

**February 2007**

© Asylum Support Appeals Project

**ASAP**

ASYLUM  
SUPPORT  
APPEALS  
PROJECT

# Failing the Failed?

**HOW NASS DECISION MAKING IS LETTING DOWN  
DESTITUTE REJECTED ASYLUM SEEKERS**

**A report by the Asylum Support Appeals Project (ASAP) into the quality of decision making within the National Asylum Support Service (NASS) and how poor decision making is leaving rejected asylum seekers unnecessarily destitute.**

[www.asaproject.org.uk](http://www.asaproject.org.uk)

Registered Charity:  
1105625

Company Limited by  
Guarantee: 04763838

*Asylum Support Appeals Project (ASAP) is an advocacy organisation working to reduce destitution amongst asylum seekers in the UK by protecting their legal rights to food and shelter. ASAP provides free legal advice and representation to asylum seekers in their asylum support appeals when their housing and financial support has been refused or terminated, as well as second-tier legal advice and training on asylum support law for refugee community organisations. ASAP's policy work and strategic litigation work aims to change inhumane asylum policies which are forcing many asylum seekers into long-term destitution.*

**ASAP, Cornerstone House, 14 Willis Road, Croydon CR0 2XX. [www.asaproject.org.uk](http://www.asaproject.org.uk)  
Company limited guarantee no. 04763838, Registered charity no. 1105625**

## Contents

<b>Executive Summary</b>	<b>4</b>
<b>Part One: Introduction</b>	<b>6</b>
<b>Failed Asylum Seekers and Section 4 Support</b>	<b>6</b>
<b>Qualifying for Section 4 Support</b>	<b>7</b>
<b>Decision Making Process Flowchart</b>	<b>8</b>
<b>The First Hurdle: The Destitution Test</b>	<b>9</b>
<b>The Second Hurdle: Meeting the Criteria and Getting Support</b>	<b>10</b>
<b>After Support is Refused: What Happens Next</b>	<b>12</b>
<b>Asylum Support Appeals</b>	<b>12</b>
<b>A Fair Hearing?</b>	<b>13</b>
<b>Part Two: Poor Decision Making: Evidence</b>	<b>15</b>
<b>Destitution: Mistakes at the First Hurdle</b>	<b>16</b>
<b>Destitution and Human Rights</b>	<b>18</b>
<b>Other Mistakes With Destitution</b>	<b>18</b>
<b>The Criteria: Mistakes at the Second Hurdle</b>	<b>20</b>
<b>Fresh Claims, Same Mistakes</b>	<b>21</b>
<b>ASAP Summary of Findings</b>	<b>24</b>
<b>ASAP Recommendations</b>	<b>24</b>
<b>Conclusion</b>	<b>26</b>

## Executive Summary

**ASAP is concerned that poor quality decision making is leading to many asylum seekers, in particular failed asylum seekers, being refused access to shelter and financial support when they are actually entitled to it. The result of this is that asylum seekers and failed asylum seekers are subjected to extended periods of destitution when they should be supported. Poor decision making leads failed asylum seekers into poverty.**

**This report is concerned with the quality of decision making within the National Asylum Support Service (NASS), the Home Office department which provides accommodation and financial support to asylum seekers.**

**As of July 2006, NASS, as they have been known, no longer exist and are now absorbed into the Asylum Resources Directorate however in practice decisions continue to be made, at present, in the same way. The term NASS is used, therefore, throughout this report to avoid any confusion.**

**The first part of this report provides background information about the support that is available to failed asylum seekers and how to qualify for it. The second part of the report deals with the results of ASAP's research.**

**ASAP research between January and December 2006 has shown that over 80% of decisions made by NASS contain a misapplication of law or of their own policy.**

**This report highlights examples of this poor decision making and makes recommendations of how it can be improved.**

**ASAP recommends:**

- **All asylum seekers reaching the end of the asylum process be informed of the support that is available to failed asylum seekers and how to qualify for it.**
- **NASS adopt a clear, consistent approach to decision making.**
- **NASS caseworkers receive regular training to allow them to be up to date with changes in the law.**
- **Refusal letters be translated into the language of the recipient.**
- **Public funding be available for asylum support appeals.**

**Good decision making saves time and money and prevents asylum seekers and failed asylum seekers who are entitled to support enduring ongoing destitution.**

***ASAP believes that poor decision making leads to the extended destitution of society's most vulnerable people: asylum seekers. Helen is one of those people. Her story is below.***

**CASE STUDY: HELEN\***

Helen had been refused NASS support. She told ASAP her story.

*"I have been destitute since July 2005. I have had help from the Red Cross, church, friends and day centres. Without support, I can't rest properly.*

*I am restricted all the time. I have problems eating properly – I can't really eat what I need such as fruit and vegetables. I have to eat anything I am given. I have health problems, swollen feet, a bad throat and a cough I cannot get rid of, because I can't rest properly."*

*\*Names changed throughout*

## **PART ONE**

### **Introduction**

Asylum seekers make applications for support to NASS who have to assess whether or not they are entitled to support. Asylum seekers who meet specified criteria are entitled to support under the Immigration and Asylum Act 1999 and it is the NASS caseworker's job to ensure that they make their decision according to the law. NASS support is the only option for asylum seekers who are excluded from mainstream support such as Income Support and Job Seekers Allowance and not allowed to work. For asylum seekers it is NASS support or nothing.

### **Failed Asylum Seekers and Section 4 Support**

Asylum seekers who have reached the end of the asylum process and exhausted their appeal rights are commonly known as failed asylum seekers.

The term failed asylum seeker is used throughout this report. Whilst ASAP acknowledges that the use of the word "failed" may be considered derogatory to asylum seekers who have had their claims refused, failed asylum seeker is the common term used by the Home Office and in the relevant Regulations. The term 'failed asylum seeker' is therefore used here to avoid confusion.

