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FIRST-TIER TRIBUNAL
ASYLUM SUPPORT

Address:

Appeal Number : AS/18/05/38069
H.O. Ref. :
Appellant's Ref. :

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

Tribunal Judge	Mr Ian A Lewis
Appellant	
Respondent	Secretary of State

STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 ("the Rules"), and gives reasons for the decision made on 17 May 2018, after a hearing, allowing the appeal.

2. The Appellant is a national of Trinidad & Tobago born on 1979. He appeals under section 103 of the Immigration and Asylum Act 1999 against a decision of the Secretary of State dated 23 April 2018 to refuse support under section 4(2) of the Immigration and Asylum Act 1999 (as amended).

3. In his Notice of Appeal the Appellant indicated that he wanted to attend an oral hearing of his appeal. The matter was duly listed.

4. The Appellant was represented at the hearing by Ms Field of ASAP. The Respondent was represented by Mrs Crozier.

5. I have given careful consideration to all the evidence that is before me. I have borne in mind that where an Appellant appeals against a decision to refuse section 4 support the burden of proof is on him, to the civil standard of a 'balance of probabilities', to demonstrate that he meets the statutory criteria for support.

6. It is not disputed that the Appellant is a failed asylum seeker. The criteria to be used in determining eligibility for, and provision of accommodation to, a failed asylum seeker under section 4 are set out in regulation 3 of the Immigration and

Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 in the following terms:

> "*(1) …*
>
> *(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.*"

7. The Respondent has accepted that the Appellant is destitute. The issues in the appeal relate to regulation 3(2).

8. Regulation 3(2) specifies the following conditions:

> *(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which is able to leave the United Kingdom, which may include complying with attempts to obtain a travel documents 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 -*
>
> > *(i) in England and Wales, and has been granted permission to proceed pursuant Part 54 of the Civil Procedure Rules 1998*
> > *(ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 or*
> > *(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.*"

9. The Appellant's immigration and support histories are set out in the documents on file and are known to the parties. In the circumstances I do not reproduce them in their entirety here, but make reference as is incidental to a consideration of the issues before me.

10. The Appellant claimed asylum on 12 May 2016. His application was refused for reasons set out in a 'reasons for refusal' letter ('RFRL') dated 8 November 2016 (a copy of which was provided to me at the hearing by Mrs Crozier). The RFRL indicates that there were two elements to the Appellant's claim for protection: that he was at risk by reason of his sexuality; that he was at risk on religious grounds as a Rastafarian targeted by Muslims pursuant to a gang war. The Secretary of State did not accept that the Appellant was either homosexual or bisexual; further it was not accepted that he was Rastafarian or that he had ever had any problems with Muslim gangs. The Appellant appealed to the First-tier Tribunal (Immigration and Asylum Chamber): his appeal was dismissed, and subsequent applications for permission to appeal to the Upper Tribunal

were refused; the Appellant became 'appeal rights exhausted' on 29 January 2018. (Neither party has provided any of the decisions of the IAC.)

11. The Appellant applied for section 4 support on 10 April 2018. In support of his application it was claimed that he satisfied the condition of regulation 3(2)(e) because he was in the process of preparing further representations in respect of his asylum claim – and to this end on 4 April 2018 an appointment had been made for him to attend the Respondent's Further Submissions Unit ('FSU') in Liverpool on 14 June 2018.

12. The Appellant was assisted in completing his section 4 application form by Migrant Help. At the time – and indeed to date - the Appellant was also instructing Kesar & Co solicitors in the context of his asylum representations. Kesar & Co were identified as representatives in the application form, and as such it is plain that Migrant Help knew of their involvement in the Appellant's case. (The Appellant told me that he had had different representatives during the course of his asylum appeal but had since changed because of dissatisfaction with the way in which they had handled his case: see further below.)

13. Notwithstanding the fact that the Appellant was both legally represented and had the assistance of Migrant Help, nothing was advanced in respect of his proposed further asylum representations in support of his section 4 application beyond the FSU appointment letter. I return to this unsatisfactory circumstance below.

14. The Respondent refused the Appellant's application for support by way of letter dated 19 April 2018. In respect of regulation 3(2)(e), the letter states this:

"*…merely having an appointment to lodge further submissions does not constitute eligibility under this criteria. Further submissions must be lodged and accepted by the Home Office to be eligible under this criteria.*"

The first clause – 'merely having an appointment to lodge further submissions does not constitute eligibility' - is sound in law. The second clause – 'further submissions must be lodged and accepted by the Home Office to be eligible' - is not. (See further below.)

