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Factsheet 2

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**This Factsheet looks at s4 support for refused asylum-seekers – those who have come to the end of the asylum process, been refused asylum and exhausted their appeal rights.**

**What is s4 support?**

Section 4(2) of the Immigration and Asylum Act 1999 (the 'IAA 1999') allows for support to be provided to refused asylum-seekers. Following the abolition of s4(1) in January 2018, references to s4 support always mean s4(2). The relevant Home Office policy is [Asylum Support, section 4\(2\): policy and process](#).

To qualify for s4 support, refused asylum-seekers must be destitute and meet a narrow set of criteria. The support consists of accommodation and £35.39 a week via a pre-paid Visa card (ASPEN card). Extra money is available to pregnant women and mothers of children under 3. Unlike s95 support, s4 applicants cannot request 'subsistence only' support (i.e. no accommodation) and s4 recipients cannot withdraw money using ATM machines.

Dependants of refused asylum-seekers may also qualify for s4 support (see *Factsheet 11 – Asylum Support for Dependants*). For dependants aged under 18, it's important to check if they were born before the refused asylum-seeker exhausted their appeal rights. If so, and they have remained part of the same household, the refused asylum-seeker should still qualify for s95 support until their youngest child turns 18 (see s94(5), IAA 1999).

**The eligibility criteria**

To qualify for s4 support a refused asylum-seeker must satisfy reg 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 [www.opsi.gov.uk/si/si2005/20050930.htm](http://www.opsi.gov.uk/si/si2005/20050930.htm) (the 'Regulations').

They must:

- be destitute, or be likely to become destitute within the next 14 days (or 56 days if they are already receiving support); and
- meet one of the conditions set out in reg 3(2)(a)-(e) of the Regulations (see below).

## Burden of Proof

The applicant must prove that they qualify for support “on the balance of probabilities” (i.e. more likely than not). The Home Office will therefore require evidence of destitution and reg 3(2) eligibility; see *Factsheet 6 – Evidence for S4 Support*. Refused applicants (or people notified that their s4 support will be terminated) can normally appeal to the First-tier Tribunal (Asylum Support) (the ‘**Tribunal**’) - see *Factsheet 3 - Appealing to the AST*.

## Destitution test

An applicant must show that they are **destitute**, or likely to become destitute, within 14 days. A person is destitute if they do not have adequate accommodation<sup>1</sup>, and/or have insufficient money to meet their and any dependants’ essential living needs (see *Factsheet 5 - Proving Destitution*).

## Regulation 3(2) criteria

An applicant must also show they meet one of the conditions in reg 3(2):

- they are taking all reasonable steps to leave the UK or facilitate their departure - reg 3(2)(a);
- they are unable to leave the UK due to a physical impediment to travel or for some other medical reason – reg 3(2)(b);
- that in the opinion of the Secretary of State there is no viable route of return to their country of origin – reg 3(2)(c);
- they have been granted permission to proceed<sup>2</sup> with an application for judicial review of the decision on their asylum claim – reg 3(2)(d);
- the provision of support is necessary to avoid breaching their human rights – reg 3(2)(e).

## 3(2)(a) All reasonable steps

Applicants must show they are taking **all** reasonable steps to leave the UK. They must demonstrate a proactive approach, and continue to do so if support is granted. Whether or not a particular step is objectively reasonable depends on the applicant’s circumstances. For example, do they need to approach the relevant embassy in the UK to obtain valid identity and/or travel documents? If so, are there barriers or delays beyond their control? See the Tribunal’s Landmark decision [AS/17/01/36372](#) (paras 48-50) for guidance from Chamber President Aitken and Principal Judge Storey as to the minimum steps<sup>3</sup> required under reg 3(2)(a). Note that what appears reasonable in respect of one applicant may not be

<sup>1</sup> See reg 8(3)(a) of the Asylum Support Regulations 2000 for the matters to which the Secretary of State must have regard in determining whether accommodation is adequate.

<sup>2</sup> A different statutory regime applies to applications made in Scotland.

<sup>3</sup> The requirement at paragraph 49(b) to register with *Choices* is no longer relevant. Applications for voluntary return should be submitted to the relevant department of Home Office.

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reasonable for another. However, every applicant should seek written evidence (to the extent possible) to demonstrate they have taken all reasonable steps in their specific circumstances.

**Important note:** Refused asylum-seekers should be advised that making an application to return voluntarily could negatively impact on any future fresh asylum claims. For this reason, they should seek independent legal advice before applying under reg 3(2)(a).

### 3(2)(b) Unable to leave UK due to physical impediment to travel or some other medical reason

To qualify under reg 3(2)(b), applicants must show that they are unable to travel due to a physical or mental health problem. It is **not** enough simply to be receiving treatment in the UK or to have a doctor's opinion that it would be preferable not to travel. They must have a medical condition which makes them **unable** to travel on any given day. See [R \(SSHD v The Asylum Support Adjudicator, Osman & Others \[2006\] EWHC 1248](#). Written evidence must be obtained from a medical practitioner confirming the individual is unable to travel, explaining the reason why, and indicating how long this will persist. This information should be written on the "Section 4 Medical Declaration" form<sup>4</sup>. Generally, the greater level of detail that can be provided, the better (particularly if the client has mental health problems); a client who is particularly unwell may still potentially qualify for s4 support under reg 3(2)(e), even if they do not meet the *Osman* test for reg 3(2)(b).<sup>5</sup> The Home Office provides medical practitioners with a fee for completing a Medical Declaration (see p11 of ['Asylum support, s4\(2\): policy and process'](#)) and the completed invoice and form should be sent to the s4 team.

