

FAMILY SUPPORT BRIEFING

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Introduction

1. This briefing looks at the legal framework regarding asylum support for families and whether they should be on Home Office (HO) or Local Authority (LA) support. It also includes consideration of the HO's duty under the Borders, Citizenship and Immigration Act 2009 s55. To illustrate the legal position, certain decisions of the Asylum Support Tribunal (AST) are referred to. These decisions are either linked to on the AST website¹ (where the case name will include the appellant's initials) or are attached as Appendix 1 to this paper in anonymised form. Whilst decisions of the AST are not binding in later appeals, the judges' Statements of Reasons are treated as 'persuasive', particularly those of Principal Judge Storey. To discuss individual cases, please ring our Advice Line.

Section 95 support and the s94(5) exception

2. In order to obtain s95 support it is necessary to be an asylum-seeker and meet the destitution test. As a general rule, asylum-seekers cease to be eligible for s95 support 21 days after their claims are finally determined if their claims are unsuccessful, and 28 days after their claims are finally determined if they are allowed. They are either granted leave (in which case they will become eligible for mainstream social security benefits) or they become appeal rights exhausted (ARE).
3. However, there is an exception to the general rule that asylum-seekers cease to be eligible for s95 support once they become ARE. This exception applies to applicants whose households contain dependent minor children who were born before they became ARE. In those cases, the applicant's s95 support will continue until the youngest child turns 18. This is because they continue to be defined as asylum-seekers for the purposes of asylum support by virtue of s94(5) of the Immigration and Asylum Act 1999 (1999 Act). This states:-

[I]f an asylum seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum-seeker while:

(a) the child is under 18; and

(b) he and the child remain in the United Kingdom

The meaning of 'dependant'

4. The word 'dependant' in s94(5) is defined in s94(1), as follows:

¹ <https://www.gov.uk/asylum-support-tribunal-decisions>

“dependant”, in relation to an asylum-seeker or a supported person, means a person in the United Kingdom who—

(a) is his spouse;

(b) is a child of his, or of his spouse, who is under 18 and dependent on him; or

(c) falls within such additional category, if any, as may be prescribed.

5. There is also an extended definition of ‘dependant’ in Regs 2(4)-(5) of the Asylum Support Regulations 2000, which is incorporated into the definition of ‘dependant’ for the purposes of s94(5) by virtue of Reg 2(7) and s94(4)(c).
6. For more information about who can be a ‘dependant’, see ASAP’s [Factsheet 11](#)

The effect of s94(5)

7. The effect of s94(5) is that an applicant is treated as ‘continuing’ to be an asylum-seeker (with the result that their eligibility for s95 is also treated as ‘continuing’) after the applicant has become ARE.
8. Note: there is no equivalent provision for s4 support, although in practice (rather than as a matter of legal entitlement) s4 support tends to continue even after the applicant ceases to meet the criteria for support under the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 reg 3(2) until the youngest child of the family turns 18.
9. It should be born in mind that asylum-seekers can make more than one asylum claim, and so can be ARE more than once, ie they can be ARE both (i) when their initial asylum claim is finally determined, and again (ii) after they make further submissions which, although refused, are recognised as a fresh asylum claim by the HO (thereby giving the applicant a fresh right of appeal). Provided an asylum-seeker has a dependent minor child when their initial claim is recorded (or when their fresh claim is recognised by the HO), they can rely on s94(5) for the duration of the initial asylum claim (or, as the case may be, the fresh asylum claim).
10. Different scenarios relating to s94(5) are considered below.

The asylum-seeker parent is ARE before the first child is born

11. The AST has held² that s94(5) cannot operate to re-establish entitlement to s95 where a child is born **after** an applicant becomes ARE, because (assuming there is no subsequent fresh asylum claim), eligibility for s95 would have been lost prior to the birth of the child when the applicant became ARE, and therefore could not be treated as ‘continuing’.

² See [GA \(appeal ref: 29002\)](#), at para 14

12. An asylum-seeker who has a child after becoming ARE can only rely on s94(5) if (i) they make further submissions after the child is born, and (ii) the further submissions, although refused, are recognised as a fresh asylum claim by the HO. From that point they will be treated as an asylum-seeker once again, and so eligible once again for s95 support. The effect of s94(5) is that they will continue to be treated as an asylum-seeker (and so eligible for s95 support) after any appeal against the refusal of the fresh asylum claim is dismissed until the youngest child turns 18.

There has been a break in the asylum-seeker parent's support

13. The word 'continuing' in s94(5) refers to the applicant's status as an asylum-seeker, not their **receipt of** s95 support. So in a case where an applicant with dependent minor children receives s95 support, and then loses it (eg by leaving their s95 accommodation), s94(5) will allow them to re-apply for s95 support after they become ARE if they continue to have dependent minor children in their household (and provided they can prove destitution).³

The applicant for support has not previously been on s95 support

14. Applicants can rely on s94(5) to claim s95 support even if they apply for asylum support for the first time **after** they are already ARE, provided that they had a dependent minor child at the time they became ARE.
15. This is clear from a decision of the High Court in [R\(VC\) and others v Newcastle City Council and SSHD \[2011\] EWHC 2673 \(Admin\)](#). The claimant in VC had (i) claimed asylum, (ii) seen her asylum claim finally determined, and (iii) become ARE all **before** the birth of her first child. After her first child was born, she had made further submissions in support of her asylum claim, which although refused, were accepted as a fresh asylum claim by the HO. VC appealed unsuccessfully against the refusal of her fresh asylum claim. After becoming ARE for the 2nd time, she required support. The question before the High Court was whether support should be provided to her under s4 of the 1999 Act, or under s17 of the Children Act 1989.
16. At the hearing of the case, it became clear that the choice between support under s4 and support under s17 never actually arose on the facts of VC: the Court recorded in its judgment (at para 56), that all the parties in the case (including the HO) agreed that from the date that VC's further submissions had been accepted as a fresh claim, she (VC) became entitled to s95 support by virtue of s94(5) **even though she had not applied for asylum support until after her fresh claim had been finally determined**.⁴ Since she was entitled to s95 support, she could not be

³ See [GA \(appeal ref: 29002\)](#) at para 13

⁴ For completeness, it is noted that VC had been in receipt of asylum support during her initial unsuccessful asylum claim. However, this was before the birth of her first child, and before her fresh asylum claim, and is irrelevant for the purposes of the Court's analysis. What is important for present purposes is that VC was already ARE for the 2nd time when she applied for asylum support, but the Court nonetheless held s94(5) to apply.

entitled to s17 support because of s122(5)(b)(ii) of the 1999 Act (as to which see para 28* below).

17. It may be useful to be aware that (before *VC* was decided) the AST had incorrectly understood s94(5) to apply only where there had been an award of s95 support before the applicant became ARE. Examples of such decisions are the 2002 decisions of the Principal Judge in [EH \(appeal ref: 1872\)](#) and [RB \(appeal ref: 1877\)](#), and the 2007 decision of Judge Verity Smith in [YY \(appeal ref: 14740\)](#). The Statements of Reasons in these cases remain on the AST website, but they should not be followed in relation to s94(5), since they pre-date *VC*, and are clearly wrong in light of the guidance given by the High Court in that case.