15. The Appellant lodged an appeal with the Tribunal on 8 May 2018, again assisted by Migrant Help. The grounds of appeal raised three matters: it was reiterated that the Appellant had an appointment at the FSU on 14 June 2018; it was identified that the decision letter referred to a viable route of return to Russia which was not the Appellant's country of nationality; it was said that the Appellant had "*ongoing medical issues*". There is nothing of substance in the latter two matters – and nothing further is pursued by way of them before me. The reference to Russia clearly and obviously was a mere slip on behalf the decision-maker, and in any event it was not contended that regulation 3(2)(c) could be pleaded in respect of a route of return to Trinidad & Tobago. Although three hospital appointment letters were attached to the Notice of Appeal no particulars of the Appellant's medical condition were provided therewith. I note that hospital appointment letters were also appended to the application; however regulation 3(2)(b) was not pleaded in either the application or the grounds of appeal – and was expressly not relied upon by Ms Field. The medical circumstances were seemingly only relied upon in the application under the head of 'special circumstances': in the relevant section of the application form it is stated "*Pulmonary Embolism & Colostomy – has ongoing care at Liverpool & Broadgreen Hospital*".

16. Accordingly, the only matter of substance pleaded in the grounds was the Appellant's proposed further representations – the same matter that was the basis of his application. Notwithstanding the Respondent's observation in the decision that was the subject of the appeal that "*merely having an appointment to lodge further submissions does not constitute eligibility*", nothing further was advanced in respect of the Appellant's proposed further representations: the grounds of appeal simply restate the fact of the appointment on 14 June 2018 and enclose again the FSU appointment letter. Necessarily this does not address the premise of the Respondent's decision: in reality it raises no basis of challenge at all, and as such does not disclose a ground of appeal.

17. Directions were issued by the Tribunal on 11 May 2018. In respect of the Appellant's proposed further representations the Directions stated the following:

"*[The Appellant] to send to the Tribunal and to the Home Office… by 2pm on Wednesday 16 May 2018 or bring in person:*

> *1. a copy of his representations which he will submit on 14 June 2018; and*
>
> *2. a written submission, which sets out clearly and precisely what is new in his representations of 14 June 2018 and was not contained in his claim for asylum which was refused by the Home Office on 8 November 2016 and by an Immigration Judge on 7 June 2017; and*
>
> *3. a written submission, which addresses paragraphs 30 and 31 of the Principal Judge's decision in AS/14/11/32141 in which she comments that an assertion that fresh representations will be lodged is unlikely to satisfy Regulation 3(2)(e).*"

18. Paragraphs 30 and 31 of <u>AS/14/11/32141</u> are in the following terms:

"*30. However, the burden of proof is upon an appellant and it is for them to discharge that burden on a balance of probabilities and demonstrate that any further submissions are not obviously hopeless or abusive. This will necessitate the production of the further submissions to the asylum support judge and for a limited assessment to be conducted by the FTT-AS that excludes consideration of the merits of the application. Where the appellant has submitted multiple further submissions, the burden will be harder to discharge. The greater the number of applications, the more likely it is that the application will be deemed to be repetitive, obviously hopeless or abusive.*

31. I should add that I cannot conceive of a situation where the mere assertion that further submissions are in the process of being lodged will be sufficient to satisfy an asylum support judge that eligibility under Regulation 3(2)(e) is established. In exceptional circumstances, for example where an appellant has attempted to lodge the further submissions without success, through no fault of their own, an asylum support judge may accept that the requirements of Regulation 3(2)(e) are met. This is, however, likely to be rare."

19. The Appellant did not comply with the Directions. Instead Kesar & Co faxed a letter to the Tribunal on 16 May 2018, seemingly in the early evening. (The fax bears the time stamp of 18.08, but I do not know how accurate that might be.) The letter explains that it will not be possible to comply with Directions until 25 May 2018, and is said to be written in support of the Appellant's application to adjourn the appeal.

