

ASAP

ASYLUM
SUPPORT
APPEALS
PROJECT

The Joint Committee on Human Rights Inquiry into Treatment of Asylum Seekers

**Submission by Asylum Support Appeals Project
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Executive Summary

Asylum seekers are often left destitute unnecessarily because there is no public funding available for asylum support appeal hearings. These appeals are against National Asylum Support Service's (NASS) decisions to terminate or refuse asylum seekers' access to housing and financial support and are not immigration appeals. This lack of access to legal representation prevents asylum seekers, many of whom have mental and/or physical health problems, from exercising their legal rights to food and shelter effectively.

ASAP's statistics show that competent legal representation triples asylum seekers' chances of having their housing and financial support awarded or reinstated.¹ However, 99% of asylum seekers had no legal representation during their oral asylum support appeal hearings in 2004/05.² Our research also shows NASS decision making is poor and they frequently misinterpret and misapply the criteria for support provision.³

ASAP believes that the current asylum support appeal system contradicts the well recognised concept of "equality of arms", which holds that to deal with a case justly the parties should be on an equal footing, embodied in the Civil Procedure Rules (CPR); Rule 1.1(2), and systematically places asylum seekers in a disadvantaged position when challenging NASS decisions. We also believe that unnecessary destitution of this already vulnerable group of individuals as a result of a lack of public funding for their asylum support appeals and of administrative delays caused by NASS is inhuman and degrading. We are also concerned that an increasing number of failed asylum seekers who are not able to leave the UK have no access to any support.

Note 1: Between August 2005 and March 2006, ASAP assisted and/or represented 106 asylum seekers during their oral hearings at the Asylum Support Adjudicators. ASAP had a success rate of 62% while only 20% of unrepresented asylum seekers had positive outcomes after their oral hearings.

Note 2: Asylum Support Adjudicators Annual Report 2004-2005

Note 3: A study into the quality of NASS decision making carried out by ASAP showed an error rate of 98.8%. This was based on 85 decisions from cases represented by ASAP between January and July 2006.

Asylum Support Appeals Project - Introduction

Asylum Support Appeals Project (ASAP) is a registered charity providing free legal representation for asylum seekers whose NASS support has been refused or terminated. We also provide second-tier legal advice and training services on asylum support appeal issues for voluntary sector advisors and law practitioners. ASAP is the only agency specialising in the area of law known as asylum support law which relates to asylum seekers' legal entitlements to housing and financial support. Our submission is based on our experience of legal representation work at the court as well as our work with other front-line agencies working with destitute asylum seekers.

Every year, approximately 2500 appeals are lodged against NASS decisions to refuse or terminate asylum seekers' housing and financial support. The total number of asylum seekers with a right of appeal to the Asylum Support Adjudicators (ASA) who do not lodge an appeal is not known. In 2005/06, ASAP represented 106 asylum seekers at the ASA with a success rate of 62%. 56% of the clients we assisted had mental or physical health problems and 75% of them were already destitute by the time they had come to the ASA. We also represented some families which were affected by section 9 and dealt with a number of queries regarding individuals affected by section 55.

There is no public funding available for asylum support appeal hearings. As a result, very few law practitioners have expertise in asylum support law. ASAP advised over 80 organisations with over 200 asylum support queries in 2005/06 and trained 40 organisations.

ASAP welcomes this inquiry, in particular the examination of whether the recent legislative provisions on asylum support breach human rights; particularly: the rights to freedom from torture and inhuman and degrading treatment under Article 3 of ECHR and the right to family life and a fair trial under Articles 8 and 6 respectively. ASAP is also concerned that asylum seekers' ability to safeguard their legal rights to accommodation and financial support as well as to challenge potential human rights violations when support is not provided by NASS is severely restricted due to the lack of public funding for asylum support appeal hearings. We believe that this potentially engages Article 6 which provides for the right to a fair hearing. With the increasing number of destitute failed asylum seekers who are unable to leave the UK and the imminent national roll-out of the New Asylum Model (NAM), ASAP appreciates this opportunity for witnesses from front-line organisations to inform the Committee of the real conditions of life for asylum seekers and hopes that there will be a significant improvement in the treatment of asylum seekers.

