

Immigration Bill 2015-16  
Briefing for House of Lords Committee Stage 18 January 2016

**New Research on Asylum Support Appeals**

**Why Appellants Succeed, The Role Of 'Late' Evidence &  
The Need For A Right Of Appeal for s95A Cases**

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**A: Headline summary**

- In only **30%** (15 cases) of the sample was 'late' written evidence the sole or dominant factor in a successful appeal.
- In **44%** (22 cases) of the sample the Tribunal cited a combination of factors in support of its decision to allow or remit the appeal.
- **36 successful appellants** (72%) would not have a right of appeal under the proposed bill.
- In **42%** (21 cases) of the sample the Home Office case was flawed due to a legal or factual issue, or rejected by the Tribunal.

## **B: Background**

During the Public Bill Committee debate on 5.11.15, the Minister for Immigration stated:

*“many appeals are allowed...or remitted, because the appellant provides the necessary evidence of their eligibility at a later stage [than the Home Office decision].”<sup>1</sup>*

ASAP disputes the suggestion that ‘late’ evidence is the sole reason for the consistently high rate<sup>2</sup> of allowed and remitted appeals. As a result, we reviewed 50 client files from October and November 2015 to examine why those appeals were successful and explore the extent to which ‘late’ evidence was provided and influenced their outcome. We set out our findings below. In light of the proposed bill not including a right of appeal for cases falling under the new section 95A<sup>3</sup>, we also highlight some specific examples that demonstrate the vital role the Tribunal performs in overseeing Home Office decision-making on asylum support.

## **C: Research method**

Working back from 27.11.15, we selected the first **50 cases** in which our client’s appeal was allowed or remitted. The appeal outcome was the only criterion applied to selection. We chose to look at all successful cases (rather than only potential s95A cases) for two reasons. First, we wanted to present as unfiltered and contemporaneous a snapshot as possible. Secondly, we consider that all cases inform the current debate surrounding the complexity of appeals and the quality of Home Office decision-making. For each file we reviewed the Tribunal Statement of Reasons, the Home Office decision letter and each party’s appeal documents, recording the reason(s) the appeal succeeded and the evidence that was presented at each stage of the decision-making process.

## **D: Research findings**

The 50 cases comprised 41 allowed and 9 remitted appeals, relating to 17 ‘refusals’ and 33 ‘discontinuations’ of support.

### D1 Reason(s) for success

In **28 cases** a single or dominant factor emerged from the Tribunal’s Statement of Reasons relating to:

- written evidence submitted post Home Office decision (‘late’ evidence) (**15 cases**);
- oral evidence provided at the hearing (**5 cases**)
- the Tribunal rejecting the Home Office’s legal position (**3 cases**)

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<sup>1</sup> Hansard, page 425, 2<sup>nd</sup> paragraph.

<sup>2</sup> From September 2014 to August 2015 the Tribunal received 2,067 appeals against a refusal of Home Office support. 62% of these were either allowed (44%), remitted or withdrawn by the Home Office.

<sup>3</sup> These will be people facing a ‘genuine obstacle’ to leaving the UK. ‘Genuine obstacle’ will be defined in Regulations, but in the debate of 5.11.15 the Minister indicated that it is likely to encompass people who lack necessary documents or have a medical reason.

- the Home Office making a factual error (**1 case**)
- facts emerging<sup>4</sup> and/or being clarified post Home Office decision (**4 cases**)

In **22 cases** the Tribunal cited a combination of the above factors (without any one being dominant) in support of its decision to allow or remit the appeal. This finding reinforces our view that a significant proportion of appeals are not determined solely by ‘late’ written evidence but various factually and/or legally complex issues (exemplified by the example in the box below). This is consistent with the conclusion drawn by the Independent Chief Inspector<sup>5</sup>. A table showing the breakdown of relevant factors (including case references) for all 50 appeals is at Appendix 1.

