Neutral Citation No: [2023] NIKB 113 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL12325** *ICOS No:* **23/014385** *Delivered:* **17/11/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JOSEPH DADZI
FOR JUDICIAL REVIEW

Mr Erik Peters (instructed by Wilson Nesbitt Solicitors) for the Applicant
Mr Joseph Kennedy (instructed by the Crown Solicitor's Office) for the Respondent

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COLTON J

Introduction

[1] The applicant initially brought proceedings before this court to challenge two decisions of the Secretary of State for the Home Department ("the respondent"). The first challenge concerned the alleged failure of the respondent to consider the applicant's further submissions under paragraph 353 of the Immigration Rules. This challenge was not pursued during the course of hearing as the respondent communicated to the applicant that it was in the process of assessing the further submissions. The court has since been provided with an affidavit from the applicant explaining that his further submissions were rejected on 2 May 2023.

[2] Following the leave hearing, the applicant by way of amended Order 53 statement challenged inter alia the SSHD's failure to consider the applicant's paragraph 353 submissions within a reasonable time.

[3] The second challenge which formed the central issue at the hearing is against the decision of the respondent dated 30 January 2023 to discontinue provision of support to the applicant under section 95 of the Immigration and Asylum Act 1999 on the grounds of his status as a "failed asylum seeker."

Factual background

[4] The applicant, a national of Ghana, arrived in the UK on 16 July 2018 and claimed asylum on the same day. The applicant has availed of asylum support under section 95 of the 1999 Act since 31 July 2018.

[5] On 5 January 2020, the applicant's asylum claim was rejected by the Home Office. The appeal was heard in the First-tier Tribunal ("FtT") by Farrelly IJ on 31 August 2021 and subsequently dismissed on 15 September 2021. The applicant sought to appeal the decision of the FtT which was rejected. The applicant became appeal rights exhausted on 8 December 2021.

[6] Although the applicant became appeals rights exhausted on 8 December 2021, he did not lose his entitlement to section 95 support which normally would have occurred after his asylum claim failed. However, due to COVID-19, the government decided in March 2020, to suspend evictions and extend section 95 support to those who would otherwise have had their support withdrawn. This suspension continued until the end of December 2022.

[7] Following the rejection of his claim, the applicant made efforts to obtain additional evidence with a view to making further submissions pursuant to paragraph 353 of the Immigration Rules. On 3 February 2022 he attended an appointment at Belfast Service and Support Centre ("BSSC") and lodged his further submissions. The applicant was sent a receipt letter confirming his attendance and explained that he would be notified of the decision in due course.

[8] What occurred following this appointment caused considerable confusion and distress to the applicant. It appears that the applicant's documents were posted to the Support Centre in Liverpool but should have been forwarded to the Liverpool Further Submissions Unit ("LFSU").

[9] No note was made on the Home Office case management system by staff in BSSC that the applicant had attended, and no copy of the receipt letter was logged on the system. A question was raised by LFSU in March 2022 whether the applicant had attended his appointment and made further submissions. However, in the absence of any electronic record, BSSC informed LFSU that the applicant had not made further submissions. It appears that no further action was taken in relation to the applicant whose section 95 support remained in place due to the COVID suspension.

[10] Fast-forward to 19 January 2023, the applicant's solicitor made an enquiry seeking an update on the progress of his further submissions. On 23 January 2023, his solicitor received a response explaining that Mr Dadzi had no outstanding applications and therefore no basis to remain in the UK. Subsequently, the applicant received a letter on 30 January 2023 from the Home Office stating the following:

> "I am writing to inform you that the decision has been taken to resume negative cessations across the Devolved Governments, therefore the support you have been receiving under section 95 will soon end.
>
> Your asylum claim was fully determined on 8 December 2021. As such you are no longer entitled to the support you are in receipt of. Your support will end 21 days from the date of this letter on 22 February 2023.
>
> After this date you can continue to use and access funds on your Aspen card for a further 28 days…
>
> Your eligibility for accommodation…will cease on 22 February 2023 when you will be expected to leave. You should make immediate arrangements to vacate the premises…
>
> You should note that there is no right to appeal against this decision under section 103 of the Immigration and Asylum Act 1999 to the First Tier Tribunal…As a failed asylum seeker, you are expected to make arrangements to leave the United Kingdom without delay. If there is a reason why you cannot immediately return to your country of origin and would otherwise be destitute, it may be possible to provide you with short term support under section 4 of the 1999 Immigration and Asylum Act."