Evidence for the House of Commons Select Committee

Memorandum:

1. The Inequality of Arms – Legal Aid for Asylum Support Appeals

1.1 Introduction

1.1.1 Where a person has been refused support or their support has been withdrawn by NASS, that person has an exercisable right of appeal under Sections 102-104 of the Immigration and Asylum Act 1999. A tribunal was set up under Schedule 10 to the Immigration and Asylum Act 1999 (as amended by the National Immigration and Asylum Act 2002) and appeals made against the withdrawal or refusal of support are made to the Asylum Support Adjudicators (ASA).

1.1.2 The ASA hear appeals against decisions to withdraw or refuse support, not challenges to the type, level or adequacy of support. The ASA on hearing an appeal can allow the appeal and grant the person support, dismiss the appeal by upholding NASS' decision not to provide support or remit the appeal to NASS for further investigation and a fresh decision.

1.2 Strict Time Limits to Make an Appeal – Barriers to Exercising Rights

1.2.1 There is a very short time in which to complete an appeal to the ASA. Once a person receives notice in writing of the decision to remove or refuse support, an appeal must be completed by the person appealing and received by the ASA within 5 days of the date of that decision. Many asylum seekers find it difficult to complete the form, which must be completed in English, within this time frame and the ASA are able to decide an appeal is invalid if the form is not completed correctly. In 2005 the ASA invalidated 485 appeals (19% of all appeals).

1.2.2 Many people find it difficult to complete the form and attend an appeal regarding their support without advice and support from a suitably qualified person. Due to short time limits, complex law and most significantly a lack of public funding the vast majority of people complete the appeal form and attend the appeal hearing alone and unrepresented. 56% of all people who ASAP have helped in the last year had additional mental and physical health needs rendering the job of representing themselves virtually impossible. The strict appeal time has been put in place to ensure that a destitute person gets an appeal hearing quickly to expedite the length of time they are without accommodation but given that NASS can take up to 8 weeks to make a decision on a person's original

application, the logic of this is flawed. For further comment see paragraph 4.2.1.

1.3 No Representation in Appeals – A Fair Trial?

1.3.1 NASS is usually represented by a Home Office Presenting Officer. ASAP is concerned that where one party to the proceedings (NASS) is represented and another (the person appealing) is not, the unrepresented person does not have an equally fair chance to prove their case. This can be considered as contradicting the well recognised concept of “equality of arms” which holds that to deal with a case justly the parties should be on an equal footing. This is embodied in the Civil Procedure Rules (CPR); Rule 1.1(2). The burden of proof in asylum support appeals always rests with the person making the appeal meaning an unrepresented person is required to not only show that NASS’ decision was incorrect but also that they are entitled to support.

1.3.2 ASAP argue that the lack of public funding for representation prevents solicitors assisting in asylum support appeals and could be a breach of an individual’s rights under ECHR Article 6. Article 6 provides; “In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Asylum support law is complex and individual cases may contain complex issues which are beyond the understanding of a person who wishes to appeal. The proceedings may be unfair if the person appealing does not understand the process, is not able to identify and argue the legal issues and faces a trained Home Office Presenting Officer. The judicial system in the UK is adversarial and it may be an unequal battle if the person appealing is unrepresented.

1.4 Poor Decision Making Undetected

1.4.1 The key issue that ASAP has identified is that often the quality of decision making by NASS can be poor and that these decisions are often unlawful, misrepresent the law or contradict their own policy. Whilst the ASA can provide information regarding how many people do appeal, NASS do not provide statistics which show how many people have their support withdrawn or refused and do not appeal so the number of people who don’t appeal a decision which could be flawed is unknown. Their destitution will continue, which may give rise to a breach of their rights under ECHR Articles 3 and 8. Those who do appeal but go unrepresented may not be able to identify mistakes of law or policy made by NASS. It can be argued that the Adjudicator in the appeal can identify these issues however the role of the Adjudicator is one of independence and it is only a suitably qualified representative who is advocating for the person appealing who can construct an argument around NASS’ errors

which benefits the person appealing. ASAP statistics show that 62% of people who received our representation won or had their appeal remitted. This is only true of 20% of people who were unrepresented.