An asylum seeker's right to asylum support (or NASS support) ends 21 days after their asylum claim has been fully determined. The majority of failed asylum seekers are expected to return home and are not entitled to NASS support. Many of them find themselves destitute on reaching the end of the asylum process and losing their NASS support.

Some failed asylum seekers may not be able to leave the UK through no fault of their own. If a failed asylum seeker is temporarily unable to leave the UK or cannot reasonably be expected to do so, they may be entitled to a limited type of support under Section 4 of the Immigration and Asylum Act 1999, commonly known as Section 4 support or "Hard Case" support, provided they are destitute.

In addition to being destitute, there are strict criteria to be met if a person is to be entitled to Section 4 support. These are listed in the Asylum Support (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. To qualify for Section 4 support a failed asylum seeker must pass this stringent two part test.

When a failed asylum seeker makes an application for Section 4 support, NASS are required to assess whether or not that person is

firstly destitute and then meets the necessary criteria which is laid down by law.

***Section 4 support is a legal right. If a failed asylum seeker meets the criteria then they are entitled to support. Many people are, however, being refused support when in fact they are entitled to it.***

This report focuses on decision making in relation to applications for Section 4 support.

### Qualifying For Section 4 Support

Many failed asylum seekers find themselves destitute when their full NASS support comes to an end. Once their claim has been refused NASS writes them a letter in English which explains their support is coming to an end.

ASAP research has found that few of these letters advise that the person may be entitled to Section 4 support. Many failed asylum seekers don't apply for Section 4 support because they simply do not know it exists or if they do, how to get it.

In a report published in 2006, "The Destitution Trap",<sup>1</sup> Refugee Action found that even vulnerable failed asylum seekers did not know any other type of support existed other than full asylum support and those who did were confused about their options and how they could qualify for Section 4 support.

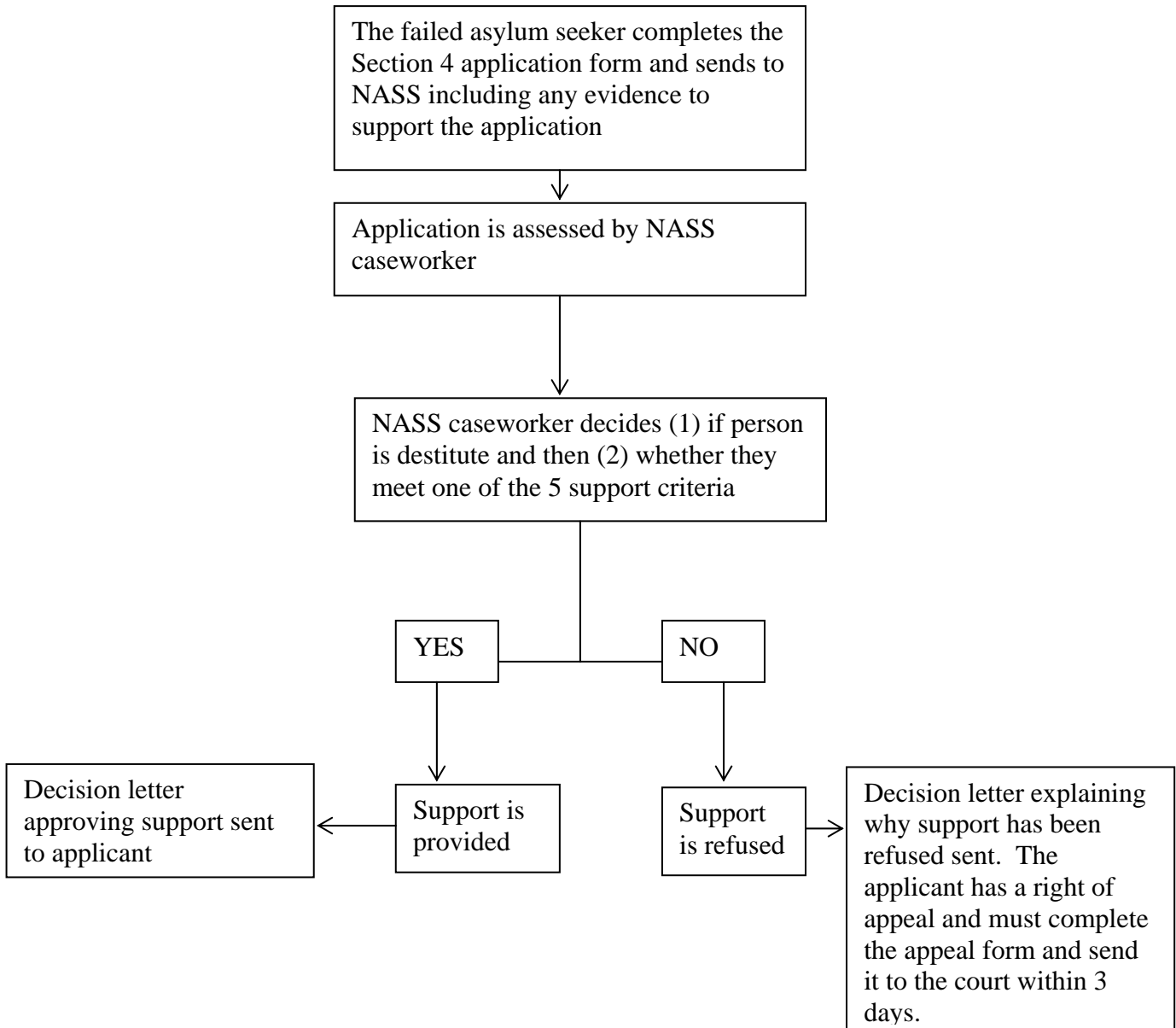
For those who do know about Section 4 support, they then face the task of proving they are entitled to it. The conditions for Section 4 support are strict and a person must pass the two stage test if they are to receive Section 4 support. A failed asylum seeker has little chance of making a successful application for Section 4 support if they are not firstly told it exists and secondly advised of what they have to fulfil to get it.