**‘Combination case’ example:** In Appeal 14 the Home Office terminated support on the basis that the appellant had breached the conditions of her support by allowing her daughter to stay in her accommodation. However, the Tribunal allowed the appeal due to a combination of factors comprising:

- *Home Office legal error:* the Tribunal Judge held there was “*insufficient evidence, if indeed any at all*” to confirm that a relevant breach had occurred, and that therefore the Home Office had “*not made out [its] case to the required standard.*” (Statement of Reasons, paragraph 32)
- *Written evidence:* the appellant and her daughter submitted witness statements in support of her case.
- *Oral evidence:* the appellant answered questions about her daughter visiting the accommodation and why the appellant could not be accommodated by her daughter.

## D2 The significance of additional evidence

Our research confirms that additional evidence submitted to the Tribunal does play an important role in asylum support appeals<sup>6</sup>. In **42 cases** such evidence appeared relevant to the outcome as described by the Statement of Reasons. Superficially, the connection the Minister drew between ‘late’ evidence and appeal success rates appears plausible. However, a detailed analysis reveals that the connection is not as direct as he suggested.

As noted above, additional written evidence was the single or dominant factor underpinning the Tribunal Judge’s decision in only **15 cases**. Furthermore, in a sizeable proportion of the 42 identified cases, it is unlikely that the appellant’s ‘late’ evidence would have had any significant impact on the initial refusal / termination decision due to the stance the Home Office took on the appeal. For example, additional evidence in **17 cases** related to further

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<sup>4</sup> These cases are in a separate category because the relevant fact was not contained in the appellant’s written or oral evidence. For example, in Appeal 17 it was established that neither the Home Office nor its medical advisor had considered medical reports written in 2013 and 2014 in the context of the asylum support regulations, and the appeal was remitted for this to happen.

<sup>5</sup> An Inspection of Asylum Support September 2013 – January 2014, paragraph 1.5.

<sup>6</sup> This is unsurprising given that appellants are invited to submit supporting evidence with their Notice of Appeal and are required to provide additional information in response to Tribunal Directions.

submissions or pre-action protocol letters (and the steps taken to progress them) that had yet to be submitted to the Home Office. The Home Office consistently states that in these types of cases an application or pre-action letter must be lodged in order to qualify for support, but the Tribunal applies a less restrictive interpretation of relevant case law<sup>7</sup>. In other cases, it appeared unlikely that the Home Office would alter its initial negative finding regarding an applicant's credibility if it had been provided with all the evidence presented to the Tribunal.

It is also important to note the context in which 'late' evidence may be submitted to the Tribunal. All of the scenarios in the box below featured in our review sample. The first two points underline the importance of the Tribunal's oversight of Home Office decision-making.

**'Late evidence' in context:** Relevant examples include

- the Tribunal requests evidence from the appellant which the Home Office did not (Appeal 21)
- the Home Office is (or should be) already aware of the information the appellant provides (Appeal 4)
- the Home Office refuses the appellant's suggestion to withdraw its appeal and review the additional evidence that was then provided to the Tribunal (Appeal 20)
- the Tribunal requests updated evidence from the appellant in order to have a contemporaneous picture (Appeal 13)
- the relevant evidence does not exist at the time of the Home Office's initial decision (Appeal 43)

### D3 The impact of Section 95A

Applying the new legislative framework to the 50 cases, **36 successful appellants** (72% of the sample) would be denied their right of appeal. **20** of these appellants were recorded as 'vulnerable clients' due to a mental health issue<sup>8</sup>, a physical health issue<sup>9</sup> or being a victim of domestic or sexual violence.

In the Public Bill Committee debate, the Minister justified the lack of appeal right on the basis that determining whether a 'genuine obstacle' such as a medical problem "*should be a straightforward matter of fact*"<sup>10</sup>. However, our review sample contains evidence which tests that assertion, illustrated by the example in the box below. This example demonstrates two points. First, it underlines how vital the appeal process is for vulnerable individuals whose symptoms are subject to volatile and unexpected changes. Secondly, it highlights the importance of having an independent decision-maker to evaluate conflicting medical evidence. While the Home Office may seek to propose certain safeguarding

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<sup>7</sup> In each case the Tribunal identified why support should be awarded or reinstated in the specific circumstances. Examples included a pending Legal Aid application supported by Counsel's opinion, and the lack of time an appellant had to react in comparison to the length of time the Home Office took to refuse his asylum claim.

