

# Support for people on immigration bail

October 2018

On 15/01/18 significant changes were introduced by the Immigration Act 2016 to the asylum support system. Prior to that date, those on immigration bail or temporary admission could get support from the Home Office under s4(1) Immigration and Asylum Act 1999, provided they met the criteria. On 15/01/18 s4(1) was abolished and replaced by a new system called schedule 10 support (sch 10).

This briefing explains who is affected, who meets the new conditions for sch 10 support, how to apply and how to assist people who are still supported under the old system. There are a lot of uncertainties and problems with the new system so we anticipate that what is written here will probably change.

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## 1. Who is NOT affected?

There have been NO CHANGES to the support system for asylum seekers or refused asylum seekers. s95 and s4(2) support remain in place as before (please refer to our [factsheets](#) or [training courses](#) for further information on the criteria). The controversial changes regarding asylum support contained in the Immigration Act 2016 are not likely to be brought in to force at this time<sup>1</sup>.

## 2. Who is affected by this change?

s4(1) stated that:

*The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons –*

- (a) Temporarily admitted to the United Kingdom under paragraph 21 of Schedule 2 of the 1971 Act;*
- (b) Released from detention under that paragraph; or*
- (c) Released on bail from detention under any provision of the Immigration Acts.*

Unlike s4(2) there were no accompanying regulations detailing who was eligible for support so this question was entirely governed by policy<sup>2</sup>.

### 2.1 Immigration bail cases

Under s4(1)(c), support was provided to people who were released on bail from detention but who didn't have accommodation to go to. This group represented the majority of the individuals supported under s4(1).

### 2.2 Temporary admission cases

A smaller number of people were also supported under s4(1)(a) or (b) because they were on temporary admission, were destitute and there was a practical or legal obstacle preventing their departure from the UK. As a matter of policy, the Home Office stated that this support was not available to asylum seekers or refused asylum seekers who could access support through s4(2) and s95 (although ASAP has always argued this was not a lawful position).

Examples of groups concerned are:

- People with outstanding applications for leave to remain that were not asylum claims (like Article 8 or statelessness applications)
- Those taking steps to leave the UK

<sup>1</sup> The Immigration Act 2016 limits the support options for those whose asylum claims have been refused particularly families with children and care leavers. See ASAP [March 2016 Immigration Act 2016 briefing](#)

<sup>2</sup> Previous s4(1) policy can be found on the national archive website here: <http://webarchive.nationalarchives.gov.uk/20170616174920/https://www.gov.uk/government/publications/asylum-support-section-4-policy-and-process>

- Individuals who were currently too ill to travel.

There were also individuals who had claimed asylum in the past but could not get support under s4(2) or s95 because, for technical reasons, they did not meet the legal definitions (for support purposes) of asylum seeker or refused asylum seeker. The Home Office recognised in its policy that they could get s4(1) support instead. These were:

- People who had chosen to withdraw their asylum claims but were now seeking to get the claim re-instated.
- People who stopped engaging with the Home Office so the Home Office treated their claims as withdrawn. The Home Office refers to them as absconders. To qualify for support they would also be seeking to re-instate their asylum claims.
- People who came as unaccompanied children whose asylum claims had been fully refused before they turned 18 and who had further submissions outstanding or some other obstacle preventing departure.

### 3. [What does this change mean?](#)

Anyone currently on s4(1) support will be able to stay on support, subject to a new policy regime (see [below](#)). Anyone who would previously have fallen to be supported under s4(1) but is not already on support will need to apply for [sch 10 support](#).

### 4. [Schedule 10 support](#)

Schedule 10 (at paragraph 9) of the Immigration Act 2016 creates a new kind of support to replace s4(1) support.

Para 9, sch 10 states:

*(1) Sub-paragraph (2) applies where—*

*(a) a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and*

*(b) the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.*

*(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.*

*(3) But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.*

The Home Office has published version 3 of their non-statutory guidance entitled [Immigration Bail](#) on 10/08/18. The policy is essential reading as it explains who the Home Office will provide support to. However, as with all policy documents, it may not accurately reflect the extent of the Home Office's legal obligations.

In summary, support will be provided to people who:

- are on immigration bail, and
- are required by bail conditions to live at a specified address (a 'residency condition') and need support to comply with this; and
- the Secretary of State accepts there are exceptional circumstances which justify the provision of support.

