

# Support for absconders and others who have withdrawn their asylum claims

27 November 2018

Occasionally a person will either ask the Home Office (HO) to withdraw their asylum claim (an express withdrawal) or, through their conduct, indicate they no longer want the HO to consider their asylum claim (an implicit withdrawal). Whichever applies, the consequences to their asylum support entitlement are severe. Withdrawing an asylum claim will generally mean that the person is no longer an asylum-seeker or a refused asylum-seeker so the only form of support they can obtain is Schedule 10 (sch10) support<sup>1</sup>.

This briefing explains:-

- Under what circumstances a person's asylum claim is considered withdrawn,
- Why, as a general rule, for support purposes, they are not asylum-seekers or refused asylum-seekers, and
- When a person might be able to make applications for s95 or s4 support anyway<sup>2</sup>.

The briefing also looks briefly at sch10 support and our longer sch10 briefing should be consulted for more information<sup>3</sup>.

This a very tricky area, so please ring our advice line (020 3716 0283 Mon, Wed, Fri 2-4pm) if you have a client this briefing might be relevant to, and you are unsure how to apply it. Please also be aware that as a general rule applications for s95 and s4(2) support are unlikely to be successful. Unless you are confident that one of the exceptions detailed below applies, we advise such applications should only be made in conjunction with representations on sch10 support so as not to delay support from starting.

## 1. Background

Until 15/01/2018 this issue rarely came to the attention of advisers; destitute people whose claims had been withdrawn could get support under s4(1)<sup>4</sup>. However, on that date s4(1) was repealed and replaced by sch10. Unfortunately, the HO's policy on sch10 support does not make it clear that this group of people might qualify, nor does it stipulate a way of applying for sch10 support<sup>5</sup>. ASAP has experienced an increase in enquiries on our advice line relating

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<sup>1</sup> Para 9, schedule 10 of the Immigration Act 2016.

<sup>2</sup> References in this briefing to s94, s95 or s4 are to sections of the Immigration and Asylum Act 1999.

<sup>3</sup> Support for people on immigration bail, available here: <http://www.asaproject.org/resources/briefing-notes>

<sup>4</sup> See para 1.3 of the old [s4 guidance](#) available on the national archive website.

<sup>5</sup> See our briefing (footnote 3) and also the [Immigration Bail policy](#)

to this group of people. We have also noticed an increase in unmeritorious appeals as advisers apply for the wrong type of support. We have been speaking to the HO since 15/01/2018 to ask for the policy and process to be clarified as we do not believe the omission of this group of people from policy was intentional<sup>6</sup>. However, as yet this change has not been forthcoming.

## 2. When is a person's asylum claim considered withdrawn?

Withdrawals of asylum claims are governed by [Immigration Rule 333C](#) (IR333C) and an Asylum Process Instruction: [Withdrawing Asylum Claims](#) (the API). A withdrawal means that the person's claim will no longer be considered unless they apply to have their case looked at once more (see below for details of the basis on which they can do this).

### 2.1 Express Withdrawal

ASAP has mainly encountered examples of express withdrawals when a person claims asylum and then changes their mind, or when they sign up to Assisted Voluntary Return (AVR) in order to leave the UK<sup>7</sup>. IR333C states that a person needs to sign 'the relevant form' in order for the claim to be withdrawn in this way.

### 2.2 Implicit withdrawal

IR333C defines specific circumstances in which a person's asylum claim can be treated as withdrawn (implicit withdrawals):

- If they leave the UK without authorisation before their claim is concluded,
- If they fail to complete an asylum questionnaire when requested to do so, or
- If they fail to attend their asylum interview unless they can show within a reasonable time that this was due to circumstances beyond their control (the API defines this as 5 days in non-detained cases, p11).

The rules were changed on 27/02/2015. Applications for asylum made before that date can only be treated as withdrawn if the person does not attend their asylum interview.

Sometimes a person does not deliberately lose touch with the HO and letters are sent to the wrong address. But more typically, we have found that implicit withdrawals occur when a person claims asylum and then shortly after they leave HO accommodation and go 'underground'. Often this is to avoid removal to a third country, usually under the Dublin III

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<sup>6</sup> The Immigration Act 2016 contains a new definition of asylum-seeker which includes people whose asylum claims had been withdrawn, and therefore creates eligibility for s95. **However**, this section (Sch 11 para 3(2C)) has not been brought into force.

<sup>7</sup> Current HO practice is to require a person to sign a notice withdrawing their claims at the point of applying for AVR.

