August 2019, the respondent established through further enquiries that the appellant was no longer residing at the Oldham address. (Document 015). An entry on CID records, 'checklist complete; is 274 ready; email to heo to sign off.' I do not know the significance, if any, of this entry.

m) On 16 August 2019, the respondent received an email from the appellant's former solicitors stating that they had ceased acting for him on 31 July 2019 and that this was communicated to the Home Office on that date. (Document 016). There is no record in the respondent's evidential bundle of such communication on 31 July 2019. In the absence of evidence, I cannot accept that the solicitors communicated this information to the respondent before 16 August 2019.

n) On 16 August 2019, the respondent recorded on CID that the appellant's former solicitors were no longer instructed.

o) The respondent states that the appellant's asylum claim was implicitly withdrawn. However, (excluding a reference to this in correspondence

dated 7 August 2019), I can find no entry in the respondent's CID notes of the appellant's claim having been *recorded* as implicitly withdrawn at any time. In response to directions, the respondent's supplementary response at page 002 includes a one-line statement to the effect that, "[t]his was withdrawn as an absconder on 21 August 2019." In the absence of evidence confirming that a formal record of implicit withdrawal was made on 21 August 2019 and saved to the appellant's file, I cannot accept that it was done.

p) The appellant made further representations on 19 January 2021. I do not know the precise language used, or whether these further representations were in addition to his original claim for asylum or new grounds in substitution of the original claim.

q) On 24 January 2022, the appellant applied for asylum support by completing form ASF1. The application was received by the Home Office on 25 January 2022 and refused on 26 January 2022, pursuant to Regulation 3 of the 2005 Regulations.

DISCUSSION

50. The appeal of *HS* (written reasons dated 7 April 2021) raised similar questions to those raised in this appeal, namely:

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a) What, is meant by the term "failed asylum seeker"?
b) Is a rejected asylum claim materially different to one that is refused?
c) Whether an asylum claim recorded by the respondent as "discontinued and impliedly withdrawn" (because of a failure to attend an interview) is a claim that has been rejected or refused?
d) Is a person whose asylum claim is treated as impliedly withdrawn entitled to accommodation under Section 4(2) of the 1999 Act?
e) Is a person whose asylum claim is treated as impliedly withdrawn entitled to accommodation under Schedule 10(9) of the Immigration Act 2016?

51. *HS* concerned a claim for asylum made by a minor who was accommodated and cared for by a local authority. The appellant in that appeal was represented by ASAP. In relation to the above five questions, I held that:

a) For the purposes of section 95 support, the term "asylum seeker" is defined in section 94(1) of the 1999 Act as a person who is not under eighteen and has made a claim for asylum which has been recorded by the Secretary of State and which has not been determined**.** Legislation does not currently provide a definition of "failed asylum seeker". Section 7(4) of Schedule 11 to the Immigration Act 2016, inserts subparagraph 2D into section 94 of the 1999 Act to provide such definition, but this is not yet in force. For the purposes of section 4(2) support, a failed asylum seeker is a person who was, but is no longer an asylum seeker whose claim for asylum has been rejected.

b) Whereas section 94(3) of the 1999 Act defines when a claim is 'determined', neither the 1999 Act nor the 2002 Act defines when a claim is 'rejected'. In the absence of any provision in the Regulations or the Immigration Rules, the natural and ordinary meaning of the words 'rejected' and 'refused' were to be adopted, in keeping with the approach of Lord Hughes in *MS (Uganda) v SSHS* [2016] UKSC 33 (22 June

2016) [at 21] and Lord Kerr in *ZO (Somalia) & Ors, R (on the application of) v SSHD* [2010] UKSC 36 (28 July 2010) [at 17 – 19].

c) An implicitly withdrawn claim is not one that has been rejected or refused because Article 20 of the Procedures Directive provides that where a claim for asylum is implicitly withdrawn the decision maker shall 'discontinue the examination or reject the application' (emphasis added) The conjunction 'or' suggests that discontinuance and rejection are alternatives such that 'rejection' connotes a form of determination whilst 'discontinuance' conveys that the claim remains outstanding and is capable of being 're-opened' (see Article 20(2)).

d) A person whose asylum claim is treated as impliedly withdrawn is not entitled to accommodation under Section 4(2) of the 1999 Act.

e) Schedule 10 to the Immigration Act 2016, specifically provides for the provision of facilities for the accommodation of persons on immigration bail and not to assist a person whose asylum claim is implicitly withdrawn. However, the Home Office Immigration Bail Policy at page 60 provides that Schedule 10 support may be made available to a person whose asylum claim is implicitly (or explicitly) withdrawn for whom there is no other support available.

52. The respondent has not sought to challenge the findings made in *HS*.

53. The Intervener, essentially, takes issue with paragraph 51(b) above and disagrees that 'rejected' and 'refused' are broadly synonymous. Whilst I agree with Mr Johnston's submission that on matters of legislative construction, where words are not defined, the appropriate starting point must be the 'ordinary meaning' of words used, I consider that my decision in *HS* was based on ordinary meaning.

54. I agree that a claim that is 'determined' will either result in a grant of refugee status or a refusal on the merits, normally with appeal rights.

