Neutral Citation Number: [2008] EWHC 2282 (Admin)

Case No: CO/4294/07

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 October 2008

Before :

THE HON. MR. JUSTICE SILBER

- -

Between :

The Queen on the application of Mohammed Kareem Ahmed	**Claimant**
- and -	
Asylum Support Adjudicator	**First Defendant**
Secretary of State for the Home Department	**Second Defendant**

- -
- -

Simon Cox (instructed by **Refugee Legal Centre**) for the **Claimant**
The First Defendant was not present and was not represented
Elisabeth Laing QC (instructed by **Treasury Solicitor**) for the **Second Defendant**

Hearing dates: 23 July 2008

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Approved Judgment

Mr Justice Silber:

I. Introduction

1. Mohammed Kareem Ahmed ("the claimant") is seeking in these proceedings to quash the decision of Mr. David Saunders, an Asylum Support Adjudicator ("ASA") dated 3 May 2007 by which he dismissed the appeal of the claimant from a decision of the Secretary of State for the Home Department ("the Secretary of State") dated 19 April 2007 who had refused to provide the claimant with accommodation under section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"). There is also a challenge by the claimant to the earlier decision of the Secretary of State of 19 April 2007.

2. This application, which is brought with permission of Underhill J, raises issues on the construction and on the application of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 ("the 2005 regulations"). As I will explain, the crucial and decisive factors in this case are that irrespective of how the relevant provisions of the 2005 regulations are construed, the claimant's case fails on the facts on the issues argued in front of me.

II. The Facts

3. The claimant is an Iraqi national, who lived in Jalawala in Central Iraq. He entered the United Kingdom on 7 May 2002 and he claimed asylum. On 10 July 2003, the Secretary of State refused his application. By a determination promulgated on 24 November 2003, an Immigration Adjudicator dismissed the claimant's appeal on asylum and human rights grounds from the decision of the Secretary of State of 10 July 2003. On 12 February 2004, the Immigration Appeal Tribunal refused the claimant's application for permission to appeal from the decision of the adjudicator and so he had exhausted his appeal rights.

4. On 21 April 2004, the Secretary of State stopped providing the claimant with asylum support under section 95 of the 1999 Act. The claimant then began living with friends. In March 2007, the claimant's friends required him to leave their home and he attended the offices of Refugee Action where he received advice on return to Iraq.

5. On 15 March 2007, the claimant applied to the Secretary of State for section 4 accommodation. On 19 April 2007, the Secretary of State refused the claimant's application for section 4 accommodation while accepting that the claimant was destitute. On 25 April 2007, notice of appeal was given against that decision. On 3 May 2007, the ASA dismissed the appeal from the Secretary of State's decision and it is that decision as well as that of the Secretary of State which is the subject of the present application. The ASA issued a statement of reasons for the decision to which I will have to consider later.

6. On 24 May 2007, the claimant brought the present claim. On 25 May 2007, Goldring J ordered the Secretary of State to accommodate the claimant pending further order and that order remains in force.

III. The Statutory Framework

7. In order to understand the nature of this claim it is necessary to explain the statutory framework which is of critical importance to this case. The critical provisions in primary legislation are contained in sections 4(2) and (5) of the 1999 Act which (in so far as is material) provide that:

> *"4. (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if-*
>
> *(a) he was (but is no longer) an asylum-seeker, and (b) his claim for asylum was rejected.*
>
> *. . .*
>
> *(5) The Secretary of State may make regulations specifying criteria to be used in determining-*
>
> *(a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;*
>
> *(b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section."*

8. Pursuant to the power contained in section 4 of the 1999 Act, the Secretary of State made the 2005 Regulations and regulation 3 provides that:

> *"3 (1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-*
>
> *(a) that he appears to the Secretary of State to be destitute, and*
>
> *(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.*
>
> *(2) Those conditions are that-*
>
> *(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;*

> *(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;*
>
> *(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;*
>
> *(d) he has made an application for judicial review of a decision in relation to his asylum claim . . .;*
>
> *(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998."*

9. So an asylum-seeker is eligible for section 4 accommodation provided first that he is destitute and *also* second that he also meets one or more of the conditions set out in regulation 3 (2). There is no dispute but that the claimant is destitute and so the only issue is, and has been, whether the claimant's case falls within any of the of the categories set out in regulation 3 (2) of the 2005 regulations.