***ASAP believes that all failed asylum seekers should be advised of their right to apply for Section 4 support when they are told their full NASS support is coming to an end. Although some NASS termination letters advise Section 4 is available, failed asylum seekers should be advised of the conditions of support and the test they will have to pass to get it. All failed asylum seekers have a right to know what support is available and have a fair opportunity to apply for it.***

<sup>1</sup> "The Destitution Trap", Refugee Action, 2006.

**Decision Making Process Flowchart**

The following flowchart shows the process of applying for Section 4 support and the assessment NASS must carry out when deciding if the person qualifies for support.





## The First Hurdle: The Destitution Test

To get Section 4 support a person must firstly prove they are destitute. This means that they cannot meet their accommodation needs and essential living expenses for the next 14 days. This is the test for destitution and it is found in Section 95(3) of the Immigration and Asylum Act 1999.

Many failed asylum seekers find themselves destitute when their claim is finally refused and they exhaust all their appeal rights. Some sleep on the streets begging for food and money, others sleep in churches and rely on charities for food and clothes and some stay with other asylum seeker friends who usually cannot afford to support them. Many asylum seekers who are in NASS accommodation themselves won't help their friends as they worry that NASS will evict them if they do. This is because people in NASS accommodation have to follow conditions of support and are not allowed to let people stay with them. In their recent report, "Down and Out in London",<sup>2</sup> Amnesty International gives examples of destitute failed asylum seekers eating out of bins, working illegally for well below the minimum wage and sleeping rough in doorways.

The following case study highlights a typical situation a failed asylum seeker may find themselves in.

### **CASE STUDY: AHMED**

*Ahmed became a failed asylum seeker in June 2005. He was evicted from his NASS accommodation because his claim for asylum had failed and became homeless. He found a solicitor who made a fresh claim for asylum for him. Ahmed spent 6 months living on the streets. He got food from a charity and sometimes a member of his church would let him stay the night so he could wash himself and his clothes. None of his friends could help him because they lived in NASS accommodation and were scared of being evicted themselves. When Ahmed applied for Section 4 support he had been sleeping in a bus stop in London for 4 weeks and begging for food and money. The charity could not afford to feed him every day and he had run out of people to ask for help at the church.*

**Sleeping rough, overstaying in NASS accommodation, sofa surfing, begging for food and money and living off charitable assistance are all examples of what being destitute means. Ahmed could not access accommodation or meet his essential living needs. The law says Ahmed was destitute.**

**Unable to access accommodation and meet essential living expenses for next 14 days = Destitute**

**Section 95(3) Immigration and Asylum Act 1999**

<sup>2</sup> "Down and Out in London" – The Road to Destitution for Rejected Asylum Seekers. Amnesty International. November 2006.

## The Second Hurdle: Meeting the Criteria and Getting Support

Being destitute is not enough. Once a person has proved that they are destitute they then have to meet one or more of 5 criteria listed in the Asylum Support (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. These criteria are:

- 1) They are taking all reasonable steps to leave the UK
  - This criterion is usually fulfilled by the person approaching the International Organisation for Migration (IOM) who assist people to voluntarily return to their home countries. NASS expect anyone applying for support under this criterion to have registered with IOM's voluntary return programme. The person has to take all reasonable steps to qualify for support so may also be expected to approach their embassy to try and get a travel document.
  
- 2) They are unable to travel due to a physical impediment or another medical reason
  - The requirements for this criterion are very strict. The leading case on whether a person is medically unable to travel is *R(on the application of the Secretary of State for the Home Department) v Chief Asylum Support Adjudicator*.<sup>3</sup> In this case it was established that to qualify for Section 4 support for medical reasons the person should firstly be unable to leave the UK and secondly that inability must be by reason of a physical impediment to travel or for some other medical reason. This criteria is only likely to be met if the failed asylum seeker provides medical evidence which clearly states they are unable to travel, the medical reasons why and how long they are likely to be unable to travel for. A letter of this type should be accepted as evidence that the failed asylum seeker is unable to travel.
  
- 3) They are unable to leave the UK because in the opinion of the Secretary-of -State there is no viable route of return to their country of origin available
  - This criterion is not currently in use as the Secretary-of-State has to make a declaration of policy that no safe route exists to a particular country. There is no such declaration of policy in respect of any country at this moment in time.

---

<sup>3</sup> CO/10382/2005

- 4) They have made a claim for Judicial Review in relation to their asylum claim and have been granted permission to proceed
- If a person has claimed Judicial Review of their asylum decision and has been given permission to proceed they are entitled to Section 4 support. The court will give the person evidence of this and if this is provided to NASS there should be no problems with support being provided.
- 5) The provision of support is necessary to avoid a breach of the person's human rights under the Human Rights Act 1998.
- NASS interpret this as meaning the person has made a fresh claim for asylum or an Article 3 claim within the meaning of the Human Rights Act 1998 that has been received but not recorded. The majority of failed asylum seekers who apply for support on this basis have made a fresh claim for asylum however this criterion could be interpreted in other ways. All the decisions relating to this criterion considered for this report however did involve a fresh claim for asylum.

Being destitute in itself is not considered a breach of a person's human rights in order to get NASS support. A destitute failed asylum seeker must also meet one of these 5 criteria.