**Important note: Pregnancy** – Home Office policy accepts that women in the late stages of pregnancy (around six weeks before their expected due date, or earlier if there have been complications), or those with a baby under six weeks old, are unable to travel. In some cases the Tribunal has awarded support to a pregnant woman earlier than six weeks before her due date (see Factsheet 9 – Support for Pregnant Refused Asylum-Seekers).

### 3(2)(c) No viable route of return

This condition only applies to a country for which the Home Secretary has stated there is no viable route of return. At the time of writing no such statements have been issued, therefore no applicant can currently qualify under this condition.

<sup>4</sup> At the time of writing the form is not on the Home Office's website, but a copy was circulated on the ASAN network on 12 February 2018 at 11:30am – please contact ASAP if you have any difficulty obtaining a copy of the form.

<sup>5</sup> Please contact ASAP's advice line to discuss a specific case.

### 3(2)(d) Permission granted to proceed with judicial review

If a person wishes to judicially review a decision on their asylum claim they must first apply to the High Court for permission to proceed. Once the High Court has granted permission, the applicant will be eligible for s4 support under this condition. If an applicant has started the judicial review process (for example by sending a pre-action protocol letter or issuing a claim form) but is waiting to learn whether permission will be granted, they will not qualify under this condition. However, they may still qualify on human rights grounds under reg 3(2)(e).

### 3(2)(e) Human rights breach

Support must be provided if a refused asylum-seeker's rights under the European Convention on Human Rights (the 'ECHR') would otherwise be breached. The case of [R\(NS\) v First-tier Tribunal \[2009\] EWHC 3819 \(Admin\)](#) held that there are "a variety of factual circumstances" in which reg 3(2)(e) may apply and each case should be considered on its own merits. The two most relevant ECHR provisions are likely to be Article 3 (prohibiting torture and inhuman or degrading treatment) and Article 8 (protecting private and family life). Article 5 (right to liberty) and Article 6 (right to a fair trial) may also apply.

The courts have found that denying support to street homeless asylum-seekers with outstanding claims would constitute "inhuman and degrading treatment"<sup>6</sup> and is therefore prohibited under Article 3 of the ECHR. These principles also apply to refused asylum-seekers. But, crucially, refused asylum-seekers must show they cannot reasonably be expected to leave the UK. For advice on whether it is reasonable to expect a person applying for s4 support to leave the UK, please contact ASAP's Advice Line.

**Important note: Further submissions** - Many refused asylum-seekers qualify for Section 4 support under reg 3(2)(e) because they have further submissions outstanding. This is when a refused asylum-seeker has submitted new evidence or arguments for the Home Office to consider as part of an application for leave to remain.

In [AS/14/11/32141](#) Principal Judge Storey held that unless the outstanding further submissions are obviously hopeless or abusive, not an application for leave to remain at all, or merely a repetition of an application which has already been rejected, reg 3(2)(e) eligibility is established. She also stated there is no requirement for further submissions to be protection-based.

The s4(2) Home Office [policy](#) acknowledges (see p.13) that it is unreasonable to expect a refused asylum-seeker to leave the UK where:

- they have submitted further representations against the refusal of their asylum or Article 3 claim and these remain outstanding;
- they have submitted a late appeal against the rejection of their asylum or

<sup>6</sup> [R \(Limbuella\) v Secretary of State for the Home Department \[2005\] UKHL 66](#)

Article 3 claim and the First-tier Tribunal is considering whether to allow the appeal to proceed out of time.

If an appellant submits a copy of further submissions and evidence of an imminent FSU appointment, the Tribunal may even accept support entitlement notwithstanding that the further submissions have yet to be lodged.<sup>7</sup>

**Important note: Home Office Further Submissions Policy** – subject to exceptional circumstances (see Further Submissions Instruction, para 3.3), all further submissions made on protection grounds following the refusal of asylum or humanitarian protection must be made in person at the Further Submissions Unit (FSU) in Liverpool (see Further Submissions Instruction, para 3.1).

Following the High Court decision of [R\(MK and AH\) v SSHD \[2012\] EWHC 1896 \(Admin\)](#), the Home Office amended its policy on dealing with applications for s4 support on the basis of outstanding further submissions. All such applications must be decided within **5 working days**, and priority decisions must be decided within **2 working days** (see pp.13-14 of the s4(2) policy). The policy provides a non-exhaustive list of priority cases which includes: street homeless people; families with minors; disabled people; elderly people; pregnant women; people who have been subjected to torture, rape or other forms of serious sexual violence; potential victims of trafficking. If your client suffers a delay of longer than 5 working days (or 2 days in priority cases) you should consider making a complaint to the Home Office and/or bringing judicial review proceedings. Note that these time limits relate to when the Home Office must decide the application, as opposed to actually providing the support. If the Home Office grants support but your client suffers a delay receiving it, contact a public law solicitor to see if that delay can be challenged by judicial review.

**For further information on where someone might qualify for s4 support under reg 3(2)(e) see *Factsheet 12 – Breach of human rights and Section 4.***

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<sup>7</sup> For further information see decision 38069 attached to Claire Tindale's email to ASAN on 12 June 2016.