Absconder cases and s94(5)

18. In cases where an asylum applicant absconds and/or departs from the UK prior to receiving a decision on their asylum claim, and then resurfaces and wishes to apply for asylum support, the legal position can be unclear. Different judges of the AST have adopted different, inconsistent, analyses, and have found applicants to be eligible for support under s95, s4 of the 1999 Act or Schedule 10 to the Immigration Act 2016, depending on the particular judge's legal analysis and the facts of the case. See ASAP's briefing on [Absconders](#).⁷
19. In [CME](#) (39001), the appellant had 2 children before she claimed asylum in 2016. She later expressed a wish to withdraw her asylum claim, but never returned the form sent to her by the HO to enable her to withdraw her asylum claim expressly. Nevertheless, the HO ceased consideration of her asylum claim on the (mistaken) basis that it could be treated as having been impliedly withdrawn. The appellant made a claim under Article 8 ECHR, and then applied for s4 support, having never previously received asylum support. The AST held, following *VC*, that even though consideration of the appellant's asylum claim by the Home Office had ceased following the HO's decision to treat the claim as impliedly withdrawn, her household contained a minor child at that date, and so she continued to be treated as an asylum-seeker for asylum support purposes, by virtue of s94(5). So *CME*'s appeal was allowed, on the basis that she was eligible for s95, not s4 support, even though she had not previously received s95 support.
20. s94(5) confers eligibility for s95 support, provided the applicant had a minor dependent child at the time of becoming ARE, for so long as the applicant's household contains a child under 18. It is therefore crucial to check the date on which an applicant became ARE against the date(s) of birth of the applicant's child[ren]. If no children were yet born at the time the applicant became ARE, then s94(5) will not be relevant (unless there has been a fresh asylum claim after the birth of a child), and the applicant will have to apply for another form of support. If the applicant has made further submissions which have been recognised as a fresh asylum claim, then a similar check should be made to see if a child was born prior to the applicant become ARE for the 2nd time.

Local Authority support for children in need: s17

21. Section 17 Children Act 1989⁵ is headed: 'Provision of services for children in need, their families and others'. Section 17(1) states:

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.
[emphasis added]

22. Section 17(10) states:

(10) For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.
[emphasis added]

23. A child who is destitute is generally treated by LAs as meeting the definition in s17(10). The support provided to meet the duty arising under s17(1) can include accommodation and a cash payment. Support can be offered to the family of a child in need, subject to s17(3), which states:

Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

24. In practice, the support received under s17 may be better (in terms of its monetary value) than support provided under s95 because the former is assessed to meet

⁵ Applicable to England and Wales only. The equivalent provisions for Scotland and Northern Ireland are (respectively) section 22 of the Children (Scotland) Act 1995 and Article 18 of the Children (Northern Ireland) Order 1995

the particular needs of the particular child, and to promote the child's welfare rather than merely meeting the child's essential living needs.

25. As stated in footnote 5*, s17 applies to England and Wales only. The equivalent duties in Scotland and Northern Ireland, (section 22 of the Children (Scotland) Act 1995 and Article 18 of the Children (Northern Ireland) Order 1995), are not considered in detail in this note. References below to 's17' should be treated as references to s17 Children Act 1989 in England and Wales, and the equivalent duties in Scotland and Northern Ireland.
26. There is good information about s17 support on the [Project 17 website](#).

The availability of support under s17 for asylum-seekers with dependent minor children who are potentially eligible for s95 support

27. Local authorities' power to provide support to asylum seekers with dependent children in need is constrained by s122(5) of the Immigration and Asylum Act 1999.

Section 122 Immigration and Asylum Act 1999

28. Section 122 of the 1999 Act is headed 'Support for children'. By s122(1)-(4), the Secretary of State must exercise powers under s95 by offering accommodation and/or money in respect of essential living needs, if (i) an application for s95 support has been made by an eligible person whose household includes a dependant under 18 years of age, and (ii) it appears to the Secretary of State that adequate accommodation is not being provided for the child or the child's essential living needs are not being met.

29. Section 122(5)-(7) state:

(5) No local authority may provide assistance under any of the child welfare provisions in respect of a dependant under the age of 18, or any member of his family, at any time when—

(a) the Secretary of State is complying with this section in relation to him; or

(b) there are reasonable grounds for believing that—

(i) the person concerned is a person for whom support may be provided under section 95; and

(ii) the Secretary of State would be required to comply with this section if that person had made an application under section 95.

(6) "Assistance" means the provision of accommodation or of any essential living needs.

(7) “The child welfare provisions” means—

- (a) *section 17 of the Children Act 1989 (local authority support for children and their families);*
- (b) *section 22 of the Children (Scotland) Act 1995 (equivalent provision for Scotland); and*
- (c) *Article 18 of the Children (Northern Ireland) Order 1995 (equivalent provision for Northern Ireland).*

30. The effect of s122 is:

- (1) to require the HO to offer s95 support to applicants with dependent children who appear to be eligible (even if they failed to apply for asylum as soon as reasonably practicable, and so would – but for s122 – be liable to have their s95 claims refused by operation of s55 of the Nationality Immigration and Asylum Act 2002); and
- (2) to prevent LAs from providing s17 support where either (i) the HO is supporting a child under s95; or (ii) there are reasonable grounds for believing that s95 would be granted if an application were made. In other words, if the LA considers that a child who would otherwise be a ‘child in need’ is eligible for s95 support and would, if an application was made, be granted s95, then the LA is prevented from providing any support under s17 or under the equivalent powers in Scotland and Northern Ireland.

In summary, s122 ensures that families who are entitled to s95 support must apply for s95, not s17 support.

31. The prohibition on LA support for children in need contained in s122(5) becomes more problematic where an application for s95 support for the family is refused, typically because the HO and the AST do not accept that the family is destitute. The question arises whether, having applied for s95 and been refused, the prohibition contained in s122(5) prevents a LA from providing s17 support.
32. In practice, where children are threatened with destitution, and potential street homelessness, it is natural to expect the local authority to intervene. There is no direct authority on point, but in at least two cases,⁶ a High Court judge considered it arguable that s122(5) did not prevent a LA from providing s17 support where an application for s95 support had been made and refused.

⁶ *R(Ezeh) v London Borough of Barking and Dagenham* [2013] EWHC 4486 (Admin) at para 14, and *R(FA) v London Borough of Redbridge* [2018] EWHC 2189 (Admin) at para 35, although note that these were both judgments given on applications for injunctive relief, rather than permission decisions. These decisions are some (albeit weak) legal authority for arguing that s122(5) does not prevent s17 support where an application for s95 support has been refused, and an appeal dismissed by the AST because the applicant has been found not to be destitute.

The availability of s17 support for refused asylum-seeking families who are potentially eligible for s4 support

33. There is no equivalent to s122 of the 1999 Act that applies to s4 support. This raises 2 questions: whether refused asylum-seeking families (1) can, and (2) should apply for s4 support, rather than s17 support. This question was answered in VC (considered at paras 15-17* above).

34. In summary the High Court in VC held [para 86] that:

‘in contrast to section 17, section 4 is a residuary power and that the mere fact that support is or may be available under section 4 does not of itself exonerate a local authority from what would otherwise be its powers and duties under section 17’

35. This conclusion flowed from certain features of the legislation, including:

(1) The different purposes of the 2 statutory schemes (resulting in generally higher levels of support being available under s17). The court contrasted the different regimes provided for under s4 and s17. s4 support was described as *“an austere regime, effectively of last resort, which is made available to failed asylum seekers to provide a minimum level of humanitarian support”* whereas by contrast s17 support was described as *“a significantly more advantageous source of support, its purpose being to promote the welfare and best interests of children in need ... by reference to the assessed needs of the child”* [para 87];

(2) *‘the striking fact that, in contrast to the position under section 95 [entitlement to which bars a local authority from providing support under s17 pursuant to s122 of the 1999 Act], Parliament has not excluded families who are or may be eligible for support under section 4 from local authority support under section 17’.* [para 88]

36. The court stated that where a child of a refused asylum-seeker is assessed as being ‘in need’ for the purposes of s17;

the local authority will not be able to justify the non-provision of assessed services and support under s17 on the ground that s4 is available unless it can be shown, first, that the Secretary of State is actually able and willing (or if not willing can be compelled) to provide section 4 support, and, second, that section 4 support will suffice to meet the child's assessed needs. [para 91]

37. The court concluded that:

Given the residual nature of the Secretary of State's functions under section 4, the local authority may well have difficulty in establishing the first. Given the very significant difference between what is provided under section 4 and what is

very likely to have been assessed as required for the purposes of section 17, the local authority is unlikely to be able to establish the second. [para 91]

38. The decision in *VC* makes it difficult if not impossible for LAs to refuse s17 support on the basis that s4 is available from the HO.
39. As a matter of practice, some refused asylum-seekers do apply for, and are granted s4 support (eg where a first child is born to a refused asylum-seeker already in receipt of s4 support).