55. I also accept Mr Johnston's submission that the Immigration Rules cannot be determinative of the true interpretation of the words used in primary legislation in section 4(2) of the 1999 Act.

56. However, I have difficulty accepting Mr Johnston's contention that a 'rejected' claim does not require that it must be substantively considered by the respondent and thus, could include a claim that had been implicitly withdrawn under rule 333C. This does not accord with my reading of Article 20 of the Procedures Directive nor of Rule 333C or the Withdrawal Policy. As held in *HS*, Article 20 provides that an implicitly withdrawn asylum claim may be discontinued without further consideration or rejected on the basis that the applicant has not established an entitlement to refugee status, which would attract a right of appeal. Rule 333C of the Immigration Rules and the Withdrawal Policy refer to implicitly withdrawn cases only in terms of discontinuation without further consideration. A discontinued claim may subsequently be 're-opened' with consideration of the claim resuming at the stage where it was discontinued. This supports the view that an implicitly withdrawn claim is not one that has been rejected with the result that the claimant *was but is no longer* and asylum seeker, but one where a substantive consideration of the claim has been suspended. The claim remains on hold until it is either revived (in any number of circumstances, including where it was wrongly withdrawn), replaced with a fresh claim or simply

left in abeyance. I note Mr Johnston concession that the terminology used in Article 20(1) mirrors this interpretation.

57. The act of implicitly withdrawing an asylum claim is a draconian measure and it is perhaps not surprising that the Withdrawal Policy sets out clear guidance to decision makers on the process to be followed. In particular, decision makers are reminded of the importance of maintaining good records and keeping copies of all correspondence on the Home Office file and databases. Decision makers are reminded that failure to follow the correct process may result in incorrect withdrawals having to be cancelled.

58. In this case, there have been a number of errors, omissions or failures to follow the proper procedure set out in the Withdrawal Policy. I have found that certain documents/records/notes relevant to this appeal, were not sent or retained on the appellant's Home Office file or databases as required by the Withdrawal Policy. In particular, there is:

    a) no record/evidence that enclosures to the letter of 23 May 2018 were sent/served with the letter;

    b) no record/evidence that the letter of 22 July 2018 was sent, informing the appellant that he would not be returned to Sweden;

    c) no record/evidence that he was informed prior to the letter of 16 July 2019, that he would be required to attend an interview as part of the asylum process and that failure to attend would result in the withdrawal of his claim;

    d) no record/evidence (save for a reference in the letter of 7 August 2019) that the failure to report to substantive interview letter (ASL.3724) was sent to the appellant on 24 July 2019 or at all;

    e) no entry on the appellant's Home Office file or CID that the appellant's claim for asylum was recorded as implicitly withdrawn on 21 August 2019 (as stated in supplementary submissions);

    f) no evidence that the failure to report to substantive interview letter ASL.3724 was served to file once SERCO confirmed the appellant's whereabouts were unknown, or that it was handed to the appellant when he was encountered in January 2022.

59. The Withdrawal Policy provides that in cases where the correct process is not followed, the withdrawal decision must be cancelled. I am satisfied that there were numerous errors in the processing of this claim. It is very apparent that the claimant's own conduct in failing to notify the respondent that he had left his Oldham address posed particular difficulties for the respondent, but they could have been overcome had they followed their own policy. In the circumstances, I am satisfied that the appellant's asylum claim was incorrectly withdrawn, and the withdrawal must be cancelled.

60. I remain of the view that Schedule 10 to the Immigration Act 2016, provides only for the provision of facilities for the accommodation of persons on immigration bail. Accordingly, Schedule 10 cannot specifically assist a person whose asylum claim is implicitly withdrawn. However, the Home Office Immigration Bail Policy at page 60 (see paragraph 26 above) clearly provides for support to be made available to a person whose asylum claim is implicitly (or explicitly) withdrawn for whom there is no other support available.

61. The respondent has discretion to grant support in circumstances where there is no specific statutory entitlement. It may, for instance, be appropriate to do so where there is lengthy delay in deciding whether further representations amount to a fresh claim. I note with concern that the appellant's further representations, made in January 2021, remain outstanding 14 months later, but his asylum support claim was decided within one day of its receipt. The early grant of Schedule 10 Support in these circumstances, would ensure that genuine claimants were not left without funds for lengthy periods.

62. Further, it is unclear why there is one form for section 95 and section 4 support, but a separate application is required for Schedule 10 support. It would assist if a claim for Schedule 10 Support could be incorporated into ASF1.

MY DECISION IN THIS CASE

63. I substitute my own decision for the respondent's decision of 26 January 2022. The appellant is not entitled to the provision of section 4(2) support because he is not a failed asylum seeker. In my judgment, based upon my above findings of fact, he is entitled to the provision of section 95 support on the grounds that his claim for asylum was incorrectly treated as implicitly withdrawn.

64. I note that the appellant originally applied for s4(2) support on Form ASF1 (document 011) and completed parts 1- 26. A claim for section 95 support requires only the completion of parts 1 – 18 of the same form. The respondent accepts that the appellant is destitute. In the circumstances, I direct that his completed ASF1 claim form is treated as an application for section 95 support.

Signed:

[Signed on the original]
S.H. Storey
Principal Judge
FTT – SEC Asylum Support **Dated: 17 March 2022**