

Immigration Bill 2015-16

Timing of an application for support under section 95A

Schedule 11

PROPOSED AMENDMENT

Page 180, line 11, at end insert –

(*) Regulations under subsection (4) must provide that an application for support under this section may be made at any time.

Purpose

This amendment provides that a failed asylum seeker who meets the criteria for support under s95A because they are destitute and face a genuine obstacle to leaving the United Kingdom, may apply for support at any time these conditions are met. The Minister has stated that regulations will generally restrict support to those who apply within 21 days of the decision on their asylum claim. This amendment would ensure that individuals are not forced to remain destitute where they cannot currently leave the UK due to a genuine obstacle but have applied for support outside this period.

Briefing

Purpose of s95A and comparison with s4 support

Section 95A, replacing s4 of the IAA 1999, is support for failed asylum-seekers, and is for those who ‘face a genuine obstacle to leaving the United Kingdom.’ The phrase ‘genuine obstacle’ is new, but the intention is that the s95A criteria will be similar to the current regs 3(2)(a) and (b)¹ which govern s4 support. Thus it will be available for those who are in the process of obtaining travel documents or temporarily unable to travel for medical reasons.

Failed asylum-seekers can apply for s4 support at any stage. In contrast, s95A support will be limited to those who have *just* lost their asylum appeals, and thus have become ‘appeals rights exhausted’ (ARE), and are still in receipt of s95 grace period support. The grace period of s95 support will be 21 days for individuals and 90 days for families. Restricting when applications for s95A support can be made fundamentally changes this form of support.

The other key distinction between the two forms of support is that there is a right of appeal regarding s4 support decisions and there will be no right of appeal regarding s95A.

¹ Reg 3(2)(a) ‘he is taking all reasonable steps to leave the UK or place himself in a position in which he is able to leave the UK, which may include complying with attempts to obtain a travel document to facilitate his departure’
Reg 3(2)(b) ‘he is unable to leave the UK by reasons of a physical impediment to travel or for some other medical reason’.

Very few failed asylum-seekers apply for s4 on the basis of ‘genuine obstacle’ reasons within 21 days of becoming ARE. The Home Office’s own data shows that of the 105 people who applied in 2015, only 6 were made in the grace period.²

The grace period requirement

There is no indication regarding this key requirement and limitation in the Bill itself. Section 95A is contained in clause 9 of what is now Schedule 11 (‘support for certain categories of migrants’). The draft primary legislation gives the clear impression that an application for s95A support can be made when not currently on support. For example the requirement to be destitute is set out, and reference is made to regulations which will distinguish between providing support and continuing to provide support. However, those on s95 have already been assessed as destitute, and so there would be no need to re-assess them.

To use regulations to restrict s95A support in this way will give an artificial definition to ‘genuine obstacle’.

The lack of debate hitherto on the grace period requirement

It only became fully explicit during the passage of the Bill through the House of Lords that s95A support will be subject to this strictly drawn restriction. It was debated at length in the Public Bill Committee on 5/11/15, as an amendment to introduce a right of appeal had been tabled. All who contributed to the debate did so on the basis that there would be no grace period requirement, and therefore, in this respect, s95A would be similar to s4. The Minister for Immigration introduced the section without any reference to the requirement, and the debate then continued on this wrong track.

The limited nature of s95A was made explicit in the Home Office’s January 2016 document³ at para 30, when examples were given as to when exceptions would be made (hospitalisation during the grace period or late notification of dismissed asylum appeal). Therefore the debate in the committee stage in the House of Lords on 3/2/16 was the first time the point was clear to those discussing it, hence Baroness Lister referring to it as ‘a sting in the tail’ (column 1823).

Misconception regarding the repeal of s4 and the implication for s95A

The debate regarding the right of appeal continued to cloud the issue that s95A is fundamentally different from s4. Lord Bates, in his letter (p3, 3rd bullet point) of 10/2/16, defended the grace period requirement by stating ‘to provide otherwise would effectively reverse the repeal of s4’. However, s95A is *already* fundamentally different to s4, as the majority of those currently on s4 are those with outstanding further submissions. The Bill transfers this cohort to s95, and in doing so removes the discontinuation of support right of appeal they currently enjoy. This is intended and significant. Lord Bates in his 10/2/16 letter and in the Report stage debate on 15/2/16 (column 1839) stated that support appeals for failed asylum-seekers are being retained where they ‘commonly arise’. In fact, by transferring those with outstanding further submissions to s95, the opposite is true. A significant proportion will lose their appeal rights.

