

BULLETIN NO. 3

Asylum Support Bulletin July 2016

ASAP's Asylum Support Bulletins provide an update on asylum support law, policy and practice, report on trends in Home Office and Tribunal decision-making, and share best practice and interesting and useful cases.

ASYLUM SUPPORT NEWS AND TRENDS

IMMIGRATION ACT 2016 UPDATE

The Immigration Act received royal assent on 12 May. Our Asylum Support Bulletin No. 2 contains an overview of the changes to the asylum support system that the Act will introduce. These changes will not be effective until the government writes regulations bringing them into force. We currently understand that these will be ready by the end of 2016, laid before parliament at the beginning of next year, and passed by April 2017 (though this timetable could slip). Until they have been approved by parliament there are no changes to the existing asylum support system.

NO MORE LEGAL AID FOR 'POOR' OR 'BORDERLINE' CASES

The Legal Aid Agency (LAA) has said it will no longer fund any judicial review cases with less than a 50% prospect of success. This decision was announced quickly after the LAA's success in *The Director of Legal Aid Casework v IS [2016] EWCA Civ 464*, in which the Court of Appeal found that its exceptional case funding scheme was lawful. The challenge to the scheme was brought by the Public Law Project, which may appeal to the Supreme Court.

SECTION 4: FOCUS ON THE MERIT OF FURTHER SUBMISSIONS

The mere assertion that further submissions are in the 'process of being lodged' does not make someone eligible for Section 4 support, according to Principal Tribunal Judge (PTJ) Storey, whose authoritative decision last August (*AS/14/11/3214*) confirmed the Asylum

Support Tribunal's (AST) stance in such cases. Gone are the days when an appointment letter from the Further Submissions Unit (FSU) is enough to demonstrate Section 4 eligibility.

Although it is not the role of the Section 4 team or the AST to assess the merits of further submissions, they can refuse support if they consider them to be obviously repetitious or 'manifestly unfounded' (see *R(AW) v Croydon LBC [2005] EWHC 2950* and para 1.15 in *Asylum support, Section 4 policy and process*). This is a low threshold, but one which ASAP observes being applied more rigorously since the PTJ's decision.

ASAP's clients are still winning more of these appeals than they are losing but their success very much depends on whether they can persuade the judge that their evidence is new and relevant.

If they cannot do this their appeal is dismissed, or in some cases judges opt to remit the appeal back to the Home Office because they cannot decide whether the material is new without seeing the appellant's previous immigration decisions. If the appellant is destitute they remain so during the period of remittal (see *AS/15/09/33943*).

Tip: Our advice for 'preparing further submissions' appeals is to provide the Tribunal with evidence of an appointment at the FSU, the new evidence and a draft of the accompanying submissions, or failing that, a detailed letter from the immigration solicitor explaining the significance of the new evidence. Previous immigration decisions may be requested in directions, so it is worth having these ready to send.

SECTION 95 DESTITUTION: IF YOUR FAMILY CAN PAY A SMUGGLER WHY CAN'T THEY SUPPORT YOU NOW?

Applicants for Section 95 support are facing a greater evidential burden to demonstrate their destitution than ever. The Home Office's enquiries are growing more extensive, requiring applicants to provide detailed evidence about the financial circumstances of everyone who has ever supported them or might do so.

Further information requests now routinely ask for detailed personal information about the person who paid the smuggler or 'agent' who brought them to the UK including their name, address, occupation, salary, monthly outgoings, educational qualifications and even, bafflingly, the educational institutions their children attend. The assumption appears to be that anyone who has ever provided support to the applicant, however briefly, and every single one of their family members, can reasonably be expected to pay for their accommodation and living costs, unless they can prove why not.

The majority of AST judges endorse this approach, requiring evidence about the financial circumstances of relatives abroad and explanations for why they cannot support them, even if they have never done so before. Naturally, this is not always easy to obtain because of the circumstances that forced the appellant to flee their country. Their relatives may have disowned them or may be uncontactable because they are in hiding, and their communications may be being monitored by the authorities so that contacting them may put them at risk.