- 1.4.2 There is a wider issue in that mistakes made by NASS may have a wider effect on a large group of people requiring NASS support. It is important that NASS decision making is scrutinised and challenged where needed. If a person does not get legal advice in respect of an asylum support appeal, mistakes and errors of law may go unchecked. It may be that the individual concerned has a right to judicially review the decision. Judicial reviews are a check on the decision making of government bodies and can not only achieve a positive outcome for an individual who has lost their asylum support appeal but also clarify and even change the law. This opportunity is lost for the want of legal advice.
- 1.4.3 ASAP has conducted research into the quality of NASS decision making in order to ascertain how often NASS caseworkers make errors when deciding whether someone is entitled to support. This research has highlighted many errors of law and policy made by caseworkers when refusing support and demonstrates the need for a legal representative to identify and challenge this evidence.
- 1.4.4 The majority of cases heard at the ASA relate to Section 4 support. This is a type of support available to some failed asylum seekers. The ASAP represented 85 Section 4 cases at the ASA over a six months period and all of these have been scrutinised to identify errors. ASAP used decisions between January and July 2006 as this was felt to represent a fair cross section of decisions made by NASS. What ASAP's research does not show however is the number of incorrect decisions issued to people who do not appeal. ASAP only sees decision letters from those who have managed to appeal and then access our service, the total number of incorrect decisions made over a six month period may therefore be much higher. NASS have not made available any statistics which show how many decisions they make to terminate or refuse support each year.
- 1.4.5 A failed asylum seeker who is unable to leave the UK can apply for Section 4 support providing they are destitute and meet one of 5 qualifying criteria (see paragraph 1.4.6). It is therefore a two stage test.

When considering a person's destitution the correct test is whether that person can meet their living needs for the next 14 days. None of the 85 decisions stated this test correctly. 28 of these decisions did not consider the person's destitution at all. Of the 57 that did, 33 contained an error which is equal to 57%. In 25 instances NASS stated that a person is only destitute if they could prove their circumstances had reached the required level to demonstrate a breach of ECHR Article 3. This incorrectly and

unlawfully places proving destitution at a much higher threshold than the actual test of demonstrating a person cannot meet their living needs for the next 14 days.

1.4.6 The second test for Section 4 support is that the person must meet one of the following criteria in addition to being destitute;

- (a) The person is taking all reasonable steps to leave the UK
- (b) The person is unable to leave the UK by virtue of a physical impediment to travel or other medical reason
- (c) In the opinion of the Secretary of State there is no viable route to the person's country of origin
- (d) The person has made an application for judicial review in respect of their asylum claim and has been given permission to proceed
- (e) Support is necessary to avoid a breach of the person's human rights within the meaning of the Human Rights Act 1998 and the European Convention on Human Rights

In respect of the qualifying criteria 64% of the 85 decisions were legally flawed with many commenting on the credibility and honesty of the person applying for support. Comments included suggesting that applicants had made fruitless asylum claims just to get support, had got married and had children to try and remain in the UK and had converted to Christianity to delay their removal from the UK.

1.4.7 The report concluded that the combination of results for the test for destitution and the test for the qualifying criteria demonstrated that 84 out of the 85 decisions used contained an error. This represents 98.8%.

2. Prolonged Destitution – Failed Asylum Seekers and Section 4

2.1 Failed Asylum Seekers

2.1.1 Failed asylum seekers (those who have exhausted their asylum application, including appeals) are expected to make arrangements to leave the UK and return to their country of origin. NASS support is terminated approximately 21 days after they receive a final refusal on their asylum application.

2.1.2 However, many failed asylum seekers, for various reasons, are unable to leave the UK at this point. This includes those who are too ill to travel, women who are heavily pregnant or who have very young babies. There are also practical reasons why some failed asylum seekers are unable to leave the UK. Many will experience difficulties obtaining appropriate travel documents or will be denied entry to their country of origin. Some may have outstanding issues regarding their asylum claim. Some will be

classed as stateless or there will be disputes concerning their nationality. Unable to leave the UK, many will become destitute.

