

Immigration Bill 2015

Briefing for House of Lords committee stage January 2016

1. About the Asylum Support Appeals Project (ASAP)

1.1 The Asylum Support Appeal Project (ASAP) is a registered charity that provides specialist advice on asylum support law. We run a full-time duty representation scheme at the First-tier Tribunal (Asylum Support) (the AST), where our staff and pro-bono solicitors and barristers give advice and representation to over 650 appellants a year.

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2. Summary of ASAP'S position on part 5 of the Immigration Bill 2015

2.1 This briefing addresses why ASAP considers the lack of a right of appeal for s95A ('genuine obstacle') support for refused asylum-seekers to be problematic and unworkable. **ASAP also considers that, until the regulations to accompany s95A are drafted, the government's position that s95A is so straightforward that there is no need for a right of appeal is untenable.**

2.2 The amendment we are therefore seeking addresses this issue:-

That there is a right of appeal to the AST for refused asylum-seekers who have applied for, and been refused, s95A support, or who are in receipt of s95A support and a decision is made to terminate that support

3. The proposed new conditions for eligibility to asylum support in the Bill

3.1 Destitute refused asylum-seekers who face a genuine obstacle in leaving the UK will be eligible for s95A support. It replaces the current s4(2) support for refused asylum-seekers, although the term 'genuine obstacle' is new. There is currently a right of appeal regarding all existing s4 decisions. Asylum support appeals are either 'application' appeals or 'discontinuation' appeals; the latter is when the person is already on support and is appealing the Home Office's decision to terminate it.

3.2 'Genuine obstacle' will be defined in regulations, which have yet to be drafted. The government has indicated that the regulations will specify that support is to be provided to two of the categories of people who are currently eligible for s4(2) support; those who are taking all reasonable steps to leave the UK and those who are medically unfit to travel.

3.3 Currently refused asylum-seekers who submit further asylum claims can qualify for s4(2) support under a human rights provision in the 2005 regulations.¹ Under the Bill, this group will become eligible for s95 support. Such claims will be defined as ‘further qualifying submissions’. The Home Office made clear in its memorandum on the European Convention on Human Rights that there will not be a similar human rights provision in the regulations which will accompany s95A.²

3.4 The human rights memorandum refers to the relevant case law³ which has established that, whilst there is no duty to provide support to those who could return to their country of origin, a duty does arise if they have an outstanding non-abusive application, and the effect of not providing support would leave them destitute in breach of Article 3. Hence those with fresh asylum claims currently access support via s4(2) and regulation 3(2)(e) of the 2005 regulations.

3.5 There is a further difference between s4(2) and s95A which will be explained more below. The government intends s95A support only to be available, for the most part, to those who apply for it whilst still on s95 support. However, until the regulations are published, it is not known how this will be achieved.

4. **The removal of the right of appeal for refused asylum-seekers who have applied for asylum support**

4.1 ***In the Bill there is no right of appeal at all with regard to s95A support.*** The existing right of appeal regarding s95 support will continue. Analysing the figures on asylum support appeals reveals that these changes risk leaving destitute a large number of people who may have a legal right to support. We estimate that, under the Bill, over 1216⁴ people will no longer have a right of appeal.

4.2 From September 2014 – August 2015 the Asylum Support Tribunal received 2067 applications for appeals against a Home Office refusal of asylum support. 62% of these were either allowed (44%), remitted or withdrawn by the Home Office. Once the AST has its ability to scrutinise Home Office decisions reduced, we anticipate refusals of asylum support will increase.

4.3 Appeals fall into two broad categories; cases concerning destitution and cases relating to other eligibility criteria. We have been monitoring decision-making on destitution and have found that there has been a rate of between 60% (in 2014) and 82% (in 2011) of cases overturned at appeal because the AST found the appellant to be destitute.

