

11<sup>th</sup> March 2016

## **Immigration Bill 2015-16**

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### **ASAP's response to asylum support issues raised in Lord Bates' letter of 10<sup>th</sup> February 2016 to Lord Rosser**

#### **1. Introduction**

This briefing is written to respond to Lord Bates' letter to Lord Rosser of 10<sup>th</sup> February 2016. We are responding on some specific points and to address some misconceptions relating to the grace period, the right of appeal, and ASAP's research into why asylum support appeals are successful.

#### **2. The grace period requirement for s95A**

**2.1** The condition that s95A support is only available to those who apply within the grace period has very significant consequences and contradicts the government's aim of encouraging voluntary departure. It is extremely rare for a failed asylum-seeker to be taking 'all reasonable steps' or to leave, or be medically unfit to leave, immediately after losing their asylum appeal. The Home Office's own data shows that of the 105 people who applied for s4 support in 2015 based on medical and reasonable steps reasons only 6 were made within the grace period.<sup>1</sup>

**2.2** However, they may seek to do so months (or years) later, for a variety of reasons, including the success of the 'hostile environment' policy. Currently, those on s4 support can also apply for exceptional payments to fund travel to Embassies or other expenses relating to leaving the UK. None of this will be possible and it is not known whether the government intends engagement officers (a key plank of the bill in encouraging voluntary departures) to be available to such people. Clearly, 'engagement' will be rendered less effective when the person is destitute. It is already the case that people struggle to communicate with Embassies and obtain documentation.

#### **3. The right of appeal for asylum support and the severe reduction in appeal rights**

**3.1** Those who have outstanding further submissions will be eligible for s95, whereas currently they receive s4. Transferring this group (who make up the majority of those on s4) to s95 will severely reduce the number of discontinuation appeals. This is because there is a right of appeal against the termination of s4 support whereas there is no right of appeal

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<sup>1</sup> Response of James Brokenshire to written parliamentary question WP 29521 tabled on 2/3/16

against the termination of s95 unless it comes to an end pre-maturely (IAA 1999 s103(2)). It is stated at p3 of the letter that if it were possible to apply for s95A outside the grace period that would 'effectively reverse the repeal of s4'. However, s4 support has *already* been very significantly altered by the transfer of the further submissions group and the loss of their appeal rights.

**3.2** Given that over half of those on s4 support have outstanding submissions, the following statement at the bottom of p5 of the letter is incorrect:- 'we are therefore retaining, not removing, a right of appeal for the present circumstances in which support appeals by failed asylum seekers commonly arise'. By transferring the further submissions group to s95, a right of appeal has automatically been lost to this group. The letter, at the bottom of p5, gives the higher figure of 87% of appeals to the year August 2015 as coming within this category, although it is not clear to what extent the 87% also includes other categories.

**3.3** The fact that not many failed asylum-seekers are currently in receipt of s4 support on the basis of being unfit to travel or taking all reasonable steps to leave is not in itself a reason to make unenforceable the rights of those who do qualify. However, it is implied at the bottom of p5 that the small numbers are relevant to why no right of appeal is needed.

**3.4** The government's position is that whether or not there is a genuine obstacle will be so straightforward that a right of appeal is not needed. ASAP carried out research, published in a report, in 2014 on 51 'all reasonable steps' cases, and this showed that these types of cases are inherently complex.<sup>2</sup>

**3.5** The scenario given on p3 of the letter (2<sup>nd</sup> point in 4<sup>th</sup> bullet point) for when support could be applied for outside the grace period is a good example of a non-straightforward case. In this hypothetical case, the family or individual would have to prove that a) that they had been taking steps during the grace period and b) that there was an intervening event, beyond their control, preventing departure. It is not clear at what point this intervening event needs to have taken place.

**3.6** Further examples of two 2015 non-straightforward 'genuine obstacle' appeals are given at para 4.4 of our attached January 2016 briefing for the House of Lords committee stage.

#### **4. ASAP's research on successful appeals**

**4.1** As stated on p6 of the letter, the debate on s95A must be properly grounded in evidence. We note the absence of any evidence supporting the statements about the Tribunal's published statistics to August 2015. Where evidence has been provided, it is essential to analyse it properly in context. The summary of our research misrepresents and/or misunderstands our findings. It also ignores the relevant background and research method.