#### 4.1 Immigration bail

The new rules have abolished the previous regime of granting immigration bail, temporary admission or temporary release. According to the [Immigration Bail policy](#), bail can be imposed on any person who is detained or liable to be detained under immigration powers (p8). Anyone who was previously on temporary admission (or some other form of restriction) will now be treated as if they were granted Bail (p72). Therefore, a period of prior detention is not a pre-requisite. Bail may be managed by the Home Office or the Immigration and Asylum Tribunal (IAT). A person on bail will now be notified through a BAIL 201 form. BAIL 201 forms will replace existing IS96s when the Home Office varies a person's bail conditions.

#### 4.2 Residency condition

A residency condition can be imposed by the IAT or the Home Office depending on who is responsible for granting or managing a person's bail. The wording in the legislation is confusing. In order to get support it would seem that the person needs to have already had imposed a residency condition (see para 9(1)(a) above). Yet they are applying for support specifically because they don't have an address and so can't possibly fulfil this criterion when they apply. This obstacle seems to have been overcome as the Home Office has confirmed in a letter to BID dated 26/3/18 that para 9(1)(a) should be read as meaning "either an address that is already specified or one that is to be specified"<sup>3</sup>.

However policy and guidance throw up an additional issue as it is envisaged that a residency condition should rarely be imposed. The [Immigration Bail policy](#) states at p16 this condition should not normally be necessary unless there is a need for high level contact or to mitigate against a serious risk of non-compliance. Likewise, the [IAT guidelines](#) confirm at para 34 that a residence condition should normally only be used for bail monitoring purposes. Judges are reminded in the guidance that bail conditions amount to a restriction of liberty and they should only impose the minimum condition necessary (para 12). The Home Office policy reminds caseworkers that a breach of bail condition can potentially lead to criminal prosecution (p12).

Notwithstanding these problems it will undoubtedly be the case that if a person qualifies for support, a residency condition will need to be added to their bail conditions. It is unclear at

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<sup>3</sup> BID's June 2018 report <http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation> (see footnote 4).

present whether the Home Office will do this of their own volition or whether the individual will have to apply for a variation of bail conditions themselves. Should the latter be necessary, advisers will need to check the OISC implications of assisting their client with this aspect of their application<sup>4</sup>.

#### 4.3 Exceptional circumstances

Support will only be provided in exceptional circumstances, at the discretion of the Secretary of State. This may explain why the Home Office confirmed to BID in a response to a Freedom of Information Request that as of 31/5/18 only 8 people were in receipt of sch 10 support.

The Home Office's [Immigration Bail policy](#) gives three categories of exceptional circumstances: (i) SIAC cases; (ii) other harm cases; or (iii) where the failure to provide support will lead to a breach of human rights (pp51-56). The only example given in the policy of people who might qualify under (iii) are those with serious physical or mental health problems who would not be able to get support elsewhere (p53). However, in reality, the circumstances in which support will be necessary in order to prevent a breach of human rights are much broader.

This issue was considered by the House of Lords (as it was then called) in the test case of *R (Limbuella and others (Shelter intervener)) v Secretary of State for the Home Department* [2005] UKHL 66. In *Limbuella*, it was decided that where a person was left (in the UK) without access to shelter, food or the basic necessities of life by the state there could be a breach of Article 3 of the European Convention of Human Rights.

Crucially, *Limbuella* and other subsequent cases established that destitution alone is not enough: there needs to be some kind of obstacle preventing the person from leaving the UK. In *Limbuella* that obstacle was a pending asylum claim. If there is no obstacle preventing departure, then the individual can 'cure' the breach of their Article 3 rights by leaving. The destitution they may then face in their home country is not relevant. As the Home Office [Immigration Bail policy](#) sets out, unwillingness on the part of the individual to return is not the same as an inability to return (p54).