10. Neither party has been able to find anything in Hansard which provides assistance on the interpretation of regulation 3(2). The parties have agreed that regulation 3(2) cannot be construed in a vacuum and that indeed it must be considered in the context of the legislative scheme for providing relief for failed asylum seekers. Mr. Simon Cox counsel for the claimant attaches significance to the statement of Stanley Burnton J (as he then was) in **R (Salih) and R (Rahmani) v SSHD** [2003] EWHC 2273 (Admin), when he explained that:

> *"69…by introducing the hard cases scheme the Home Secretary has himself recognised that common humanity requires that even failed asylum seekers, who are prohibited from working and have no other avenue of support, and have good reason not to return to their own countries, must be provided with the essential basics of life."*

11. This helpful statement must be considered in the context of first the conditions specified in regulation 3 (2) and also of second the legislative scheme for providing assistance to failed asylum-seekers.

12. There are a number of very relevant features of the legislative regime as it provides a structure for:

    (a) considering asylum, human rights and related claims by the Secretary of State, with a right of appeal in appropriate cases to an independent, specialist tribunal, the Asylum and Immigration

Tribunal ("the AIT") and then again in appropriate cases through the courts;

(b) supporting asylum-seekers while their claims are being considered;

(c) as a general rule requiring asylum-seekers who have exhausted their appeal rights to leave the United Kingdom

(d) providing support for some failed asylum-seekers in the very limited circumstances which are set out in the 2005 Regulations; and

(e) giving support where the failed asylum-seeker makes representations purporting to be a fresh asylum or human rights claim and before the Secretary of State decides whether to accept the representations as such. Support is routinely given in such cases but *"it is only in the clearest cases that it will be appropriate for the public body concerned to refuse relief on the basis of the manifest inadequacy of the purported fresh grounds"* (per Lloyd Jones J in **R(on the application of AW) v Croydon London Borough Council** [2005] EWHC Admin 2950 {76) but although this judgment was the subject of a successful appeal, there was no appeal against this part of the judgment- see [2007] EWHC Civ 266) (A failed asylum-seeker can bring a "fresh claim" with all the rights of appeal to the Immigration Appeal Tribunal if he or she subsequently is able to rely on matters which are significantly different from material previously considered in that they:

> "*(a) had not already been considered; and (b) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection*" (Immigration Rules paragraph 353).

13. I agree with Miss Elisabeth Laing QC counsel for the Secretary of State that the structure in place for dealing with asylum and human rights claims means that issues relating to these matters should normally be decided either through the regime outlined in paragraph 12 (a) above or by making a fresh claim which falls with rule 353 of the Immigration Rules. The purpose of section 4 support is not to provide surrogate asylum protection but to deal with what are

described as "*hard cases*" in **MacDonald's Immigration Law and Practice** (7th edition paragraph 13.118).

14. Of the cases specified in regulation 3(2), conditions (a) to (c) relate to cases where the failed asylum-seeker wishes to leave the United Kingdom but is unable to do so while condition (d) refers to the case where the failed asylum-seeker has obtained permission to pursue judicial review proceedings. Only condition (e) deals with the case where the failed asylum-seeker does not wish to leave the United Kingdom and has not obtained permission to pursue judicial review proceedings. In other words, condition (e) is the only condition which deals with events abroad because the conditions in regulation 3 (2) are additional to the requirement of destitution in the United Kingdom which is set out in regulation 3(1) (a).