2.2 Section 4 Support for Failed Asylum Seekers

2.2.1 Some failed asylum seekers can apply for a limited type of support known as Section 4. The provision of Section 4 support was initially introduced under the Immigration and Asylum Act 1999. However, it was not until the 31st of March 2005 that Section 4 was placed on a statutory footing. The new regulated scheme was brought in by Section 10 of the Asylum and Immigration (Treatment of Claimants) Act 2004.

2.2.2 Section 4 is regarded as a temporary type of support whilst a person is preparing to leave the UK and, as a result, the criteria are very strict. Those applying must first show that they are destitute and secondly, that they meet one or more of the five qualifying criteria. In brief these are: that the person is taking all reasonable steps to leave the UK; that they are unable to leave the UK due to some physical impediment or another medical reason; the Secretary of State has declared there is no viable route of return to a particular country; the person has permission to proceed with a judicial review; support is necessary to avoid a breach of the person's human rights.

2.3 Right to Appeal

2.3.1 As well as putting Section 4 on a statutory footing, the Asylum and Immigration (Treatment of Claimants) Act 2004 provided those who were refused Section 4 support with the right of appeal to the Asylum Support Adjudicator (ASA). Evidence provided earlier in this submission outlines the remit of the ASA (see paragraph 1.1.1).

2.3.2 This finally put failed asylum seekers on par with asylum seekers who have a right to appeal to the ASA if their support withdrawn (either because they are deemed as having breached the conditions on which support is provided or are seen as no longer meeting the conditions). Prior to the 2004 Act, Section 4 was provided on a discretionary basis and failed asylum seekers had no way of challenging NASS' decisions.

2.3.3 However, despite being placed on a statutory footing, Section 4 support is generally regarded as a temporary measure until the reason why an individual cannot leave the UK is resolved. Section 4 support is deliberately constructed to act as a deterrent, to encourage the return of failed asylum seekers which is why the level of support is so much lower than that offered to on going asylum seekers. There is no cash payments, instead failed asylum seekers are provided with housing and £35 worth of vouchers. However, ASAP believes this is flawed logic as anyone in

- receipt of Section 4 support cannot return home anyway (with the exception of receiving support because they are taking steps to leave the UK) and should not be kept on such a low level of support when they have an impediment to travel.
- 2.3.4 In addition to poor provisions, many of those applying for Section 4 can experience serious delays when they first apply. In the past year the ASAP represented over 100 failed asylum seekers with their appeals to the ASA. Our case files show that it can take anything from 3 to 8 weeks for NASS to make a decision on a application for Section 4 support. Many of those we represent are in urgent need of support and are either sleeping rough or on the floors of friends and community members. Very often these are individuals who are NASS supported and who run the risk of losing their accommodation as NASS regulations strictly prohibit overnight visitors.
- 2.3.5 The treatment of those applying for Section 4 contrasts sharply with the situation for asylum seekers when they first apply for NASS support on making their asylum claim. Unlike Section 4 applicants they are immediately placed in emergency accommodation whilst NASS assess their application for support.
3. Delays Following an Appeal to the ASA – Destitution Continued
- 3.1 Following a Successful Appeal
- 3.1.2 As well as experiencing delays when they first apply, failed asylum seekers who successfully overturn a decision by NASS not to support them, are also experiencing serious delays between winning their appeals and being awarded support. Again our files show that it can take anything from 7 days to 6 weeks for support to be awarded following a successful appeal at the ASA. This is despite the fact that the adjudicator's decision is binding both on NASS and the person appealing. In the case of an appeal being allowed, the decision essentially means that the individual was entitled to support in the first place and the decision to refuse them support was incorrect. It follows, therefore, that the appealing person if successful is entitled to support immediately following the appeal and it should be awarded accordingly. It is the experience of the ASAP that adjudicators, when closing the hearing often state expressly that the person, having had their appeal allowed, is entitled to support from that day.
- 3.2 Following a Remitted Appeal
- 3.2.1 The ASA also has the power to remit the appeal which instructs NASS to make a fresh decision thus quashing the decision appealed against This

happens in instances where the ASA believes that NASS has failed to take into account all the relevant factors or has reached a decision based on incorrect information. The expectation here is for NASS to reach a new decision as soon as possible. However, again our records show that, in many cases NASS can take several weeks to make a new decision thus prolonging the destitution of those awaiting support.