The case of *R (NS) v the First Tier Tribunal and SSHD* [2009] EWHC 3819 held that there are a variety of factual circumstances which may constitute an obstacle. The Home Office has already designated those with serious health problems as a category of people that might qualify. Applying known situations to the sch 10 context we suggest that the following scenarios may amount to 'exceptional circumstances' and engage an applicant's human rights:

- People with an outstanding immigration application (for example an Article 8 application or statelessness application) or some kind of ongoing challenge against the refusal of such an application. However, as an application for support may have

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<sup>4</sup> Asylum support law is not subject to OISC regulation but we understand that an application for variation of bail is.

an impact on the immigration application we would always advise a person to check with their immigration adviser before applying. Such applications would need to meet a minimum merits test: claims which manifestly do not put forward new grounds<sup>5</sup>, are hopeless and abusive or merely repetitious<sup>6</sup> would not qualify. This category will include people who would be asylum seekers or refused asylum seekers except that for technical reasons they don't meet the definitions of s95 or s4(2) (for example absconders, see [above](#)).

- People with medical conditions which prevent them from travelling (see our [s4 factsheet](#) for information on the legal test that is likely to apply)
- People taking steps to leave the UK who face a barrier to departure (see our [s4 factsheet](#) for information on obtaining support when taking all reasonable steps to leave the UK)
- People who are obliged to stay in the UK in order to appear before a court or some other statutory body

A question that is often posed by the First-Tier Tribunal (Asylum Support) (AST) when considering this matter is whether or not it is reasonable to expect a person to take steps to return home at this time. There will therefore be other examples than those given here.

#### 4.4 [Exclusions from sch 10 support](#)

The [Immigration Bail policy](#), at p51 and p53, states that support under sch 10 will not be provided if a person is eligible for another kind of statutory support. So asylum seekers and refused asylum seekers should apply for s95 or s4(2) support; those with children or care needs should approach the local authority for support. This policy position mirrors that which was previously adopted when s4(1)(a) and (b) existed. However, it may well be challengeable as there is nothing within the wording of sch 10 which precludes providing support to people who are also eligible for another form of support (except where a person has children as sch 10 is not available to dependants).

Generally, applying for s4(2) or s95 support has advantages: support is available for dependants and a refusal of support carries a right of appeal (unlike sch 10 applications). However, detainees may find that their s4(2) and s95 support applications are refused (see 5.1 [below](#)) which might impeded their ability to apply for bail. Advisers will therefore need to make a tactical decision as to which kind of support they apply for.

#### 4.5 [Destitution](#)

In theory the usual destitution test does not apply to sch 10 as it is not part of the criteria as defined in the Immigration Act 2016. However, the wording of sch 10 para 9(1)(b) implies destitution. Furthermore, the [Immigration Bail policy](#) confirms that an individual will need to show that they are not able to support themselves first. In human rights cases applicants for support need to show that they are facing street homelessness as discussed above. So in

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<sup>5</sup> *R(AW) v Croydon* [2005] EWHC 2950 (Admin)

<sup>6</sup> *Birmingham City Council v Clue* [2010] EWCA Civ 460

practice, assessment of eligibility will require, as a minimum, similar considerations to the destitution test.

#### 4.6 [Support for dependants](#)

As with s4(1) support, there is no provision for dependants under sch 10 support. If a person has children they might be able to apply for support from the local authority. Partners and other dependants will need to apply for support in their own right.

#### 4.7 [No right of appeal](#)

There is no right of appeal against a decision to refuse support; therefore the only remedy against a refusal is judicial review.

### 5. [Issues to consider when applying for support from detention](#)

There is confusion as to what immigration detainees should do now that s4(1) has been repealed<sup>7</sup>. Hopefully, these issues will be resolved over time. But in the meantime, here are some points to consider.

#### 5.1 [Detainees who are asylum seekers or refused asylum seekers](#)

A significant problem with the new system is that the [Immigration Bail](#) policy states that it would not be appropriate for sch 10 support to be given to asylum seekers and refused asylum seekers (p53). However, detainees who are applying for s4(2) and s95 from detention have been told they are not eligible because their accommodation and essential living needs are being met within detention and they are not destitute. This means that they are then unable to provide the IAT with an address or a promise of an address to enable them to apply for bail.

Since the repeal of s4(1), to our knowledge, this point has only been tested once before the AST, in an appeal which was allowed (AS/18/06/38186<sup>8</sup>). The appellant was detained in prison and appealed a discontinuation of his s4(2) support. ASAP relied on a decision made by the Principal Tribunal Judge in 2005 ([MAS](#) (AS/05/05/9315)) where she held that the appellant was entitled to s4(2) support when released: whilst a cell was considered inadequate accommodation there was no interference with Article 5 (the right to liberty) because detention was lawful. However, as the appellant would be destitute on release the appeal was allowed so that support could start at that point.