[11] Urgent emails were sent by the applicant's solicitor between 1 February – 7 February 2023 attaching evidence that further submissions had been made and seeking clarification on the outcome of that assessment of the applicant's "fresh claim." No response was received.

[12] The applicant's solicitor sent pre-action correspondence to the respondent on 9 February 2023 expressing the applicant's intention to challenge the discontinuation of his section 95 support while his fresh claim was still to be assessed. Proceedings were issued on 17 February 2023.

[13] On the morning of 20 February 2023, a reply to the pre-action correspondence was sent by the respondent which stated:

> "The SSHD has made enquiries with the relevant team regarding your client's further submissions. The team have confirmed that your client did not attend his appointment at the Further Submissions Unit in Belfast on

> 03/02/2022. Furthermore, the team confirm that no such letters confirming attendance at the Further Submissions Unit in Belfast have been provided to your client. Consequently, your client does not have an outstanding further submissions application…
>
> With regards to your client's asylum support, as your client does not have outstanding further submissions application, he is not eligible for section 95 asylum support"

[14] The assertion that the applicant did not attend his appointment was erroneous. Later that afternoon, an email was received from the respondent's legal representative explaining instead that efforts have been ongoing to investigate the applicant's circumstances and that "the further submissions provided by the applicant on 3 February 2022 cannot be located."

[15] Leave to apply for judicial review was granted by this court following the above exchange between the parties on 20 February 2023, along with interim relief. Accordingly, the respondent was ordered not to take any steps to discontinue section 95 support, including the withdrawal of accommodation, pending the outcome of the hearing.

[16] An automated letter dated "9 February 2023" was sent to the applicant on 27 February reminding him of the requirement to vacate his place of residence. This applicant was informed that this was a mistake as the letter was prepared before the court's interim relief order was made on 20 February.

[17] On 20 March 2023, the respondent accepted that written submissions had been provided and undertook to consider them.

[18] The applicant's further submissions were assessed by the respondent on 2 May 2023 and rejected. Notification of this decision and the reasons for it were provided to the applicant's solicitor on 11 May 2023. According to the respondent steps have been taken to ensure that the errors which befell the applicant do not happen again. The court is informed that in the future the BSSC will update the respondent's systems to confirm on the electronic record when someone attends for their further submissions appointment.

The grounds of challenge

[19] The applicant contends that the respondent's failure to consider his paragraph 353 submissions expeditiously was unreasonable in the *Wednesbury* sense. Mr Peters underlined that the delay was primarily caused by the public authority's mishandling of the applicant's documents, which in his view is something about which the court must be critical. Mr Kennedy explained that the respondent has

acknowledged the mistake and has considered the further submissions. Mr Kennedy pointed out that the applicant has, in any case, potentially benefitted from the delay by being permitted to remain in the UK while the respondent considers his further submissions.

[20] The essence of the applicant's second challenge is that the impugned decision is illegal insofar as the SSHD has misapplied the relevant law. More specifically, Mr Peters argued that by making further submissions pursuant to paragraph 353 of the Immigration Rules, the applicant's asylum claim could not be considered as "fully determined" and therefore his entitlement to section 95 support should have been maintained. The applicant further contended that this decision was irrational, breached his legitimate expectation to have his section 95 support maintained and was a disproportionate interference with his article 8 ECHR rights.

[21] Mr Kennedy's response is that a person's entitlement to section 95 support is contingent upon a particular status, that is to say, destitute asylum seekers whose initial claim has not been determined. Mr Kennedy argues that the applicant's status is that of a failed asylum seeker which according to the statutory framework set out in section 95 and section 4 of the 1999 Act justifies the decision to discontinue section 95 support. The respondent argues that the more limited level of support contained in section 4(2) of the 1999 Act is applicable for those whose claims have been rejected. This challenge was the focus of the arguments at the hearing and the court therefore proposes to deal with this issue first.