20. I acknowledge that it is evident from the letter that the writer has had limited time to deal with the Directions – and I do not dispute her assertions in that regard. To some extent that is the nature of the business of the FTT(AS), which, because it is dealing with issues of destitution, runs to a tight timetable set by its procedure rules. Be that as it may, it seems to me that the real difficulty here is not so much the timetable of the procedure rules, or the timetable of the Directions, but the failure adequately to articulate the basis of the Appellant's claimed engagement of regulation 3(2)(e) at either the time of the application for support (10 April 2018), or the lodging of the Notice of Appeal (8 May 2018).

21. The letter from Kesar & Co – despite the time pressure upon the writer – runs to some two pages and is carefully drafted. Notwithstanding, it provides nothing by way of meaningful information as to the basis of the Appellant's proposed further submissions. Even in the context of being written in support of a possible adjournment application I would have expected something to be revealed of the proposed further representations that might then lend weight to the merit of adjourning the appeal. Without providing any detail the letter states that the Appellant "*does not himself hold the further evidence or written submissions to be lodged*", and asserts that at the time of booking the appointment with the FSU on 4 April 2018 "*we held relevant evidence and were clear on the basis for a fresh claim*". Why the writer could not then have stated in brief terms the essence of the further 'relevant evidence' and why the firm was 'clear on the basis for a fresh claim', including how it differed from what had gone before – even if not in the detail suggested by the Directions - is wholly unclear. This circumstance is underscored by the fact that Ms Field in the space of about 30 minutes was not only able to take instructions from the Appellant but also contacted the letter-writer and obtained broad details of the basis of the proposed further representations and the supporting evidence being gathered. It seems to me that the writer of the letter could just as easily have set out such matters in the body of the letter in the time it took to make the general observations and comments that, as I have said, are of little value either substantively or in support of an adjournment.

22. In the event, Ms Field - having familiarised herself with the documentary material, taken instructions from the Appellant, and spoken to Kesar & Co. - indicated that the Appellant was not seeking an adjournment, was not relying on regulation 3(2)(b), and was relying solely on regulation 3(2)(e) by reference to the proposed further submissions intended to be presented to the Respondent at the FSU on 14 June 2018.

23. In respect of the proposed further submissions I was told the following matters, variously related by Ms Field or the Appellant. (Insofar as they were matters related by Ms Field the Appellant confirmed their accuracy to the best of his knowledge and understanding.)

(i) The core of the Appellant's proposed further submissions is a claim that he had been attacked and shot in Trinidad & Tobago because of his sexuality.

(ii) In support of this claim the Appellant intends to provide his own testimony, and testimony by way of a witness statement from a Mr Thomas, who presently resides in the Netherlands. Mr Thomas's witness statement has not yet been obtained.

(iii) The Appellant sustained injuries to his stomach during the shooting. Medical reports already exist which relate the treatment he is receiving in the UK, and these will be presented to the FSU.

(iv) A report in relation to the country situation and risk has been commissioned from a country expert.

(v) The Appellant's immigration solicitor has identified case law that may assist the Appellant in relation to the late disclosure of evidence.

(vi) It is the position of the Appellant's immigration solicitor that further representations will be submitted at the FSU on 14 June 2018 even if all of the items of supporting evidence have not yet been brought together; such matters as are available by that date will be given to the FSU Team. The Appellant's solicitor has expressed the opinion that he has a 'strong' case in respect of his proposed further representations.

24. As noted above, I have had been provided with a copy of the RFRL of 8 November 2016. It is apparent from the RFRL that the Appellant, whilst referring to having suffered public ridicule, beatings and sexual abuse, and relating an incident of an assault where he and a partner were threatened at gunpoint as well as assaults on others, did not relate that he had been shot.

25. I do not, however, have any materials in respect of the Appellant's asylum appeal. In this regard the Appellant told me that the claimed fact of him having been a victim of a shooting that he described as 'a hate crime', had not been presented as part of his appeal. The Appellant claimed that he had mentioned this matter to his previous representatives, but for reasons that were unclear it had not thereafter been advanced in support of his appeal. This failure was one of the elements that had led him to change representatives.

26. Although I have no documentary material in this regard by way of the decisions of the IAC, I am prepared to accord the Appellant the benefit of the doubt. It seems to me more likely than not that his current immigration solicitors have had sight of his IAC appeal decisions, and in such circumstances would not be touting the alleged shooting as a 'strong' basis for a fresh claim if it had been a feature of the asylum appeal.