15. It is common ground that if a "*fresh claim*" can be brought under paragraph 353, this in itself does not mean that accommodation under section 4 cannot be provided under the 2005 regulations. The 2005 regulations do not state that asylum support cannot be given when a "*fresh claim*" can be brought. Moreover, there is no good reason why the 2005 regulations should be construed so that asylum support cannot be given where a fresh claim can be brought. In addition, there is an overlap between the circumstances in which a "*fresh claim*" can be brought and at least one of the cases specified in the 2005 regulations; that is condition 3(2) (e) where the "*provision of accommodation is necessary to avoid breach of the Convention rights*" and that contention could in an appropriate case amount to a "*fresh claim*".

IV. The Claimant's Case and the Issues.

16. The case for the claimant is that he can satisfy:

    i) condition (a) ("all reasonable steps");

    ii) condition (c) ("no viable route"); and/or

    iii) condition (e) ("avoiding breach of Convention rights").

17. Mr. Cox however accepts that in **R (Rasul) v ASA** [2006] EWHC 435 (Admin), 24 February 2006, Wilkie J decided that condition (c) ("no viable route") is satisfied provided that there is, in general, no viable route to *any* part of the country concerned.

18. Wilkie J said of the Secretary of State's opinion that:

> "*The opinion which, if held by the Secretary of State, automatically satisfies the condition, is that there is currently no viable route of return available. This is not an opinion which is held on an individual basis. Rather this is an opinion held as a matter of policy in respect of a country. I accept that this is the true construction of 3 (2) (c).The*

> *opinion to be held is not one which in any way is particular to the applicant"* [32].

19. Wilkie J upheld that Secretary of State's approach that condition 3(2) (c) is satisfied where there is

> *" a statement of policy that the Secretary of State considers there is no viable route of voluntary return available to the applicant's country of origin." [34].*

20. Mr. Cox does not attempt to persuade me that I should not follow the reasoning in **Rasul** because he accepts that a decision of a single judge of the High Court is not binding but it should nevertheless be followed by another single judge unless the decision was *clearly* wrong: **R v Greater Manchester Coroner ex p Tal** [1984] 3 WLR 643; **Huddersfield Police Authority v Watson** [1947] KB 842.

21. The Court of Appeal granted **Rasul** permission to appeal, but his appeal was withdrawn when he was granted indefinite leave to remain. Mr. Cox does not submit that Wilkie J's decision in **Rasul** (supra) was *clearly* wrong. He accepts that I, as a single judge of the High Court, should follow it. The claimant reserves the argument that the decision in **Rasul** was wrong and that Wilkie J should have accepted the submissions advanced by the Claimant in that case.

22. I have not heard any submissions on whether **Rasul** was wrongly decided and therefore as requested by counsel, I will assume that it is correct with the consequence that the claimant in the present case cannot rely on condition 3 (2) (c). If the matter had been argued in front of me, I would have wished to hear how Mr. Cox would have overcome submissions that:

    i) although condition (c) refers to a *"the viable route of return"* it does not specify return to a particular place rather than to particular country;

    ii) there is no reason why condition (c) should be construed as referring to return to a particular place rather than a particular country;

    iii) an asylum seeker should not succeed in his claim if there is some part of his home country to which he could return from the United Kingdom in safety and at which he could live safely. In other words, does the possibility of internal relocation to a place of safety in Iraq preclude reliance on condition 3 (2) (c)?; and

    iv) the evidence does not establish that there is not a "*viable route of return"* to the claimant's home in Jalawla in the light of for example the material to which I will refer in paragraphs 55 to 57 below.

23. The claimant, in this case like many failed asylum seekers, had failed in his claim before the Immigration Judge to establish first a risk of persecution on

his asylum appeal and second that his rights under article 3 of the ECHR would be infringed if he was to be returned to his or her home country.

24. The issues which have now to be considered are whether the claimant can satisfy:

i) Condition 3(2) (a) ("*all reasonable steps")* ("*the Condition (a) issue*") (paragraphs 25 to 42 below)); and/ or

ii) condition 3(2) (e) ("*avoiding breach of Convention rights")* ("*the Condition (e) issue")* (paragraphs 43 to 60 below)).