¹ ‘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’ reg 3(2)(e) of the Immigration and Asylum (Provision of Support to Failed Asylum-Seekers) Regs 2005 SI 930

² Immigration Bill European Convention on Human Rights Memorandum by the Home Office 17/9/15 para 108

³ R(Kimani) v Lambeth BC [2003] EWCA Civ 1150, Clue v Birmingham CC [2010] EWCA Civ 460, R(Limbuela) v SSHD [2005] UKHL 66, paras 105-18 in the memorandum

⁴ This is 83% (ratio of cases related to s4) of the number of appeals received at the AST between March 2014 – Feb 2015 1571 minus 105 which were struck out.

4.4 Two examples from the AST in 2015 where there will no longer be the right of appeal

A is a Somali woman in her late 60s. She has two children in the UK with refugee status. Her own claim for asylum was refused in 2005. She suffers from chronic mental health problems including psychotic depression and post-traumatic stress disorder. She is at risk of suicide and self-harm. She also has physical health problems which restrict her mobility and leave her in pain. She receives frequent care from her GP and her condition is reviewed every few months by a psychiatrist.

She has been on s4 support due to her medical condition since 2011. Her GP has consistently said she is unable to travel because of the impact this would have on her health. At various points the Home Office's own doctors have also agreed. Since 2011 her support has been subject to at least eight internal Home Office reviews all of which have resulted in her staying on support. Twice the Home Office was required to re-instate her support following a successful AST appeal. On at least two other occasions the Home Office changed its position and decided to continue to support her shortly before an appeal was due to be heard.

In the latest and third appeal, the Home Office's doctor expressed concern that continually reviewing her case was not in her best interest and the question of her presence in the UK should be resolved once and for all. The judge decided she was unable to travel and moreover that her mental health was too poor for her to make a decision about returning voluntarily. She continues to be eligible for support on health and human rights grounds.

B is a Palestinian. Following the refusal of his asylum claim he decided to return home. However, he faced significant obstacles in doing this. He was born in Gaza but left around the age of 10. He moved with his father to Lebanon following the death of his mother and brother. He was orphaned not long after arriving and was looked after by neighbours in a refugee camp. He could not remember whether he ever had a Palestinian ID number which may have allowed him to obtain a travel document. He did not know anyone in Gaza (who could have helped find out his ID number) or whether he had any kind of formal status in Lebanon.

He obtained support following a successful hearing in November 2014 when the judge found that he was taking all reasonable steps to leave the UK. She accepted that he had no means of confirming his identity or nationality. As he left Gaza as a young child, it was not realistic to expect him to know his ID number or to recollect whether he had any extended family left there. He had provided evidence that the Lebanese Embassy had refused to assist him and confirmed they would only respond to enquiries made by the Home Office.

In July 2015 the Home Office decided to terminate his support and he appealed. Despite the conclusions in the previous appeal there had been no progress. The judge came to same conclusions as her colleague in 2014, namely that it was now the responsibility of the Home Office to help him contact the Lebanese embassy. She remitted the appeal back to the Home Office so the matter could be progressed, and he remained on support.

5. Arguments from the Minister for Immigration in the House of Commons Committee as to why a right of appeal is not necessary

5.1 The amendment we are seeking was debated in detail in the Public Bill Committee on 5/11/15 (Hansard pages 415-425). The opposition members repeatedly drew attention to the success rates on appeal, and argued that therefore s95A should attract an appeal right. They failed to understand how fairness could be promoted by removing the right of appeal. The Minister for Immigration had three responses, which will be considered in turn, in the next three sections:-

5.1.1 Deciding whether a genuine obstacle exists 'should be a straightforward matter of fact for which a statutory right of appeal is not needed' (page 422, 2nd column, 3rd paragraph).

5.1.2 He maintained that the Independent Chief Inspector's report⁵ essentially showed that there were no particular problems with Home Office decision-making.

5.1.3 He stated that many appeals are allowed or remitted because the appellant only provides the necessary evidence at a late stage (page 425, 1st column, 2nd paragraph).

6. Why decisions on s95A applications will not be straightforward

6.1 The regulations will need to cover various situations and so necessitate some complexity. Errors by Home Office decision-makers on some cases will be inevitable.