Increasingly it falls to the AST judge to decide whether these explanations are



BULLETIN NO. 3

Asylum Support Bulletin July 2016

◀ true on the balance of probabilities. This puts them in an interesting position where it is difficult to avoid making findings of fact and credibility about issues that are central to the applicant's asylum claim, before that claim has been determined by the Home Office.

Many judges try to refrain from making such findings, recognising that the substance of the appellant's asylum claim is outside their jurisdiction. However, it is not always possible to cleanly separate asylum issues from asylum support issues. This raises the question: What weight, if any, does the Home Office place on findings of AST judges when making asylum decisions?

ASAP has concerns about the access-to-justice implications of the AST making findings of fact and credibility about an asylum seeker's asylum claim in a setting where they do not have state-funded legal representation.

Top tips for destitution cases:

- Encourage your client to disclose all bank accounts in the UK and abroad even if they are empty, inaccessible, or the funds inside them belong to someone else. Not doing so can damage your client's credibility.
- Encourage your client to disclose all assets in the UK or abroad. If they cannot be accessed, explain and show

why not. Not doing so can damage your client's credibility.

- If your client cannot obtain evidence because they are afraid of the consequences for themselves or others, they should explain this. Otherwise it will be assumed that they are concealing information.
- You should keep your client's immigration solicitor updated about developments in their asylum support case, and certainly send them the statement of reasons from their asylum support appeal. Information that comes to light through an asylum support application could be critical to their asylum claim.

DECISIONS OF THE FIRST-TIER TRIBUNAL (ASYLUM SUPPORT)

APPELLANT INTENTIONALLY DEPRIVED HIMSELF OF FUNDS BUT THEY ARE NOT RECOVERABLE

AS/16/05/35312, 17 May 2016

The appellant agreed to buy a house for his parents and younger sister inside a Palestinian refugee camp in Lebanon because of his concerns for their safety outside the camp. He signed an agreement with his bank, allowing his father to withdraw \$40,000 from his account when he needed it. Ten days later he received a threat from a terrorist group, which prompted him to flee to the UK with his wife and two children. They applied for asylum and Section 95 support. At that point he and his wife had approximately \$70,000 in their accounts. Shortly after he applied for support, the appellant's father withdrew \$40,000 to pay the final instalment for the sale of the house. The appellant transferred additional funds to his mother to repay his uncle who had lent his parents money for the earlier instalments. The appellant's wife paid some outstanding medical bills. The rest of their money was spent on living costs. They had nothing left.

The Home Office refused the application for asylum support on the basis that he had intentionally deprived himself of funds in order to bolster his application for asylum support (2.3.10 in *Assessing destitution*). The judge at his appeal agreed. However, she found that since the house was in his father's name, and his father was not willing to sell the property to return the funds to the appellant, he and his family were destitute and eligible for Section 95 support.

Comment: See Asylum Support Bulletin No. 2 for ASAP's analysis of the intentional deprivation of funds test.

ASSETS ABROAD CAN BE REALISED BUT NOT WITHIN 14 DAYS

AS/16/05/35309, 18 May 2016

In his application for Section 95 support the appellant declared \$185 in an Afghanistan bank account; land worth \$50,000; property for which he had paid \$80,000 but still owed the developer \$32,000; a laptop, jewellery, TV and mobile phones. The appellant said he could not access the money in his bank account from abroad. The property and land are both in his wife's name. She cannot sell them from abroad, and even if they could be sold, by giving her father power of attorney, they do not have the means to practically arrange this. In addition they did not know how they could access the proceeds of the sale because of currency restrictions on the exit of funds from Afghanistan.