The criteria are so strict that in reality it is very unlikely that a person will qualify for support unless they have made a fresh claim (5) or are taking all reasonable steps to leave the UK (1). The remaining criteria are so narrow they are extremely difficult to meet.

Once NASS has decided whether or not to provide a person with support they must issue that person with a decision letter. In the case of a negative decision NASS must explain all the reasons why support has been refused. These letters are written in English.

Many failed asylum seekers think they can only get Section 4 support if they agree to return home. Most people are too scared to return home and as a result do not apply for Section 4 support in case they are forced to return.

***The majority of NASS letters which inform a failed asylum seeker that their full NASS support is coming to an end state that they may be able to get Section 4 support if they volunteer to return home: "As a failed asylum seeker you are required to take to take steps to voluntarily leave the United Kingdom...should you decide to make an application to IOM we would invite you to re-apply for support under Section 4". Volunteering to return home is one of 5 ways of getting Section 4 support – NASS should advise failed asylum seekers of ALL 5 criteria so those unable to return know their rights to support.***

## After Support is Refused: What Happens Next

If the failed asylum seeker does not agree with the decision NASS has made they have a right to appeal against that decision. These appeals are called asylum support appeals.

### *Asylum Support Appeals*

Asylum support appeals are heard by the Asylum Support Adjudicators. The ASA are an independent body set up by the Home Office to hear appeals against the refusal or withdrawal of NASS support.

Making an appeal is not easy. A person who has been refused Section 4 support has only 3 days in which to make an appeal to the ASA. Many find it difficult to appeal on their own and need to find someone to help them. A lot of people won't even be able to understand the letter until someone translates it for them. In some cases, the failed asylum seeker will not appeal at all because they do not understand the letter, cannot get advice and in some cases don't even know they can appeal. Many of those who do appeal, do so with no help whatsoever. Even if a person does manage to complete and send off the appeal form, they then have to respond to any requests for further information the ASA request (known as Directions and sent to the person appealing), gather evidence and speak for themselves in the hearing. One failed asylum seeker told ASAP this:

*"I received directions from the ASA but I did nothing. I could do nothing. I didn't feel I had enough time to get documents to send to the court. I cannot read nor write. I didn't know what to do."*

The ASA hears both oral appeals (where the person appealing, known as the appellant, attends in person) and paper appeals (where no-one attends the hearing and the ASA makes a decision solely on the evidence the appellant has sent with their appeal).

The ASA can make one of three decisions when hearing an appeal. They can **allow** the appeal, which means they think the decision made by NASS was wrong and that the appellant is entitled to support. They can **dismiss** the appeal, which means they agree with NASS and that the person is not entitled to support. Finally if there is not enough evidence to make a decision or NASS have not considered a particular point they can **remit** the appeal. This means that NASS have to make a new decision. If NASS once again make a negative decision, that person will have a further right of appeal.

## A Fair Hearing?

There is no public funding available in this area of law so failed asylum seekers who are refused Section 4 support cannot get solicitors to represent them in their appeal. The 3 day time limit to appeal also means many people may not be able to get advice about how to appeal so have to try and complete the appeal form and find all the evidence to prove they are entitled to support on their own. ASAP is concerned that many people go to their appeals alone and unrepresented which places them on an unequal footing with NASS who are almost always represented in appeals by a NASS Presenting Officer.

An appeal can be an intimidating place for an asylum seeker who will have to face an experienced and trained NASS Presenting Officer. The person appealing will have to conduct their appeal through a translator and is unlikely to have knowledge of the law or NASS policy. An unrepresented failed asylum seeker is automatically at a disadvantage. In addition many failed asylum seekers have additional support needs.

**56% of all appellants assisted by ASAP at the Duty Scheme had physical and/or mental health problems or had been affected by torture or rape.**

A failed asylum seeker told ASAP this about his asylum support appeal:

*“Of course I needed help. I don’t think I could have done it on my own. I needed help and advice on law and rules. I’d have been very nervous. I could not have said everything by myself.”*

For this reason, ASAP run a duty scheme at the ASA twice a week. Appellants can get free legal advice and representation concerning their appeals from one of ASAP’s own legal advisors or one of their volunteer barristers, solicitors or practitioners. ASAP believes that every person is entitled to good, free legal advice and representation regarding their asylum support appeals. ASAP also believes that when an asylum seeker enters their appeal they should be on an equal footing to NASS who are always represented in the appeals.

**60% of the appellants assisted by ASAP under the Duty Scheme had their appeals remitted or allowed. Of those appellants unrepresented during their oral hearings only 20% had their appeals remitted or allowed in 2004/5.**

**Despite this 99% of appellants still have no legal representation at their asylum support oral hearings in 2004/5.**

Through representing failed asylum seekers at the ASA under the duty scheme, ASAP have noticed that many decisions made by NASS when refusing Section 4 support are incorrect in law, misapply their own policy or contain irrelevant considerations.

In many cases, poor decision making means that the appellant goes on to win their appeal. The effect of this is that the ASA agree that NASS were wrong to refuse support in the first place. The time frame between an original application for support and an appeal can be anything between 2 weeks and 3 months (and longer in some cases). A decision that incorrectly applies the law or policy to the facts of the individual's circumstances means that every day the person is destitute until the appeal is a day they could and should have been supported.

NASS do not "backdate" their support, if they make a mistake the person has to survive without support until they appeal and win.