Regulations (see below). The HO will treat them as ‘absconders’<sup>8</sup> and then treat their asylum claim as withdrawn. In order to do this, the HO needs to follow specific steps which can be found at [pp10-13 of the API](#).

### 3. What happens to a person’s support entitlement when their asylum claim gets withdrawn (and they later want to reinstate it)?

Whether a withdrawal is implicit or express, the impact on their support entitlements is the same.

The general rule is that a person whose claim for asylum has been withdrawn:-

- Cannot get s95 support until they manage to persuade the HO to re-open their asylum claim (unless it is possible to show that the HO didn’t follow the withdrawal process so are wrong to treat the case as a withdrawn case or they had children before their asylum claim was withdrawn or the withdrawal rules didn’t apply at the time).
- Cannot get s4 support (except in limited circumstances which will mainly affect third country/Dublin III cases).
- Should be able to get sch10 support (except support is not provided to dependents).

### 4. Why can’t they get s95 support?

In order to be eligible under s95, a person needs to be a destitute asylum-seeker.

Section 94(1) defines as asylum-seeker as a person:

- Over 18,
- In the UK,
- Who has made a claim for asylum,
- Which is recorded,
- And not determined.

Section 94(3) states that claim is determined once the HO notifies the individual of a ‘decision on the claim’.

The asylum support Tribunal (the AST) have looked at this question many times<sup>9</sup>. The established position is that although the person once made a claim that was recorded and not determined, by withdrawing it (whether explicitly or implicitly) the claim no longer exists. In other words it is no longer ‘recorded’ and is no longer waiting to be ‘determined’. The person is no longer an asylum-seeker.

ASAP considers there are 3 exceptions to the general rule:-

<sup>8</sup> See HO [Non-compliance and absconder process Instructions](#)

<sup>9</sup> See in particular decisions AS/13/07/30183 and AS/18/06/38201 both available on the AST database <https://www.gov.uk/asylum-support-tribunal-decisions>

#### 4.1 Failure to follow procedure

The HO may have failed properly to follow the API procedure for withdrawing an asylum claim. In this situation it can be argued that the person should still be considered to be an asylum-seeker for support purposes<sup>10</sup>.

The difficulty for advisers is that the HO has never, to our knowledge, conceded this point without the need for an appeal and crucially, advisers may not know whether this point can be argued until they reach the appeal stage. This is because it is only when the HO discloses (as part of the HO bundle it sends to the AST) what steps it took to withdraw the asylum claim, that the advisor can then check this information against the procedure set out in the API (see 2.2 above). Please call our advice line to discuss individual cases. ASAP has been successful in several appeals on this procedural point.

If the AST makes a finding that the person is entitled to s95 support, it is still vital that the individual seeks immigration advice (if they have not done so already). The AST's finding only extends to the question of entitlement to support and will not result in the person's asylum claim being reconsidered.

#### 4.2 Children born before the asylum claim is withdrawn

In this situation it is possible the asylum support applicant will benefit from IAA 1999 s94(5) which establishes that asylum-seekers who have children under 18 in their household continue to be treated as asylum-seekers for support purposes after they become appeals rights exhausted (ARE). In ASAP's view, s94(5) creates an entitlement to s95 support, even if the family was not on s95 support at the point of becoming ARE (or may never have been on s95 support).

The AST has generally taken the view that, for s94(5) to take effect, it is necessary to have been on s95 support at the point of becoming ARE<sup>11</sup>. This is also the position of the HO. However, in AS/18/08/38542<sup>12</sup>, heard on 5/9/18, an appellant (who had a dependant child) and who had not previously been on s95 support, was successful. She had been treated as an absconder, as she had lost touch with the HO when she moved from s98 accommodation in with a partner. She later separated from him and applied for s95 support, and that application was the subject of the successful appeal. The judge found that the decision to

<sup>10</sup> See *R(SSHD) and Chief Asylum Support Adjudicator and Malaj* ([2006] EWHC 3059 which established that the AST has jurisdiction to consider whether or not a person is an asylum-seeker for support purposes

<sup>11</sup> IAA 1999 s94(3) states that an asylum claim is determined when there is a decision on the claim, or the appeal is disposed of, which is what is meant by ARE

<sup>12</sup> This statement of reasons is not on the AST database but can be requested from the AST

treat her asylum claim as withdrawn was a determination of her claim under s94(3), and therefore she came within s94(5).