27. In the circumstances I accept that the Appellant is seeking to rely upon a matter not previously considered.

28. Where further representations have been submitted to the FSU it is, of course, not for this Tribunal to reach any conclusion as to the ultimate merits of such representations. In the context of considering the possible engagement of regulation 3(2)(e) what must be considered is whether it would be reasonable for an appellant to remain in the UK pending consideration of the representations. The 'test' has a very low threshold: it is reasonable for an appellant to remain if the representations cannot be characterised as being clearly abusive, manifestly unfounded, clearly specious, merely fanciful or speculative, or obviously hopeless or abusive: see the approach adopted variously and similarly in **R (AW, DAY) v Croydon LBC [2005] EWHC 2950 (Admin)**, **(2006) 10 CCLR**, **R (PB) v Haringey LBC [2006] EWHC 225 (Admin)**, **(2007) 10 CCLR 99**, and **Binomugisha v Southwark LBC [2006] EWHC 2254 (Admin)**, **[2007] FLR 916**, - echoing the wording of the Respondent's Section 4 Guidance at paragraph 1.15. If it is otherwise the Appellant should be expected to take steps to leave the UK to avoid the consequences of destitution.

29. In my judgement – and subject to a consideration of the guidance in paragraphs 30 and 31 of AS/14/11/32141 - much the same principles apply in cases based

on a proposal to submit further representations at the FSU. Accordingly the following matters ought to be borne in mind:

(i) Pursuant to paragraph 31 of AS/14/11/32141, "*the mere assertion that further submissions are in the process of being lodged will [not] be sufficient to satisfy an asylum support judge that eligibility under Regulation 3(2)(e) is established*".

(ii) To take matters beyond 'mere assertion' it will be necessary to demonstrate that genuine concrete steps are being taken in pursuit of lodging submissions. The mere making of an appointment at the FSU is insufficient because it does not take matters meaningfully beyond assertion that submissions are in the process of being lodged. Nonetheless, as a bare minimum an applicant might reasonably be expected to have at least secured such an appointment.

(iii) In a similar way to a case where representations have been lodged at the FSU, an appellant will need to demonstrate that proposed representations "*are not obviously hopeless or abusive*" (paragraph 31 of AS/14/11/32141). If it were otherwise an appellant who has not yet lodged further submissions might be in a better position than an appellant who has.

(iv) To demonstrate that proposed representations are not obviously hopeless or abusive an appellant will need to articulate the nature of the further submissions, and demonstrate how they are different from what has previously been considered. This latter element will usually require production of earlier decisions by the Secretary of State and/or the IAC to assist in undertaking what is essentially a comparative analysis.

(v) I note the Directions issued herein (quoted at paragraph 17 above). If the further representations have already been drafted then it would make sense to file them with the Tribunal. However, if the representations have not yet been drafted it will not be fatal to the appeal if the basis of such proposed representations is adequately articulated.

(vi) If the basis of the further submissions is not set out the Tribunal will not be able to undertake the limited assessment required within the parameters of the principles rehearsed at paragraph 28 above. In such circumstances the appeal will likely be dismissed because the appellant has not discharged the burden of proof.

(vii) Appellants and the Tribunal will no doubt be mindful of the Principal Judge's observation in respect of 'multiple further submissions' (paragraph 30 of AS/14/11/32141).

(viii) The Tribunal will require to be satisfied that it is more likely than not that the appellant will indeed present the proposed representations at the FSU. It is for this reason that as a bare minimum an appellant might reasonably be expected to be able to confirm an appointment has been made.

(ix) The Tribunal can reasonably expect an appellant to demonstrate that any 'new' evidence is real and pertinent. A general assertion that unspecified evidence is being sought may not overcome the 'speculative' hurdle; alternatively it may not persuade the Tribunal that there is yet anything that founds genuinely new or different representations.

(x) In so far as the further representations rely upon 'new' evidence, the Tribunal can reasonably expect an appellant to indicate what such evidence is, and to establish what stage any evidence gathering has reached.

30. It seems to me that not only should the above matters be borne in mind at appeal, but also that good practice will generally demand that they be considered and addressed by advisers at the application stage. See further below.

31. Mrs Crozier made a number of observations in respect of the Appellant's proposed further representations. In my judgement there was much of substance in what she had to say, and I share certain concerns as to the cogency and efficacy of the proposed further representations. However, after careful consideration I have concluded that such concerns are not sufficient to defeat the Appellant's appeal. In this context and generally I note the following.