² Response of James Brokenshire to written parliamentary question WP 29521 tabled on 2/3/16

³ ‘Reforming support for migrants without immigration status, The new system contained in Schedules 8 and 9 to the Immigration Bill’.

Allowing applications to be made s95A outside the grace period would not reverse the repeal of s4, but would give 'genuine obstacle' its common sense meaning.

Who will be left destitute

The Home Office's 2015 s4 support figures show that 63 people were taking all reasonable steps to leave and 42 were unable to leave due to a medical reason⁴. Those on 'reasonable steps' support are mainly certain nationalities where there are well-known difficulties in obtaining travel documents. These are currently Occupied Palestinian Territories, Somalia and Eritrea (and Iran between 2011 and 2014). There is often a prior problem regarding whether the person has (or can obtain) the specific identity documents required by their particular Embassy in order for a travel document to be issued.⁵

Those who cannot travel for medical reasons may be physically or mentally ill. In either case, to be left destitute will worsen their condition, and make it less likely that they will be able to travel in future. Support for medical reasons is not open-ended and is *only* on the basis that the person cannot currently travel; the treatment they may be receiving in the UK and which may not be available in their home country is not relevant.⁶ It is also important to bear in mind the effect of destitution on mental health and the fact that it can lead to some very vulnerable individuals becoming a risk to themselves and/or others.

The Home Office currently accepts that women in the late stages of pregnancy cannot travel and provides s4 support from when they are within 6 weeks of their due date (or earlier if there is a particular medical complication). Lord Bates in his 10/2/16 letter has confirmed that this group will likewise be able to apply for s95A support if they are within 6 weeks of their due date during the grace period of their s95 support. However, should they become pregnant later, they will be left destitute.

The grace period requirement is counter-productive

The overall aim of the Immigration Bill is to incentivise those who no longer have a legal right to remain in the UK to leave. Creating the power to provide genuine obstacle support at any stage fits with that aim. The Home Office and Ministers have referred to the key role that 'engagement officers' will play in encouraging and assisting people in leaving, but it is very likely they will only work with those on support. Currently, if on s4 support, it is possible to apply for exceptional payments to cover fares to Embassies and other costs in obtaining travel documents. Cutting off this help to people who wish to leave (and maybe because of the success of the 'hostile environment' policy) appears perverse. People are more likely to have come to terms with leaving, and understand it is their best option, further down the line, and not within 21 days of having lost their asylum appeal.

The grace period requirement, if enacted, will reduce the future s95A budget, as almost no-one will qualify. However, it will lead to extra costs not only to the public purse generally but also potentially to the

⁴ *Op Cit*, fn 2

⁵ For further details, see ASAP's 2014 research report 'The next reasonable step, recommended changes to HO policy and practice for s4 support granted under reg 3(2)(a)'

⁶ R (SSHD) v Asylum Support Adjudicator and Osman [2006] EWHC 1248

Home Office, for example extra detention costs (and unlawful detention damages and legal costs). There is a danger in this 'silo mentality' and not taking into account the broader consequences.

Families

Families who become ARE are in a very different position. Firstly their s95 grace period is 90 days. More crucially, if they either do not apply for s95A support, or are deemed not to qualify, they will always have an avenue back onto support via para 10A support, which is to be provided by local authorities. One of the qualifying conditions will be that they have not failed to co-operate with arrangements that would enable them to leave the UK. Families can apply for this form of support at any stage.

The legislative intent is that s95A support takes priority over para 10A support. Thus families who are taking 'all reasonable steps' and apply for s95A support during their s95 grace period will remain the responsibility of the Home Office. All others will apply for para 10A support, although there is a continuing lack of clarity regarding this issue⁷.

Conclusion

The HO is well aware of the difficulties it faces in returning many migrants to their home countries, caused by several factors, including the lack of co-operation by some foreign governments in taking back their nationals, especially with enforced removals. Thus the HO is keen to give responsibility to failed asylum-seekers and others who no longer have a legal basis to remain, to document themselves and leave. The grace period requirement removes the opportunity to fully engage with and receive assistance from the HO. It does not allow individuals time to come to terms with their situation and seek help to leave. In December 2015, the HO took the various schemes for assisted voluntary returns (AVR) in-house. There will now be very limited opportunities to engage with individuals regarding AVR whilst they are on support, which is likely to have a detrimental effect on this scheme and voluntary departures overall.

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⁷ For example, the HO's January 2016 document para 54 states that LAs can provide emergency support pending a s95A assessment, and a transfer to that support is being arranged