Briefing Note: Article 8 applications and eligibility for section 4 support

It is well established that destitute refused asylum seekers who have outstanding further submissions relating to asylum or Article 3 ECHR (a 'fresh claim') are eligible for section 4 support. They come within reg 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005:-

> *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 1998*

The Home Office usually decides (after a few months or longer) that their further submissions do not meet the threshold set out in Rule 353 of the Immigration Rules to qualify as a fresh claim, and so refuses them without granting a right of appeal. Section 4 support is then discontinued.

The Home Office's position has been that those who have outstanding Article 8 applications are not eligible under reg 3(2)(e). However, there is nothing in the regulation to suggest that the further submissions have to relate to asylum or Article 3 (together known as 'protection' claims). The logic of granting section 4 support to a destitute person with an outstanding application (of any sort) is as follows:-

- Being left destitute in the UK is a breach of a person's Article 3 rights – 'inhumane or degrading treatment'
- A person can remedy this breach by leaving the UK
- However, it would not be reasonable to expect them to leave the UK when they have an outstanding application

ASAP's position has been that reg 3(2)(e) could cover those with outstanding Article 8 applications. In 2014 ASAP intervened in the Article 8 section 4 case of *R (Mulumba) and First-tier Tribunal (Asylum Support) and the Secretary of State for the Home Department*. On 2nd February 2015 this case settled, as the Home Office conceded that those with outstanding Article 8 applications may also be eligible for section 4 support.

Home Office policy on reg 3(2)(e) is contained in the *Asylum support, section 4 policy and process instruction* para 1.14. Unfortunately the Home Office, notwithstanding the court settlement, has not taken the opportunity to amend the wording to show that it now accepts that Article 8 applicants can be included. Henceforward, to comply with the 2nd February 2015 consent order, the Home Office must cease its practice of routinely refusing all section 4 applications that are based on outstanding Article 8 applications. It is likely that many applications will still be refused and advisors are encouraged to contact ASAP for help with submitting the appeal to the First-Tier Tribunal (Asylum Support).

Q. Should I encourage all my destitute clients with outstanding Article 8 applications to apply for section 4 support?

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A. No. It is important for your client to seek immigration advice before applying for section 4 support on this basis. It is essential that none of the information in the section 4 application contradicts or could be construed to contradict anything in your client's outstanding Article 8 application. For example, their Article 8 cases might be based on being in a stable committed couple. While your client's partner's inability to accommodate or support them financially is not necessarily incompatible with having a strong subsisting relationship, applying for section 4 support could damage that claim. It is imperative that they seek immigration advice before providing destitution evidence from their partner in support of their section 4 application.

Q. Which type of case is more likely to succeed?

A. One example would be fathers who no longer live with their children (or with the children's mother) but have maintained strong relationships with their child or children, which forms the basis of their Article 8 claim. Whilst it is not the role of the First-Tier Tribunal (Asylum Support) judge to consider the substantive merit of an outstanding immigration application, they may take into account whether it is repetitious or hopeless. Therefore, just as with further submissions on protection grounds, support will not be awarded where it appears the Article 8 case has little or no merit. Applying for section 4 support may trigger a decision on any outstanding application, especially if the facts are weak.

Q. What if there has already been a decision on the Article 8 claim?

A. This is more tricky, and ASAP's advice should be sought. If the person was given a right of appeal, and they are waiting for that appeal to be heard, then they are in a strong position, as it would not be reasonable for them to abandon their appeal, which would happen if they left the UK. If, as is more likely, they were not given a right of appeal, then their immigration advisor may be considering challenging the decision by way of judicial review. If the decision is to be judicially reviewed, then it is worth applying for section 4 support (assuming the immigration advisor agrees). If there is no possibility of a judicial review, the immigration advisor may have requested that the Home Office issues a Removal Decision, which would then attract a right of appeal. If so, it is probably safe to apply for section 4, but again check first with the immigration advisor.

Q. What if my client never applied for asylum?

A. Support under section 4(2) Immigration and Asylum Act 1999 (IAA 1999) is only for failed asylum seekers. If your client has never applied for asylum, they may be eligible for support under section 4(1) IAA 1999, provided they are on Temporary Admission. See ASAP's Factsheet on section 4(1)(a) and (b). Note para 1.1.3 of the *Asylum support, section 4 policy and process instruction* as to how the Home Office operates section 4(1)(a) and (b), and the reference to Article 8 on page 6. As with section 4(2), the Home Office is highly likely to refuse the application and you may succeed on appeal. Examples of appeals where section 4(1) support has been awarded are: 1) a man with a very strong Article 8 case who had he been in the UK for 23 years 2) a young adult brought to the UK unlawfully as a child who was in the process of regularising his status via an Article 8 application.