But why apply for s4 support if you are likely to be eligible for s17 support?

40. Given that the level of support may be lower under s4 than under s17, the question arises why a destitute refused asylum-seeker with dependent minor children might want to apply for s4 support when they could, following *VC*, apply for more generous support under s17. One answer to that question concerns the respective policies of the HO and LAs in cases where the refused asylum seeker who is benefiting from s4 or (on account of their dependent child) s17 support is no longer able to point to any obstacle preventing removal.

HO policy towards refused asylum-seeking families on s4 support contrasted with LAs' policies to s17 families

Families on s4 support

41. An application for s4 support will only be necessary where s94(5) does not apply,⁷ typically where the refused asylum-seeker did not have dependent minor children at the time they became ARE. Once s4 support has been granted, the HO's general practice is not to discontinue it until (i) the family is no longer destitute; (ii) they have breached other conditions of their support; or (iii) their children have attained the age of 18.

Families on s17 support

42. By contrast, where the family no longer has an outstanding immigration application or any other ground for arguing that there is an obstacle to their voluntary departure from the UK, it may be open to the LA to assess the needs of the child in need and to conclude that the duty under s17 is met by the LA facilitating the return of the family to their country of origin, and withholding further support if this option is not taken.
43. The Court of Appeal has considered the circumstances in which LA support can be withheld on the basis that the recipient of the support can make a voluntary departure from the UK in the context of claims that departure would breach Article

⁷ See paras 2*-20* above

8 of the ECHR in a number of cases,⁸ including [Clue](#), which summarises the caselaw, and the duties of a LA providing a support to a person who (i) is destitute, (ii) is unlawfully present in the UK, and (iii) has made an application for leave to remain which expressly or implicitly raises grounds under the Human Rights Convention:

55. If the withholding of assistance would not in any event cause a person to suffer from destitution amounting to a breach of Convention rights (typically article 3), the local authority's investigation ends there. The local authority must, therefore, investigate whether there are available to the claimant other sources of accommodation and support. But if it is satisfied that there are no other sources of assistance which would save the claimant from destitution amounting to a breach of a Convention right, then it must consider the matter further. It must then decide whether there is an impediment to the claimant returning to his country of origin.

56. Where the only potential impediment is practical in nature, such as where the person concerned is unable to fund his return, it is open to a local authority to avoid a breach of Convention rights by arranging transport back to the person's country of origin: see Grant.

44. In relation to the consequences of an applicant's outstanding application to remain on Convention grounds, the court held:

62. I find it difficult to conceive of circumstances in which a local authority could properly justify a refusal to provide assistance where to do so would deny to the claimant the right to pursue an arguable application for leave to remain on Convention grounds...

63. ... In my judgment, save in hopeless or abusive cases, the duty imposed on local authorities to act so as to avoid a breach of an applicant's Convention rights does not require or entitle them to decide how the Secretary of State will determine an application for leave to remain or, in effect, determine such an application themselves by making it impossible for the applicant to pursue it....

...

66. I conclude, therefore, that when applying Schedule 3 [of the Nationality Immigration and Asylum Act 2002, in order to determine whether withholding support would lead to a breach of the applicant's Convention rights], a local authority should not consider the merits of an outstanding application for leave to remain. It is required to be satisfied that the application is not "obviously hopeless or abusive" ... Such an application would, for example, be one which is not an application for leave to remain at all, or which is merely a repetition of

⁸ See [R\(K\) v London Borough of Lambeth \[2003\] EWCA Civ 1150](#); [London Borough of Lambeth v Grant \[2004\] EWCA Civ 1711](#), and [Birmingham City Council v Clue \[2010\] EWCA Civ 460](#)

an application which has already been rejected.⁹ But obviously hopeless or abusive cases apart, in my judgment a local authority which is faced with an application for assistance pending the determination of an arguable application for leave to remain on Convention grounds, should not refuse assistance if that would have the effect of requiring the person to leave the UK thereby forfeiting his claim.... [emphasis added]

45. The need for the indirect recipient of s17 support to show a non-hopeless or abusive immigration application or, by analogy, some other similar impediment to a voluntary return to justify continuation of LA support, contrasts with the HO general practice of not discontinuing s4 support whether there is a dependent minor child.
46. In order to achieve an overview of the duties determining the extent of the HO's asylum support functions and LA's child protection functions, it is necessary to consider one further duty on the Home Office in relation to children: the duty imposed by s55 of the Borders Citizenship and Immigration Act 2009.

Section 55 Borders Citizenship and Immigration Act 2009

47. Section 55 of the Borders Citizenship and Immigration Act 2009 is headed 'Children'. It states:

Duty regarding the welfare of children

- (1) *The Secretary of State must make arrangements for ensuring that—*
- (a) *the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
 - (b) *any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*
- (2) *The functions referred to in subsection (1) are—*
- (a) *any function of the Secretary of State in relation to immigration, asylum or nationality;*
 - (b) *any function conferred by or by virtue of the Immigration Acts on an immigration officer;*

...

⁹ Note that the test in *Clue* is the same test as is applied by the AST to determine whether further submissions lodged with the Home Office by a refused asylum seeker should result in a grant of s4 under reg 3(2)(e).

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

...

(6) In this section—

“children” means persons who are under the age of 18;

...

Application of s55 to asylum support

48. The HO accepts that its asylum support functions relate to ‘immigration, asylum or nationality’ for the purposes of s55(2)(a), and are therefore subject to the s55 duty.

Statutory guidance on s55

49. Guidance has been issued for the purposes of s55(3) called [Every child matters: change for children](#). At para 2.5, under the heading: ‘The role of the UK Border Agency in relation to safeguarding and promoting the welfare of children’ the guidance states:

Other parts of the UK Border Agency’s contribution include: Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm. Making timely and appropriate referrals to agencies that provide ongoing care and support to children. [emphasis added]

50. The main application of s55 to asylum support is to ensure that the HO makes timely and appropriate referrals to LAs to safeguard and promote the welfare of children liable to be adversely affected by a refusal or discontinuation of asylum support under s95 or s4.

HO guidance on s55 and asylum support

51. Guidance on how the HO applies the s55 duty is contained in:

- A statement of general guidance re s55 incorporated into other policies;
- Specific guidance on s95 discontinuations;
- Specific guidance on s4 discontinuations.

General Home Office guidance on s55

52. Almost all HO asylum support guidance documents include the following paragraph reminding caseworkers that they must have regard to s55:

Application [of the particular policy in question] in Respect of Children and Those with Children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK. It does not impose any new functions, or override existing functions.

Officers must not apply the actions set out in this instruction either to children or to those with children without having due regard to Section 55.

The Home Office instruction 'Arrangements to Safeguard and Promote Children's Welfare in the Home Office' sets out the key principles to take into account in all activities where a child/children are involved. Our statutory duty to children includes the need to demonstrate:

- *Fair treatment which meets the same standard a British child would receive;*
- *The child's interests being made a primary, although not the only consideration;*
- *No discrimination of any kind;*
- *Asylum applications are dealt with in a timely fashion;*
- *Identification of those that might be at risk from harm.*

53. While this general statement is welcome, so far as it goes, it has no express asylum support policy or procedural implications. In practice, the s55 duty is commonly engaged when asylum support is either discontinued or refused for a family including dependent minor children, and there is specific HO guidance covering this. The application of s55 in these scenarios is considered below.

The s55 duty when s95 support is discontinued

54. The Home Office's [Asylum Support: Policy Bulletins Instruction \(version 9\)](#), dated 26 May 2021 applies to s95 cases. It states, at para 25.2.1

Discontinuation of support to families with children

When considering whether to discontinue the provision of support under Section 95 of the Immigration & Asylum Act 1999 to families with minors, the course of action taken must be consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, to ensure that the decision has regard to the need to safeguard and promote the welfare of children who are in the UK.

If a decision is being made as to whether it is appropriate to discontinue support to a family with children under regulation 20 of the Asylum Support Regulations 2000 [ie for breach of conditions], if the family are assessed as being destitute if it were not for the provision of the aforesaid support, the Home Office must take in to account the impact of any decision on the family.