Section 95 support - Relevant statutory provisions

[22] The 1999 Act established two distinct schemes which are relevant to the present case. The first scheme can be found under section 95 which confers the power to provide support, including accommodation to asylum seekers while their application is being assessed by the Home Office. The relevant paragraphs are 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."

[23] The second scheme is for failed asylum seekers and can be found under section 4 of the 1999 Act. It provides for the power to grant a more limited form of support in the following cases:

"(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.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for accommodation of a dependant of a person for whom facilities may be provided under sub-section (2).

(4) The following expressions have the same meaning in this section as in Part VI of this Act (as defined in section 94) - (a) asylum-seeker, (b) claim for asylum….

(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 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."

[24] Persons supported under section 4 receive the same entitlement as those under section 95 in terms of monetary value, but do not receive cash.

[25] Section 103(2) of the 1999 Act is relevant. This provides for the right to appeal against a decision to discontinue section 95 "before that support would otherwise have come to an end." Section 103(2A) allows for appeals against a decision not to provide accommodation to a person under section 4, or not to continue to provide accommodation under section 4. Whilst not a key feature of this case, I note that the issue of the SSHD's letter informing the applicant that he had no right of appeal under section 103 was raised by the applicant. On a plain reading of section 103, the respondent is correct. The right to appeal against the decision to discontinue section 95 support applies only to the asylum seeker who has been deprived of his section 95 entitlements before his initial claim has been determined.

[26] The Immigration and Asylum (Provision of Accommodation to failed Asylum Seekers) Regulations 2005 (SI 2005 No 930) established the criteria to be used when assessing a failed asylum seeker's eligibility for accommodation under section 4 of the 1999 Act. Regulation 3 provides:

"(1) ... 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–

[…] (iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

(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."

[27] The policy document on the application of section 4(2) of the 1999 Act, entitled "Asylum support, section 4(2): policy and process" (16 February 2018) ("the section 4(2) policy") is important. According to page 9, in order to be eligible for section 4(2) support, a person must be a failed asylum seeker and must meet conditions set out in the 2005 Regulations (see above). The person must appear to be destitute or likely to become destitute within 14 days (or 56 days if they are already

in receipt of support). In deciding whether the person is destitute, regard must be had to several factors, including "whether the person has, or has had access to accommodation or financial support and if so the evidence about the continued availability of this support."

[28] Page 12 of the section 4(2) policy identifies the standard in *R (Limbuela) v Secretary of State* [2005] UKHL 66 as the relevant test for determining whether regulation 3(2)(e) of the 2005 Regulations is engaged. Accordingly, "a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to article 3 of the ECHR. The policy document further notes that the positive obligation to provide section 4(2) support does not apply where the failed asylum seeker is able to return to their country of origin. However, where there are practical or legal obstacles to their return, section 4(2) support should be provided. One such legal obstacle includes making further submissions under paragraph 353 of the Immigration Rules (see page 13 of the section 4(2) policy).

[29] Paragraph 353 of the Immigration Rules provides:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[30] The inter-relationship between fresh claim submissions and asylum support is expanded upon at page 14 of the section 4(2) policy, which explains the following:

> "The existence of further submissions, combined with the fact that the person does not have access to accommodation and the means to live (or will shortly be in this position) may mean that support will need to be provided to prevent a breach of their ECHR rights.
>
> Wherever possible, the further submissions should be considered at the same time as consideration is given to the support application.

> If it is found that the further submissions are clearly abusive, manifestly unfounded or repetitious the application should be refused, which in practice will be at the same time as the further submissions are rejected.
>
> However, a decision on the application should not be unnecessarily delayed to await the further submissions decision. Generally, decisions should be made within 5 working days, but careful consideration should be given to any additional factors that call for the case to be given higher priority and the decision made more quickly.
>
> […]
>
> If consideration of the further submission results in:
>
> […]
>
> Them being accepted as a fresh claim…support should be refused or discontinued, and the person advised that they may be eligible for asylum support provided under section 95 of the 1999 Act."

