

Briefing note on when it is possible to appeal a decision under Section 57 of the Nationality and Immigration Act 2002

Background

1. The Home Office may refuse to entertain an application for s95 support where the Secretary of State is 'not satisfied that the information provided is complete or accurate or that the applicant is co-operating with enquiries' under s57 of the Nationality and Immigration Act 2002.¹
2. There is no right of appeal to the First-tier Tribunal - Asylum Support (the AST) against a s57 decision and therefore AST judges may strike out such appeals on the basis they do not have the power to hear them (known as 'lack of jurisdiction'). At the end of this briefing (Annex A) are four recent cases, of which only one was struck out.
3. Therefore, the AST can sometimes be persuaded to accept jurisdiction in s57 cases where the decision being appealed can be viewed, in substance, as a decision to refuse s95 support giving rise to a right of appeal under s103(1) of the Immigration and Asylum Act 1999. Therefore advisors, when faced with a s57 decision in a situation where their client has co-operated, should lodge a notice of appeal to the AST, as explained below.
4. As further explained below, AST judges adopt different approaches when deciding whether a s57 decision is in substance a decision to refuse s95 support. Some AST judges will look solely at the wording of the decision letter, whereas other judges will consider whether the wider chain of correspondence predating the decision shows that, in substance, the Home Office has considered and rejected the application for support.
5. Note that s57 applies only to applications for asylum support made under s95. No equivalent legislative provisions exist for s4 applications, although there is an 'administrative closure' procedure, which is set out in Chapter 11 of the *Asylum support, section 4 policy and process instruction*.

When will the Secretary of State issue a Section 57 decision?

6. The Home Office policy in relation to s57 is set out in Chapter 10 of the *Asylum Support Policy Bulletins Instructions* ('Incomplete Information').²
7. In short, the Secretary of State may refuse to entertain an application for s95 support where an application is considered to be inaccurate or incomplete, or where an applicant is deemed not to be cooperating with enquiries. The Policy Bulletin Instructions re-iterate that a s57 decision does not attract a right of appeal to the AST.
8. Pursuant to the Policy Bulletin Instruction, the Home Office should follow the following procedure before issuing an applicant with a s57 letter:

¹ Section 57 Nationality and Immigration Act 2002, read with Regulation 3(4)(b) of the Asylum Support Regulations 2000.

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/487402/Asylum%20Support%20Policy%20Bulletins%20Instructions%20Public%20v7.pdf

- If information provided by an applicant is not considered to be accurate or complete, caseworkers should request an explanation of the anomalies and should give the applicant 5 working days to respond (subject to an extension in exceptional circumstances). This letter should make explicit that failure to supply the requested information within the specified period will normally result in the applicant having to vacate their Initial Accommodation and their application for s95 support not being entertained.
 - If the applicant provides an explanation or evidence which satisfactorily addresses the anomaly, caseworkers should proceed to consider the applicant's eligibility for support.
 - If the applicant fails to provide the further information requested, or, despite the provision of additional information, the caseworker concludes that the application details are still incomplete or inaccurate, the application will not be entertained.
 - If the applicant subsequently provides the information requested after expiry of the 5 working day period (or any extension granted), further consideration may be given to the application 'but only when accompanied by the information originally requested together with a clear and coherent account of why delays have occurred in submitting the relevant information'.
9. It follows that the most effective way for s95 applicants to avoid a s57 decision is to ensure that they provide full, complete and accurate information at the time they initially submit their ASF1 application form.
10. It is also vital for s95 applicants to respond promptly and as comprehensively as possible to any requests for further information about their application. On occasions the Home Office asks for information that has already been provided. It is still important to respond in full, referring back to previous correspondence and to keep copies of everything sent to the Home Office.

If an applicant is unable to provide the additional information requested, it is essential to explain why this is the case and provide evidence where possible. For instance, if information is requested about an applicant's bank accounts abroad which he/she can no longer access, it is sometimes possible to obtain written confirmation from the bank or to explain why it has not been possible for the applicant or his/her relatives to access the accounts. In some circumstances, it may be necessary to request an extension of time in order to gather the appropriate supporting evidence.

Should a Section 57 decision be appealed to the Tribunal?