V. The Condition 3 (2) (a) Issue

(i) The approach of the Secretary of State and the ASA

25. The decision letter of the Secretary of State of 19 April 2007 records that:

> (i) in order to qualify for condition (a) support, it is reasonable for the claimant to have applied for an Assisted Voluntary Return ("AVR");
>
> (ii) Iraqi Country Policy Bulletin of 7 February 2007 paragraph 4.1.11 states that "*between 1 April 2005 and 30 September 2006, 2, 52 individuals had taken advantage of Voluntary Assisted Returns and Reintegration Programme run by the International Organisation for Migration ("IOM") and have returned to Iraq. There is no evidence to date of any problem encountered by returnees during their journey to Iraq. Taking into account the general possibility of travelling to Iraq and that a considerable number of people have returned with the assistance of the IOM it is considered that travel from the U K to Iraq is both possible and reasonable*"; and
>
> (iii) the Secretary of State was not satisfied that the claimant had taken reasonable steps to leave the United Kingdom as he had not applied to the IOM or provided confirmation that he had been approved under the Voluntary Assisted and Reintegration Programme

26. The ASA dealt with this issue in this way:

> *"16.There is no evidence before me to demonstrate that the appellant is taking steps to leave the United Kingdom and, indeed, it would be contrary to the case which he states in his grounds of appeal for him to take such steps. The appellant claims (through his representatives) that the circumstances in Iraq are such that he has done as much as he can in order to*

> *affect his return albeit that he has not registered with IOM. This matter has already been considered in a similar case decided by the Chief Asylum Support Adjudicator in appeal ASA/06/06/13556 on 26 June 2006. A similar argument was presented upon behalf of the appellant. That decision is persuasive upon me. It was held, in 13556, that the reasonableness of a return to Iraq would already have been established in the course of the rejection of the appellant's asylum claim - the basis of being considered for support under Section 4. Accordingly, an appellant cannot seek to re-open that issue in the context of regulation 3(2) (a). I utilise the words she sets out a paragraph 28 of that decision and which reads as follows:*
>
> *"in my opinion, the ASA's jurisdiction does not extend to consideration of extraterritorial issues such as the risk posed to individuals on a particular route if and when they leave the UK. If a failed asylum seeker seeks to argue that there exists barriers preventing him from reaching internal safety, where the quality of internal protection fails to meet the basic norms of civil political and socio-economic human rights or where internal safety is otherwise illusory or unpredictable, the correct course of action is for him to lodge a fresh application for asylum and to submit his further evidence in support for consideration by the Secretary of State."*

(iii) The Rival Submissions

27. Mr. Cox contends that the approach of the Secretary of State and of the ASA to condition 3 (2) (a) is wrong as it was necessary not merely for the claimant to be able to leave the United Kingdom and to arrive in Iraq but also to be able to return to his home in Jalawla. He submits that condition 3 (2)(a) has to be construed in the light of the construction of condition 3(2) (c) determined in **Rasul** (which was that the claimant can return to Iraq if there is a viable route of return to *any part* of Iraq for the claimant), then condition 3 (2)(c) cannot be satisfied, because in the words of the claimant's written skeleton argument, this:

> *"37 …points strongly to a construction of condition (c) which permits reliance upon such dangers. It would be not only strange, but unjust, to deny accommodation to a destitute asylum seeker on the ground that other nationals of his country can safely return to their homes and therefore his claim to be different cannot be considered.*
>
> *38…the 'step' of applying for voluntary return is not satisfied if the voluntary return available would not be by safe route".*

28. No contention has been made that this decision or that of the Secretary of State is irrational and the only challenge is that an error of law was made by the Secretary of State and ASA. Miss Laing QC submits that the proper approach

is that condition 3 (2) (a) on its true construction only relates to matters which arise in the United Kingdom.