<sup>8</sup> Examples included PTSD, psychosis and bipolar affective disorder.

<sup>9</sup> Examples included diabetes, epilepsy and serious infection.

<sup>10</sup> Hansard, page 422, 3<sup>rd</sup> paragraph.

measures under the new framework, it is difficult to envisage a system that would be more practical, cost effective or equitable than that currently available through the Tribunal.

**‘Genuine obstacle’ case example:** In Appeal 36 support was discontinued because the appellant had no further submissions lodged with the Home Office. However, the subsequent appeal turned on whether the appellant was fit to travel due to his condition of bipolar disorder with psychotic symptoms. At the appeal the Tribunal was required to evaluate conflicting views from medical professionals.

- The Notice of Appeal contained a medical declaration from the appellant’s Consultant Psychiatrist stating that he was not currently fit to fly as it would likely contribute to a major relapse of his mental health.
- The Home Office provided an opinion from its medical advisor who had reviewed the appellant’s evidence and concluded that while he may be at risk of relapse at some point in the future, the available evidence did not indicate he was presently unfit to fly.
- At a video linked hearing, the Tribunal heard brief oral evidence from the appellant and detailed oral evidence from his mental health support worker who described how she had observed the appellant’s condition deteriorate over the preceding weeks.
- The Tribunal Judge allowed the appeal on the basis of the oral evidence, the appellant’s presentation and the written medical evidence that was available to her. In reaching her conclusion the Tribunal Judge noted that the Home Office medical advisor stated *“it is difficult for me to advise definitively on the information provided.”*

#### D4 The quality of Home Office decision-making

The review sample did contain evidence consistent with the type of case the Minister described in the Committee debate. For example, in Appeal 24 the Home Office terminated an individual’s support after the Upper Tribunal rejected her appeal against the rejection of her substantive asylum claim. She applied to the (asylum support) Tribunal to appeal against the termination decision. Her support appeal was allowed because by then the appellant was able to evidence that she had lodged further submissions (to be considered as a fresh asylum claim) with the Home Office. We would not question the Home Office’s initial decision to terminate support in that scenario. But in **21 of 50 cases** (42%) there were aspects of the Home Office case<sup>11</sup> that could be queried on either a legal or factual basis (see the box below for some examples) and/or was rejected by the Tribunal. The percentage of questionable Home Office decisions identified in our review contrasts sharply with the findings of the Independent Chief Inspector. However, to place that report in context, we note the following three points:

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<sup>11</sup> Either as part of the initial decision or the case at appeal.

- *ICI emphasis on 'refusal' decisions:* the ICI report is almost exclusively focused on decisions to grant or refuse support. In contrast, 66% of our review relates to 'discontinuation' decisions, where the onus is on the Home Office to demonstrate why the individual concerned no longer qualifies for support. Accordingly, these types of decisions can be more complex for the decision-maker.
- *Small sample of appeal cases:* in light of the Minister's reliance on the report in the context of appeals, it is important to note the Chief Inspector's sample included only 15 cases where an appeal was made to the Tribunal (12 files reviewed, 3 hearings observed).
- *Limited scope of legal analysis:* the ICI report states that 89% of decisions to refuse support were reasonable. However, it is unclear what legal benchmark the inspectors applied to reach that conclusion. There is little to suggest that they performed a detailed legal analysis (for example, examining the decision in light of all relevant case law, statutory duties and published policies). Instead, as stated in its Executive Summary<sup>12</sup>, the emphasis appears to be on timeliness and consistency of decision-making.