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<sup>2</sup> 'The Next Reasonable Step, Recommended changes to Home Office policy and practice for s4 support granted under reg 3(2)(a)' September 2014

### Misrepresentation of findings on late evidence

**4.2** The letter states that 42 of 50 appeals in our sample were allowed or remitted “*wholly, mainly or partly*” because of fresh evidence. Bluntly grouping these cases together misrepresents some key matters. The reality is that out of the 50 successful cases we analysed, in only 15 was submission of late evidence a sole or dominant factor. The research also found that a combination of factors (not just late written evidence) featured in 22 cases.

In particular:

- It ignores the fact that in some cases there were mitigating reasons why the evidence had not been previously submitted to the Home Office. For example, only the Tribunal requested it (*AS/15/11/34455/CA*) or it had already been provided to another Home Office department (*AS/15/10/34297*).
- It ignores what role the further evidence played in the appeal and assumes that all of it was key in the successful outcome. For example, in *AS/15/11/34522* the additional evidence was not entirely helpful to the appellant’s case.
- It ignores the fact that in certain cases the Home Office would not have granted support even if the applicant had been able to submit all the appeal evidence with their initial application (*AS/15/10/34303*).

### Misrepresentation of research sample

**4.3** On p6 the letter focuses on the small number of ‘genuine obstacle’ cases in the sample. It particularly highlights the absence of any cases showing that an obstacle existed at the point the person’s appeal rights were exhausted. It is misleading to frame our case sample in this way.

**4.4** As our briefing clearly states (see Sections B and C), our research addressed the reasons given by the Minister for Immigration in committee as to why a right of appeal for s95A is not needed. It was not research into ‘genuine obstacle’ cases, but the role of additional written evidence. We selected the first 50 allowed or remitted appeals dating back from 27/11/15 (a period of only 5 weeks). This was our only selection process; we were not targeting any particular type of case. The sample in fact contained a high number of s4 discontinuation appeals (following the refusal of appellants’ asylum further submissions), which are the type of appeals that the Bill is abolishing. The reason for this high number is due to the Home Office making a large number of fresh claim refusals in the 2<sup>nd</sup> half of 2015 which then led on to a high number of s4 discontinuations.

**4.5** It is important to note that the intention to restrict s95A to a grace period, subject only to very restrictive exceptions, was not known to us. It was also not apparent to the Minister and others when discussed in the Public Bill committee.

**4.6** In any event, our sample contained notable evidence which demonstrates why having a right of appeal for s95A will result in a fairer and more efficient system. For example, *AS/15/10/34369/ZM* exemplified why ‘fitness to travel’ cases require an independent decision maker to evaluate the contrasting opinions of the Home Office medical advisor and other medical professionals. It is therefore incorrect to say that the evidence supports the argument that no appeal right is required.

**5. Continued confusion with regard to the relationship between s95A support for families and LA support under para 10A**

**5.1** We drew attention at para 3.4 of our January 2016 briefing for the House of Lords committee stage to the contradiction within the Home Office’s January 2016 document as to whether families who are outside the s95 grace period will be able to apply for s95A support. It may be that the Home Office’s position is that for families to access s95A support later, they will need to be able to demonstrate that there was a genuine obstacle ‘at the point their appeal rights are exhausted’ (para 54 HO document). And that, in all other cases, where there was no attempt to depart at that point, s95A has no relevance and that a family’s only support option is para 10A.

**5.2** The letter draws attention to the difference between these proposals and the 2005 pilot in the final bullet point on p2. It refers to engaging directly with families ‘as they become appeals rights exhausted’. Will there also be engagement at a later stage, even though any support provided would have to be via para 10A? Or will Home Office engagement officers only work with those on s95A? Clarification on these points is essential.

**5.3** We also referred at our para 3.5 to the example of a family facing a genuine obstacle who could come within s95A and para 10A Condition D support. The legislative intention is that s95A takes precedence. However in practise this will be difficult to achieve, especially without a right of appeal.