Relevant authorities

[31] The effect of further submissions on the position of failed asylum seekers was addressed in *Mahmud's Application* [2021] NIQB 6. Friedman J considered at para [3] that:

> "The mere making of submissions in support of a fresh claim <u>does not alter the status of the claimant</u> whose legal existence and concrete situation in this country is marginal. That is because he is prohibited from establishing a livelihood, has no right to subsistence, nor right of abode. Also without the formal acknowledgement that he has a fresh claim he is at risk of being removed or required to leave immediately. To say that the applicant's situation is marginal does not mean, however, that he exists outside the protection of a legal framework. <u>A failed asylum seeker is someone who has exhausted his formal avenues of appeal against a negative decision on his asylum claim</u>. <u>At that stage and pending his removal or voluntary exit from the United Kingdom, he is entitled to make further submissions in support of the existence of a fresh claim and the Home Office is under a duty to consider them carefully in accordance</u>

> with paragraph 353 of the Immigration Rules and otherwise in conformity with public law. The requisite care in considering such submissions is derived from the consequences of their erroneous rejection, which could be death, torture and persecution. While those submissions are under consideration it is open to the claimant to apply for discretionary asylum support under section 4(2) of the Asylum and Immigration Act 1999 (the '1999 Act'). The Home Office is under a duty to provide that support in order to avoid a claimant suffering from a breach of his rights under the European Convention of Human Rights ('ECHR'), as provided for by regulation 3(2)(e) of The Immigration and Asylum (Provisions of Accommodation to Failed Asylum Seekers) Regulations 2005 (the "2005 Regulations"). This mandatory intervention arises from the special situation of the migrant who as a condition of his temporary entry into the country has "no recourse to public funds" such as to enable him to independently acquire shelter, food, or what Lord Bingham in one of the key authorities termed the 'most basic necessities of life.'"

On 8 June 2023, the Court of Appeal overturned the decision in *Mahmud*. However, this was on the basis that the decision of the SSHD to reject the applicant's further submissions was vitiated by the failure to apply the correct test. It did not refer to the distinction between section 95 and section 4 support.

[32] This interpretation was cited with approval by Humphreys J in *Re Said's Application* [2023] NIKB 1 wherein the applicant lodged further submissions but was refused an ARC card on the basis that he was a failed asylum seeker. The ARC is a credit card-sized plastic card issued by the Home Office to individuals who claim asylum. It contains information about the holder's identity, it certifies that the holder is an asylum claimant and as such will be allowed to remain in the United Kingdom while their claim is still pending. It also confirms whether the claimant has permission to work at the time of issue. Humphreys J observed:

> "The inescapable consequence of this [Friedman J's] analysis is that the applicant is properly recognised in law as a failed asylum seeker, albeit one who has exercised his right to make further submissions under paragraph 353."

[33] On this basis and reinforced by the clear wording of the relevant sections of the Immigration Rules, Humphreys J concluded:

> "it is apparent that only asylum seekers are eligible for an ARC, not failed asylum seekers. Unless and until the extant further submissions are treated as a fresh claim, the

applicant remains a failed asylum seeker and therefore cannot avail of the benefits of an ARC."

[34] This issue was thoroughly considered by the judgment of McCloskey LJ when *Said* came before the Court of Appeal – *Said and Secretary of State for the Home Department* [2022] NICA 49.

[35] At paras [18]-[21] McCloskey LJ said as follows:

"[18] The appellant's status in the United Kingdom is a matter of central importance. The correct analysis is that he has had several different types of status during the ten-year period in question:

(a) Upon first arriving in the United Kingdom, he was a person of irregular immigration status, having no right to enter or remain.

(b) Having entered and having made his first claim for refugee status, his domestic law status became that of a person entitled to remain pending determination of his asylum application.

(c) Upon the dismissal of his first asylum application, he reverted to having status (a).

(d) Following his removal from and subsequent re-entry to the United Kingdom the appellant reverted to status (a).

(e) Upon making his second asylum application a conversion to status (b) occurred.

(f) Upon the dismissal of his second asylum application, he reverted to status (a).