6.1.1 There will be a distinction between whether the application is made whilst still on s95 support or at a later stage. As stated above, the government intends that it will only be possible to apply for s95A support whilst still on s95 support. However, there will be exceptions, and so in some situations it will be possible to apply when no longer on support.⁶

6.1.2 Cases which come within the exception (and so can apply when no longer on s95 support) will require extra resources from the Home Office eg in assessing medical evidence. The Minister for Immigration in the Public Bill Committee (Hansard page 424) failed to take this into account when he stated (assuming that those applying for s95A would already be on support) 'we are not doing this by correspondence'. These 'exceptional' cases will be applying for s95A support by correspondence.

6.1.3 There will be a distinction between those with children and those without. With regard to the former, the exceptions may be broader and the 'grace period' (ie the period s95 support continues after an asylum refusal or a dismissed asylum appeal) is likely to be longer.

6.1.4 The statutory 'grace period' will be crucial, as determining of entitlements, and yet the Home Office currently makes mistakes regarding asylum support discontinuation decisions and the grace period.

⁵ 'An Inspection of Asylum Support' Sept 2013 – Jan 2014, Independent Chief Inspector of Borders and Immigration, John Vine CBE QPM

⁶ ECHR memorandum para 115

6.1.5 As explained in Section 11 below, entitlement to s95A support and the new 'para 10A' support from local authorities will be linked, as entitlement to the former prevents access to the latter. Therefore local authorities will be directly affected by whether s95A support is correctly granted.

6.1.6 Currently, very few refused asylum-seeking families apply for s4(2) support, as they remain on s95 support. The Bill changes this, and many families will be applying for s95A support. Decisions on s95a applications from families will require an assessment by the Home Office under s55 (safeguarding children) Borders, Citizenship and Immigration Act 2009.

6.1.7 In the case of families and individuals applying for s95A support when no longer on s95 support, there will also have to be an assessment on destitution.

7. Why the Chief Inspector's Report does not show the full picture

7.1 During the debate, the Minister referred to the Chief Inspector's report to support his argument that there are no particular problems with Home Office decision-making. However, to view that report as a singularly comprehensive assessment of Home Office practice ignores the following limitations:

7.2 Small sample size for 'appeal' cases

The ICI report states that in order to assess the quality of decision-making the inspectors sampled 103 refusal decisions, 74 of which carried a right of appeal⁷. However, only 12 applicants exercised this right and only 2 had their appeal allowed by the AST. The ICI report includes details of 3 further appeals which the inspectors observed. **Accordingly, in the valuable context of appeals (where the Home Office is held to account by the AST), the report's findings are based on just 15 cases.**

7.3 Emphasis on 'refusal' decisions

The ICI report is almost exclusively focused on decisions to grant or refuse support (215 cases)⁸. The finding that 90% of Home Office decisions were reasonable relates only to this type of case.

7.4 A comprehensive analysis of Home Office decision-making would require a more detailed consideration of 'discontinuation' cases. Here, the onus is on the Home Office to demonstrate why the relevant individual no longer qualifies for support. We are aware from our experience at the AST that 'discontinuation' cases sometimes involve complex legal and factual issues which can result in Home Office error.

7.5 Absence of detailed legal analysis

There is little to explain what legal benchmark was applied by the inspectors in finding that 89% of refusal decisions were reasonable. The lack of reference to how the Home Office satisfied its obligations under case law and statute is surprising. The fact that the report describes a routine appeal as being "complex and unusual"⁹ further indicates that a

⁷ An Inspection of Asylum Support, September 2013 – January 2014, paragraph 4.28

⁸ The only reference to 'discontinuation' cases in the ICI report are at paragraph 4.49 (support discontinued in error as the Home Office failed to record outstanding submissions) and paragraph 4.57 (a consideration of how efficiently the Home Office processed the termination of support in 56 cases where asylum had been granted).

⁹ An Inspection of Asylum Support, paragraph 4.30

rigorous legal analysis was beyond scope. It is more likely, as the Executive Summary suggests¹⁰, that the report's predominant focus was on the administrative aspect of decision-making.