Since the 38186 appeal ASAP is aware of another appeal where destitution was considered for someone in detention. However, in that case the Home Office appears to have changed their approach. Instead of looking at whether detention amounted to adequate accommodation they considered the circumstances of the individual outside detention.

<sup>7</sup> See BID's recent report at <http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation>

<sup>8</sup> This decision is attached to the end of this briefing.

Hopefully this indicates that considerations of whether or not detention centres constitute adequate accommodation will no longer be needed.

However, should practitioners need to rely on the *MAS* case and *AS/18/16/38186*<sup>9</sup> cases, it should be noted that AST judges are not bound by the decisions of their judicial colleagues. It is not a given therefore that others will follow this reasoning. Support appeals will be stronger if a person has an application for release pending (bail application or unlawful detention challenge) and considerably stronger if release is likely within 14 days (if the person is applying for support) or 56 days (if the person is challenging a discontinuation of support).

## 5.2 [Exceptional circumstances criteria](#)

In our view, the new system is more restrictive than the previous one. Whereas before, immigration detainees only had to demonstrate they were on bail or applying for bail and had no address to go to in order to secure support, the new system deliberately seeks to restrict the number of people who are entitled to assistance. With the exception of people who are considered by the Home Office to pose a risk to others, detainees will generally need to show that a failure to provide them with support will amount to a human rights breach (see section [above](#)). This means that release to the streets is a real possibility for those that can't demonstrate that there is an obstacle that prevents their departure from the UK.

## 6. [How to apply for support](#)

At present there is uncertainty as to the application process, particularly in non-detained cases. There is currently no application form and the Home Office has resisted giving guidance on how a person might apply arguing that the support was discretionary. However, as a result of lobbying the Home Office has started to provide a bit more clarity. The following is only a summary of what we understand to be the system. We anticipate this will change fairly rapidly.

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<sup>9</sup> One advantage of pursuing this tactic is that s4 and s95 decisions carry a right of appeal, unlike decisions made in sch 10 cases.

Not detained	Sch 10	S4(2) or s95
<b>Claimed asylum (including ARE<sup>10</sup>)</b>	According to current Home Office policy, this group cannot apply for sch 10 support. However, note comments at 4.4 <a href="#">above</a> . Sch 10 will be the only option for those that don't meet the definition of asylum seekers or refused asylum seeker (see 2.2 <a href="#">above</a> ). See box below on how to apply.	Apply using the ASF1 in the usual way
<b>Never claimed asylum</b>	<p>There is no form. Apply in writing to the Home Office team that manages the person's bail conditions.</p> <ul style="list-style-type: none"> <li>• If the person knows who manages their bail conditions, apply in writing to them (Note potential OISC implications at 4.2 <a href="#">above</a>).</li> <li>• If the person has a criminal conviction, requests for support can be made to the Criminal Casework Accommodation Team (but note that Migrant Help are currently advising that applications for sch10 support applications can't be made through them).</li> <li>• In other circumstances: we understand there is no department at the Home Office who will consider these applications. This means there is no way of applying for support. Individuals will need the help of a lawyer who would be able challenge the lack of system in court.</li> </ul> <p>Please call our advice line if you are unsure how to proceed.</p>	Not entitled to s4 or s95 support
Detained	Sch 10	S4(2) or s95
<b>Claimed asylum (including ARE)</b>	<p>According to current Home Office policy, cannot apply for sch 10 support. However, note comments at 4.4 <a href="#">above</a>. Sch 10 will be the only option for those that don't meet the definition of asylum seekers or refused asylum seeker (see 2.2 <a href="#">above</a>).</p> <p>There is no form or process. Practitioners are making representations to the Home Office as part of the bail application process</p>	Apply using the ASF1, but see 5.1 <a href="#">above</a>
<b>Never claimed</b>	There is no form or process. Practitioners are making representation to the Home Office as part	Not entitled s4 or s95 support

<sup>10</sup> Appeals Rights Exhausted  
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asylum

of the bail application process.