[19] What, therefore, has the appellant's status in the United Kingdom been since the last-mentioned event? One element of the answer to this question is not altogether clear. His status in domestic law or policy in the United Kingdom since the refusal of his ninth further submissions under paragraph 353 of the Rules is not

> addressed in the evidence or the parties' submissions or in agreed terms. In particular, there is no indication that the appellant has been granted limited leave to remain in the United Kingdom. Furthermore, he cannot lay claim to either of the two basic types of status recognised in substance by the Refugee Convention namely (a) that of a person who has applied for refugee status and awaits determination of their application or (b) that of a person who has been granted refugee status by the host country.
>
> [20] Subject to the reservations mentioned, it seems likely that most recent status of the appellant – and that of any person awaiting the outcome of a paragraph 353 further submissions application – belongs to a twilight zone in which their continued presence in the United Kingdom is tolerated as a matter of grace by the executive. On any showing it is, in the language of the immigration law and practice lexicon, a status of the most precarious kind.
>
> [21] Unlike the first element of the answer to the question posed in para [19] above, the second element is abundantly clear. The appellant does not have the status of asylum applicant. Rather his status has two salient characteristics. He is (a) an unsuccessful asylum applicant who (b) via the domestic law paragraph 353 machinery is seeking to re-acquire the status of asylum applicant. This follows from the terms of para 353 of the Rules (see para [2] *supra*), which contemplate a two-stage approach in the case of "further submissions" applicants. At the first stage, the decision maker will, applying the specified tests, "… determine whether [the further submissions] amount to a fresh claim." A negative determination will generate a final decision adverse to the claimant, without more. In contrast, a positive determination will trigger a second stage, entailing a substantive and final assessment and determination of what is accepted as being a fresh claim. This analysis was not contentious as between the parties."

[36] The inter-relationship between section 95 and section 4 of the 1999 Act was discussed in *R (Nigatu) v Secretary of State for the Home Department* EWHC 1806. The applicant argued that the mere making of further submissions would transform him into an asylum seeker and entitle him to support under section 95 of the 1999 Act. Collins J rejected this contention stating at para [26]:

> "I am satisfied that the making of what is asserted to be a fresh claim does not automatically trigger the right to continuing support as an asylum seeker. That only arises when the Secretary of State decides, obviously as soon as possible, that it can be properly regarded as a fresh claim, whether or not, as I said, in the end it succeeds."

[37] Collins J explained the rationale behind discontinuation of section 95 support at para [19]:

> "If it is known that the mere making of what is said to be a fresh application for asylum will trigger continuing right to support, then there will be an obvious incentive to those who merely seek to delay their removal from this country to do just that. It will always, and inevitably, take some time for the Secretary of State to deal with these so-called fresh applications. Although, of course, it is necessary and desirable that they are dealt with as speedily as possible, the reality is that one cannot expect such matters to be dealt with overnight. Of course there should be no unnecessary delay, and it is unfortunately the case that it does sometimes appear to take far too long for the Home Office to deal with these applications. If the individual is to be deprived of support in the meantime, that may put an altogether illegitimate pressure upon that individual, who may have a genuine fresh claim, to give up if the alternative is effectively destitution. Accordingly, it is important that this is not abused by the Secretary of State if the decision is that there is no fresh claim until he decides that it should be regarded as such by putting such a pressure upon individuals.
>
> [20] <u>The safeguard lies in section 4 of the Act</u>. This means that so long as the individual is remaining in this country, there is power in the Secretary of State to provide at least for his accommodation. This will 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."
> [My underlining]

[38] I pause here to point out that while section 4 is intended to act as a safety net, the Secretary of State is not obliged to automatically provide section 4 support where further submissions have been made pursuant to paragraph 353. Thus, where the further submissions are "manifestly unfounded, or merely repeat the previous

grounds or do not disclose any claim for asylum at all", section 4 support may be refused (see *R (AW) v Croydon LBC [2005] EWHC 2950* Admin at para [69]).