11. As indicated above, there is no statutory right of appeal to the AST against a decision not to entertain an application for support under s57. Under the Tribunal Procedure Rules³, the AST has to strike out the case if it does not have jurisdiction but it does first give the appellant the opportunity to make (written) representations against the proposed strike out. Therefore, although it is not guaranteed that the case will proceed to an oral hearing, ASAP strongly recommends that an oral hearing is requested on the notice of appeal. If the case does proceed to that stage, there is a much higher chance of success than if the matter is dealt with solely on the papers. If there is an oral hearing, and by that stage the s57 decision is still a live issue, then it is dealt with first, and if the appellant is successful, the judge then hears the substantive appeal.

³ Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008, rule 8(2)(a)(available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/455198/social-entitlement-chamber-tribunal-procedure-rules.pdf).

12. In order to persuade AST judges to accept jurisdiction over the appeal and consider the merits of an applicant's destitution claim, it is necessary to establish that the s57 decision being appealed amounts, in substance, to a decision that the applicant does not qualify for support under s95 such as to give rise to a right of appeal under s103(1) of the Immigration and Asylum Act 1999.⁴
13. As illustrated by the cases below in **Annex A**, AST judges have taken divergent approaches to determining whether a decision is, in substance, a decision to refuse support. Two main trends emerge from recent cases:
- (a) **'The Decision Letter approach':** Some AST judges consider the wording of the decision letter determinative of the nature of the decision and have struck out appeals where there is no indication in the s57 decision letter that the Home Office has considered and rejected the substance of the appellant's application for support. On this approach, the AST will accept jurisdiction only where the wording of the decision letter suggests that the Home Office has in fact considered the appellant's application and found the appellant not to be destitute.
 - (b) **'The contextual approach':** Other AST judges have been willing to look beyond the immediate wording of the s57 decision letter at the entire chain of correspondence between the appellant and the Home Office. For instance, some judges have accepted jurisdiction over appeals where the Home Office has purported not to entertain the application despite engaging in detailed correspondence with the applicant about the evidence submitted.
14. In light of these varying approaches to s57 cases, ASAP would recommend that advice agencies consider submitting an appeal to the AST where either:
- (a) It is arguable from the wording of the s57 decision letter itself that the Home Office has considered and rejected the substance of the application for s95 support. For instance, appeals have previously succeeded where the decision letter stated that the appellant had 'failed to satisfy us of your destitution', or where the letter stated that the appellant's evidence was 'not truthful', or otherwise contained an assessment of the applicant's destitution evidence. Or:
 - (b) It is arguable from the correspondence predating the decision letter that the Home Office has considered and rejected the substance of the application for support. For instance, this may be the case where the applicant has co-operated fully with the Home Office's request(s) for further information and believes he or she has provided complete and accurate information, or where the Home Office has issued a s57 decision letter on the basis of a request for information which the appellant has explained it is impossible to provide. Overall, it can appear that the Home Office is now using s57 decisions when it does not like (or believe) the information it has received, rather than that there has been a lack of co-operation.
15. If the AST considers that the decision is, in substance, a decision to refuse s95 support, then it will accept jurisdiction over the appeal and proceed to examine whether the appellant meets the destitution test. If, on the other hand, the AST finds that the decision is a decision not to entertain the application, then it will strike out the appeal and will not proceed to hear any oral evidence about whether the appellant is destitute.
16. The AST will usually hear oral evidence from the appellant only after deciding that it has jurisdiction to hear an appeal. However, in Case 4 below, the judge took the step of hearing the appellant's oral evidence about false information provided in a previous entry visa application in order to

⁴ s103(1) provides for a right of appeal "*If, on an application for support under section 95, the Secretary of State decides that the applicant does not qualify for support under that section.*"

assess whether her response to the Home Office's further enquires was credible and determine whether the AST had jurisdiction. In other cases, the Home Office presenting officer at the beginning of the hearing has conceded that the s57 point is no longer being pursued, and therefore the substantive appeal can begin immediately.

17. If there are children under 18 in your client's household (and presuming your client is being asked to leave their s98 accommodation or is otherwise homeless), then the grounds of appeal can also state that the Home Office has failed to apply s55 of the Borders, Citizenship and Immigration Act 2009 (duty to have regard to the welfare of children).

What other remedies are available?