## 7. Individuals still supported under s4(1)

Individuals on s4(1) support on 15/01/18 will continue to receive support until the Home Office or the AST discontinue it. However, once they come off s4(1) support they will not be able to request it again and will need to consider other options (under sch 10, s4(2), s95...etc.).

The [Home Office's policy](#) on these "transitional cases" (Asylum Support: section 4(1) handling transitional cases, p6) explains that support entitlement should be reviewed at least every three months. Where possible, a person should be transferred onto s4(2), s95 or sch 10 support and they should be notified of this change. There should be no change to their support arrangement with the exception of those on s95 support who will be entitled to draw out cash using their ASPEN card.

According to the policy, a person will only be able to remain on s4(1) support if discontinuing support would amount to a breach of their human rights. In 'temporary admission cases', (i.e. those on s4(1)(a) and (b) support) this does not constitute a significant change. The vast majority of people who were on support under that category would have been assisted for human rights reasons. If nothing has changed in their circumstances since they were granted support, then they should remain entitled. If their situation has changed they will need to demonstrate that there is something new which prevents their departure from the UK.

For 'bail cases' (i.e. those previously applying for s4(1)(c)) this amounts to a significant change. In order to remain on support, it will no longer be sufficient to show that a person is still on bail. Individuals will now need to demonstrate that there is some kind of practical or legal obstacle that stops them from leaving. This may also require an assessment of destitution whereas before there was no assessment of destitution.

ASAP is aware of a small number of appeals at the AST relating to the discontinuation of s4(1)(c) which have all been dismissed<sup>11</sup>. These concerned individuals who had been supported for a number of years without any obstacle preventing departure. ASAP therefore recommends that any person who is on s4(1)(c) bail and has no outstanding further submissions or other obstacle to seek immigration and support advice as soon as possible.

Any decision to discontinue support will be subject to a right of appeal. Please call our advice line if you are unsure how to proceed.

<sup>11</sup> See for example AS/18/04/37964 and AS/18/04/37991 both on the gov.uk website: <https://www.gov.uk/asylum-support-tribunal-decisions>

## 8. Individuals with outstanding application for s4(1) support

Anyone who had an outstanding application for s4(1) support on 15/01/18 will still have their claim considered under the old rules and retain a right of appeal if that application is refused.

At the time of writing it is extremely unlikely that any applications remain outstanding for people who applied outside detention. However, we are aware of a significant number of cases from within detention which are still due to be considered.

## 9. Useful web links

Hyperlinks have been provided throughout this briefing to relevant documents. However, for those reading a printed version of this briefing the following web pages might be useful:

- Asylum support policy: [www.gov.uk/government/collections/asylum-support-asylum-instructions](http://www.gov.uk/government/collections/asylum-support-asylum-instructions)
- Bail policy: [www.gov.uk/government/publications/offender-management](http://www.gov.uk/government/publications/offender-management)
- AST decisions: [www.gov.uk/asylum-support-tribunal-decisions](http://www.gov.uk/asylum-support-tribunal-decisions)
- ASAP factsheets: <http://www.asaproject.org/resources>
- ASAP training: <http://www.asaproject.org/training>



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Appeal Number AS/18/06/38186  
UKBA Ref.  
Appellant's Ref.

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

Tribunal Judge	<u>Mr. Christopher Rayner</u>
Appellant	_____
Respondent	<u>Secretary of State</u>

**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 given on Thursday the 12<sup>th</sup> day of July 2018 substituting my decision for that of the Secretary of State in the above mentioned appeal and determining that the appellant is entitled to the continuation of his accommodation under the provisions of Section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act").
2. The appellant is a 45 year old citizen of Guinea. He appeals against the decision of the Secretary of State who on 22 May 2018 discontinued his accommodation provided as a failed asylum seeker under the provisions of section 4 of the 1999 Act on the grounds that the appellant was no longer destitute and therefore no longer satisfied Regulation 3(1)(a) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 ("the 2005 Regulations").