[39] The approach of Collins J in *Nigatu* was confirmed in the later case *of R(MK) v Secretary of State for the Home Department* [2012] EWHC 1986 Admin which addressed the scope of the obligation to provide temporary accommodation and assistance to those seeking asylum whilst their fresh submissions remain under consideration. Commenting on the scheme laid down by section 4 of the 1999 Act, Foskett LJ stated at para [6]:

> "The statutory obligation concerning accommodation and assistance in this context arises pursuant to section 4 of the 1999 Act (as amended by section 49 of the Nationality, Immigration and Asylum Act 2002) which, together with regulations made pursuant to it, is the provision that forms the backdrop to each of these applications. An asylum seeker who is yet to receive a decision on his or her initial asylum claim is entitled to support and accommodation where appropriate under section 95 of the Act if he or she would otherwise be destitute."

Was the decision to withdraw s.95 support unlawful?

[40] It is clear from a plain reading of the statutory provisions, the policy document and an examination of the relevant case law both in this jurisdiction and in England & Wales, that section 95 support is intended to be withdrawn once an asylum seeker's initial claim has been determined and they have become appeal rights exhausted. From that point onwards, section 4 operates as a safeguard to ensure inter alia, that where further submissions are made under paragraph 353 of the Rules, a more limited support is available to avoid the failed asylum seeker being exposed to conditions in breach article 3 of the ECHR.

[41] In course of the hearing, Mr Peters sought to argue that Regulation 3 of the 2005 Regulations, as a whole, makes clear that section 4(2) support is designed for failed asylum seekers who are in a different position to that of the applicant. He submitted that Regulation 3(2)(e) (which is the relevant condition to be satisfied in this case) as a "catch all" provision, does not apply to persons with outstanding paragraph 353 submissions. However, the court considers that the policy document provides express evidence to the contrary and in fact envisages section 4 support being provided in situations where further submissions are made, and the support is necessary to prevent a further breach of an applicant's ECHR rights.

[43] Properly analysed there is a material difference between the two schemes provided for in section 95 and section 4 of the 1999 Act, which is based on status. The court is satisfied, in line with the authorities referred to above, that the making of further submissions does not change the applicant's status as a failed asylum

seeker. The making of a paragraph 353 further submissions claim does not render an individual from being a failed asylum seeker into an asylum seeker.

[44] In the present case, it is accepted by both parties that the applicant was a failed asylum seeker from December 2021 and was only afforded section 95 support due to the COVID-19 suspension on "negative cessations" which remained in place until December 2022. Accordingly, the decision to discontinue section 95 support once the suspension was lifted was lawful. The applicant's status did not change as a result of his further submissions claim.

[45] The court, therefore, rejects the applicant's challenge on the grounds of illegality. For the same reasons, the court rejects the applicant's contention that the impugned decision was irrational and breached the applicant's legitimate expectation that his section 95 support would continue.

Article 8 of the ECHR

[46] The other limb of the applicant's second complaint concerns a challenge under article 8 of the ECHR. The applicant contends that a policy whereby failed asylum seekers are informed that they are required to move from their section 95 accommodation and may apply under a separate provision, without assurance that accommodation will be provided, cannot be considered as compatible with article 8 of the ECHR. Mr Peters drew the court's attention to the respondent's admission that "in practical terms, the accommodation and financial support under [section 95 and section 4] are the same" to support his contention that the policy results in an unnecessary and disproportionate interference with a person's article 8 rights.

[47] In the court's view, this argument fails to consider the rationale behind the withdrawal of section 95 support and the function of section 4(2) accommodation. If section 95 support were to be maintained in every situation where paragraph 353 submissions were made, it would encourage unsubstantiated claims with no realistic prospect of success designed to stay the removal of the support provided under section 95. It is clear that the withdrawal of section 95 support once an initial claim has been determined is, therefore, lawful and pursues the legitimate aim of facilitating the removal of failed asylum seekers and disincentivising abusive claims. Section 4 therefore strikes an appropriate balance, ensuring that those with potentially meritorious further submissions continue to be supported, without unnecessarily burdening the immigration appeals system.