Any decision as to whether it is appropriate to discontinue support must be proportionate to the situation. If the breach was minor, such as failing to report, it may not be appropriate to discontinue the provision of support. If however, the breach was extremely serious, such as extreme violence or vandalism, it may be appropriate to discontinue support. When making decisions as to whether it would be appropriate to discontinue support, Case workers should consult their Senior Caseworker before proceeding.

If the discontinuation of support is appropriate, the Case workers should take appropriate steps to safeguard and promote the welfare of the children. Before any action is taken to begin the process to discontinue support, the Case worker should liaise with the local authority, notifying them that the Home Office plans to discontinue support from the family, and request that the local authority provides alternative support. If the local authority makes an offer of support, the provision of support under Section 95 should be discontinued as soon as the family transfers in to local authority care.

If the Home Office considers that the supported family are eligible for support provided by the local authority, but the local authority refuses to provide support, the provision of asylum support must be maintained until the local authority provides support.

If a decision is taken that it would be appropriate to discontinue the provision of support to a family with children, the discontinuation letter should explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009. [emphasis added]

55. Note that similar (but inconsistent) guidance on s95 discontinuations is contained in the HO guidance document: [Conditions of Support \(version 1\)](#) dated 14 May 2021). The guidance in *Conditions of Support* omits the requirements in the *Policy Bulletins Instruction* (dated 26 May 2021) that (1) the HO should liaise with the LA before any action is taken to begin the process to discontinue support 'notifying them that the Home Office plans to discontinue support from the family, and request[ing] that the local authority provides alternative support', and (2) that the HO should not discontinue support until the responsibility for ongoing support after asylum support is discontinued has been clarified.
56. The guidance in the *Policy Bulletins Instruction* (which post-dates *Conditions of Support* by 12 days) is clearly consistent with the purpose of s55 and should be relied on where support is being discontinued.
57. Both the *Policy Bulletins Instruction* and *Conditions of Support* are silent about the application of s55 where s95 is discontinued because the claimant is found by the HO to be not destitute.
58. In addition, there is a further guidance document: [Ceasing Section 95 Support Instruction \(version 1\)](#) dated 28 June 2022, at page 13, which focuses on when

support should be maintained under s94(5).¹⁰ Extracts from all three documents are included in Appendix 2, below.

The s55 duty when s4 support is discontinued

59. The HO policy governing the discontinuation of s4 support is contained in [Asylum support, section 4\(2\): policy and process \(version 3\)](#), at p16. It states:

Discontinuation of support to families with children

In considering whether to discontinue the provision of support to a person with child dependants, the course of action taken must have regard to the need to safeguard and promote the welfare of the children as provided for in section 55 of the Borders, Citizenship and Immigration Act 2009. If support is being discontinued because the person no longer meets the conditions set out in regulation 3(2) of the 2005 Regulations or because they breached the conditions attached to the provision of support, the local authority children's services should be informed so that they can consider whether they need to take any action that they consider necessary to safeguard the welfare of the child.

It is not necessary to inform the local authority if support is being discontinued because the person is not destitute.

Senior caseworker approval must be given before support is discontinued to any person with dependent children.

The nature of the s55 duty: making enquiries, liaising with the LA, and considering the welfare of the children in the refusal letter

60. The s55 duty may require the HO to engage in one or more of three types of action:

- (1) making enquiries into the welfare of children whose support has been refused or discontinued (so as to, if necessary, take steps to safeguard and promote their welfare); and
- (2) having made enquiries, liaising with the relevant local authority where the local authority's duties under s17 may be engaged;
- (3) if asylum support is withheld, addressing in the refusal letter how the welfare of the children will be safeguarded.

61. In s95 breach of condition cases, the guidance requires the HO to liaise with the LA, 'before any action is taken to begin the process to discontinue support' (see para 54* above).

¹⁰ See paras 2*-20* above.

62. Where the HO proceeds to discontinue or refuse asylum support without considering the needs of the children, and/or without liaising with the LA, the AST may be persuaded to remit the appeal to the HO to make such a referral. For example, in appeal ref: 35580, which concerned a decision to discontinue s4 support, Asylum Support Judge Owens held:¹¹

23. I find that the respondent accepts that the appellant continues to be destitute. The issue in this appeal is only whether she can continue to meet one of the requirements of Regulation 3(2). I find that the decision [to discontinue s4 support] is prima facie unlawful since the decision discontinuation letter does not explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009. There is no indication that the respondent has made any fact finding exercise in relation to the welfare and best interest of the child and there has been no liaison with the local authority notifying them that the Home Office plans to discontinue support from the family. I also find that the father of the child is not willing to support the child and that as a recognised refugee the respondent cannot compel the child to return to Eritrea.

24. I therefore remit this appeal for the respondent to take a fresh lawful decision in respect of the welfare and best interest of this child on the facts as I have found them. [emphasis added]

Confused and incomplete nature of the guidance

63. As noted at para 54* above, two of the HO guidance documents (Policy Bulletins Instruction and Breach of Conditions) contain different guidance for s95 breach of condition discontinuation cases. Further, certain scenarios are not addressed in any of the guidance documents (eg cases involving the refusal rather than the discontinuation of asylum support, and s95 not destitute discontinuation).
64. Whether the s55 duty will require the HO to liaise and make arrangements with the relevant LA will depend in every case on the facts. The AST has made it clear that s55 can require the HO to liaise with the relevant local authority in s4 refusal cases (which are not referred to in the guidance), as well as in s4 'not destitute' cases (which are, but where the guidance states that no liaison is necessary) (see paras 68-72* below).
65. The guidance is therefore of limited use: given the general and overarching nature of the s55 duty, it is difficult to see how it can be said to impose a practical duty to make enquiries and liaise with the local authority only in certain types of asylum support cases (eg in s95 breach of condition cases), but not also in other types of case (such as s95 and s4 'not destitute' cases, and all s95 and s4 refusal cases).

¹¹ Judge Owens' Statement of Reasons is included in Appendix 1.

66. It all depends on the facts, and the evidence that without asylum support, the welfare of the minor children of the family concerned will be jeopardised. That should be born in mind in the consideration of the HO guidance that follows below.

67. With that important qualification, the relevant guidance is set out in table form at Appendix 2 for ease of reference.

The s55 duty in discontinuations vs refusals of asylum support

68. As stated above, the HO guidance is silent about whether the s55 duty is engaged when asylum support is refused as opposed to when it is discontinued. However the s55 duty applies to the discharge of all of the HO's asylum support functions, and any suggestion that the s55 duty is not engaged when asylum support is refused has been held by the AST to be incorrect. In [ZN \(appeal ref: 37288\)](#), the Principal Judge held that:

In my judgment, section 55 requires the respondent to have regard to the need to safeguard and promote the welfare of children when discharging any function in relation to Immigration, Asylum or Nationality. That must include the making of a section 55¹² decision. Accordingly, when refusing support under section 95 to a family that includes minor children, the decision letter must address how the welfare of the children will be safeguarded. I am assured and accept that the respondent will not evict a family from section 98 accommodation until an assessment has been carried out by Social Services. [emphasis added]

The s55 duty in 'not destitute' cases

69. In relation to the discontinuation of s95, the HO guidance is silent about whether the s55 duty is engaged when support is discontinued because the applicant is found not to be destitute. in appeal ref 36490 (reproduced in Appendix 1 below), Asylum Support Judge Briden considered the circumstances in which s55 might be engaged in 'not destitute' refusal cases. He accepted that in some cases, there will be evidence for the HO and the AST to conclude that the applicant has sufficient resources not to raise any particular concerns about the applicant's dependent minor children's welfare if asylum support were to be withheld.

70. However, Judge Briden concluded that a referral to the LA might be necessary to properly have regard to the need to safeguard the welfare of any children affected where:

destitution is not proved because the mother's account is found to be not credible or there is otherwise insufficient documentary evidence to explain historic transfers of assets ... but there is no precise evidence to find what assets the mother has at her disposal at the date of the hearing. [emphasis added]

¹² This clearly should read 's95', and appears to be a typographical error.