**Asylum history and background**

3. The appellant is a failed asylum seeker, and liable to deportation. He has a complex asylum history, which I need to recite in full. So far as is relevant to this appeal, he entered the United Kingdom on 14 August 1998 as the spouse of a British citizen, and was given leave to remain on 28 August 1999. He has twice been refused British citizenship. He has accumulated a large number of convictions during his time in the United Kingdom, as a result of which he was served with a Notice of Liability to Deportation on 21 May 2012. He appealed unsuccessfully against that order, and became appeal rights exhausted on 11

February 2013. He claimed asylum on 7 June 2013, which was refused and certified on 25 March 2014. It is not suggested that the appellant has any applications outstanding in respect of his asylum claim or immigration status.

4. My record of the appellant's asylum support history and criminal convictions may not be complete. However, relevant to my decision:
- (a) I know from a decision in this Tribunal on 20 November 2015 (Tribunal Judge Penrose, AS/15/11/34486) that on 24 March 2015 the respondent granted bail accommodation to the appellant under the provisions of the now repealed section 4(1)(c) of the 1999 Act. At an unspecified date that accommodation came to an end.
  - (b) The appellant was next arrested in respect of criminal matters on 24 February 2016, and released with reporting restrictions on 23 June 2016.
  - (c) According to the respondent's discontinuation letter, he was granted accommodation under the provisions of section 4 of the 1999 Act on 17 June 2016. It is this award of accommodation that the respondent seeks to discontinue by his letter of 22 May 2018.
  - (d) On 22 August 2016 the respondent agreed to the release of the appellant to section 4 accommodation.
  - (e) On 6 April 2018 the appellant was returned to prison for 14 days for breaching his probation order. He was detained, still in prison, on 19 April 2018, under immigration powers.
  - (f) On 22 May 2018 the respondent served the letter discontinuing the appellant's accommodation. Today's hearing is the appeal against that letter.
  - (g) The applied for bail on 13 June 2018, but was not produced for the hearing and the application was marked as withdrawn. The appellant again applied for bail on 26 June 2018, but that was refused by the First-tier Tribunal Immigration and Asylum Chamber.

#### Relevant law

5. Section 4(2) of the 1999 Act allows the Secretary of State to provide, or arrange for the provision of, facilities for the accommodation of a person and his dependants if –
- a. he was (but is no longer) an asylum seeker; and
  - b. his claim for asylum was rejected.
6. Section 4(5) of the 1999 Act permits the Secretary of State to “make regulations specifying criteria to be used in determining – a) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section”.
7. The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations (The 2005 Regulations) are made under the provisions of section 4(5) of the 1999 Act, and Regulation 3 specifies the criteria to be used in determining eligibility for the provision of accommodation to a failed asylum seeker under section 4. Regulation 3 reads as follows:
- 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 the 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) – (d) not relevant here
  - (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.

8. "Destitution" is defined in section 95(3) of the 1999 Act:

" .... a person is destitute if

- (a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or
- (b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs."

Regulation 7(b) of The Asylum Support Regulations 2000 stipulates that the period within which the respondent must demonstrate that a failed asylum seeker in receipt of support is likely to become destitute is 56 days.

#### Letter of discontinuation and appeal.

9. As this is the respondent's application to discontinue support, the burden is on him to establish that he has grounds to do so. In his letter of 22 May 2018 the respondent writes,

*"On 17 June 2016 you were granted support under section 4(2) of the Immigration and Asylum Act 1999.*

*I have reviewed your case to establish whether you still qualify for support and note that you have been detained under immigration powers since 19 April 2018. Home Office records do not show that any date has been arranged for your release from immigration detention. It is therefore considered that you are no longer destitute as your needs are currently being met by the Immigration Removal Centre where you are currently detained.*

*In view of the above you are no longer entitled to support under Section 4(2) of the Immigration and Asylum Act 1999 and your support will be discontinued with effect from 14 June 2018. This means that we will no longer pay for your present accommodation after that date.*

*Should you be released from detention prior to 14 June 2018 you can return to your present Section 4 property. If however you are released from detention after 14 June 2018 you will be required to submit a new application for Section 4 support.*

10. In a subsequent letter dated 12 June 2018 the respondent extended the date until which the appellant's accommodation would remain available until 18 June 2018.

#### The hearing

11. The appellant did not attend the Tribunal. Messrs Wilsons are acting for the appellant in proceedings associated with his current detention. The appellant had agreed to the appeal being dealt with in his absence, subject to his being represented by a representative from the Asylum Support Appeals Project (ASAP). In accordance with Rule 31 of the Rules, I was satisfied that the

appellant was aware of the hearing and that it was in the interests of justice to deal with the matter in his absence. Ms Fishwick of ASAP appeared on his behalf. Mrs Crozier represented the respondent.