[48] The court agrees with the approach of Humphreys J in *Re Said's Application*, in which the applicant claimed that the decision to withdraw his access to an ARC card on the basis of his status as a failed asylum seeker was an unlawful interference with his right to respect for private and family life. Humphreys J concluded:

> "Even if such an interference were established, it has arisen as a result of the consequences of a failed asylum

> application. The law recognises a distinction between those individuals whose applications are pending and those whose applications have been rejected. In the latter case, once appeal rights have been exhausted, certain consequences flow and the denial of an ARC is one of these. As Friedman J observed [in Mahmud], the legal existence of such individuals is marginal. The existence of discretionary support under the 1999 Act and 2005 Regulations is intended to provide a bare minimum, human rights compliant, entitlement. Any such interference with the applicant's article 8 rights is in accordance with law."

On appeal the court did not interfere with this conclusion. In fact, it concluded that there was an insufficient evidential basis to establish the subject matter of the applicant's complaint came within the scope of protection provided by article 8 ECHR.

[49] For these reasons, the court dismisses the challenge on the article 8 ECHR ground.

Unreasonable delay

[50] The facts relating to this challenge are undisputed by both parties and bear repeating briefly here.

(a) The applicant made further submissions pursuant to paragraph 353 on 3 February 2022.

(b) The respondent mishandled those submissions by sending them to the wrong Further Submissions Unit. Additionally, the respondent made the mistake of not recording that the applicant had attended his further submissions appointment that day.

(c) The applicant remained on section 95 support due to the suspension on "negative cessations."

(d) The applicant sought an update on his further submissions on 19 January 2023.

(e) The respondent communicated that the applicant had no outstanding claim on 2 February 2023.

(f) On 20 March 2023, the respondent accepted that written submissions had been provided and undertook to consider them.

(g) A decision was eventually made to reject the applicant's further submissions on 2 May 2023, which was notified to the applicant on 9 May 2023.

[51] Whilst the respondent made a decision within six weeks upon learning that the applicant had indeed made further submissions, the time which elapsed since the date of his paragraph 353 claim amounts to 1 year and 3 months. The question is therefore whether this period of delay was unreasonable.

[52] There was little argument on the delay issue at the hearing. The respondent was in a position to file affidavit evidence at short notice explaining what had happened in relation to the applicant's application. Neither party referred the court to any case law on the issue. Clearly, there were very significant administrative errors in the way in which the application was dealt with. The respondent has accepted that the errors should not have occurred. It is obviously desirable that such applications are dealt with speedily. That said, it must be recognised that the UK asylum process faces considerable burdens.

[53] Ultimately, the question of any remedy to an applicant in judicial review is a discretionary one. The court is not minded to make any orders in relation to the delay in considering the applicant's claim under paragraph 353 of the Immigration Rules. In doing so, I am influenced by a number of factors.

[54] The applicant was at all times during the delay provided with section 95 support, although as a result of this decision, he was not legally entitled to this support.

[55] Even if the applicant's claim had been dealt with by say mid to late 2022, he would still have been entitled to section 95 support until the end of the year, because of the Covid-19 concessions.

[56] He was granted interim relief when these proceedings were brought before the court on an emergency basis. The decision to grant this relief was heavily influenced by the manner in which the respondent had dealt with the Rule 353 application.

[57] When the matter was identified the respondent made an expedited effort to consider the submissions resulting in the decision in May 2023.

[58] There is an insufficient evidential basis to establish any breach of his article 8 ECHR rights as a result of the delay in considering the application.

[59] It seems to the court, that in all the circumstances, a declaration would be of no utility and is not merited in this case on the issue of delay.

The Paragraph 353 decision

[60] In an affidavit filed on 2 November 2023 the applicant has set out his dissatisfaction with the decision dated 2 May 2023 which was received on 11 May 2023. That decision has been the subject matter of correspondence between the parties which is exhibited in the affidavit.

[61] The applicant has issued separate proceedings challenging that decision; ICOS No: 23/064132/01. A leave hearing has been listed for 14 December 2023. It seems to the court that the issues that arise in relation to that decision can be dealt with by way of separate proceedings rather than within the confines of this application.

Conclusion

[62] The application for judicial review is dismissed.