The judge found that the appellant and his family's personal possessions, such as jewellery and phones, must not be taken into account when assessing destitution because they were not assets listed in reg 6(5) of the Asylum Support Regs 2000. However, the money, property and land must be taken into account. She did not accept that he could not access the \$185 in his bank account. She found that the appellant's wife could sell the property and land by granting her father power of attorney. The funds



BULLETIN NO. 3

Asylum Support Bulletin July 2016



released from the sale of the house could be transferred to her. However, she acknowledged that the sale could not be arranged within 14 days and so she found that the appellant and his family were destitute on the day of the appeal. In allowing the appeal she indicated that the Home Office is entitled to set out a timescale in which the appellant must liquidate his property and land and may discontinue support if he fails to take steps to do so. She noted that the appellant should not be expected to accept a sum substantially below the value of his assets for the sake of a speedy sale, but that he should make 'some compromise in reaching the sale price'.

WOULD CONTACTING FAMILY IN IRAN PUT THEM AT RISK?

AS/16/06/35502, 4 July 2016

The appellant's brother had borrowed money to pay a smuggler or 'agent' to help him escape Iran. He stated he was not involved in this transaction and did not know how much was paid or how his brother raised the funds. He did not even know where the agent was taking him. His Iranian bank account is frozen and neither his brother nor any other family members are able to support him. He was not able to get any evidence from any of his family to confirm this because he was afraid to contact them because the Iranian government monitors communications. He explained that revealing his whereabouts could put his family at risk. His father and brother had already been questioned by the authorities about him. He had been in touch with his wife by text message but only generic messages asking how she was, nothing that would arouse suspicion. He had slept in a park and also in a mosque.

While the judge accepted that he was unable to contact his father or brother because this might put them in danger, she did 'not accept that all email and text messages from abroad to [the area where the appellant's family live] are monitored to the extent that messages to his siblings regarding the financial circumstances of the family would put them at risk' (para 20). Dismissing the appeal, she found that some of the appellant's oral evidence was inconsistent and that he needed to provide evidence about how his brother funded his escape from Iran and why his family cannot support him, such as their bank statements.

Comment: This decision is illustrative of the new approach to Section 95 destitution cases described in the news item, page 1.

CASE LAW

ASSESSING DESTITUTION FOR SUPPORT UNDER SECTION 17 CHILDREN ACT 1989

R (on the application of O) v London Borough of Lambeth [2016] EWHC 937 (Admin)

Lambeth Social Services had refused to support and accommodate O and her mother (PO) under Section 17 CA 1989 because they were not believed to be destitute. PO is a single parent. She overstayed a visitor visa in 2007. She had made various applications for leave to remain in the past but at the time of the application she had nothing outstanding. O was born in the UK in 2010.

O approached Lambeth Council for assistance twice and was refused support on both occasions, the latter being the decision under challenge. At the first assessment, PO's bank statements showed 'significant income' from friends. At the second assessment, four months later, there was no income going into the account. Enquiries revealed inconsistencies in PO's account of how she had supported herself and O and she would not provide full details of everyone who had supported her. Those who were contacted by social services did not cooperate with enquiries.

The assessing social worker concluded that PO still had financial support even though it was no longer visible in her bank account. Therefore, she could meet O's needs.

The judge found that Lambeth's decision to deny the family support was lawful. In doing so, she outlined some helpful principals that social workers should follow when assessing destitution for the purposes of Section 17 support:

- 1) The local authority has a duty to make reasonable enquiries to assess destitution (para 16).
- 2) If a local authority refuses support on the basis of poor credibility some reason other than 'feel' should be articulated to explain why it distrusts the appellant's account (para 17).
- 3) Fairness demands that any concerns social workers have about a lack of evidence to support the applicant's claim that those who have previously supported them can no longer do so should be put to the applicant so s/he has the opportunity to comment 'before any adverse inferences are drawn' (para 20).
- 4) If the applicant claims that friends or family can no longer support them but does not provide any evidence or a satisfactory explanation for why this is, then the local authority is entitled to conclude that they are not destitute or homeless (para 20).