71. Another scenario in a not destitute case where the s55 duty might cause the HO to liaise with the LA is where a family's resources are assessed as exceeding the destitution threshold, but only by a small amount. In some such cases, there may be a risk that by the time the family's resources fall beneath the destitution threshold to enable them to make a fresh application for asylum support, proactive steps such as liaising with the LA, will be necessary to safeguard the children's welfare in the time between the submission of a fresh asylum support application, and its determination by the HO.
72. In relation to s4 discontinuation cases, the guidance makes the express blanket statement that 'It is not necessary to inform the local authority if support is being discontinued because the person is not destitute'. However it is difficult to see why the tasks undertaken by the HO to discharge its s55 duty (to make enquiries into the needs of children whose asylum support has been refused or discontinued, and to liaise with the LA as appropriate to safeguard and promote the children's needs) should be any different in s4 and in s95 cases. Judge Briden's decision (see paras 69-70 * above) strongly suggests that the HO blanket guidance that it is not necessary to liaise with the LA in 'not destitute' s4 discontinuation cases is simply wrong, and that whether enquiries, and a referral to the LA are needed will depend on the facts of the case.

Conclusions on the s55 duty when asylum support is discontinued or refused

73. It is clear from a plain reading of the duty that s55 requires every discontinuation or refusal decision involving minor children to have regard to the need to safeguard and promote the welfare of the children affected.
74. This obviously includes refusal as well as discontinuation cases, and 'not destitute' as well as breach of condition cases and also s4 cases where the relevant eligibility criteria are not met.
75. Whether the s55 duty will require the HO to liaise and make arrangements with the relevant LA will depend on the facts of the case. But the AST has made it clear that s55 can require the HO to liaise with the relevant local authority in refusal cases and in not destitute cases (notwithstanding the HO guidance being silent on the point, or stating the contrary). Given the general and overarching nature of the duty, it is difficult to see how it can be said as a general rule to impose a practical duty in some types of case but not others.
76. In some cases (for example, where the Home Office forms the view that, although asylum support must be withheld because of a breach of conditions, the local authority will be under a duty to provide s17 support), it will be necessary for the Home Office to await a decision by the local authority as to whether it will assume responsibility for the family's support, before ending any existing asylum support.¹³

¹³ see para 54* above, and the highlighted section of the *Policy Bulletins Instruction* reproduced there.

77. A failure by the HO to include in a letter discontinuing or refusing asylum support a statement of why, in the HO's opinion, the decision is consistent with its s55 duty may be treated as evidence that the duty was not properly discharged (see appeal ref: 35580 in Appendix 1 at para 23).
78. Subject always to the facts of the case, including the HO's reasons for discontinuing or refusing support, advisers should consider asking the HO to make a referral to the LA at the same time as lodging notice of appeal against the decision to discontinue or refuse asylum support. This is because, depending on the facts of the case, the AST may be persuaded to remit an appeal to the HO (to enable liaison with the LA) rather than dismissing it, and a request to the HO may succeed in focusing the AST's mind on this potential outcome.

August 2022

Appendix 1 – Certain Asylum Support Tribunal decisions referred to in this briefing and not available on the AST website



FIRST-TIER TRIBUNAL ASYLUM SUPPORT

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XXXX

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Appeal Number	AS/16/07/35580/NP
UKVI Ref.	XXXX
Appellant's Ref.	

IMMIGRATION AND ASYLUM ACT 1999

STATEMENT OF REASONS

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008, and gives reasons for the decision given on Thursday the 21st day of July 2016, remitting the above mentioned appeal.
2. The appellant, a citizen of Eritrea born on XX June 1988, appeals against the decision of the Secretary of State who, on 7 July 2016, decided to discontinue her support under Section 4 of the Immigration and Asylum Act 1999 (“the 1999 Act”) on the grounds that she no longer satisfies one or more of the conditions set out in Regulation 3(2) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005 (“the 2005 Regulations”).

The Hearing

3. The appellant attended the Tribunal in person. She was represented by Ms Webb of ASAP. The respondent was represented by Ms Crozier.

Immigration History

4. It is not in dispute that the appellant is a failed asylum seeker. She claimed asylum on 9 April 2010. Her claim for asylum was refused on 14 September 2010 and an appeal against that decision dismissed on 11 November 2010. The appellant was refused permission to appeal to the First-tier Tribunal and Upper Tier Tribunal. She had no further rights of appeal after 23 February 2011. The appellant lodged further submissions on 31 October 2011 and these were rejected on 10 November 2011. There are no submissions currently outstanding.

Support History

5. The appellant was previously in receipt of Section 95 support between 14 April 2010 and 11 April 2011. She was granted Section 4 support on 7 January 2015 on the basis that she was unable to travel by reason of a physical impediment to travel. At that date she was in the advanced stages of her pregnancy. On 7 July 2016 the respondent took the view that the appellant no longer meets any of the conditions of Regulations 3(2). It is against this decision that the appeal lies.

The Law

6. Section 4(5) of the 1999 Act as amended by Section 10 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (the 2004 Act) allows the Secretary of State to make regulations specifying criteria to be used in determining –
 - (a) whether or not to provide accommodation, or arrange for the provision of accommodation, for a person under this section;
 - (b) whether or not to continue to provide accommodation, or arrange for the provision of accommodation, for a person under this section.
7. The criteria to be used in determining eligibility for and provision of accommodation to a failed asylum-seeker under Section 4 are set out in Regulation 3 of the 2005 Regulations. These came into force on 31 March 2005.
8. Regulation 3 states as follows:
 - (1)the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are-
 - (a) that he appears to the Secretary of State to be destitute, and
 - (b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
 - (2) Those conditions are that-
 - (a) (not relevant to this appeal);
 - (b) He is unable to leave the UK by reason of a physical impediment to travel or for some other medical reason;
 - (c) (not relevant to this appeal);
 - (d) (not relevant to this appeal)
 - (e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

The Decision

9. It is said by the Secretary of State that in order to satisfy Regulation 3(2)(b) the appellant's medical condition must be such that she is unable to travel or leave the United Kingdom. The appellant is no longer pregnant and has had her baby. It is considered that her child is now a dependant on the asylum claim of Mr Kidane. Since the appellant does not meet any of the conditions of Regulation 3(2) she is expected to take steps to return to her country to avoid a breach of her rights under the ECHR.

Grounds of Appeal

10. In her grounds of appeal the appellant asserted that she is the primary care giver for her son who is 18 months old. To deprive her of support would result in her being separated from her child.

Directions

11. Detailed directions were issued on 15 July 2016. The appellant was directed to provide further evidence in respect of her child including an explanation as to how the father of the child has claimed tax credits and child benefit for the child as well as written evidence from the child's father explaining where the child lives, the reasons why his child cannot live with him and why the appellant is not able to be supported by him. The appellant is also asked to provide evidence to show that she satisfies Regulation 3(2)(e) and why she cannot remedy any breach of her Convention rights by taking steps to return with her child to Eritrea.
12. The respondent was asked to provide confirmation that the appellant's child had remained accommodated with her in Section 4 accommodation and a written submission which comments on the consideration given to the Home Office's duty to children as set out in Section 55 of the Borders, Citizenship and Immigration Act 2009.
13. In response to directions the appellant produced statements for herself and from the father of the child as well as a copy of the child's birth certificate and a letter from Home-Start Glasgow North Family Group. The respondent produced a further brief submission.

Destitution

14. It is agreed by the respondent that the appellant continues to be destitute. I find that this is the case since she is currently in receipt of Section 4 support and has been so since 7 January 2015.

Burden and Standard of Proof

15. It is for the respondent to prove that the appellant no longer qualifies for support on the balance of probabilities unless the appellant raises new matters at which point the burden reverts to the appellant.