4. Recommendations

4.1 Public Funding to be Available for Asylum Support Appeals

4.1.1 The high level of error leads to unnecessary extended periods of destitution, dismissed appeals and no chance of judicial review. ASAP recommends that public funding be available to provide representation at asylum support appeals so those appealing can have adequate advice and support in order to allow them to attend the appeal on an equal footing to NASS. Asylum seekers and failed asylum seekers are amongst the most vulnerable people in society and the need for accessible legal advice is great.

4.1.2 NASS caseworkers should be adequately trained to make decisions and should ensure that they address all elements of qualifying criteria for support when making decisions as to whether a person is entitled to support.

4.1.3 Those appealing to the ASA have only 5 days from the date on the NASS decision in which to lodge their appeal and have it received by the ASA. Many of those appealing are doing so without any representation and will struggle to understand and complete the appeal form. It seems very then unfair then to insist on such a tight time frame for appealing when NASS themselves often fail to process an application for support within a reasonable timeframe. NASS should process applications within 48 hours so the person can immediately exercise their appeal rights.

4.2 Clear Time Frame For Section 4 Support Provision

4.2.1 Despite Section 4 being placed on a statutory footing, NASS have in many respects continued to treat this provision as if it were discretionary. This can be observed in the ongoing delays surrounding the provision. Section 4 support was created in recognition that there are groups of failed asylum seekers who, through no fault of their own, are unable to leave the UK. ASAP believes that NASS is failing to honour its obligations towards this group and recommends that Section 4 support given the same priority as mainstream NASS provision. Whilst we recognise that it may not be practical to provide emergency accommodation for those applying for Section 4 support, the ASAP recommends that, at the very

least, NASS should endeavour to process their applications within forty eight hours (see also paragraph 4.1.3).

4.3 Prompt Responses to ASA Decisions – Providing Support or Reissuing Decisions

- 4.3.1 ASAP recommends that NASS implement the ASA decisions immediately and awards support to the applicant within 24 hours of the appeal being allowed. Failure to do so, having proved they are destitute and are unable to leave the UK, is arguably breach of the persons Article 3 rights as it subjecting them to cruel, inhuman and degrading treatment.
- 4.3.2 Given that a successful appeal means that the person was entitled to support when they applied and NASS were incorrect to have refused support, the support should be backdated to the date the person originally applied for support. NASS can take up to 8 weeks to provide support and it is unacceptable that a person entitled to support spends this time destitute.
- 4.3.3 When a case is remitted, the ASA should have the power to instruct NASS to make a new decision within 48 hours. ASAP have witnessed the ASA allowing appeals providing the person complies with certain conditions (such as providing NASS with certain documentation) and this power should equally apply to insisting NASS deliver a fresh decision within a proscribed time frame.

Case Studies

The following are examples of cases which the ASAP undertook at the ASA. Without the ASAP, these people would have gone into their appeal alone.

All names have been changed.

Case study 1 – Sarah

Sarah was a failed asylum seeker who had made a fresh claim. She applied for Section 4 support because she was destitute and the fresh claim had been received by the Home Office but not yet processed.

When ASAP met Sarah at the duty scheme she had been sleeping rough for 9 months. She suffered from a serious medical condition which meant she occasionally lost consciousness without warning. She suffered from post-traumatic stress disorder having been raped and tortured in her country of origin which caused many side effects including sleepwalking. She often wandered the streets at night when she was asleep and had been robbed and assaulted. In her desperation to find money and food she had turned to prostitution and was living in a squat with a man she worked for.

NASS had refused to support Sarah. They did not accept she was destitute, saying that she access to private means of support. They also stated her fresh claim had a limited chance of success.