(i) The failure to mention being shot as the victim of a hate crime because of his sexuality during the asylum application process (including a substantive asylum interview), whilst otherwise relating incidents of threats and assaults on himself, and violence to others, in the context of a claim of a fear of persecution because of his sexuality, raises very considerable issues as to the plausibility and credibility of the proposed further submissions.

(ii) As does, similarly, the failure of such an event to feature in the asylum appeal process.

(iii) It is unclear why nothing was said of this event at his asylum interview. I recognise and understand that genuine asylum seekers may sometimes be reluctant to disclose certain matters – including if they relate to issues of sexuality, or if they have reasons to be afraid of officialdom. But the Appellant was seemingly able to relate details of his claimed sexuality and his claimed consequential victimhood, which makes it all the more remarkable that the one very particular and serious incident now relied upon, was not mentioned.

(iv) Nonetheless, I note that the Appellant has offered something by way of an explanation as to the absence of such an incident from the appeal process – albeit it seems to me his explanation was somewhat vague and incomplete. Essentially he claims that by the time of the appeal process he was seeking to raise this incident but he was let down by his then representatives.

(v) I also note that I am told that the present solicitor has identified case law that might assist in respect of late disclosure. This at least indicates that the further representations will seek to address the impact on credibility of the late claim that the Appellant was shot for being gay.

(vi) Even so, plainly the proposed further representations face a very serious obstacle in respect of credibility. I have given consideration to whether the obstacle is so substantial that the Appellant's proposed representations could be characterised as 'clearly specious' or 'obviously hopeless' in this regard. Ms Field reminds me that the Appellant's solicitor has opined that the claim is 'strong'. With respect, such an opinion does not constitute evidence of merit – it is merely an opinion. Moreover it seems to me that it is an opinion that at best might be characterised as naïve. However, I also note that Mrs Crozier did not consider that she could go so far as to assert that the Appellant's proposed further representations fell below the very low merits threshold (see above) to be applied by the Tribunal. In all such circumstances I have concluded that whilst on the materials available to me the Appellant's case is borderline, it is not to be rejected as specious or hopeless.

(vii) In this latter context, and generally, I have taken into account what has been said about supporting evidence beyond the Appellant's own assertion. The Appellant says that he has a supporting witness; however, he has not yet obtained a witness statement from him. The Appellant's evidence before me was vague about the supporting medical evidence. He said that his ongoing treatment in the UK in respect of his stomach related to the injuries sustained when shot. Whilst he told me that he had told his treating team in the UK about the cause of his injuries, he was unclear as to whether the currently available medical evidence merely detailed his ongoing treatment or whether it provided supporting expert opinion of the claim to have suffered such injuries as a consequence of being shot. However, at this remove I do not consider that I can exclude from my consideration the possibility that the medical documents provide a degree of corroboration, or might not otherwise be updated so to do before 14 June 2018.

(viii) Mrs Crozier, having acknowledged that she did not consider she could argue that the Appellant's proposed further representations were 'hopeless' or 'abusive', focused more particularly on the seemingly incomplete nature of the evidence being gathered on behalf of the Appellant, and submitted that there should be a concern as to whether the Appellant would submit any further representations at all.

(ix) I have already noted above that there was a degree of vagueness as to the import of the currently available medical evidence. The Appellant was similarly vague as to whether he would be able to obtain supporting evidence from Trinidad & Tobago as to the treatment he received there. Further, he has not yet obtained a supporting witness statement from Mr Thomas.

(x) However, as noted above, I do not feel I can rule out that the currently available medical evidence provides a degree of corroboration. A 'country expert' has been commissioned. It is reasonable to think that the Appellant's representatives are actively pursuing further witness testimony. In any event, the Appellant's solicitors have indicated that it is intended that further representations will be submitted on 14 June 2018 even if not all of the documentary material has yet been obtained.

(xi) It is on this latter basis in particular that I accept that it is more likely than not that the Appellant will present further representations in respect of his asylum claim to the Secretary of State at the FSU on 14 June 2018.

32. It follows from the foregoing that the Appellant has satisfied me that he will make further representations based on a matter not previously considered, and that such representations cannot be characterised as hopeless or abusive. The evidence goes beyond a mere assertion that further submissions are in the process of being lodged. In such circumstances I find that it would be reasonable for the Appellant to remain in the UK pending the submission and consideration of his proposed further representations; it is unreasonable to expect him to take steps to leave the UK to avoid the consequences of his destitution.