#### 4.3 Applications for asylum made before 07/04/2008 or 27/02/2015

The third exception is likely to occur more rarely. IR333C only applies to applications made on or after 07/04/2008, so any applications made before this date should not be refused on this basis. Also, the rules were broadened on 27/02/2015, as explained above, so applications before 27/02/2015 can only be considered withdrawn if the asylum-seeker did not attend their asylum interview. We understand that in these circumstances the HO will refuse the asylum claim on non-compliance grounds<sup>13</sup>. If no such refusal has been made, it may be possible to argue that the withdrawal should not have happened and the person should still be considered an asylum-seeker.

### 5. What about the current asylum claim? Why is that not considered to be an asylum claim?

According to [Immigration Rule 353 \(IR353\)](#) if a person whose claim has been withdrawn wants the HO to re-open their case, they need to lodge further submissions with the Further Submissions Unit (FSU) in Liverpool. This claim will be subject to IR353 process meaning it will not be recorded as an asylum claim until the HO decides it is one. So in practice a person will only be eligible for s95 support once they have a decision letter on the further submissions.

The further submissions policy allows the HO to conduct interviews.<sup>14</sup> It is therefore unlikely that having had such an interview will be sufficient in itself to show that the claim has been recorded as an asylum claim. The policy also points out that it is not automatically the case that a withdrawn asylum claim will be recorded as an asylum claim.<sup>15</sup> So if the person receives a refusal, unless this comes with a right of appeal they will still not be an asylum-seeker for support purposes.

Likewise, if the person had been treated as an absconder, once the individual resumes contact, the HO has to follow specific steps in order to reverse their absconder status<sup>16</sup>. These steps are part of enforcement procedures and are separate from any treatment of their asylum claim. So merely having notice that these steps have occurred does not necessarily mean that the person's asylum claim is now recorded.

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<sup>13</sup> See [APG on Non-Compliance](#)

<sup>14</sup> See para 4.1 of the [Further Submissions policy](#)

<sup>15</sup> See para 5.4 of the [Further Submissions policy](#)

<sup>16</sup> See [Non-compliance and absconder process Instructions](#)

## 6. Why are people not entitled to s4(2) support?

In order to get s4(2) support, a person's asylum claim needs to have been considered and refused (the word in s4(2)(b) is 'rejected'). Absconders and others who withdraw their asylum claims usually have not received a decision on their claim so cannot be considered refused asylum-seekers.

Section 4(2):-

*The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if:*

- (a) he was (but is no longer) an asylum-seeker, and*
- (b) his claim for asylum was rejected.*

An applicant for s4(2) must also meet the other eligibility criteria for support<sup>17</sup>.

In the last few years the AST has consistently found that a withdrawal is not a rejection, so the person cannot obtain s4(2) support<sup>18</sup>.

There are limited circumstances where it might be possible to argue that a person whose asylum claim has been withdrawn is a refused asylum-seeker and therefore entitled to s4(2) support:-

### 6.1 A decision to reject the asylum claim was made before the claim was withdrawn

ASAP has encountered cases where the HO made a decision to reject the asylum claim before the claim is withdrawn. In these circumstances, it is arguable that they are entitled to s4(2) support (as they are former asylum-seekers whose claim has been rejected), provided they meet the other criteria for support.

#### 6.1.1 Third country absconder cases

In ASAP's experience, one of the main reasons that asylum-seekers abscond is that their claim falls to be considered under the third country rules, usually the Dublin III regulations. These are cases where the UK is asking another EU country to take responsibility for a particular asylum-seeker usually because there is evidence that this person travelled through that EU country. Some people abscond in order to avoid removal there.

As part of the Dublin III procedure, once a referral by the HO has been accepted by the other EU country the HO should certify their asylum claim<sup>19</sup>. ASAP believes it is arguable

<sup>17</sup> See our Factsheet 2 on s4 support available on our website: <http://www.asaproject.org/resources>

<sup>18</sup> See AS/13/06/29996 which is quoted by Judge Penrose in AS/18/06/38201 (available on the AST website)

<sup>19</sup> Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and also HO guidance of 02/11/2017 on the [Dublin III Regulations](#), p. 33.

that a decision to certify amounts to a rejection of the asylum claim. Subsequent absconding by the applicant will not change that fact.

Therefore, advisers who are instructed by their clients that they received this kind of certification decision should consider applying for s4(2) support. The applicant will also need to meet the other criteria for support<sup>20</sup>.