12. The appeal proceeded by way of representations only. The respondent had been unable to provide a copy of the letter granting accommodation to the appellant. However, both representatives submitted that accommodation was likely to have been granted under the provisions of section 4(2) of the 1999 Act. However, neither Mrs Crozier nor Ms Fishwick knew which criteria under Regulation 3(2) of the 2005 Regulations that the appellant satisfied. However, as the discontinuation letter did not raise regulation 3(2) eligibility, it was agreed that the appeal should be conducted on the basis that appellant continued to satisfy that regulation.
13. I confirmed with the representatives therefore that the only issue raised in the discontinuation letter was the appellant's destitution in view of the fact that he is currently, and has been since 6 April 2018 in prison, either by way of a sentence or immigration detention. That raises issues of whether detention can be considered 'adequate accommodation'; and, if it is, whether the respondent can show that the appellant is likely to remain there for 56 days.
14. Ms Fishwick addressed me, by reference to a Briefing Paper from Bail for Immigration Detainees, on the difficulties faced by those in immigration detention in securing accommodation, particularly since the revocation of section 4(1) of the 1999 Immigration Act. She submitted, (and Mrs Crozier agreed) that by reference to the Home Office Guidance on Bail Policy, the appellant would not qualify for support under the new provisions of schedule 10 to the Immigration Act 2016. Ms Fishwick relied on the case of MAS ASA/05/05/9315 where the Principal Judge Asylum Support had decided (paragraph 33),
 

*"I readily accept that accommodation in a prison cell does not amount to adequate accommodation and that it would not be reasonable to continue to occupy a prison cell where there is an alternative available. In the event that the Administrative Court grant the appellant interim relief and bail, I am satisfied that the appellant will be destitute on the basis that he will no longer have access to adequate accommodation nor the means to meet his essential living needs".*
15. The Home Office accept, Ms Fishwick submitted, that if released the appellant would be destitute: in their response to directions, they accepted, "*Whilst it is expected that you would be destitute if not detained ...*". Alternatively, Ms Fishwick submitted, if it were to be accepted the prison accommodation was suitable and currently relieved the appellant's destitution, it is likely that he will be released from immigration detention before the end of 56 days, particularly in light of the Tribunal Judge's remark when dealing with his bail application on 26 June 2018 that although bail was refused on that occasion, "*If there is no progress when you next apply for bail and you have cooperated then the decision might be different*". The respondent had not therefore demonstrated, Ms Fishwick submitted, that the appellant's destitution was relieved for the next 56 days. There was another bail hearing pending on 24 July 2018, and Messrs Wilsons were pursuing the unlawful detention judicial review application, which, if successful, was also highly likely to result in his release.
16. Mrs Crozier submitted that the appeal raised a number of issues beyond the appellant's destitution. She acknowledged that Home Office policy did not

suggest that prison was “adequate accommodation”. The minimum that was required for that was that the claimant should have a key. Mrs Crozier submitted however, that the discontinuation could be construed to have been made because the appellant had breached the requirements of that accommodation by not residing there, although she acknowledged that was not explicit from the discontinuation letter. She submitted that given his immigration and criminal history, it was no better than 50/50 that the appellant would be released within 56 days to be able to take up the accommodation.

17. If this appeal were dismissed, Mrs Crozier submitted, because the appellant had ‘kept alive’ his asylum claim, he could apply for section 4(2) support on release, or from prison prior to making a bail application. Mrs Crozier accepted that the appellant could not qualify for support under the provisions of schedule 10 of the 2016 Act.
18. I asked the representatives for representations on the effect of allowing or dismissing the appeal. Ms Fishwick submitted that if the appeal were allowed, the respondent would not have to keep open a specific address for the appellant. He could retain his eligibility and be allocated an address in light of a successful bail application. Mrs Crozier submitted however that the Home Office practice does not enable this. If accommodation is awarded, a specific address has to be allocated, and an Aspen Card account set up. She pointed out that the appellant had not apparently been using his Aspen card between June 2017 and April 2018, so it was difficult to see how he could have been considered ‘destitute’ during this period. There can be no “theoretical” award. She submitted that it would be open to the appellant to re-apply for section 4(2) support at any time in conjunction with a bail application, or on release from detention. Given the difficulties relating to arranging conversations with and representation for the appellant while he remained in prison, Ms Fishwick submitted that requiring him to make a section 4 application for each bail application was unnecessarily onerous and not legally required.
19. At the conclusion of the hearing I indicated that I would allow the appeal, for which I now give my reasons.