#### **CASE STUDY: MARY\***

*Mary had been homeless for two years. She had one friend who would give her food and shelter a couple of nights a week in exchange for child care. The rest of the week Mary had to sleep rough. She was so scared of being attacked on the streets she used to sit at crowded bus stops throughout the night so she wouldn't be alone. She got food most days at a drop-in centre. Mary couldn't go back to her country because she had serious mental health problems which meant she was a suicide risk and couldn't fly. With the help of an advice agency she got medical evidence which clearly stated her mental health problems prevented her from flying. NASS on two occasions rejected medical evidence and refused to provide her with support. When Mary appealed she won and was granted support. Three months had passed between making her initial application for support and winning her appeal. Every day of these three months was one Mary should not have had to endure destitute. She was entitled to support from day one.*

## **PART 2**

### **Poor Decision Making – Evidence**

To assess the quality of NASS decision making, ASAP examined 117 Section 4 refusal decision letters issued to failed asylum seekers by NASS who had applied for support between January and December 2006. These were taken from appeals in which ASAP assisted the individual under the Duty Scheme.

**88% of these decisions contained a misapplication or misinterpretation of the law.**

**Only 12% fully assessed the 2 stage test for Section 4 support and properly applied the law to the individual facts of the application. While ASAP welcomes these decisions this percentage is very low and would encourage NASS to increase it.**

Each decision was considered to see if it contained a misapplication of law or NASS' own policy. Many of the decisions also contained comments or points which were irrelevant to the application or were personally judgemental of the applicant. While not wrong in law, examples have been highlighted as they demonstrate a lack of sensitivity to the failed asylum seeker. ASAP is concerned that a judgemental approach, while not unlawful in itself, leads NASS to make decisions that are not correct in law and enforces a negative view of asylum seekers. Such an approach also casts doubt on how objective NASS decision making actually is.

#### **CASE STUDY: ELAN**

*Elan made a fresh claim for asylum because he had converted to Jehovah's Witness and was concerned that he would be persecuted in his own country as a result. NASS said he had deliberately converted to be able to make a fresh claim and avoid removal from the UK. The caseworker's personal judgement led them to make an unlawful decision that Elan's fresh claim would not have a chance of success which in their opinion meant Elan was not entitled to support.*

It should be noted that the decisions used in this report are those of people who managed to get advice and appeal the decision. Many people will not be as lucky or simply assume that NASS have got it right. It is not possible to discover how many decisions NASS make which may be flawed in any given year as many may not appeal meaning no-one will ever examine the decision letter to see if it is right.

ASAP wanted to find out how many people apply for Section 4 support each year, how many are refused and how many do not appeal even though they had a right to.

For this reason ASAP made a request to NASS under the Freedom of Information Act to provide statistical information. ASAP asked the following questions in relation to Section 4 (note: ASAP requested figures for the entire period NASS has been operating rather than just the period to which this report relates):

- 1) How many applications for Section 4 support have been received between 1<sup>st</sup> January 2000 and 31 December 2006?
- 2) How many applications for Section 4 support have been refused between 1<sup>st</sup> January 2000 and 31 December 2006?
- 3) Of the number of applications for Section 4 support refused between 1<sup>st</sup> January 2000 and 31 December 2006, how many generated a right of appeal to the Asylum Support Adjudicators?

In response to ASAP's request, NASS said they were unable to provide this information, claiming that they do not hold statistical information of this type. The only data relating to Section 4 which NASS were able to provide was the number of decisions to grant Section 4 support between the second quarter of 2004 until the present day. The figure provided was 16395 however, ASAP does not know how many of these grants were later terminated.

Despite NASS' response to ASAP's Freedom of Information Act request (that they do not hold statistical information on the number of applications for and refusals of Section 4 support) ASAP has found evidence to the contrary. A Citizen's Advice Bureau report entitled "Shaming Destitution"<sup>4</sup> states that in 2004, there were 16,436 applications for Section 4 support and 10,325 of those applications were approved. The source of this statistical information is referenced to NASS briefing note to the NASS Stakeholder Forum members. This suggests that NASS do in fact hold this information.

ASAP believes this information should be easily accessible to all stakeholders.

To maintain confidentiality no client specific information has been used in this report. Names and some other details such as nationality have been changed to protect the identities of the people appearing in case studies.

### Destitution: Mistakes at the First Hurdle

The test for Section 4 is a two stage test as explained earlier in this report. The person applying for support has to be destitute and meet one of the criteria listed earlier in this report.

---

<sup>4</sup> "Shaming Destitution", Dunsten R. June 2006. Citizen's Advice Bureau.



The first question NASS has to ask themselves in deciding whether a person is entitled to Section 4 support is whether or not that person is destitute.

The test for destitution which NASS should use for Section 4 applications is found in Section 95(3) of the Immigration and Asylum Act 1999 and states that a person is destitute if they cannot access adequate accommodation or meet their essential living expenses for the next 14 days.

17% of the decisions appeared to correctly assess destitution based on the law and the evidence provided by the applicant. ASAP welcomes this positive approach to decision making and encourages NASS to ensure all their decisions are made in this way.

None of the decisions used to produce this report expressly stated the legal test for destitution regardless of whether the issue of destitution was considered. Those decisions that did consider destitution did not make it clear that they were doing so with reference with the legal test. ASAP believes the legal test should be stated in each letter. Good decision making should always highlight the legal test that is being applied and why the person does or does not meet it.

38%, over a third of the decisions, did not address the issue of destitution at all.

*ASAP Comment: NASS should clearly state the test for destitution and explain why the person does not meet it in their decision letters. In an appeal the appellant has to prove they are entitled to support. Given the short time frame they have to do this they need to know exactly what they have to prove in their appeal. They can only do this if NASS make it very clear in the initial refusal letter why they think the person is not destitute or does not meet the criteria.*

In an appeal, NASS have the opportunity to change the decision letter to include destitution by making an application to do so to the Adjudicator. They may not mention that they do not accept the person is destitute in their decision and then suddenly after the hearing has begun, the NASS Presenting Officer says that NASS think the person is not destitute. ASAP strongly believes this is unfair and will always argue that by failing to comment on destitution in the refusal letter NASS have impliedly accepted that the person is destitute and that to change the decision letter at the last minute places the person at even more of a disadvantage. The appeal is hard enough but unless the person knows their destitution is questioned they won't get the right evidence for their appeal.