33. Accordingly I find that the Appellant has satisfied me that the condition of regulation 3(2)(e) is met. I am satisfied that the Appellant is presently entitled to support pursuant to section 4(2).

34. In preparing this Statement of Reasons I have set out in some detail what I consider to be the guiding principles in cases such as this. I have also identified

what I consider to be the unsatisfactory nature of the information (or lack of it) provided with both the application and the Notice of Appeal.

35. During the course of the hearing I expressed my struggle to comprehend why, in circumstances where the Respondent routinely refuses applications for support which rely merely on the fact of an appointment having been made at the FSU, it might ever be thought by a competent adviser sufficient to advance only the fact of an appointment without attempting to articulate something of the basis of the proposed further representations. In this context it is to be noted that the decision of the Principal Judge in AS/14/11/32141 was made in August 2015. It has been clear from the date of that decision that something more than "*the mere assertion that further submissions are in the process of being lodged*" will be required to succeed on an application, and in turn an appeal. This underscores the futility of making an application on the basis only of having an appointment with the FSU, and reinforces my incomprehension as to why advisers seemingly continue to make applications in such a way, or lodge grounds of appeal pleading nothing further.

36. It is in this context that at paragraph 30 above I have suggested that it would be in keeping with good practice for advisers to bear in mind and seek to address the matters identified at paragraph 29. I struggle to contemplate that it could be said to be in accordance with good practice and ethics to draft an application in terms that must fail, or to draft grounds of appeal that in reality do not articulate anything by way of actual challenge to the decision being appealed. To do so serves the interests of nobody. Most particularly preparing an application that is bound to fail does not assist the destitute applicant. It would be no answer that the matter might later be 'sorted out' on appeal: the applicant may be without support in the interim; in any event such a course of action potentially unnecessarily takes up the resources of the Respondent and in turn the Tribunal to the possible detriment of other applicants and to the detriment of the public purse.

37. I understand and acknowledge that advisers, particularly in the voluntary sector, may be under considerable pressures of resource and time. However, that does not offer any particular excuse for advancing an application in terms that will fail, and by doing so in effect passing the pressure of resource and time on to the Home Office - and possibly in turn the Tribunal – whilst the applicant might literally be left out in the cold.

38. It seems to me that with a little reflection the matter may be seen as relatively straightforward.

(i) An applicant who has a sound basis for making further representations to the FSU, will have a sound basis for satisfying regulation 3(2)(e).

(ii) If there is no such basis, then advisers should not be making appointments with the FSU and should not be making applications for section 4(2) support.

(iii) This is a matter of simple merits assessment; if clients do not meet the merits they should be advised accordingly, and it would be contrary to good practice to assist in pursuing an application notwithstanding the absence of any grounds so to do.

(iv) If upon consideration it is thought there is a sound basis for making further representations, then the very fact that it has been duly considered and 'merit assessed' means that it should be capable of being expressed in relatively brief terms.

(v) For example, in the instant case: 'The applicant contends that it has not been previously considered by the SSHD or the IAC that he was shot in consequence of his sexuality. In support of this 'fresh claim' he relies upon supporting medical evidence, the testimony of X, his own testimony, and a country expert report that has been commissioned from Y. In so far as this event could have been raised before, the applicant says he told his representatives but they did not put it forward on his behalf. More detailed legal submissions on this latter point will be included in the further representations when a draft is finalised.'

(vi) If it can be expressed in relatively brief terms, there is no reason not to set out those terms in the context of the section 4(2) application. It might be prudent to enclose with the application any relevant available supporting materials – including an FSU appointment letter - and perhaps an invitation for the Respondent to indicate if anything further by way of detail or evidence might be required before determining the section 4(2) application.

39. I have taken the time to articulate these thoughts and concerns – which in themselves are not part of the decision herein, and are not in any way binding on any party or other Tribunal decision-maker, but which I nonetheless hope will be helpful – in part because notwithstanding the passage of time since AS/14/11/32141 the practice of seeking to rely merely on an FSU appointment persists, but also in part because I understand there are presently particular concerns abroad arising from the delays in respect of FSU appointments.

40. In the instant case the FSU appointment was booked on 4 April 2018 for 14 June 2018. It is said that this was the earliest available appointment – a wait of 10 weeks. I understand that this is currently typical because of the high volume of appointments being sought, although the Respondent is seeking to reduce the delay by increasing appointment capacity, for example by making appointments available on some Saturdays.