Potential exception to this exception:- In some cases, the decision to certify the asylum claim under Dublin III rules is later superseded by a decision to accept the asylum claim in the UK. This decision is made at a time that the HO is unaware that the person has absconded, and the absconder is unaware that this (positive) decision is made. That asylum claim is then later treated as withdrawn when the HO finds out the person has absconded. ASAP considers that in this situation it is arguable that the later withdrawal will have nullified their earlier status as a refused asylum-seeker. Therefore, they will not be entitled to s4(2) or s95 support although this point is untested.

### 6.1.2 Other examples

There may be other examples of claims that are withdrawn after the initial decision is made on the asylum claim (this list is non- exhaustive):-

- AVR cases: In our experience people sign up for AVR once their asylum has come to an end. It is HO practice to make AVR applicants withdraw any outstanding claims. Such a withdrawal would not interfere with their eligibility for s4(2) support.
- Further submissions: likewise, a person who withdraws their further submissions either expressly or impliedly (by not attending a further submissions interview for example) would may still be entitled to s4(2) support. In fact, the API (at p12) makes it explicit that a failure to attend an interview in connection with further submissions would not engage IR333C.

### 6.2 Applications for asylum made before 07/04/2008 or 27/02/2015

If the asylum claim and/or withdrawal were made prior to IR333C coming into force (07/04/2008) or been modified (27/02/2015) it might be that the asylum claim was considered and refused.

## 7. If a person is not entitled to s4(2) or s95 support what support can they get?

This depends on their personal circumstances:

- If they are single, they might be entitled to sch10 support. If they have a partner or other *adult* dependant, that dependant will need to make their own application for support as it is not possible to get sch10 support for dependants.

<sup>20</sup> See our Factsheet 2 on s4 support available on our website: <http://www.asaproject.org/resources>

- If the individual has children born after their claim was withdrawn they should consider a referral to the local authority.
- If the person has care needs they should consider approaching the local authority.

For more information on sch10, please refer to our sch10 briefing. But in summary, to get sch10 a person will need to be:-

- On bail (this is notified through a BAIL 201 form),
- Subject to a residency condition, and
- Usually fall under the exceptional circumstances criteria.

This means that the person will need to be destitute and have considerably advanced the process of re-engaging with the HO before they can qualify for support. Doing so will usually involve attending the FSU to hand in further submissions. It may be possible to get support prior to that stage depending on facts of the case. However, with regard to refused-asylum seekers applying for s4(2) support it is the HO position that they need to have attended the FSU before support is granted (although some appeals are allowed from applicants who have not yet lodged at the FSU).

It is likely that the HO will follow the same approach in sch10 cases. And crucially there is no right of appeal against a refusal of sch10 support so it will be necessary to explore judicial review if the decision is challengeable. Please call our advice line for further advice.

Sch10 has been in place since 15/01/2018. Prior to that date, people who withdrew their asylum claim were explicitly covered by s4(1) support<sup>21</sup>. As yet, the HO has not put in writing that they might be eligible for sch10 support and in fact written policy on sch10 support relates primarily to people in detention. Furthermore, there is no application process for applying for sch10 support and no department to our knowledge is currently processing sch10 applications for people who are not detainees or who do not have a criminal conviction<sup>22</sup>.

At present therefore making a sch10 application presents many logistical obstacles. It is unlikely that a successful sch10 application can be made without resorting to litigation. Perhaps it would be easier and more expedient to explore with the person's immigration adviser whether it would be possible and/or wise to pressure the HO to make a decision on their further submissions which would, if positive, trigger an entitlement to s95 support.

## 8. Useful references

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:-

- Immigration Rules: [www.gov.uk/guidance/immigration-rules](http://www.gov.uk/guidance/immigration-rules)

<sup>21</sup> See [old s4 policy](#)

<sup>22</sup> See table on p9 of ASAP briefing Support for people on immigration bail



- API Withdrawing Asylum claims: [www.gov.uk/government/publications/withdrawing-asylum-applications](http://www.gov.uk/government/publications/withdrawing-asylum-applications)
- Further submissions policy: [www.gov.uk/government/publications/further-submissions](http://www.gov.uk/government/publications/further-submissions)
- Old s4 Policy: <http://webarchive.nationalarchives.gov.uk/20180105041928/https://www.gov.uk/government/publications/asylum-support-section-4-policy-and-process>
- AST decisions: [www.gov.uk/asylum-support-tribunal-decisions](http://www.gov.uk/asylum-support-tribunal-decisions)
- ASAP factsheets and briefings: <http://www.asaproject.org/resources>
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