The remaining decisions were flawed in various ways in regards to destitution as described below.

## Destitution and Human Rights

35% of the total number of decisions stated that the person had to demonstrate that their human rights under Article 3 of the European Convention on Human Rights (ECHR) had been violated in order to be considered destitute. This is not the correct test for destitution. This was the most common mistake in decision letters relating to destitution. Applying the wrong test in assessing destitution is clearly a misapplication of the law. Each contained the following (assumed standard) wording:

*“You have not established the standard necessary to engage the high threshold of Article 3 of the ECHR”*

The test for a breach of Article 3 rights (the right not to be subjected to inhuman and degrading treatment) is indeed a high test and requires a much higher standard than the actual test for destitution (that a person is unable to meet their living expenses and secure adequate accommodation for the next 14 days).

The case studies that follow give examples of how applying the destitution test too strictly can have serious consequences for the failed asylum seeker.

### CASE STUDY: *Bina*\*

*Bina had been homeless for 3 months. She had spent this time sleeping rough in a squat with a man who gave her money in exchange for sex. She was also expected to have sex with his friends. Bina suffered from post-traumatic stress disorder which caused her to sleepwalk putting her in danger on the streets at night. She applied for Section 4 support because she had a fresh claim. NASS said she was not destitute even though she had evidence from charities and the police which showed she was homeless.*

### CASE STUDY: *Mohammed*\*

*Mohammed had been staying in the Mosque for 6 weeks. Members had been giving him food and sometimes he could have a shower and wash his clothes at a friend's house. Most of his friends could not help them as they were in NASS support themselves. Sometimes Mohammed would have to sleep outside if he could not get into the Mosque and when this happened he would go onto a night bus without paying so he would be in the warm and off the streets. He had been caught but could never pay the fine. Despite letters from the Mosque members NASS said he was not destitute.*

**Both Bina and Mohammed were found to be destitute on appeal.**

## Other Mistakes with Destitution

**15% of decisions made various other errors in regards to destitution.**

5 of the decisions considered related to people who were in detention and applying for Section 4 support to facilitate a bail application. All stated that the person was not destitute because they were detained and therefore had access to private means of accommodation and support. One decision letter said;

*“I note you are currently detained at Colnbrook Detention Centre. I conclude that your needs are being met and you have access to a private means of support”.*

It has been made very clear by the ASA in May 2005, that a person in detention is destitute<sup>5</sup> and that accommodation in a prison cell or a detention centre is not adequate accommodation for the purposes of destitution. NASS should have applied this case law correctly but did not.

A person’s detention should not continue for the want of Section 4 accommodation. Every person applying for NASS support who is detained for no other reason than needing an address should be considered destitute and able to access to Section 4 support.

3 decisions suggested that the person’s family members who had status in the UK should stop relying on benefits and instead find employment which would then mean they could support them. For example:

*“You state that your mother is unable to provide you with support. She has been granted Leave to Remain...your mother (sic) particular situation can change at any time if she undertakes paid employment rather than continue to access welfare benefits. She can at present provide you with accommodation if your mother secure (sic) paid employment”.*

This is incorrect as NASS cannot dictate whether a person related to the applicant should work or claim benefits. NASS should look at the applicant’s circumstances at the time of the application. Whether or not a person may or may not be able to help the applicant in the future is irrelevant.

2 stated that inadequate accommodation does not equal destitution. For example:

*“Lack of adequate accommodation is a problem that does affect many people but it is not considered that a person with lack of adequate accommodation is destitute”*

<sup>5</sup> ASA/05/05/9315 available at [www.asylum-support-adjudicators.org.uk](http://www.asylum-support-adjudicators.org.uk) .

This is wrong in law. Section 95(3) of the Immigration and Asylum Act states that a person is destitute if they do not have adequate accommodation.

2 stated that the person had brought their destitution on themselves because they did not apply for Section 4 support as soon as they became destitute. For example:

*“You state have had no income for over a year, however it is reasonably clear you were destitute for all that time. You could and should have applied for Section 4 support sooner”*

Many asylum seekers are not aware they may be entitled to Section 4 support. Not applying immediately cannot be the decisive factor that a person is not destitute.

*ASAP comment: If a person proves evidence that they do not have any secure accommodation and no access to money to allow them to buy food then the test of destitution is met and NASS should accept their destitution in express terms.*

### The Criteria: Mistakes at the Second Hurdle

Many applications for Section 4 are made on the basis that the person has made a fresh claim for asylum that has been sent to the Home Office. It is not reasonable to expect a person to leave the UK when they have outstanding representations at the Home Office.

In this situation a failed asylum seeker who is destitute can apply for Section 4 support on the basis that support is necessary to avoid a breach of their human rights under the Human Rights Act 1998. Having made a fresh claim for asylum is one way to get support under this criterion.

NASS Policy Bulletin 71 outlines the procedure NASS caseworkers must follow when they receive an application for Section 4 support on the basis that the person has made a fresh claim for asylum. The Policy Bulletin says that NASS caseworkers can look at the fresh claim and decide to refuse support only if:

1. The fresh claim contains no detail whatsoever (e.g. if it just states that the person will be sending new information at a later date).
2. The fresh claim rehearses previously considered material (information that the Home Office and any appeal court has seen before).

These are the only circumstances in which a NASS caseworker can refuse to provide support when a person has made a fresh claim.