The ASAP represented Sarah and argued that she was destitute. There were police reports stating she had been involved in prostitution and sleeping rough. Her doctor had also been very concerned about her health and safety. ASAP also said that NASS could not comment on whether her fresh claim had any prospect of success. This contradicts their own policy as Policy Bulletin 71 states that support can only be refused on the basis of a fresh claim if the fresh claim has no content whatsoever or if it contains information that has already been considered by the Home Office. Sarah won her appeal.

Case Study 2 – Mohammed

Mohammed was an asylum seeker receiving Section 95 support as he had not received a decision about his asylum claim. NASS stopped his support and he had to leave the accommodation because NASS said that he had breached his support conditions and abandoned the property.

The accommodation provider had written to him and told him they were coming to inspect the property. Mohammed couldn't read English and couldn't get the letter translated so was out when the accommodation officer came to visit him. No one had told Mohammed that these visits were a condition of his support and

the letter did not state this either. The accommodation officer entered his room and told NASS that Mohammed had left the accommodation because there were very few belongings there.

As his appeal, Mohammed told ASAP that he didn't have any belongings except those which were in his bag which he always carried with him as he was afraid they would be stolen from the accommodation. He had not known about the accommodation inspection as he could not read the letter and he had never been informed of the conditions of the support. ASAP represented him and argued that he had not abandoned the accommodation and that he should have been told the conditions of his support. His appeal was allowed.

Case study 3 - Karim

Karim was an asylum seeker from a Middle Eastern country. He slept rough for more than two years, including a three-month stay at an airport, before his appeal was allowed by the Asylum Support Adjudicator where he was represented by the ASAP.

His asylum claim was rejected in summer 2003 and his solicitors submitted fresh representations in mid 2004 together with fresh evidence to support his claim. However, until early 2005 Karim was never informed of the existence of Section 4 support to which he was entitled to because he had made further representations to the Home Office in relation to his asylum claim.

Initially he was wrongly advised by one of the advice agencies that all those who want to qualify for Section 4 support must take reasonable steps to leave the country. Terrified of returning to his country of origin where his father was recently arrested in his stead, Karim decided not to apply for section 4 support and to continue sleeping rough, relying on handouts from friends, churches and other voluntary organisations and occasionally sleeping on the floor of those who provided him temporary accommodation lasting only for a few days at a time. Many months afterwards, another agency correctly advised him that he should be entitled to Section 4 support because of his further representations.

In 2005, 10 weeks after he applied for Section 4 support, NASS refused to award Karim any support because they did not believe that he was destitute. When the ASAP intervened Karim was feeling unwell and extremely distressed and frustrated. He was also under medication for stress and anxiety, as well as suffering from a dental infection and pain.

During the hearing, the ASAP successfully argued that there was enough evidence to prove Karim's destitution and helped him argue that he was entitled to Section 4 support. The Adjudicator allowed the appeal and he is now provided with Section 4 support from NASS.

Case Study 4 – Sasha

Sasha was a failed asylum seeker from Africa. A year after she arrived in the UK to claim asylum she discovered that she was HIV positive. She kept this secret from the family who took her in on an emergency basis. The family was expecting a baby and Sasha noticed that she was not welcome any more. Despite many attempts, she could find no one who could provide her somewhere to stay.

At the same time Sasha was finding it increasingly difficult to store her medication safely away from the family's small child with whom she was sharing a room and was very worried that the child might swallow her medication by mistake. She was given £10 by the Social Services which was not enough to buy her three nutritious meals a day to sustain her energy levels and to enable her to take her medication. Sometimes she skipped her medication when it was impossible to take it in private. Her health was deteriorating with a decreasing CD4 count and loss of appetite. She also started suffering from severe headaches which resulted in daily nose bleeding, for which her doctor said she needed a CT scan.

Sasha's immigration solicitor, who was preparing to make fresh representations, helped her apply for Section 4 support from NASS because she was unable to travel in the meantime. Sasha's application was turned down because NASS did not accept the medical evidence she submitted and claimed that she should take reasonable steps to leave the country because she was fit enough to do so.

The ASAP helped Sasha explain the significance of her doctor's letter to the Adjudicator during the hearing and argue that she was indeed unable to travel at that moment. The Adjudicator accepted this argument and allowed her appeal.