(iii) Discussion on the correct interpretation of condition3 (2) (a)

29. I am unable to agree with the claimant's approach for four reasons, which individually and cumulatively lead me to the conclusion that the Secretary of State is correct because the wording of condition 3(2)(a) shows that it *only* relates to matters which arise in the United Kingdom, such as attempts by an applicant to leave the United Kingdom.

30. First, there is nothing in condition 3(2) (a) which relates to anything that might happen outside the United Kingdom and the wording relates solely to what has to be done in the United Kingdom in order to leave the United Kingdom. The wording states (with my emphasis added) that there has to have been "*reasonable steps <u>to leave</u> the United Kingdom or place himself in a position in which he is able <u>to leave</u> the United Kingdom*".

31. Second, if the draftsman of the 2005 regulations had wanted to ensure that condition 3(2) (a) *only* related to matters which arise in the United Kingdom and which relate to attempts by an applicant to leave the United Kingdom, then he or she might well have used the exact wording which in fact appears in that condition. In other words, the wording of condition 3(2) (a) is consistent with the Secretary of State's construction of it.

32. Third, the only example given in condition 3(2) (a) is of "*complying with attempts to obtain a travel document to facilitate his departure*". This shows not only that condition 3(2) (a) only relates to matters which arise in the United Kingdom and which relate to attempts to leave the United Kingdom but also that it is not concerned with what might occur abroad. Indeed it is settled law that

> *"one of the best ways, I find of understanding a statute is to take some specific instances which, by common consent, are intended to be covered by it."* (per Lord Denning in **Escoigne Properties Limited v IRC** [1958] AC 549, 565-566*).*

33. Fourth, the construction advocated by Mr. Cox would mean rewriting condition 3(2) (a) so as to insert words to the effect that "*and to return to his place of residence abroad"* in condition 3(2) (a) after the words "*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"*. Such rewriting is not permissible especially as the need for the insertion of these words has not been established.

34. My conclusion is therefore that the wording of condition 3(2) (a) shows that it only relates to matters which arise in the United Kingdom and which relate to attempts by an applicant to leave the United Kingdom; this means that on the facts of this case, the claimant cannot succeed as by failing to apply for an assisted voluntary return with the IOM, the claimant failed (in the words of

condition 3(2) (a)) to take "*reasonable steps to leave the United Kingdom or to place himself in position in which he is able to leave the United Kingdom"*.

(iv) The consequences if the claimant's construction of condition 3 (2) (a) is correct

35. Finally, there is another reason why the claim must fail because even if Mr. Cox's construction of condition 3(2) (a) is correct, it would not be of any assistance to the claimant because the evidence of the claimant does not show that in the words of Mr. Cox's written skeleton argument that "*the voluntary return available would not be by a safe route*". The case for the claimant is as he stated in his application form for section 4 relief that:

> *"I believe that by informing myself about the mechanics and dangers of voluntary return to my town, and by considering whether to make a voluntary return there, I have taken all reasonable steps to place myself in a position in which I would be able to leave the United Kingdom . The next step would be to make a dangerous journey and I believe that it is not reasonable to expect me to take that step".*

36. As I will explain, the evidence consists solely of averments by *the* claimant of his belief without any details in support. The burden of proof must be on the claimant and it can only be discharged if he adduces some evidence in support of his assertion that there is not a safe route of return available. As I will explain, even if the onus of proof is on the Secretary of State, she will be able to show that the claimant cannot rely on this condition.

