

Immigration Bill 2015-16

Briefing for House of Lords Second Reading 22 December 2015

About the Asylum Support Appeals Project (ASAP)

The Asylum Support Appeal Project (ASAP) is a registered charity that provides specialist advice on asylum support law. We run a full-time duty representation scheme at the First-tier Tribunal (Asylum Support) (the AST), where our staff and pro-bono solicitors and barristers give advice and representation to over 650 appellants a year. We run a second tier advice line and regular training sessions on asylum support law for organisations. Our third area of activity is advocacy and policy work based on the evidence gathered at the AST and through our links with a large constituency of organisations working directly with asylum-seekers.

Summary of ASAP'S position on the Immigration Bill 2015

ASAP specialises in asylum support appeals. Therefore the key amendment we are seeking relates to asylum support appeal rights and addresses the following issue:-

That a right of appeal to the AST is retained for destitute refused asylum-seekers who face a 'genuine obstacle' in leaving the UK

We also seek two other amendments concerning the provision of asylum support under the Bill which address the following:-

The in-built delay, prolonging destitution, before refused asylum-seekers who have made 'further qualifying submissions' become eligible for s95 support.

That s95 support will terminate immediately on the refusal of those 'further qualifying submissions'.

However, the briefing below only deals with the right of appeal for those facing a 'genuine obstacle'. Our more detailed briefing for the committee stage will also cover the other two issues.

This briefing addresses why ASAP considers the lack of a right of appeal for 'genuine obstacle' support to be problematic and unworkable. We first set out some key contextual background.

Overview of asylum support

Financial support and accommodation is provided under the Immigration and Asylum Act 1999. Destitution is always a qualifying condition. Asylum-seekers who have not exhausted their asylum appeal rights are eligible for s95 support.

Refused asylum-seekers, in defined circumstances set out in the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, are eligible for s4(2) support. The 1999 Act also contains a power under s4(1) to support migrants on temporary admission, released from detention or on immigration bail.

The new s95A support

Section 4 support is to be abolished in its entirety. Section 4(2) support is to be replaced with s95A support, which is for destitute refused asylum-seekers who face a genuine obstacle in leaving the UK. 'Genuine obstacle' will be defined in regulations, which have not yet been drafted. It is likely that the regulations will specify that support is to be provided to two of the categories of people who are currently eligible for s4(2) support; those who are taking all reasonable steps to leave the UK and those who are medically unfit to travel.

Currently refused asylum-seekers who submit further asylum claims may qualify for s4(2) support under a human rights provision in the 2005 regulations.¹ Under the Bill, this group will become eligible for s95 support. Such claims will be defined as 'further qualifying submissions' and s95 is amended such that those with outstanding submissions are eligible. The Home Office made clear in its memorandum on the European Convention on Human Rights that there will not be a similar human rights provision in the (yet to be published) regulations which will accompany s95A.²

The human rights memorandum refers to the relevant case law³ which has established that, whilst there is no duty to provide support to those who could return to their country of origin, a duty does arise if they have an outstanding non-abusive application, and the effect of not providing support would leave them destitute in breach of Article 3. Hence those with fresh asylum claims currently access support via s4(2) and regulation 3(2)(e) of the 2005 regulations.

There is currently a right of appeal regarding all s4 decisions. Asylum support appeals are either 'application' appeals or 'discontinuation' appeals; the latter is when the person is already on support and is appealing the Home Office's decision to terminate it. ***In the Bill there is to be no right of appeal at all with regard to s95A support.*** The existing right of appeal regarding s95 support will continue.

There is a further difference between s4(2) and s95A which will be explained more below. The government intends s95A support only to be available, for the

¹ '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 1988' reg 3(2)(e)

² Immigration Bill European Convention on Human Rights Memorandum by the Home Office 17/9/15 para 108

³ R(Kimani) v Lambeth BC [2003] EWCA Civ 1150, Clue v Birmingham CC [2010] EWCA Civ 460, R(Limbuela) v SSHD [2005] UKHL 66, paras 105-18 in the memorandum

most part, to those who apply for it whilst still on s95 support. However, until the regulations are published, it is not known how this will be achieved.

Thus, subject to the detail in the regulations, s95A decision-makers will need to decide two issues:- is the person destitute and is there a genuine obstacle. For example, the Home Office may accept that a person (or family) is taking all reasonable steps to leave the UK but not accept that they are destitute. Alternatively, the Home Office may have found the reverse; destitution is accepted but there is not a genuine obstacle. Both tests require applying the law to factual findings.

Figures on appeals and the projected impact of losing the right of appeal

Appeals fall into two broad categories; cases concerning destitution and cases relating to other eligibility criteria. In 2014–2015 we represented 168 asylum seekers who the Home Office did not believe were destitute, and 70% of those decisions to refuse support were overturned on appeal. We have been monitoring decision-making on destitution since 2008 and have produced various research reports during this time. We have found that there has been a rate of between 60% (in 2014) and 82% (in 2011) of cases overturned at appeal because the AST found the appellant to be destitute.