41. It has been the usual – though not invariable - practice of the Respondent's 'Section 4 Team' to accept that once representations have been presented at the FSU regulation 3(2)(e) is thereby engaged. The current delay has meant that many applicants and appellants have not had the benefit of such concessions in circumstances where they might have done but for the delay.

42. It has also been suggested that where an immigration representative perceives that there is a period of several weeks before further representations have to be finalised, those representations may not be worked upon until very close to the appointment date – which means that they have not been drafted by the time of an appeal hearing before the FTT(AS). Indeed such was the case herein. The letter from Kesar & Co includes "*Given [the date of 14 June 2018], and the need for me to prioritise my work according to urgency and deadlines, I have yet to complete the written submissions…*". I make no criticism of that method of work, which seems understandable, sensible, and expediently prudent.

43. However, in accordance with the matters set out above, in my judgment it is not a pre-requisite to engagement of regulation 3(2)(e) that a finalised version of the proposed further representations be available. Indeed I have found it appropriate to allow the appeal herein on its particular facts without any such finalised version, or even a draft. For the reasons explained above, it seems to me that even if no such draft is available, there is no obstacle to an applicant or appellant who is genuinely intent on pursuing further representations upon a

sound basis, being able to articulate the nature of those proposed representations in such a way as to permit the Respondent in the first instance, and if necessary thereafter the Tribunal, to evaluate the claim for support against the condition of regulation 3(2)(e).

44. Of course this approach requires the Respondent to recognise that in principle an applicant *may* satisfy regulation 3(2)(e) even if an FSU appointment is only pending and further representations have not yet been submitted. Indeed in my judgement were the Respondent not to recognise such a proposition, in principle he would be unlawfully fettering his decision-making.

45. It is in such circumstances that I observed at paragraph 14 above, that the comment in the decision letter of 19 April 2018 that "*Further submissions must be lodged and accepted by the Home Office to be eligible under this criteria*" was not sound in law.

46. Mrs Crozier has not relied upon that aspect of the decision letter. She has not sought to argue that the appeal herein must fail because the Appellant has not lodged his representations at the FSU. Notwithstanding the contents of the decision letter, implicit in the presentation of the Respondent's case at appeal is that the Respondent does recognise that in principle an applicant *may* satisfy regulation 3(2)(e) even if an FSU appointment is only pending. In substance the Respondent acknowledges that it is open for an applicant to apply for section 4(2) support relying upon an intention to make further representations in connection with his/her asylum claim, explaining that he/she is destitute, and explaining why support is necessary to avoid a breach of his/her human rights by reference to the parameters of the Respondent's Section 4 Instructions, and the law and guidance set out above, including as appropriate that an appointment has been made at the FSU as soon as was available. To this extent the offending passage in the decision letter must be seen as an erroneous aberration.

47. In light of the above observations I express the following hopes in respect of applications for section 4(2) support based on an intention to make further representations. Henceforth advisers will recognise the futility of applying solely on the basis of an FSU appointment, and desist from so doing. Instead an attempt will be made to articulate the basis of the proposed further representations and how they differ from what has previously been considered. The Respondent in recognition of the principle that regulation 3(2)(e) might be engaged during the process of preparing further representations and prior to lodging at the FSU, will evaluate any such section 4(2) application in accordance with the usual principles of the Section 4 Guidance and the law. In such circumstances a meritorious applicant need not be denied support simply because the Respondent presently lacks the capacity to receive further representations without a delay of some 10 weeks.

48. It may also be hoped that such procedures will assist the efficacy of the appeal process. In the event of a refusal of support the decision-maker will necessarily be obliged to offer reasons as to why the details of the proposed further representations were not considered adequate to satisfy regulation 3(2)(e). This will provide focus for any subsequent appeal. An appellant may readily support and articulate grounds by reference to the substance of the application, together with any updating information as to further progress in the preparation of further representations. This should be relatively straightforward and assist in narrowing the focus of issues ahead of the hearing.

49. For the reasons already given, I allow the appeal pursuant to section 103 of the 1999 Act.

Signed: Mr Ian A Lewis   Date: 18 May 2018
First-tier Tribunal Judge, Asylum Support
SIGNED ON ORIGINAL (Appellant's Copy)