8. Why appeals are allowed or remitted – the true picture

8.1 ASAP's recent research¹¹ on why asylum support appeals succeed (January 2016) found that in 28 cases of the 50 examined there was a single dominant factor as to why the appeal had been successful, these were:

- written evidence submitted post Home Office decision ('late' evidence) (**15 cases**);
- oral evidence provided at the hearing (**5 cases**)
- the Tribunal rejecting the Home Office's legal position (**3 cases**)
- the Home Office making a factual error (**1 case**)
- facts emerging¹² and/or being clarified post Home Office decision (**4 cases**)

8.2 In the remaining 22 cases the tribunal cited a combination of the above factors in support of its decision to allow or remit the appeal.

9. Judicial review is an inadequate remedy in place of a right of appeal

9.1 The Home Office's Human Rights memorandum acknowledges at paragraph 109 that Article 6 (right to a fair trial) is engaged regarding the refusal of s95A support. It then states that any decision 'would be susceptible to judicial review and emergency injunctive challenge where appropriate'.

9.2 However, the memorandum is silent on the issue of the residence test¹³, which prevents this category of migrant accessing legal aid. The residence test is not yet in force although on 25/11/15 the government's appeal in the Court of Appeal on whether it is lawful was allowed¹⁴. Assuming the residence test is brought into force, the only remedy for unsuccessful s95A applicants will therefore be to conduct a judicial review as a litigant in person. This is entirely unrealistic due to the profile of the client group and the level of expertise and knowledge required.

9.3 Even if the residence test is not made law, judicial review is still an inappropriate remedy for s95A decisions. It is expensive, relies on lawyers and legal aid, and will lead to legal costs for the Home Office. The human rights memorandum at paragraph 109, in relation to s95A, further states 'in the context of any judicial scrutiny of the exercise of the

¹⁰ An Inspection of Asylum Support, paragraph 1.1

¹¹ Asylum Support Appeals Project, *Why Appellants Succeed*, (Jan 2016) www.asaproject.org.uk

¹² These cases are in a separate category because the relevant fact was not contained in the appellant's written or oral evidence. For example, in Appeal 17 it was established that neither the Home Office nor its medical advisor had considered medical reports written in 2013 and 2014 in the context of the asylum support regulations, and the appeal was remitted for this to happen.

¹³ The residence test was introduced in 2014 in draft regulations pursuant to the Legal Aid, Sentencing and Punishing of Offenders Act 2012

¹⁴ *Public Law Project v Lord Chancellor and the Office of the Children's Commissioner (intervener)* [2015] EWCA Civ 1193

power, the person would be entitled under Article 6 to a fair and public hearing within a reasonable time by an independent tribunal established by law'. This strongly implies that judicial review would not be adequate and yet no explanation is then given as to how Article 6 will be complied with.

10. The benefit of the existing system of Tribunal appeals

10.1 The right of appeal to the AST ensures judicial oversight of Home Office decisions in a cost effective, straightforward and accessible way. Appeals are quick, with decisions given on the day at the end of the hearing. If appeals are dismissed, then appellants lose their support immediately. Without the AST overseeing the process, there will be no realistic check on the Home Office's decision-making. Thus it will matter much less what is contained in the statute, regulations and Home Office policies, as there will be no effective mechanism for ensuring that they are followed.

10.2 There is no legal aid provision for representation at the AST (nor has there ever been in the past). Destitute asylum seekers are mostly reliant on the charity sector for assistance with their asylum support applications and appeals. The statutory timeframe from date of refusal decision to date of hearing (about 2 weeks) is very tight, to allow for the fact that appellants may be destitute. In contrast, if the only remedy were judicial review, then the appellant would need to apply for interim relief (to obtain emergency support) pending the decision on the permission application, which usually takes several weeks or more. Again this is unrealistic as an effective remedy.

10.3 The very fact that asylum support applicants have limited rights makes it even more important that there is an effective and accessible system to ensure that decisions on those rights are made lawfully and that they are enforced. This is especially the case when the alternative is destitution, which can have serious and lasting effects on an individual.

