

ASAP Case Study March 2007

Why is legal representation important? Proving “destitution” at the Asylum Support Adjudicators

Introduction

The Asylum Support Appeals Project (ASAP) is the only agency in the UK specialising in asylum support law. We want to reduce destitution among asylum seekers by protecting their legal rights to food and shelter. In reality, this means that ASAP provides free legal representation to asylum seekers who are challenging NASS decisions to refuse or terminate their support.

ASAP runs a twice weekly Duty Scheme at the Asylum Support Adjudicators (ASA) in Croydon to help those asylum seekers who are unable to access legal representation. The ASA is the tribunal which hears appeals against NASS decisions to either refuse or withdraw asylum support. Barred from employment and mainstream benefits, losing NASS support means destitution for most asylum seekers.

Most of the asylum seekers we have met at the Duty Scheme had been destitute for months, sometimes several years. More than half of them had suffered from mental/physical ill health such as post traumatic stress disorder, depression, self-harm and HIV, in many cases resulting from trauma they experienced in their country of origin such as torture and rape. The ASAP had to set up a small emergency fund to provide food and drinks because some were too weak to give evidence during hearings.

There is no public funding (Legal Aid) available for this type of appeals. This means that many asylum seekers must attend their appeal hearings without any legal representation. There are between 2500 and 3000 appeals a year heard at the Asylum Support Adjudicators.

It is important to remember that asylum seekers face many barriers before they can even appeal against NASS decisions. NASS letters are issued only in English, they have only three days to complete Notice of Appeal forms and often without the help of competent legal advisors. ASAP suspects that many asylum seekers simply do not exercise their right of appeal because they do not know how to.

Just like any other area of law, asylum support law is complex, and it is becoming increasingly so. This case study, taken from our Duty Scheme work, illustrates that legal representation is so important as it helps asylum seekers to present the full facts of their circumstances to the court.

Case study Mr A – considered to have not meet “destitution” criterion

Mr A was an African national who had been in the UK since 2003. He had received a final refusal on his asylum claim in September 2005. He applied for Section 4

support in December 2006 on the basis that he was destitute and he had made a fresh claim for asylum.

To qualify for Section 4 support an applicant must first be a 'failed' asylum seeker. This means that any appeals relating to their initial asylum claim have been refused and fully determined. They then need to pass a two stage test. Firstly they must show they are destitute. This means that they will not have access to food and/or accommodation within the next 14 days. Secondly, the person must meet one of the five qualifying criteria. Making a fresh claim for asylum or a claim under Article 3 of the European Convention on Human Rights (ECHR) is one of the qualifying criteria for Section 4 support as long as the fresh representations contain information that has not previously been considered, or was not available, during their original asylum claim.

Mr A was refused Section 4 on the basis that NASS did not consider him to be destitute. In their refusal letter they stated that;

'our records show that your NASS support ceased in Sept 05 and since that time you were accessing support through private means. You have not provided any evidence that this support is no longer available to you therefore the Secretary of State is not satisfied that you are destitute'

Although the test of destitution is whether the client has access to food and housing in the next 14 days, ASAP feels that the evidence asylum seekers are expected to provide to the court proving destitution often goes well beyond this test.

For example, NASS Policy Bulletin 71 provides guidance to NASS staff and others on the criteria that a 'failed' asylum seeker must meet to qualify for Section 4 support. Regarding destitution, it states that;

'if a person has been without support for a prolonged period, then it would be reasonable for a caseworker to assume that the person has access to an alternative source of support and therefore may not be destitute.'

For this reason it is vitally important that asylum seekers are able to access advice before their hearing about the type of evidence they will be expected to provide in court to prove they meet the criteria. However, as this case highlights, those appealing against NASS decisions to refuse or withdraw support are not entitled to legal aid which means there are very few organisations providing advice in this area of law. Many can only offer limited support such as help with completing the appeal form.

Meeting Mr A at the Duty Scheme

ASAP assisted Mr A with his appeal under the twice weekly Duty Scheme we run at the Asylum Support Adjudicators (ASA) tribunal. ASAP meets the asylum seekers appealing against NASS for the first time on the day of the hearing. This means

that ASAP normally has between 30 minutes to 1 hour to take instructions, advise and prepare a case for their appeal hearings.

Like many of those we see at the tribunal, Mr A was not sure of the purpose of the hearing or the role of the ASA and how they differed from the Immigration and Asylum Tribunal. This was made worse by the fact that Mr A had received a limited amount of advice before the hearing. ASAP's first task was to help Mr A understand why he was there and what his appeal would cover.

Crucially, in Mr A's case, this lack of access to competent advice prior to the hearing date, coupled with his homelessness, meant that he had not responded to the directions the ASA had issued approximately 3 days prior to his hearing. The first time he saw these directions was on the day of his appeal.

Directions are a list of instructions sent to the Appellant (the asylum seeker who is appealing), and to their representative if they have one, outlining the type of evidence the Adjudicator wants them to submit to the court before the hearing or bring to the court on the day of the hearing.