#### **Examples of Home Office errors:**

- Incorrectly applying the relevant legal test to determine eligibility for support (Appeal 30)
- Failing to consider the relevant policy instruction (Appeal 18)
- Relying on the incorrect policy instruction (Appeal 29)
- Failing to provide adequate evidence to justify support being terminated (Appeal 14)
- Terminating support without fully resolving relevant medical issues (Appeal 21)
- Failing to explain how duties under s55 of the Borders, Citizenship and Immigration Act 2009 are discharged (Appeal 2)
- Incorrectly referencing the legal provision under which support had been awarded (Appeal 1)
- Failing to follow the policy of accepting destitution when an applicant previously on s95 support applies within the grace period (Appeal 40)

#### D5 The Tribunal's vital role

Our research supports the view that removing a statutory right of appeal for certain categories of asylum support decisions will lead to a less fair and efficient system. It is well established that asylum support applicants are an extremely vulnerable client group, and the Tribunal service offers a quick method of ensuring that such individuals are not made unlawfully destitute. In addition to correcting legal or factual errors made by the Home Office, the Tribunal provides an ideal forum for independently examining an individual's credibility and written evidence. The example in the box on the next page demonstrates the rigorous analysis that the Tribunal undertakes in a factually complex case. It also underlines the extent to which evidence is carefully scrutinised at appeal.

<sup>12</sup> An Inspection of Asylum Support September 2013 – January 2014, paragraph 1.1.

**The Tribunal's nuanced approach:** In Appeal 3, the Home Office refused support on the grounds that the appellant failed to provide credible evidence relating to destitution. At the hearing, the appellant submitted additional evidence (this included bank statements and confirmation that she could not return to previous addresses). The Tribunal Judge did not accept some of the appellant's evidence. However, applying both limbs of the destitution test (i.e a person is destitute if, for the next 14 days, they cannot provide for their 'essential living needs' or do not have access to 'adequate accommodation'), the Tribunal Judge held that the appellant was entitled to support. The Statement of Reasons records a detailed explanation of why the Judge considered the destitution test was satisfied:

- The appellant's written evidence (including the transaction history in her bank statements) and oral evidence (she stated she had previously worked) indicated that, on the balance of probabilities, the appellant could meet her and her children's essential living needs for the next 14 days.
- However, the appellant's bank statements showed that she did not have sufficient funds to provide accommodation for herself and her children for that period. There was also evidence that confirmed the appellant was in the process of being evicted from her address before being provided with 'initial accommodation' by the Home Office.
- Taking all the evidence into account, and applying the statutory duty to consider the best interests of the appellant's children, while the appellant could meet her and her children's essential living needs, she was destitute on the basis that they did not have access to 'adequate accommodation'.

## Appendix 1

### Factors Relevant To Appeal Success

**X\*** = single or dominant factor emerging from the Statement of Reasons

| Appeal Sample | Case Reference     | Further written evidence from Appellant | Appellant's oral evidence | HO legal error/ initial decision rejected by AST | HO factual error | Emerging facts (ie not in appellant evidence) |
|---------------|--------------------|---|---------------------------|--|------------------|---|
| 1             | AS/15/11/34524/JS  | x                                       | x                         | x  |                  |   |
| 2             | AS/15/11/34527/LP  |   |                           | <b>X*</b>  |                  |   |
| 3             | AS/15/11/34522     | x                                       | x                         |  |                  | x   |
| 4             | AS/15/11/34501/NP  | <b>X*</b>                               |                           |  | x                |   |
| 5             | AS/15/11/34515/ZM  |   |                           |  |                  | <b>X*</b>                                     |
| 6             | AS/15/11/34495/LP  | <b>X*</b>                               |                           |  |                  |   |
| 7             | AS/15/06/33274     | x                                       |                           | x  |                  |   |
| 8             | AS/15/11/34481     | x                                       | x                         | x  | x                |   |
| 9             | AS/15/11/00188/001 | <b>X*</b>                               |                           |  |                  |   |
| 10            | AS/15/11/34483/LP  | x                                       | x                         |  |                  |   |
| 11            | AS/15/11/34490     | x                                       | x                         |  | x                |   |
| 12            | AS/15/10/34361/ZM  | x                                       | x                         |  |                  |   |
| 13            | AS/15/11/34474     | x                                       | x                         |  |                  |   |
| 14            | AS/15/11/34452     | x                                       | x                         | x  |                  |   |
| 15            | AS/15/09/34470     | x                                       | <b>X*</b>                 |  |                  |   |
| 16            | AS/15/11/34465/LP  | x                                       | x                         |  | x                |   |
| 17            | AS/15/11/          |   |                           |  |                  | <b>X*</b>                                     |