37. The claimant's witness statement is surprisingly vague on this matter as he merely says (with my emphasis added) that:

> *"When I realised that I was going to have nowhere to live, I made an application for s.4 support with the help of Refugee Action in Liverpool. In my application, I made it clear that I was destitute, and that I had done everything that I could in order to take reasonable steps towards my voluntary return to Iraq. I think that I went as far as I reasonably could. I sought information from Refugee Action, who helped me access IOM. IOM want people to sign a waiver so that they are not held responsible for their safety, before they join their programme. This made me very nervous. Also, I looked at the information about travelling to my home area of Jalalwala from Baghdad, and <u>it looked very frightening to me. It did not seem at all certain that I would be safe making the journey. Given these risks to my personal safety,</u> I decided that I would not register with the IOM programme"*

38. In his application for section 4 relief, the claimant again merely says (again with my emphasis added) that :

> *"After due consideration, and taking the information from the IOM into account, I believe that the journey overland from Baghdad to my town would be dangerous to me."*

39. The information from the IOM, which the claimant said he took into account, is probably that provided by Refugee Action and appended to the claimant's application for section 4 relief in which it records that:

> *"We understand that currently, IOM can assist people to return via flights to Arbil, Sulemaniyah, Basra or Baghdad. IOM has told us through a local, sub-contracted agency in Arbit, it can meet returnees at Sulemaniyah or Arbil airports and can assist individuals to apply for ID which they may need in order to pass through checkpoints within the KRA. IOM can organise onward travel in Iraq by booking a local taxi company but it does not provide transport itself. IOM has told us that it can sometimes meet people at Baghdad and Basra airports but often cannot do so because of last-minute safety concerns. .IOM does not have any presence in Kirkuk, Mosul, or any towns except Arbul or Baghdad.*
>
> *Refugee Action has read the ASA's determination in appeal number ASA/06/03/12859, which suggests that IOM will not return individuals if the route is possibly dangerous. However, IOM has informed us that it is not able to carry out a monitoring role within Iraq, as it has only limited presence in Baghdad and through a sub-contracted local agency in Arbil. As such, it is unable to monitor the safety of onward travel from airports in Iraq for a particular individual, and therefore cannot make an assessment of the safety of return for a particular individual to their home town or village….*
>
> *For example, when the Secretary of State had agreed that Highway 10 might pose safety risks to returnees, IOM was able to facilitate the transport of individuals along this route if they confirmed that they genuinely wanted to return, and did not hold IOM liable for their safety once across the Iraqi border. Individuals are asked to submit their VARRP form, and sign the papers only after they have considered whether they do want to return by the particular proposed route.*
>
> *In this case, we understand that the route of return to Jalula would be via Baghdad and then overland from Baghdad to Jalula"*

40. It is striking that the claimant does not give any particulars as to:

(a) which route from Baghdad to his home town of Jalawala is dangerous and whether there are any other routes available;

(b) where on any such route it is dangerous;

(c) why, how and where it is dangerous;

(d) if there is inadequate state protection for the claimant on any such route; and

(e) why internal relocation in Iraq is not available to the claimant.

41. In other words, in order to invoke condition 3(2) (a) as construed by Mr. Cox, the claimant needs to say more to establish more than making either a mere averment the journey looked "*very frightening to me*" or an unparticularised averment that the claimant "*I believe that the journey would be dangerous to me*". My conclusion on this is fortified by the conclusions of the Secretary of State's Operation Guidance Note of 12 February 2007 ("OGN") which I set out in paragraphs 55 to 57 below and which show that Kurds (which would include the claimant) like other Iraqis do not consider travelling around the country so unsafe that they have largely curtailed their travel. I add that even if the onus of proof is on the Secretary of State, she will be able to show that the claimant cannot rely on this condition by reason of what is said in the material to which I have referred and to which I will refer in paragraphs 52 to 57 below. So even if Mr. Cox's construction of 3(2) 2 (a) is correct, the claimant cannot satisfy it irrespective of whether the burden of proof is on him or on the Secretary of State.

(v) Conclusion on Condition3 2(a)

42. Thus the claim for relief under condition 3(2) (a) fails irrespective of whether I accept the construction of that condition put forward by the Secretary of State or by the claimant.