For example, as Mr A had been refused on destitution grounds he was asked to provide evidence covering the following:

- a detailed statement that sets out each address he had lived at since his NASS support ceased, how the accommodation was funded, how he supported himself during this period and why the support could not continue
- evidence of attempts to seek charitable support
- copy of bank statements
- signed witness statements from as many of the persons and organisations who have supported or / housed him as possible since September 03 that set out the addresses, the amount and form of support, the dates during which this support was offered and precise reasons to demonstrate what has changed so that this support cannot continue to be offered
- evidence from three of the most recent people he has stayed with detailing how long he spent with them, whether he can live with them now and, if not, why not
- evidence that he has been or is about to be evicted from his most recent address

However for many of those applying for Section 4 who are destitute and have no money, it can be very difficult to gather such evidence. In this case Mr A had not been in touch with the advice agency since he had submitted his appeal and they had been unable to contact him as he had no fixed abode and no telephone number.

ASAP informed Mr A that as he had been refused on destitution grounds it would be necessary to take a full chronological account of how he had been surviving since his support stopped. As he had been unable to respond to the directions we informed him that we would have to rely heavily on verbal evidence during the hearing.

Mr A's story

Mr A told ASAP that since his support ceased he had been moving between various friends (mostly other asylum seekers) in the north west of the country. Most weeks he slept at four different addresses. The majority of the accommodation he stayed in belonged to other asylum seekers. In terms of feeding himself, he was heavily reliant on food parcels from the Red Cross and visited them on a weekly basis. They also gave him toiletries and other essential items such as warm clothing and shoes. He was also given small amounts of money from his own community. This ranged from two to five pounds. Often this money was given to him by other asylum seekers who were being supported by NASS. These asylum seekers also regularly shared their food with him and gave him second hand clothes. Mr A said that he frequently went without food and was often hungry. He washed his clothes and showered whenever he got the chance and was forced to walk everywhere as he did not have any money for bus fares.

Mr A applied for Section 4 support in December 2006. Up until that point he was unaware of the full criteria of Section 4 support. Like many other asylum seekers, he had been wrongly advised that Section 4 support was only given to those who signed up with IOM (International Organisation for Migration) to return to their country of origin. Approximately nine months before, his immigration solicitor had made a fresh claim for asylum on his behalf. This was based on new information that had emerged since his asylum appeal was dismissed in September 2005.

However at this point Mr A was not advised that he could apply for Section 4 support on the grounds that he had outstanding representations with the Home Office. He eventually learned he could qualify for section 4 support on these grounds from another asylum seeker who was in a similar situation.

The ASAP advised Mr A that the fact that he had without support for over a year and a half would weigh heavily against him. This might sound odd to those unfamiliar with asylum support law, but because Mr A had survived so long without access to section 4 support, NASS would assume he had an alternative source of support and was therefore not destitute. As a consequence he would have to answer detailed questions about how he had been surviving since September 05.

ASAP explained that the majority of this questioning would be done by them and this would involve going over all the evidence he had provided during the interview. It would include details of all the addresses Mr A stayed at, the status of the individuals he stayed with, the type of accommodation they had, how often he moved around, whether there was anyone who could give him long term support, where he got his food and clothes from, how often he ate, how he washed his clothes, why he had not applied for support before now and whether he received

the directions from the ASA. ASAP explained that the purpose of these questions would be to show that he was destitute as he was having difficulties feeding himself and had no secure accommodation.

ASAP also advised Mr A that the NASS Presenting Officer would ask him questions as might the Adjudicator. Based on our long experience of assisting asylum seekers in the court ASAP was able to tell him what these questions were likely to cover. We emphasised the importance of providing consistent and honest answers as the Adjudicator would also take this into account when making their decision.

The hearing – Mr A's appeal allowed

Throughout the hearing Mr A remained very calm. In response to ASAP questions he gave a vivid account of his daily life and the difficulties he encountered trying both to feed himself and to find shelter. During the hearing he was also asked questions by the NASS Presenting Officer.

The NASS Presenting Officer's role at the hearing is to show why the NASS decision not to grant him support is correct. Their questions to Mr A mostly focused on the fact that he had managed to survive without support for some time which, in their opinion, cast doubts on his claim to be destitute. They asked him for details of the people he had stayed with, the type of properties they lived in, what their immigration status was and why these individuals could not continue to support him. They also asked him to describe the charities he approached and to provide details of the people who worked there and whether he saw same person each week. They also asked him what type of food the charities provided, what he did with this food, where he cooked it etc.

In response to these questions the evidence Mr A provided was clear and consistent. In our submissions the ASAP asked the Adjudicator not to let the fact that the client had not responded to the directions prejudice his case. We pointed out that this was due to Mr A having no fixed address and the difficulties he had accessing advice. We asked that the Adjudicator put weight on the oral evidence provided by Mr A and emphasised that this had been both consistent and transparent.

The hearing took almost two hours. Mr A won his appeal but only by a narrow margin. In their summing up the Adjudicator stated that the case was finely balanced and that they were relying heavily on the strength of Mr A's oral evidence. On hearing the outcome Mr A broke down. This was from a mixture of relief at the outcome and in response to the stress he experienced during the two hour hearing.

ASAP believes that had Mr A not had access to advice and representation at the court he may well have lost his appeal and his destitution would have continued. As Mr A had only received a limited amount of advice before the hearing he had no way of knowing the importance of certain types of evidence or how significant his oral evidence would be during the hearing.

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