| Appeal Sample | Case Reference        | Further written evidence from Appellant | Appellant's oral evidence | HO legal error/ initial decision rejected by AST | HO factual error | Emerging facts (ie not in appellant evidence) |
|---------------|-----------------------|---|---------------------------|--|------------------|---|
|               | 34429/LP              |   |                           |  |                  |   |
| 18            | AS/15/11/34456/FN     | x                                       | x                         | x  |                  |   |
| 19            | AS/15/11/34460        | x                                       | x                         |  |                  |   |
| 20            | AS/15/11/34458        | x                                       | x                         |  |                  |   |
| 21            | AS/15/11/34455/CA     | x                                       | x                         | x  |                  |   |
| 22            | AS/15/11/34454        |   |                           | <b>X*</b>  |                  |   |
| 23            | AS/15/11/34442        | x                                       |                           |  |                  | x   |
| 24            | AS/15/10/34400/SH     | <b>X*</b>                               |                           |  |                  |   |
| 25            | AS/15/11/34433/CA     | <b>X*</b>                               |                           |  |                  |   |
| 26            | AS/15/10/34437/SH     | <b>X*</b>                               |                           |  |                  |   |
| 27            | AS/15/10/34398/LP     | <b>X*</b>                               |                           |  |                  |   |
| 28            | AS/15/10/34420/CA     | x                                       | x                         |  |                  |   |
| 29            | AS/15/10/34408/CA     |   | x                         | x  |                  |   |
| 30            | AS/15/10/34413        | <b>X*</b>                               |                           | x  |                  |   |
| 31            | AS/15/10/34403/GH /SH |   |                           |  | <b>X*</b>        |   |
| 32            | AS/15/10/34397/GH /SH | <b>X*</b>                               |                           |  |                  |   |
| 33            | AS/15/10/34377        | <b>X*</b>                               |                           |  |                  |   |
| 34            | AS/15/10/34390/ZM     | <b>X*</b>                               |                           |  |                  |   |
| 35            | AS/15/34379/CA        | x                                       | <b>X*</b>                 |  |                  |   |
| 36            | AS/15/10/34369/ZM     | x                                       | <b>X*</b>                 |  |                  |   |

| Appeal Sample | Case Reference | Further written evidence from Appellant | Appellant's oral evidence | HO legal error/ initial decision rejected by AST | HO factual error | Emerging facts (ie not in appellant evidence) |
|---------------|----------------|---|---------------------------|--|------------------|---|
| 37            | AS/15/10/34380 | X*                                      |                           |  |                  |   |
| 38            | AS/15/10/34268 | x                                       |                           |  |                  | x   |
| 39            | AS/15/10/34378 |   |                           | X*   |                  |   |
| 40            | AS/15/10/34374 | x                                       |                           | x  |                  |   |
| 41            | AS/15/10/34334 |   | X*                        |  |                  |   |
| 42            | AS/15/10/34254 | x                                       |                           |  |                  | X*  |
| 43            | AS/15/10/34322 | X*                                      |                           |  |                  |   |
| 44            | AS/15/10/34272 | x                                       | X*                        |  |                  |   |
| 45            | AS/15/10/34274 | x                                       |                           | x  |                  | x   |
| 46            | AS/15/10/34303 | x                                       |                           | x  |                  |   |
| 47            | AS/15/10/34297 | x                                       |                           | x  |                  |   |
| 48            | AS/15/10/34235 | X*                                      |                           |  |                  |   |
| 49            | AS/15/10/34294 | X*                                      |                           |  |                  |   |
| 50            | AS/15/09/34071 | x                                       |                           | x  |                  | X*  |

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