Alternatively destitution may be accepted, but in s4 cases the Home Office does not accept there is a genuine obstacle to departure. In 2014-2015 we represented 338 appellants in s4 appeals which did not relate to destitution alone. A small number of these cases (around 25) would retain a right of appeal under the new system. But most will not. Examples of the types of issues dealt with include 51 people that the Home Office had assessed as being fit to travel. The AST overturned or remitted 69% of these cases. We also represented 38 people who were applying on the basis of taking all reasonable steps to return. 60% of those appeals were allowed and 6% remitted. As stated, it is likely that these two categories will be retained under the new proposals, but without, of course, a right of appeal. The Home Office's position is that these matters are simple factual assessments. And yet, these figures show that frequently its caseworkers do not come to the right conclusion.

Analysing the figures on asylum support appeals reveals that these changes risk leaving destitute a large number of people who may have a legal right to support. We estimate that, under the Bill, over 1216⁴ people each year will no longer have access to a right of appeal against Home Office asylum support decisions. Over 850⁵ people per year who are legally entitled to asylum support could find themselves destitute.

⁴ This is 83% (ratio of cases related to s4) of the number of appeals received at the AST between March 2014 – Feb 2015 1571 minus 105 which were struck out.

⁵ Figures from AST March 2014 – Feb 2015, includes 409 people who won at appeal, plus 138 remitted discontinuation cases (87% of total remitted cases) who would have support continued, plus 300 where the Home Office withdraws their decision and people keep their support.

This number is a conservative estimate, and is based on figures from the existing system where the (independent) AST holds the Home Office to account. Once the AST has its ability to scrutinise Home Office decisions reduced, we anticipate refusals of asylum support will increase. This figure of 850 represents about a quarter of the current number of people receiving asylum support and accommodation through s4.

Arguments from the Minister in Committee as to why a right of appeal is not necessary

The amendment we are seeking was debated in detail in the Public Bill Committee on 5/11/15 (Hansard pages 415-425). The opposition members repeatedly drew attention to the success rates on appeal, and argued that therefore s95A should attract an appeal right. They failed to understand how fairness could be promoted by removing the right of appeal. The Minister for Immigration had three responses:-

1. Deciding whether a genuine obstacle exists 'should be a straightforward matter of fact for which a statutory right of appeal is not needed' (page 422, 2nd column, 3rd paragraph).
2. He maintained that the Independent Chief Inspector's report⁶ essentially showed that there were no particular problems with Home Office decision-making.
3. He stated that many appeals are allowed or remitted because the appellant only provides the necessary evidence at a late stage (page 425, 1st column, 2nd paragraph).

ASAP takes issues with all three points. The first point will be examined below. We are currently conducting research to address his second and third points, and the results will be included with our briefing for the House of Lords' committee stage. At that stage we will provide a more detailed analysis on why the ICI report gives a very partial picture, and how even that picture was not accurately depicted by the Minister in committee. We draw attention here to the fact that the ICI looked at only 215 cases, and we agree with the comments on this point (page 15) made by the Immigration Law Practitioners' Association in their briefing for the House of Lords 2nd reading.

Decisions on s95A applications

It is the government's position that these decisions are so straightforward that there is no need for a right of appeal. However, we consider that s95A decisions

⁶ 'An Inspection of Asylum Support' Sept 2013 – Jan 2014, Independent Chief Inspector of Borders and Immigration, John Vine CBE QPM

and the regulations setting out eligibility are likely to be more complicated than the current s4(2) regime.

It is the government's intention that it will only be possible to apply for s95A support whilst still on s95 support. This is not apparent from the wording of the Bill but is set out in the Home Office's August 2015 consultation document 'Reforming support for failed asylum seekers and other illegal migrants' (paragraphs 32 -35). Paragraph 35 states that in case of families, it may be possible later to make an application for support. The Home Office's human rights memorandum also deals with the point at paragraph 115. It states that although 'the new form of section 95A support will need to be made within the grace period, there will be provision for an application to be made out of time when certain criteria are met'. This particular document does not specify whether this 'criteria' will include having children in the household.

Therefore the length of time asylum-seekers remain on s95 support after losing their asylum appeal (referred to above as the 'grace period') is crucial. Regulations covering the current regime provide for a 21 day period.⁷ It is anticipated that, at least in the case of families, this will become a longer period.