VI. The Condition 3(2) (e) Issue

(i) The approach of the ASA

43. The Secretary of State did not deal with this condition as a claim under condition 3(2) (e) had not been made to her. The ASA did when he stated in relation to this claim that:

> *"32. However, these are matters which have already been considered in his asylum claim and which I cannot consider as they relate to a situation which may arise in his country of origin rather than in the UK. In my view, the appellant's situation is capable of remedy. He can avoid the effects of destitution and, in turn, a potential breach of his human rights by contacting the IOM or the Immigration Service with a view to his voluntarily returning to Iraq. In this way he will become eligible for the grant of Section 4 support once again and is free to make a further application for this purpose and as soon as he is minded to take this step".*

(ii) The rival submissions

44. The claimant did not challenge the decision that he could not satisfy condition 3(2) (e) in either the Claim form or in the written skeleton argument prepared for the purpose of the present hearing. When Mr. Cox raised a claim that his condition had been satisfied, Miss Laing was ready and able to make submissions in respect of this condition, which I duly heard.

45. Mr. Cox contends that the claimant satisfies condition 3(2) (e) as the provision of accommodation is necessary for the purpose of avoiding a breach of his rights under the ECHR as he cannot return to his home in Jalawala in Central Iraq and he has nowhere to stay in England. He takes issue with the assertion of the ASA that the claimant could contact the IOM or the Immigration Service with a view to returning voluntarily to Iraq because he says that it would not be safe for him and that might infringe his Convention rights.

46. The response of Miss Laing is that the Secretary of State accepts that there may be cases in which a destitute claimant raises credible arguments that a failure to provide him with support under section 4 will result in a breach of his Convention rights because there is a real risk that he will suffer ill-treatment crossing the article 3 threshold, either on the journey back to his home country or on the journey to the safe area if he returns to his home country or, in an internal relocation case, to a safe area of that country. In such cases, the claimant will starve if he is not supported and additionally he cannot return to his home country because it is too unsafe to do so.

47. The Secretary of State accepts that in such cases, support will in principle be available under regulation 3(2) (e). Miss Laing submits that this case is not such a case because in the light of the objective evidence, the claimant cannot show that the article 3 threshold would be breached in his case. It is also not accepted that it would not be safe for the claimant to return to Iraq.

(iii) Discussion

48. In my view, the ASA was entitled to conclude that the claimant's fear of returning to Iraq was a matter which had *"already been considered in his asylum claim"*. In his determination, the Immigration Judge had concluded of the claimant that:

> *"32 I find] the claimant's] account to be implausible, to have discrepancies and to be inconsistent. I therefore find that [the claimant] is not credible in the core of the claim…*
>
> *37…I do not find that he is fleeing persecution or that he would be persecuted were he to be returned to Iraq"*

49. The Immigration Judge also concluded in respect of the claimant's human rights appeal that:

> *"38...I do not accept that should [the claimant] be returned to Iraq, he would face treatment contrary to article 3 of the [ECHR]"*

50. The ASA was entitled to regard these findings as his starting point and that in the light of them, the claimant would have to show that they were wrong or no longer correct. The claimant's case as presented to the ASA and to the Secretary of State also fails to show that his convention rights would be infringed if he were to be returned to Iraq. In his witness statement, the claimant says without giving any particulars that *"I am unable to return to my country because I believe that it is not safe for me to do"* [29]. He had earlier said in his application for section 4 relief that:

> "*after due consideration, and taking information from the IOM into account, I believe that the journey overland from Baghdad to my town would be dangerous to me"*

51. These assertions are much too vague to show that the claimant's article 3 rights would be infringed if he were to be returned to Iraq or that it would be unsafe for him to do so. After all, the mere fact that that it might be unsafe for the claimant to return does not mean that his article 3 rights would be infringed as article 3 provides that:

> *"No one shall be subjected to torture or degrading treatment or punishment"*

52. The threshold for an infringement of an article 3 right is high both in terms of the minimum level of severity in order to fall within the scope of article 3 and also the type of the state's responsibility.