The Hearing

16. At the outset of the hearing the following facts were agreed. It is agreed that the appellant is an Eritrean national and that she gave birth to a son on XX January 2015. It is agreed that the child is now 18 months old. It is also agreed that the father of the child, Mr XXXX, applied for refugee status with the child as

his dependant and that both he and the child were granted refugee status on 21 March 2016. I have been provided with a copy of the child's grant of refugee status in this respect. It is also agreed that the appellant contacted the respondent with the assistance of the British Red Cross on 1 June 2015 to inform the respondent that the child's father had successfully applied for child tax credits and child benefit and as such asking for the respondent to move support for the child from the Azure Card.

17. Ms Webb did not call the appellant to give evidence and the appeal was dealt with by way of submissions.

Submissions

18. Ms Crozier submitted that since the appellant is a single person and not a family and the support package was amended accordingly in 2015 that Section 55 of the Citizenship, Borders and Immigration Act 2009 does not apply to the appellant. She argues that the respondent was not aware that the child was living with the appellant. The child is a dependant on his father's claim for asylum. The appellant has not explained how the child's father was able to obtain child tax credit or child benefit for the child without the child living in his household. It was appropriate on this basis to treat the appellant as a single person. The child has been given refugee status and is not eligible for Section 4 support. Further the appellant although indicating that she intends to make a fresh human rights claim has not to date made such a fresh claim. The appellant seems to have been using the system for her own benefit. She submitted that the decision is lawful.
19. Ms Webb submitted that the respondent was aware that the child continued to live with her mother which is acknowledged in the response to directions. The appellant correctly notified the Home Office that the father of the child had obtained child benefit and child tax credits. This was the right thing to do. At that point the respondent took no issue with the situation. The respondent simply removed the child from the support claim and did not provide any details in relation to a new support package. The respondent has acknowledged that the child continued to be accommodated with its mother. Even had the respondent not been aware that the child continued to live with its mother the respondent was aware that the appellant had had a child and had a duty pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009 to take into regard the welfare of any child affected by the decision. At the very least the respondent had a duty to ascertain whether the appellant still lived with her child and whether the child would be affected by the decision. She submits that the respondent has entirely failed in his duty pursuant to Section 55. There is no reference to Section 55 in the refusal letter. There is no evidence that the respondent has made any enquiries or fact finding in relation to the best interests or welfare of the child. There has been no contact with the local authority in accordance with the respondent's own policy when discontinuing support to children. Further, the appellant has an appointment with her solicitor on Monday in relation to making a fresh application for leave to remain on the basis of the status of her child and her role as the primary carer of the child.

Findings and Reasons

20. I find that the appellant's child continues to live with her in the Section 4 accommodation and has done so at all times since its birth. I have been provided with consistent statements from both the appellant and the father of

the child in this respect and there was some independent supporting evidence from Ms Forrest of Home-Start Glasgow North Family Group confirming that the appellant and her child attend family group every week on a Thursday morning. I also note that the child is only 18 months old and the father of the child states that he is a student and not willing to take on responsibility for the child as the child was the result of a brief relationship only. I also find that the child's father has applied for child benefit and child tax credits on behalf of the child. It is not clear what information was provided to obtain these benefits but it is not a precondition for obtaining child benefit that a child live with the recipient. I accept that these benefits were obtained by the child's father as a way of providing some kind of additional financial support to the child in order to buy necessary items for the baby. I find that the appellant receives approximately £85 per week from the child's father in order to support the child which represents the money he receives in benefits.

21. I find that the respondent has always been aware that the child continues to be accommodated in Section 4 accommodation because the appellant indicated this in her letter when she informed the respondent that she was in receipt of some income for the child, the accommodation provider would have been well aware of this and this is acknowledged by the respondent in their response to directions.
22. I agree with Ms Webb that even had the respondent not been aware that the child was being accommodated the respondent was aware of the existence of the child since the appellant was specifically accommodated as a result of her pregnancy. I have regard to Section 55 of the Borders, Citizenship and Immigration Act 2009. I find that where the respondent takes any decision which potentially impacts on a child the respondent is required to carry out its functions in a way that takes into account the need to safeguard and promote the welfare of children. I find that the decision to discontinue support is a decision which impacts on the appellant's child regardless of whether a child is a dependant on her immigration status. I have had regard to the respondent's policy in relation to discontinuing support to families with children. This states:

“When considering whether to discontinue the provision of support under Section 95 of the Immigration & Asylum Act 1999 to families with minors, the course of action taken must be consistent with the Home Office’s obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, to ensure that the decision has regard to the need to safeguard and promote the welfare of children who are in the UK.

If a decision is being made as to whether it is appropriate to discontinue support to a family with children under regulation 20 of the Asylum Support Regulations 2000, if the family are assessed as being destitute if it were not for the provision of the aforesaid support, the Home Office must take in to account the impact of any decision on the family.

Any decision as to whether it is appropriate to discontinue support must be proportionate to the situation. If the breach was minor, such as failing to report, it may not be appropriate to discontinue the provision of support. If however, the breach was extremely serious, such as extreme violence or vandalism, it may be appropriate to discontinue support. When making decisions as to whether it would be appropriate to discontinue support, Case workers should consult their Senior Caseworker before proceeding.

If the discontinuation of support is appropriate, the Case workers should take appropriate steps to safeguard and promote the welfare of the children. Before any action is taken to begin the process to discontinue support, the Case worker should liaise with the local authority, notifying them that the Home Office plans to discontinue support from the family, and request that the local authority provides alternative support. If the local authority makes an offer of support, the provision of support under Section 95 should be discontinued as soon as the family transfers in to local authority care.

If the Home Office considers that the supported family are eligible for support provided by the local authority, but the local authority refuses to provide support, the provision of asylum support must be maintained until the local authority provides support.

If a decision is taken that it would be appropriate to discontinue the provision of support to a family with children, the discontinuation letter should explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009."

23. I find that the respondent accepts that the appellant continues to be destitute. The issue in this appeal is only whether she can continue to meet one of the requirements of Regulation 3(2). I find that the decision is prima facie unlawful since the decision discontinuation letter does not explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009. There is no indication that the respondent has made any fact finding exercise in relation to the welfare and best interest of the child and there has been no liaison with the local authority notifying them that the Home Office plans to discontinue support from the family. I also find that the father of the child is not willing to support the child and that as a recognised refugee the respondent cannot compel the child to return to Eritrea.
24. I therefore remit this appeal for the respondent to take a fresh lawful decision in respect of the welfare and best interest of this child on the facts as I have found them. In the meantime the appellant has indicated that she intends to submit an Article 8 application to the Home Office. She should ensure that any such application is submitted promptly because this may activate further entitlement to section 4 support.
25. Appeal remitted.

Ms Rebecca Owens
Tribunal Judge, Asylum Support
SIGNED ON THE ORIGINAL [Appellant's Copy]

Dated 27 July 2016



FIRST-TIER TRIBUNAL

ASYLUM SUPPORT

XXXX

XXXX

XXXX

XXXX

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Appeal
Number AS/17/02/36490

UKVI Ref. : XXXX

Appellant's
Ref. :

Date: 28th February 2017

IMMIGRATION AND ASYLUM ACT 1999

THE TRIBUNAL PROCEDURE (FRIST-TIER TRIBUNAL)

(SOCIAL ENTITLEMENT CHAMBER) RULES 2008

Tribunal Judge Richard Briden

Appellant
XXXX

Respondent
Secretary of State

[STATEMENT OF REASONS](#)

1. This Statement of Reasons is made in accordance with Rule 34(1) of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, and gives reasons for the decision given on 28th February 2017 when the Tribunal remitted her appeal.
2. The appellant is an Algerian citizen who was born on XX November 1982.

The Decision Under Appeal.

3. The appellant appeals against the decision of the Secretary of State made on 18th January 2017 to refuse her application for support under Section 95 of the Immigration and Asylum Act 1999 (“the 1999 Act”).