18. When striking out s57 appeals, AST judges sometimes state that the proper remedy available to the recipient of a s57 letter is to re-submit a fresh, complete, application for s95 support including the additional information requested by the Home Office.
19. The only other legal avenue to challenge a s57 decision is by way of judicial review on the grounds that the Secretary of State's decision not to entertain the application is unlawful, e.g., if the Secretary of State has acted unreasonably in refusing to entertain the application rather than issuing a decision to refuse support under s95. It will be a rare case where a JR is the more effective remedy than a fresh application. If, for example, the applicant had submitted all possible information and evidence, and there would be nothing further to submit, and explanations have already been provided as to why further information the Home Office wants cannot be provided, then a JR could be the way forward.
20. We therefore advice agencies consider submitting a fresh application for s95 support with additional supporting evidence of destitution in parallel with pursuing an appeal of a s57 decision at the AST (if there is an arguable basis to do so), in order to minimise the time period for which a s95 applicant will be left destitute if the appeal is struck out (especially if the applicant is particularly vulnerable).

Annex A – Recent examples of decisions in relation to Section 57 appeals

Examples of 'Decision letter approach':

Case 1 – Appeal struck out for lack of jurisdiction

AS/16/07/35635 (Statement of Reasons, 8 August 2016)

The applicant for s95 support was a Georgian citizen with a dependent child. Following requests for further information relating to the application, the Home Office issued a s57 decision letter stating that '*Although you have responded to our recent request for further & accurate information, we are not satisfied that you have provided complete & accurate information because you have not fully complied with our request.*' The judge struck out the appeal on the grounds that the decision letter did not determine the question of destitution and contained '*no indication at all that a decision in relation to destitution has been reached*'.

Case 2 – Jurisdiction accepted, but appellant found not to be destitute

AS/16/07/35641/LP (Statement of Reasons, 9 August 2016)

The applicant for s95 support was a Moroccan national. The Home Office decision letter asserted that his application for support was incomplete and inaccurate because the applicant had declared funds on his visa application form and his claim to have lent this money to a friend before entering the UK was not credible. Although the letter stated that the applicant's response to the request for further information

was not considered to be accurate or complete, the letter was headed ‘refusal of support under s 95’ and contained no express statement that the Home Office had declined to entertain the application. The letter also stated that the appellant had ‘failed to satisfy us of your destitution’. The judge found that the letter demonstrated that the Home Office was not satisfied as to the appellant’s destitution and therefore the AST had jurisdiction over the appeal. The judge proceeded to hear evidence of the appellant’s destitution but dismissed the appeal.

Examples of ‘Contextual approach’:

Case 3 – Tribunal accepted jurisdiction, separate destitution hearing

Appeal AS/16/08/35729 (Statement of Reasons, 31 August 2016)

The applicant for s95 support was a Nigerian citizen with a dependent child who had lived in the UK for almost six years prior to claiming asylum. The Home Office issued a request for further information relating to her address history and requested letters from all of the individuals who had supported her since her arrival in the UK. The applicant responded providing additional information about her past addresses, a letter of support, and an explanation that she had been unable to contact the other individuals who had previously supported her. The Home Office issued a s 57 decision stating: *‘Although you have responded to our recent request for further & accurate information, we are not satisfied that you have provided complete & accurate information because it is not believed that you have complied or been truthful with our information request’*. The judge considered the ‘extensive correspondence’ between the appellant and the Home Office predating the s57 decision, as well as the decision letter itself, and found *‘the decision to be one to refuse the appellant’s support because of the appellant’s failure to demonstrate her destitution’* attracting a right of appeal.

Case 4 – Tribunal accepted jurisdiction and found the appellant to be destitute

Appeal AS/16/07/35637 (Statement of Reasons, 9 August 2016)

The applicant was a Nigerian citizen with two dependent children. On her original visa application for entry to the UK, the applicant had declared a Nigerian bank account and savings. When she later applied for s 95 support, the Home Office requested copies of her bank statements for the Nigerian account and later issued a s 57 decision following her failure to provide these. In response to the Home Office’s information requests, the appellant consistently explained that she did not possess a bank account or savings when she applied for the entry visa. The judge heard oral evidence from the appellant and accepted her testimony that the visa entry form had been completed on her behalf by an agent, that she had not read the form and did not have a bank account or savings, and found that the information given in the visa entry form was false. The judge considered that the Home Office had ‘in fact analysed the appellant’s explanation and found it to be unreliable’. The judge accepted jurisdiction over the appeal and proceeded to find the appellant destitute.