53. As to the requirement of the minimum level of severity required for article 3 to be engaged, the claimant's case does not contain any material which would lead to the conclusion that there would be or even might probably be a breach of his article 3 rights if he were to be returned to Iraq. I reach that conclusion not merely because of the findings of the Immigration Judge to which I referred in paragraph 46 above but also because even if it was relevant to consider his journey from Baghdad to Jalawala, then the claimant's case is also too vague and unparticularised. The claimant does not give any details as to:

> (a) which route from Baghdad to his home town would be dangerous and whether there are any other routes available;
>
> (b) where any on such route it would be dangerous for the claimant to travel;

(c) why it would be dangerous;

(d) even if the route would be dangerous, why or how this fact shows that the article 3 rights of the claimant would be infringed; and/or

(e) if there would be inadequate state protection for the claimant on any such route.

54. Thus I do not consider that in the words of condition 3(2) (e), *"the provision of accommodation is necessary for the purpose of avoiding a breach of [the claimant's article 3 rights]"*. I am fortified in coming to this conclusion that the claimant's article 3 rights would be infringed if he were to return to Iraq or to his home town there by what is stated in the OGN. Furthermore, if the burden of proof in respect of the requirements of condition 3(2) (e) is on the Secretary of State, the material in the OGN shows why she was entitled to refuse section 4 relief to the claimant.

55. Paragraph 2.19 of the OGN explains that the Iraqi Constitution guarantees freedom of movement, travel and residence inside and outside Iraq. It also notes that the prevailing lack of security, which includes *"fighting, ambushes, highway robbery, roadside bombs, mines/UXO"*, has led to the imposition locally of road closures, curfews and checkpoints, which severely restrict freedom of movement.

56. Paragraph 2.22 of the OGN notes that that there are practical constraints on choosing one's place of residence in Iraq but it then states that

> *"However, ordinary Iraqis generally use the roads on a daily basis. The roads are less well used at night. The Erbil to Kirkuk road is heavily used and whilst there are occasional incidents, these are few. The roads are generally used for purposes such as deliveries of goods by lorry and van, public transport such as buses, coaches and taxis. Ordinary Iraqis do not consider travel round the country by road so unsafe that they have largely curtailed travel around the country. Travel by road is more difficult and dangerous for people whose countries are participating in international coalition forces in Iraq."*

57. The claimant is a Kurd and so it is noteworthy that the position of Kurds is specifically dealt with at paragraph 2.29 of the OGN where it is stated that :

> *"Kurds are no more likely to have difficulty travelling outside the Kurdish areas than any other section of Iraqi society. Kurds are able to live outside the KRG. Although Kurds have been targeted outside the KRG this is no more so than any other group. Many Kurds live outside the KRG and*

> *are well represented in state institutions within Iraq such as the government, the police force and the army."*

58. Even if article 3 was engaged, there is no material that Iraq has not complied with its obligations to ensure that the state agents are not responsible and that it has taken reasonable steps to prevent real and immediate risk of torture or inhuman treatment at the hands of non-state agents.

59. I have considered, but rejected, the possibility that the claimant's article 2 rights could be infringed if he were to return to his home town. Article 2 provides that "*everyone's right to life shall be protected by law"*. The same reasons as show that the claimant's article 3 rights are not being infringed lead me to the conclusion that in the words of condition 3(2) (e), *"the provision of accommodation is necessary for the purpose of avoiding a breach of [the claimant's article 2 rights]"*.

60. This material fortifies my view that there is no error of public law in the decision of ASA that the claimant cannot rely on condition 3(2) (e). So I conclude that the claimant cannot rely on condition 3(2) (e) in the light of the evidence.

VII Conclusion

61. It follows that for the reasons which I have sought to explain, the claim fails on its facts. For the purpose of completeness, I should add that if the claimant was able to adduce some more detailed supporting evidence relating to the matters set out in condition 3(2) (e), then he might possibly be able to take advantage of that provision and thereby qualify for relief.