The Respondent’s Reasons

4. The reason given by the respondent in her decision letter of 18th January 2016 for refusing the appellant’s application was that she was not considered to be destitute.
5. The decision letter did not dispute that the appellant is an asylum seeker for the purposes of Section 95 support.
6. In summary the respondent did not accept the appellant’s claim as it appeared that the information that she had provided at various times about her means was conflicting and this had damaged her credibility to the extent that it was believed that that she was attempting to deceive the respondent as to her true financial position with a view to obtaining support. It was also asserted that the appellant had failed to provide sufficient evidence to support her claim of destitution.
7. It was noted in the decision letter of 18th January 2017 that the appellant had applied for a visit visa on 27th July 2015 and had visited the UK in September 2015. She had on arrival in the UK on 18th September 2015 been subject to what is called a desk interview. It was further claimed that the appellant had claimed to have entered the UK on 4th April 2016 on a UK visit visa and on 28th November 2016 completed an ASF1 application for asylum support which was followed by a claim for asylum made the following day. A Section 57 request for further information was made dated 8th December 2016 and a reply was made on 19th December 2016.
8. The conflicting statements made in the various documents and interview were as follows. In the supporting documentation to her ASF1 it was alleged that the appellant had stated that she owned a cleaning company in Algeria but she had asked her manager to close it down when she decided to stay in the UK and this was said to conflict with what she had stated in her reply to the request for further information that she was only a cleaner and that the lady named as manager was also a cleaner and the appellant had told her to close the business as she the

appellant had to be there to sign a letter for everything she did. It was also said to conflict with what the appellant had stated in her statement that she had requested her manager to send her £500 via a friend. The letter also referred to what she said at her desk interview in September 2015 when it was alleged that she had admitted to owning a cleaning business which she had owned since 2014 but which was being looked after by her brother. It was also said that she had claimed at the interview to be an office worker with a travel company.

9. Another reason why the respondent doubted the credibility of the appellant was that she had produced conflicting information about her assets. The letter alleged that at the September 2015 interview she had produced bank statements showing financial activity in relation to her business. In her visa application it was said that she had declared a monthly income of £748 or 100000 DNZ. This was not reflected in the bank statements that she had disclosed pursuant to the Section 57 request.
10. Reference was made to her ownership of a car which had been declared in her February 2016 visa application. Although a photograph of a damaged car had been produced no documentation relating to the accident that caused the damage had been produced. It was observed that during the desk interview in September 2016 she had said that she had 2 vehicles and property in Algeria.
11. In relation to a property that she said she owned the respondent did not accept that having made an initial payment of £10000 towards it the appellant had lost the property because she had failed to make a second payment on it in May 2016.
12. The decision letter did not in anyway dispute that the appellant is an asylum seeker for the purposes of asylum support.

The Appeal

13. The appellant challenges the decision of 18th January 2017 by way of a notice of appeal dated 14th February 2017.
14. In her notice of appeal the appellant stated that her cleaning company had ceased to exist in April 2016 because she was not in Algeria as no one had authority to sign any transactions. She went to offices and houses to look for work.
15. In relation to her insurance claim she explained that she had documentation but it was in French and she could not afford to translate it. She had received £2,000 in relation to her insurance claim but had used £1,300 to pay her staff and obtain clothing for her self. The balance of £700 she had used to come to the UK.
16. Concerning her house she stated that her mortgage arrangement had been cancelled due to her not being in Algeria. She said that she had been informed that half of the £10,000 would be returned to her in instalments.

Directions.

17. Directions were given in this case on 22nd February 2017.

The Hearing

18. The appellant appeared before the Tribunal at the hearing represented by Mr Cian Mansfield of the Asylum Support Appeals Project - ASAP. The appellant attended with her daughter M who was born on 11th February 2017.
19. Ms Reema Bassi, a UKVI presenting officer, appeared for the Respondent.
20. The proceedings were interpreted into the Arabic language by Ms Karima Amraoui an independent tribunal interpreter.
21. The Tribunal of its own motion raised whether the appeal should be remitted so that the respondent may reconsider the decision of 18th January 2017 taking into account her duty under Section 55 to promote the welfare of children in this case the appellant's daughter who was born on 11th February 2017.
22. Both parties were given an opportunity to make submissions about a proposed remittal to the respondent so that she may reconsider her decision taking into account her duty under Section 55 and then give a reasoned decision. Neither party raised any objection to this. In addition neither party tried to dissuade me from following this course of action without making any findings on fact on the substantive issue of destitution. This action was premised on what appeared to be common ground between the parties that the appellant would not be evicted from her current emergency accommodation until a decision had been made on the remitted decision. The appellant confirmed to the Tribunal that she had not yet been evicted from her emergency accommodation.

The Relevant Law

23. The appellant has to prove to the Tribunal on the balance of probabilities that at the date of the hearing she is an asylum seeker who is destitute within the meaning of the 1999 Act.
24. The Tribunal may take into account evidence that was not before the original decision maker. See Rule 15(2)(a)(ii).

25. The appellant will be destitute if it is proved on the balance of probabilities that at the date of the determination she does not have adequate accommodation or the means to obtain it or that she is unable to meet his essential living needs or does not have the means to meet them. If neither of these two criteria are satisfied but on the balance of probability it is proved that one or other of them is likely to occur within 14 days of the date of the hearing then she will be considered destitute. See Section 94 and 95 of the 1999 Act and Rule 7 of the Asylum Support Regulations 2000 as amended.
26. Under Section 55 of the The Borders, Citizenship and Immigration Act 2009 both the respondent and the Tribunal are under a statutory duty to have regard to the need to safe guard and promote the welfare of children who are in the UK.

The Tribunal's Reasons for Remitting the Appeal

27. The decision letter of 18th January 2017 did not make any reference to the appellant's daughter. She was at that date unborn. The appellant when submitting her notice of appeal attached documentation that showed that her daughter was born on 11th February 2017 in Croydon.
28. The respondent does not appear to have at any point expressly considered Section 55 and its application to the appellant's daughter. There is some e mails in the respondent's bundle at p.103 and p.105 which refer to the appellant's impending eviction and the fact that she was at that time heavily pregnant. One of the e mails refers to the need for an eviction not to take place on a Friday as "issues" were anticipated and "no one will want to be dealing with them on Friday afternoon". Beyond that there appeared to have been no consideration of the effect of an eviction on either the appellant or her expected child. The Tribunal does stress that at that date the child M was unborn.
29. The Tribunal was concerned that if it proceeded with the appeal and dismissed it the eviction would proceed and then given that there was no evidence as to what procedures were in force to ensure the welfare of the child circumstances (probably unintended but never the less of very real application) would arise which might result in a child being put on the street. The Tribunal was not prepared to take that risk and remitted the appeal so that the respondent may reconsider her decision taking into account her duty under Section 55 and then give a reasoned decision based on the evidence.
30. Any argument that the decision that the appellant has not proved destitution is of itself sufficient grounds for saying that Section 55 is satisfied is in the Tribunal's opinion an application of false logic. There may indeed be cases in which the Tribunal is able to find facts on the evidence as to the possession of particular assets at the time of the hearing so that no further enquiry is needed into the effect on the child's welfare by dismissing. Another example would be if the mother and child were already in the care of social services and again a dismissal of the Section 95 application could take place without any more enquiry under Section 55.