It should be noted that Bulletin 71 is not the law but NASS' interpretation of the law. However, their approach to fresh claims was accepted as an accurate interpretation of the law in the case of *AW v LB Croydon, A, D & Y Hackney*.<sup>6</sup>

There is nothing in statute or case law which allows NASS to refuse support on the basis that the fresh claim has no merit or chance of success. To do so confuses the role of NASS (to provide support) and the role of IND (to consider claims for asylum).

### Fresh Claims, Same Mistakes

76% of the decisions considered were in response to applications for Section 4 support based on the fact the person had made a fresh claim for asylum.

19% of the decisions stated that the person was not entitled to support because in the opinion of the NASS caseworker the fresh claim stood a limited chance of success. For example:

*"It is clear the grounds put forward clearly do not establish that a fresh claim should be accepted in line with paragraph 353 of the Immigration Rules as they stand a limited chance of success."*

***ASAP Comment: This contradicts the law and NASS' own policy in Bulletin 71. Support should always be provided where a destitute failed asylum seeker has made a fresh claim which contains new material not considered by the Home Office.***

11% of the decisions stated that support would not be provided because in the NASS caseworker's opinion, the person would be unlikely to be granted any type of status in the UK because they were not considered to be "credible". The following is a list of examples of reasons NASS gave to show why they thought the person's fresh claim would fail on account of their credibility (quotes are replicated exactly as they appeared in the decision letter):

- Suggesting the applicant had deliberately had a child to delay removal from the UK: *"You knew you had no right to remain in the UK before the birth of your second child [name removed]. Therefore it is reasonably questioned your actions while knowingly you had no right to remain in the UK, that you are intentionally trying to assist your failed asylum seeker status to that of a positive outcome"*.

<sup>6</sup> CO/2016/2005

- **Informing people that making meritless asylum claims undermines their credibility:** *“You have simply submitted further representations to the Home Office in an attempt to delay your removal from the United Kingdom. By doing so you undermine your credibility and the validity of your claims”.*
- **Stating that the individual had deliberately converted to the Christian faith to make a fresh claim:** *“You have decided through your own volition to convert fully to the Christian faith some 15 months after your asylum claim was determined to be unfounded. Therefore these developments cast doubts on your true intentions.”*
- **That the applicant could not stay in the UK for medical reasons and that British Nationals and the tax-payer had first call on the NHS’ resources which are not for failed asylum seekers:** *“You cannot remain in the UK to receive/maintain medical treatment. The resources of the National Health Service are limited and it would be unrealistic to expect the NHS to treat everyone who could not obtain treatment of a similar standard in their own country as to do so would be to overload the NHS and be unfair to British Citizens who, as nationals and tax payers, have first call on the NHS.”*

**CASE STUDY: Felix\***

*Felix was a failed asylum seeker who had made a fresh claim for asylum. Since his asylum claim failed, he had been interviewed by the police in relation to an assault. Felix had gone to the police station voluntarily and had not been arrested. He was never charged with assault or any other offence.*

*He had told his accommodation provider about what happened and they told NASS. When NASS later made a decision on his Section 4 application they said that because he had been involved in a serious offence he would never be granted asylum and that he was “not conducive to the public good”. He was refused Section 4 support.*

*On appeal, ASAP told the court that as Felix had never been convicted of any crime he was entirely innocent of any offence. NASS could not comment on the chances of his fresh claim succeeding and had no right to state that Felix was a risk to society. Felix won his appeal.*

***ASAP Comment: This contradicts the law and NASS’ own policy in Bulletin 71. Regardless of whether the NASS caseworker thinks the claim has any merit, if the evidence is new then support should be provided. It is IND’s job to decide whether the applicant or their new evidence is credible and not NASS’.***

***ASAP is also concerned that comments of this type appear judgemental and amount to a personal opinion rather than an objective decision based on facts and law.***

3% of the decisions stated that the case of *AW v LB Croydon, A, D & Y Hackney* (discussed earlier in this report) gave NASS caseworkers the authority to comment on the veracity of fresh claims. This is incorrect. The position in Bulletin 71 is an accurate description of NASS' powers and any comment on credibility goes beyond those powers and NASS' remit.

10% decisions stated that making a fresh claim for asylum did not qualify for Section 4 support at all:

*"We are not prepared to provide support purely on the basis that your latest representations may or may not be accepted under the Paragraph 353 of the Immigration Rules"*

***ASAP Comment: This completely undermines the purpose of Section 4, the Regulations and case law from the ASA and higher courts which support the well established principle that further representations qualify a person for Section 4 support subject to the test in Bulletin 71. NASS is entirely unjustified in adopting this position in their decision making.***

### Mistakes in Decision Letters - in Brief

#### Destitution:

- 0% outlined the test for destitution
- 33% did not consider destitution
- 35% applied the wrong test for destitution
- 15% made miscellaneous errors

#### Criteria:

- 19% unlawfully decided a fresh claim had no chance of success
- 11% stated the applicant was not credible
- 10% said a fresh claim did not mean a person could get Section 4 support.
- 3% misapplied case law

## ASAP Summary of Findings

**Out of all the decisions considered 83% were flawed in respect of destitution and 43% were flawed in terms of deciding whether the person met the criteria for support.**

12% of all the decisions appeared to address the questions of destitution and the qualifying criteria in a way which was compatible with the law and took account of the evidence provided by the individual. ASAP welcomes this and would encourage NASS to increase this percentage of good decision making. ASAP is concerned however that 88% of the decisions contained a misapplication of law in terms of destitution and/or the qualifying criteria.

ASAP acknowledges that not all of the decisions which contained such a mistake will go on to be successfully appealed. ASAP statistics show that 60% of the cases they represent at the appeals are allowed or remitted. ASAP recognises that this means that 40% of their appeals are dismissed and uphold NASS' decision that the person is not eligible for support. Although this suggests that in those cases NASS may have made the right decision ASAP is concerned that it may have been reached following a flawed process and that the reasoning which brought them to the correct decision was wrong. The ASA are entitled to dismiss an appeal on a different basis to which NASS refused to provide support and where appeals are dismissed it cannot be assumed that the reasoning given by NASS in their decision letter was correct.