#### Findings, decision and reasons.

20. My relevant findings of fact can be shortly stated. I incorporate the appellant’s asylum and asylum support history from above
  - a. The appellant is a failed asylum seeker. He is also subject to a deportation order. He has no right to remain in the United Kingdom. There have been a number of attempts to secure travel documents. I do not know why those attempts have been unsuccessful. However, subject to the Home Office securing travel documents, the appellant will be removed to Guinea.
  - b. The appellant has a significant history of offending. No particularly serious crimes have been brought to my attention, but the offending is persistent. Many offences have resulted in community disposals, or relatively short sentences of custody.
  - c. The appellant’s discontinuation letter states that the current award of accommodation was made under section 4(2) of the 1999 Act on 17 June 2018, although the chronology suggests that it may have been made on 22 August 2016. It follows that at that time the respondent was satisfied that the appellant satisfied one or more of the grounds in regulation 3(2) of the 2005 Regulations.

- d. The respondent does not suggest for the purpose of these proceedings that the appellant's situation has changed with regard to regulation 3(2) eligibility. It is open to the respondent to revisit regulation 3(2) eligibility.
  - e. On 6 April 2018 the appellant was sentenced to 14 days imprisonment for breach of probation requirements.
  - f. At the conclusion of his sentence on 19 April 2018, the appellant has been detained in prison custody but in immigration detention.
  - g. The respondent discontinued the appellant's support by letter dated 22 May 2018, on the basis that he was not destitute because he is in immigration detention.
21. Miss Fishwick and Mrs Crozier helpfully addressed me on recent legislative changes and the effects they may have on the appellant's status, and on the practical effects of any decision on the appellant and Home Office policy. While those submissions were helpful and provide a background to the appeal, the essential issue remained whether the respondent had demonstrated that the appellant was no longer destitute, as that was the only ground averred in the discontinuation letter. On the basis of the legislative framework and current authorities, I find they have not. I have no reason to depart from the Principal Judge's findings in ASA/05/05/9315 that a prison cell is not 'adequate accommodation'. Mrs Crozier accepted that Home Office policy did not seek to suggest it was. The fact that it is not 'adequate accommodation' does not imply that the appellant should be released from custody. That is a matter for a different judicial process, and this finding has no bearing on that. However, for a destitute failed asylum seeker who satisfies Regulation 3(2) of the 2005 Regulations, a prison cell is not 'adequate accommodation'. That finding would of itself be enough to dispose of this appeal, as the respondent has failed to demonstrate that the appellant is no longer destitute, as he has not shown that he currently has 'adequate accommodation'. He remains destitute because he does not have 'adequate accommodation' or the means to obtain it.
22. Even if prison were 'adequate accommodation' I would assess, given his offending and other history that it is 'likely' that he will be released within 56 days. The Immigration Judge has given such an indication. The appellant's most recent offending was not of a serious nature. There are limitations for how long is to proportionate to keep a claimant in custody to prevent offending. Therefore, even if prison accommodation were 'adequate accommodation' now (which I find it is not), it is likely that the appellant will again be destitute within 56 days, so the respondent has not established the grounds raised in his discontinuation letter.
23. The appellant's situation raises a number of potential issues. However, I do not need to consider or determine those for the purposes of this appeal. The respondent has not established the grounds alleged to discontinue the appellant's accommodation. I allow the appeal. That does not mean the appellant will be returned to his section 4 accommodation, but it does mean that he should, in his current circumstances, have section 4 accommodation available to him if released on bail. Nor does this require the respondent to keep a specific address available for the appellant.

Signed : Mr. Christopher Rayner  
Tribunal Judge, Asylum Support  
**SIGNED ON THE ORIGINAL** [Appellant's Copy]

Date : 12 July 2018.