31. If however the Tribunal were to dismiss the appeal on the basis that the appellant is not credible or has not proved her destitution – which is an appropriate ground for dismissal in cases where Section 55 has no application - then whilst it may find facts that allow it to find destitution not proved at the date of the hearing these found facts may be wholly insufficient for the Tribunal to be satisfied that it has discharged its duty under Section 55. Examples might be when destitution is not proved because the mother's account is found to be not credible or there is otherwise insufficient documentary evidence to explain historic transfers of assets (which would otherwise justify a dismissal) but there is no precise evidence to find what assets the mother has at her disposal at the date of the hearing. In these circumstances a simple dismissal is likely to be not consistent with the duties imposed under Section 55 and a remittal is required.
32. In this appeal there has of course been no findings of fact yet. On the evidence the Tribunal cannot say for sure that it would not (having heard the appellant and her representatives) come to the same conclusion as the respondent in relation to the appellant's credibility and lack of documentation and in which case a remittal rather than a simple dismissal is more appropriate as there is no evidence as to what procedures are in place to ensure that the appellant's daughter is not put on the street. Such evidence might take the form of an exchange of e mails between the respondent and the appropriate local authority but it is a question of degree and fact in each case as to what would be sufficient information.
33. What is not to be relied upon is reliance upon some vague assumption of the nature "oh the children will be alright" because it is assumed that some authority under some duty shall at some point discharge its duty to this particular child. What is needed is some specific evidence as to what shall happen to this particular child – in this case the daughter of the appellant at the point of eviction.
34. It would have been open to the Tribunal to have found facts today and adjudicated on the appellant's destitution and then in the event of an adverse decision remitted solely for the Section 55 exercise to be undertaken.
35. The Tribunal declined to follow the course described in the above paragraph for two reasons. The first reason was that the respondent has more facilities to make enquiries in relation to the child than the Tribunal has in the course of a hearing. Secondly, the child has a legitimate expectation in law that the respondent will fulfil her Section 55 duty in respect of her and that assessment will be tested if necessary on appeal to this Tribunal. The Tribunal does not wish to encourage the practice whereby the respondent does not exercise her function and then relies on the Tribunal to rectify her omission or oversight. In this appeal it is true that the child was not born at the time of the decision under appeal but the respondent has been on notice as to the birth of the child since the receipt of the notice of appeal and as such it was open to the respondent to make an assessment under Section 55 prior to the hearing.

Final Determination

36. For the reasons given above the appeal is remitted so that the respondent may reconsider the decision under appeal in the light of her duty under Section 55 and give a reasoned decision.

37. The appeal is remitted accordingly.

Mr Richard Briden

Tribunal Judge, Asylum Support

SIGNED ON THE ORIGINAL [Appellant's Copy]

Dated 28 February 2017

Appendix 2 – HO policies re s55 Borders Citizenship and Immigration Act 2009 re refusing or discontinuing asylum support

	Section 95	Section 4
<p>Discontinuation for breach of conditions</p>	<p>Asylum Support: Policy Bulletins Instruction, (version 9) para 25.2.1</p> <p><i>When considering whether to discontinue the provision of support under Section 95 of the Immigration & Asylum Act 1999 to families with minors, the course of action taken must be consistent with the Home Office’s obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009, to ensure that the decision has regard to the need to safeguard and promote the welfare of children who are in the UK.</i></p> <p><i>If a decision is being made as to whether it is appropriate to discontinue support to a family with children under regulation 20 of the Asylum Support Regulations 2000 [ie for breach of conditions], if the family are assessed as being destitute if it were not for the provision of the aforesaid support, the Home Office must take in to account the impact of any decision on the family.</i></p> <p><i>Any decision as to whether it is appropriate to discontinue support must be proportionate to the situation. If the breach was minor, such as failing to report, it may not be appropriate to discontinue the provision of support. If however, the breach was extremely serious, such as extreme violence or vandalism, it may be appropriate to discontinue support. When making decisions as to whether it would be appropriate to discontinue support, Case workers should consult their Senior Caseworker before proceeding. If the discontinuation of support is appropriate, the Case workers should take appropriate steps to safeguard and promote the welfare of the children. Before any action is taken to begin the process to discontinue support, the Case worker should liaise with the local authority, notifying them that the Home Office plans to discontinue support from the family, and request that the local authority provides alternative support. If the</i></p>	<p>Asylum support, section 4(2): policy and process (Version 3) p16</p> <p><i>In considering whether to discontinue the provision of support to a person with child dependants, the course of action taken must have regard to the need to safeguard and promote the welfare of the children as provided for in section 55 of the Borders, Citizenship and Immigration Act 2009. If support is being discontinued because the person no longer meets the conditions set out in regulation 3(2) of the 2005 Regulations or because they breached the conditions attached to the provision of support, the local authority children’s services should be informed so that they can consider whether they need to take any action that they consider necessary to safeguard the welfare of the child.</i></p> <p>...</p> <p><i>Senior caseworker approval must be given before support is discontinued to any person with dependent children.</i></p>

local authority makes an offer of support, the provision of support under Section 95 should be discontinued as soon as the family transfers in to local authority care.

If the Home Office considers that the supported family are eligible for support provided by the local authority, but the local authority refuses to provide support, the provision of asylum support must be maintained until the local authority provides support.

If a decision is taken that it would be appropriate to discontinue the provision of support to a family with children, the discontinuation letter should explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009. [emphasis added]

Note: the section of the Policy Bulletins Instruction highlighted in bold above is omitted from the Conditions of Support Instruction, which states:

[Conditions of Support Instruction \(Version 1\)](#) p14

If a decision is being made as to whether it is appropriate to discontinue support to a family with children under regulation 20 of the Asylum Support Regulations 2000, and the family are assessed as being destitute if it were not for the provision of the aforesaid support, the Home Office must take in to account the impact of any decision on the family before proceeding. Any decision as to whether it is appropriate to discontinue support must be proportionate to the situation. If the breach was relatively minor, such as failing to report on a single occasion, it may not be appropriate to discontinue the provision of support. If, however, the breach was extremely serious, such as extreme violence or vandalism, it may be appropriate to discontinue support. Such decisions should be discussed with a Senior Caseworker before proceeding.

If the discontinuation of support is appropriate, the Caseworkers should take appropriate steps to safeguard and promote the welfare of the children. Before any action is taken to begin the process to discontinue support, the caseworker should liaise with the local authority, notifying them that the Home Office plans to discontinue support from the family.

	<p><i>If a decision is taken that it would be appropriate to discontinue the provision of support to a family with children, the discontinuation letter should explain why the decision is consistent with the Home Office's obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009.</i></p>	
<p>Discontinuation when no longer eligible</p>	<p>Ceasing Section 95 Support Instruction (Version 1) p14</p> <p>If an asylum seeker's household includes a dependant child who is under 18, they are to be treated (for asylum support purposes) as continuing to be an asylum seeker while the child is under 18 and they and the child remain in the United Kingdom; providing the dependant was part of the household before the time when the applicant became appeal rights exhausted.</p> <p>Support should not be discontinued in these cases unless, either:</p> <ul style="list-style-type: none"> • refugee status or other leave to remain is granted • they fail to comply with the conditions of asylum support - see also: Breach of conditions and Withdrawing support to families refused asylum <p>Caseworkers should:</p> <ul style="list-style-type: none"> • amend Home Office case working system to show the new status of the asylum claim, but Home Office case working system should also continue to reflect the current status of the asylum support application • use a "bring forward" (BF) system to signal 4 weeks before the youngest child's eighteenth birthday in order that support can be ended on the birthday, and 21 days notice given • follow the extra requirements if it a schedule 3 case <p>A pregnant woman, whether single or part of a couple, who has no other minor dependants will cease to be eligible for support when her asylum claim is determined according to the definition in Section 94 (3) of the Immigration and Asylum Act 1999.</p> <p>Flexibility for a transfer of support to Section 4 can be considered if a pregnant woman is close to giving birth.</p> <p>Where a dependent child is born or (aged under 18) becomes part of the household within the 21-day grace period following the notification of the termination of support, Section 95 support can be reinstated.</p>	<p>Asylum support, section 4(2): policy and process (Version 3) p16</p> <p>Note: see extract from the policy in the row above. Note: in contrast to s95, the s4(2) policy implies that support will be discontinued in the case of families with dependant children when eligibility ends (for example, when the supported person no longer has further asylum-related submissions outstanding, or where the supported person's baby is over 6 weeks, and so can travel). However it is very rare (as a matter of HO practice) for s4 support to be discontinued to families. Refer urgently to ASAP, in the unlikely event that you have an appeal on this issue.</p>

	If the only dependent child is born or (aged under 18) becomes part of the household outside of the 21-day grace period, the family will not be eligible for Section 95 support. They may be eligible for Section 4.	
Discontinuation when no longer destitute	Not referred to.	<p><i>It is not necessary to inform the local authority if support is being discontinued because the person is not destitute.</i></p> <p><i>Senior caseworker approval must be given before support is discontinued to any person with dependent children.</i></p>

Note that there is no Home Office guidance on the application of the s55 duty in cases where s95 or s4 support has been refused (as opposed to discontinued).