## ASAP Recommendations

ASAP suggests that NASS adopt an approach to decision making incorporating the practices outlined below. Such an approach will lead to more objective, fairer decision making.

- At the end of the asylum process:

When NASS support ends initially (when the asylum seeker is refused asylum and becomes a failed asylum seeker), the letter which discontinues support should advise that Section 4 support is available and the criteria the person must meet to get it.

- Refusal letters:
  - Should start by explaining that to get Section 4 support a person must be destitute and meet one of 5 qualifying criteria.
  - Should set out the actual test for destitution in express terms.
  - Should list the evidence provided by the applicant.



- Should address the evidence provided and explain in clear terms whether or not the person is considered destitute. If they are considered destitute this should be stated expressly. If they are not considered to be destitute then the caseworker should explain why this decision has been made and why the evidence has been rejected.

- Should list the five qualifying criteria then consider in turn along with any evidence that has been provided to decide whether the person meets any of the criteria.

- If the person meets the criteria this should be expressly stated. If they do not an explanation should be given as to why including an explanation as to why any evidence provided has been rejected.

- Decision makers should:

- Remain within the law and their own policy as highlighted in this report. Comments on the credibility or honesty of the individual are judgmental and unfair and should not be made. Caseworkers should remain objective at all times.

- Be prepared to negotiate with advice workers and legal representatives following a negative decision. Appeals are expensive and time consuming and those that can be avoided should be. Case workers should be prepared to discuss a negative decision with a failed asylum seeker's representative and, if applicable, be prepared to reconsider their decision.

- Receive regular training on the law surrounding asylum support in order for them to be up to date on relevant statute and case law.

Good decision making also leads to a reduction in administrative costs for NASS and for over burdened advice agencies and refugee community organisations trying to advise individuals on how to appeal against a decision. Good quality decisions are less susceptible to appeal which saves NASS, the ASA (and ultimately the public) money. It also means a failed asylum seeker may be spared the stressful experience of an appeal which may be unnecessary and an extended period of destitution that is unlawful.

A standard decision making process like the one in this report combined with adequate training on the law and policy would lead to better decisions being made.

- Applicants:

- Should be able to read and understand the decision letter when they receive it:

**ASAP recommends that all decisions made under Section 4 should be translated into the language of the applicant. ASAP recognises the expense this would attract however this could ultimately lead to a reduction in appeals or a speedier appeals process. A person should be able to understand the decision letter as soon as it is received. This will allow them to understand why they have been refused support, whether they want to appeal and that they have to get advice straight away.**

**- Should have access to free legal advice and representation:**

**Public funding should be available so asylum seekers can be represented in their appeals. No one should have to enter an appeal alone and face a trained Presenting Officer who has wide knowledge of the law. A person who is unrepresented in this scenario is arguably not getting a fair hearing within the meaning of Article 6 of the European Convention on Human Rights.**

### Conclusion

**ASAP knows that not everyone who applies for Section 4 support will be entitled to it. Every failed asylum seeker, however, is entitled to a fair, objective process and to understand what it is they have to prove both to NASS and in an appeal in order to get support.**

**The human cost to poor decision making is great. Every time a person is wrongly refused support that person continues to live in poverty with no or limited access to accommodation and food. Every time NASS make a mistake they risk forcing someone who is actually entitled to support into destitution and exposing them to the associated dangers of living on the street.**

#### *CASE STUDY: Anna\**

*Anna had been refused Section 4 support. She had been sleeping rough and was befriended by a religious community and she went to live in a shared house. She had to leave when the leader of the community insisted she had to have sex with him to be welcomed into their community on a long-term basis.*

*Back on the streets Anna was repeatedly approached by men for sex. She finally got help from a local advice agency who made a fresh application for support and helped her make an appeal. Anna won her appeal and was granted Section 4 support.*

**Anna is one example of how vulnerable homeless women can be exposed to sexual abuse whilst homeless. Refugee Action's research "The Destitution Trap" highlights that many destitute asylum seekers who are living on the streets find themselves in dangerous situations or**

**turn to criminal activity such as prostitution or committing minor offences just to spend a night in a cell at a police station.**

**ASAP believes that precise, thorough decision making made in accordance with the law will lead to a reduction in the number of failed asylum seekers who are left destitute when they are in fact entitled to Section 4 support. ASAP urges NASS to improve their decision making process to protect the rights of one of society's most vulnerable group: failed asylum seekers.**

# ASAP

ASYLUM  
SUPPORT  
APPEALS  
PROJECT

# Advice line for advisors

**Do you work  
with asylum  
seekers?**

**Do you need  
independent  
legal advice on  
their rights to  
housing and  
benefits?**

**We provide advice on the following:**

- Who qualifies for NASS support and how to apply?
- Who has the right of appeal if NASS decides to refuse or withdraw support?
- Advice on how to appeal against NASS refusals.
- Advice on support for unaccompanied minors.
- Advice on support for asylum seekers with physical and mental health problems.
- Advice on support for 'failed' asylum seekers including Section Four support and who can access support from social services.

**If so, call our advice line on 0845 603 3884**

**N.B WE DO NOT PROVIDE IMMIGRATION ADVICE**

Supported by



ASAP is an independent legal charity that gives advice to organisations who are helping asylum seekers with their NASS support issues.

Asylum Support Appeals Project charity no 1105625  
and company no.04763838

**[www.asaproject.org.uk](http://www.asaproject.org.uk)**