11. Refused Asylum-Seeking Families

11.1 Removing refused asylum-seeking families from open-ended s95 support¹⁵ is one of the key aims of the Bill. However, in November the government laid an amendment to the Bill such that there will be a new form of support for refused asylum-seeking families. It was introduced by inserting paragraph 10A into Sch 3 of the Nationality, Immigration and Asylum Act 2002. This support will be provided by local authorities, not the Home Office.

11.2 As indicated below, there is obvious potential for para 10A support to create disputes between the Home Office and local authorities, leading to expensive litigation¹⁶ and increased costs of supporting on local authorities. Judicial oversight of the Home Office decisions by the AST would considerably reduce this risk.

11.3 Para 10A support cannot be provided if the family is, or should be, getting s95A support. To qualify for para 10A support the family will need to satisfy one of four

¹⁵ Currently support is potentially available whilst there are children under 18 in the household, Immigration and Asylum Act 1999 s94(5)

¹⁶ From *R(Westminster) v NASS* (2002) 5 CCLR 511 onwards, there has been considerable litigation and reported cases on where the responsibility lies between central and local government.

conditions A to D:- (A) have an outstanding application, (B) or appeal, (C) not failed to have cooperated with arrangements that would enable them to leave the UK and (D) 'the provision of support is necessary to safeguard and promote the welfare of a dependent child'.

11.4 Currently, if a family or individual approaches a local authority for support, or is already on local authority support, and the local authority is aware that that they should be on Home Office support, then the social worker can assist in the application to the Home Office, and, if necessary, the subsequent appeal to the AST. ASAP has advised in many asylum support appeals in this category, and the usual outcome is that the appeal is successful. However, in the future, without a right of appeal regarding s95A, the local authority will either have to provide the support itself, whilst considering whether to judicially review the Home Office, or risk being judicially reviewed itself for leaving the family destitute in breach of para 10A. A right of appeal to the AST will assist in simplifying this complex question of where the duty lies between central and local government. The following are some hypothetical examples.

11.5 Family A wishes to return home but has insufficient documentation. They apply for s95A support. Since losing their asylum appeal two years ago, they have been moving around between friends, but can be helped no longer. The Home Office does not accept that they are destitute, and refuses the application. The family applies for para 10A support, conditions C and D. The local authority does accept that they are destitute, and has no choice but to house and support them whilst assisting them with re-applying for s95A support.

11.6 Family B were in the same situation as Family A but the Home Office accepted that they were destitute and granted s95A support. Three months later the Home Office considers they have had enough time to document themselves and terminates the support. The family apply for para 10A support on the basis that conditions C and D are satisfied. The local authority is unclear as to whether they have had sufficient time or assistance to document themselves and suspects that they should still be on s95A support but has no choice but to support them. The local authority is also unclear as to how para 10A condition C support (not failing to co-operate with arrangements to leave) differs from s95A 'taking all reasonable steps to leave' support.

11.7 Family C recently became refused asylum-seekers. The mother suffers from a medical condition which, for the time being, she considers would make it unsafe for her to fly. She provides a medical report. The Home Office's doctor, who has not met the mother, makes an assessment on the papers and decides that she is fit to travel. The Home Office therefore terminates support. The family apply for para 10A support on the basis that Condition D is satisfied. The local authority has to provide support, given that the welfare of the children is at stake. The family also continue to allege that it is unsafe for the mother to fly, but they have no forum, apart from judicial review, for challenging the Home Office's finding on this issue.

12. Care-leavers

12.1 The government's amendment also contains a power (parallel to the para 10A power) to provide local authority support to refused asylum-seekers who came to the UK alone as children, and have now turned 18 (para 10B). Currently this group is supported by local authorities under the Children Act 1989 from their arrival in the UK to beyond the age of 18, and in some cases up to the age of 25. Under the Bill, they will remain on Children Act support up to the age of 18, and then they will be in a similar position to refused asylum-seekers who arrived as adults. Therefore they may or may not be eligible for Home Office support. However, para 10B does enable local authorities to support them after the age of 18 if they fulfil conditions similar to those attached to para 10A support. Again eligibility is dependent on not being eligible for s95A support, and so, for the same reasons, a right of appeal to the AST is crucial.