The issue of whether or not s95A support would only be available to those still in the grace period was not addressed during the committee stage. The Labour member Keir Starmer, seemingly unaware of this possibility, asked the Minister for Immigration what would happen if the wrong decision about destitution was made, following a s95A application (page 423, 1st column). The Minister's response, whilst not making it explicit, appeared to imply that support would only continue to be provided to those already on support. He reminded the committee 'how we intend to operate these arrangements. We are not doing this by correspondence; it is being worked through as part of an overall process towards the removal of that individual. The judgment has effectively been taken, and contact is therefore being maintained with the individual, so it is more of the joined-up approach [] it is a question of looking at the simple elements and at what will be the barriers to removal'.

Therefore there is much that is unclear about s95A support. At the very least, the regulations will need to cover at least three different scenarios:- those (both families and single people) applying for s95A support whilst still on s95 support, destitute families applying later on and single people applying later on. The rules will be different for each category. Contrary to the government's position, the regulations will be *more* complex than the current ones governing s4(2) support. And it will be even more difficult for the Home Office always to make lawful decisions without the assistance of the AST.

Judicial review is an inadequate remedy

⁷ Families are not currently affected by this, but will be under the Bill. Currently they remain on asylum support after losing their appeal, due to s94(5) which is to be repealed.

The Home Office's Human Rights memorandum acknowledges at paragraph 109 that Article 6 (right to a fair trial) is engaged regarding the refusal of s95A support. It then states that any decision 'would be susceptible to judicial review and emergency injunctive challenge where appropriate'.

However, the memorandum is silent on the issue of the residence test⁸, which prevents this category of migrant accessing legal aid. The residence test is not yet in force although on 25/11/15 the government's appeal in the Court of Appeal on whether it is lawful was allowed⁹. Assuming the residence test is brought into force, the only remedy for unsuccessful s95A applicants will therefore be to conduct a judicial review as a litigant in person. This is entirely unrealistic.

Even if the residence test is not made law, judicial review is still an inappropriate remedy for s95A decisions. It is expensive, relies on lawyers and legal aid, and will lead to legal costs for the Home Office. The human rights memorandum at paragraph 109, in relation to s95A, further states 'in the context of any judicial scrutiny of the exercise of the power, the person would be entitled under Article 6 to a fair and public hearing within a reasonable time by an independent tribunal established by law'. This strongly implies that judicial review would not be adequate and yet no explanation is then given as to how Article 6 will be complied with.

The benefit of Tribunal appeals

The AST, in common with all First-tier Tribunals, is designed to be user-friendly and accessible to litigants without lawyers. However, AST appellants, compared to other tribunal users, are more likely to be vulnerable and ill-equipped to conduct appeals on their own, hence the existence of ASAP. For example, they may not speak English and many suffer trauma and mental health problems due to what they have experienced. And the consequence of losing their appeal is more immediately severe, as they face destitution. Nevertheless appellants who are not assisted by ASAP still receive a good and fair service.

The right of appeal ensures judicial oversight of Home Office decisions in a cost effective, straightforward and accessible way. Appeals are quick, and if they are dismissed, then appellants lose their support immediately. Without the AST overseeing the process, there will be no check on the Home Office's decision-making. Thus it will matter much less what is contained in the statute, regulations and Home Office policies, as there will be no effective mechanism for ensuring that they are followed.

There is no legal aid provision for representation at the AST (nor has there ever been in the past). Destitute asylum seekers are mostly reliant on the charity

⁸ The residence test was introduced in 2014 in draft regulations pursuant to the Legal Aid, Sentencing and Punishing of Offenders Act 2012

⁹ Public Law Project v Lord Chancellor and the Office of the Children's Commissioner (intervener) [2015] EWCA Civ 1193

sector for assistance with their asylum support applications and appeals. The fact that they have very limited rights makes it even more important that there is a system to ensure that decisions on those rights are made lawfully and that they are enforced. This is especially the case when the alternative is destitution, which can have serious and lasting effects on an individual.

The relationship between Home Office and local authority support for families and care-leavers

Families

Removing refused asylum-seeking families from open-ended s95 support is one of the key aims of the Bill. However, in November the government laid an amendment to the Bill such that there will be a new form of support for refused asylum-seeking families. It was introduced by inserting paragraph 10A into Sch 3 of the Nationality, Immigration and Asylum Act 2002. This support will be provided by local authorities, not the Home Office.

As will be indicated below, there is obvious potential for para 10A support to create disputes between the Home Office and local authorities, leading to expensive litigation and increased costs of supporting on local authorities. Judicial oversight of the Home Office decisions by the AST would considerably reduce this risk.

Para 10A support cannot be provided if the family is, or should be, getting s95A support. To qualify for para 10A support the family will need to satisfy one of four conditions A to D:- have an outstanding application (A) or appeal (B), not failed to have cooperated with removal directions (C) and 'the provision of support is necessary to safeguard and promote the welfare of a dependent child' (D).

Currently, if a family or individual approaches a local authority for support, or is already on local authority support, and the local authority is aware that that they should be on Home Office support, then the social worker can assist in the application to the Home Office, and, if necessary, the subsequent appeal to the AST. ASAP has advised in many asylum support appeals in this category, and the usual outcome is that the appeal is successful. However, in the future, without a right of appeal regarding s95A, the local authority will either have to provide the support itself, whilst considering whether to judicially review the Home Office, or risk being judicially reviewed itself for leaving the family destitute in breach of s10A. A right of appeal to the AST will assist in simplifying this complex question of where the duty lies between central and local government. The following are some hypothetical examples.

Family A has insufficient documentation for returning home and has applied for s95A support. Since losing their asylum appeal two years ago, they have been

moving around between friends, but can be helped no longer. The Home Office does not accept that they are destitute, and refuses the application. The family applies for para 10A support, conditions C and D. The local authority accepts that they are destitute, but has no choice but to house and support them whilst assisting them with re-applying for s95A support.

Family B were in the same situation as Family A but the Home Office accepted that they were destitute and granted s95A support. Three months later the Home Office considers they have had enough time to document themselves and terminates the support. The family apply for para 10A support on the basis that conditions C and D are satisfied. The local authority is unclear as to whether they have had sufficient time or assistance to document themselves and suspects that they should still be on s95A support but has no choice but to support them.

Family C recently became refused asylum-seekers. The mother suffers from a medical condition which, for the time being, would make it unsafe for her to fly. She provides a medical report. The Home Office's doctor, who has not met the mother, makes an assessment on the papers and decides that she is fit to travel. The Home Office therefore set removal directions and terminates support when the family fails to cooperate. The family apply for para 10A support on the basis that condition D is satisfied. The local authority has to provide support, given that the welfare of the children is at stake.

Care-leavers

The government's amendment also contains a power (parallel to the s10A power) to provide local authority support to refused asylum-seekers who came to the UK alone as children, and have now turned 18 (s10B). Currently this group are supported by local authorities under the Children Act 1989 from their arrival in the UK to beyond the age of 18, and in some cases up to the age of 25. Under the Bill, they will remain on Children Act support up to the age of 18, and then they will be in a similar position to refused asylum-seekers who arrived as adults. Therefore they may or may not be eligible for Home Office support. However, s10B does enable local authorities to support them after the age of 18 if they fulfil conditions similar to those attached to s10A support. Again eligibility is dependent on not being eligible for s95A support, and so, for the same reasons, a right of appeal to the AST is crucial.

Two examples from the AST in 2015 where there will no longer be the right of appeal

A is a Somali woman in her late 60s. She has two children in the UK with refugee status. Her own claim for asylum was refused in 2005. She suffers from chronic mental health problems including psychotic depression and post-traumatic stress disorder. She is at risk of suicide and self-harm. She also has physical health problems which restrict her mobility and leave her in pain. She receives frequent care from her GP and her condition is reviewed every few months by a psychiatrist.

She has been on s4 support due to her medical condition since 2011. Her GP has consistently said she is unable to travel because of the impact this would have on her health. At various points the Home Office's own doctors have also agreed. Since 2011 her support has been subject to at least eight internal Home Office reviews all of which have resulted in her staying on support. Twice the Home Office was required to re-instate her support following a successful AST appeal. On at least two other occasions the Home Office changed its position and decided to continue to support her shortly before an appeal was due to be heard.

In the latest and third appeal, the Home Office's doctor expressed concern that continually reviewing her case was not in her best interest and the question of her presence in the UK should be resolved once and for all. The judge decided she was unable to travel and moreover that her mental health was too poor for her to make a decision about returning voluntarily. She continues to be eligible for support on health and human rights grounds.

B is a Palestinian. Following the refusal of his asylum claim he decided to return home. However, he faced significant obstacles in doing this. He was born in Gaza but left around the age of 10. He moved with his father to Lebanon following the death of his mother and brother. He was orphaned not long after arriving and was looked after by neighbours in a refugee camp. He could not remember whether he ever had a Palestinian ID number which may have allowed him to obtain a travel document. He did not know anyone in Gaza (who could have helped find out his ID number) or whether he had any kind of formal status in Lebanon.

He obtained support following a successful hearing in November 2014 when the judge found that he was taking all reasonable steps to leave the UK. She accepted that he had no means of confirming his identity or nationality. As he left Gaza as a young child, it was not realistic to expect him to know his ID number or to recollect whether he had any extended family left there. He had provided evidence that the Lebanese Embassy had refused to assist him and confirmed they would only respond to enquiries made by the Home Office.

In July 2015 the Home Office decided to terminate his support and he appealed. Despite the conclusions in the previous appeal there had been no progress. The judge came to same conclusions as her colleague in 2014, namely that it was now the responsibility of the Home Office to help him contact the Lebanese embassy. She remitted the appeal back to the Home Office so the matter could be progressed, and he remained on support.

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