

# Breach of Human Rights; s4 support under reg 3(2)(e)

05/03/2021

Factsheet 12

## In this Factsheet:

- Breach of European Convention of Human Rights
- Is it Reasonable to Expect the Asylum-Seeker Leave the UK?
- Out of Time Appeals to the First-tier Tribunal (Immigration and Asylum)
- Asylum-Seeker has Submitted Fresh Representations
- Refused Asylum-Seekers with Outstanding Applications for Leave Under ECHR Article 8
- Judicial Review Proceedings
- European Court proceedings
- Other Human Rights Situations
- Public Health Risks

**This Factsheet looks at situations where s4 support may be available necessary to prevent a breach of human rights. It overlaps with Factsheet 2 on s4 support. Factsheet 2 should be read first.**

## Section 4 Support and Human Rights

To qualify for s4 support,<sup>1</sup> a refused asylum-seeker has to meet certain conditions found in the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005.

They must be:

- destitute, or be likely to be destitute within the next 14 days (or 56 days if they are already receiving support); and
- satisfy one of the five eligibility criteria set out in regulation 3(2)(a)-(e) of the Regulations

Reg 3(2)(e) states that ‘**the provision of accommodation is necessary for the purpose of avoiding a breach of a person’s Convention rights**’ and it is this criteria which is examined here (for other criteria see Factsheet 2).

## Breach of European Convention of Human Rights

Support must be provided if otherwise a person’s rights under the European Convention of Human Rights (ECHR) would be breached. Article 3 states ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’. The courts have found that denying support to asylum-seekers whose claims are outstanding, given that they are not allowed to work and would be faced with street homelessness, constitutes ‘inhuman and degrading treatment’, in breach of Article 3. This principle applies to refused asylum-seekers.

## Is it Reasonable to Expect Refused Asylum-Seekers to Leave the UK?

Refused asylum-seekers with no outstanding claims are expected to avoid a human rights breach by leaving the UK. The fact that, due to poverty, they may have to live in inhuman and degrading conditions in their own country is not relevant. However, if they have a further immigration application, which is outstanding and not hopeless or abusive, then it would not be considered reasonable to leave. Once the refused asylum-seeker has no longer any outstanding applications, then they can ‘cure’ the breach of their Article 3 rights (eg street homelessness) by leaving the UK.

<sup>1</sup> Immigration and Asylum Act 1999, section 4(2)

**ASAP****Factsheet 12****Breach of Human Rights; s4 support under reg 3(2)(e)**

Fears about how they will be treated in their home country are not relevant for s4 purposes. This is because such fears would have been addressed when their asylum claim was considered and refused, *unless* such fears have been raised in fresh representations (see further below).

The following are examples of circumstances where the Home Office (HO) or the First-tier Tribunal (Asylum Support) (AST) has provided support on human rights grounds. **This is for guidance only.** The HO and AST judges often have different approaches to when it would be unreasonable to expect an applicant to leave the UK, and hence many appeals are successful. AST decisions are not binding on other judges, although decisions of the Principal Judge are seen as persuasive. A selection of AST decisions can be seen on the [AST database](#).

If you have any doubts about eligibility, call ASAP's advice line.

**Out of time appeals to the First-tier Tribunal (Immigration and Asylum)**

HO guidance<sup>2</sup> states that support may be provided under reg 3(2)(e) where 'they have submitted a late appeal against the rejection of their asylum or Article 3 ECHR claim and the First-tier Tribunal is considering whether to allow the appeal to proceed out of time'. If the appeal is allowed to proceed the person will then become eligible for s95 support.

**The asylum-seeker has submitted a fresh claim (referred to as 'further submissions' by the HO)**

A refused asylum-seeker who has exhausted their appeal rights may have new evidence or arguments to put before the HO as part of a fresh claim for asylum, or under ECHR Article 3. Once they have submitted these further submissions to the HO, there is likely to be a delay before the HO decides if these submissions constitute a fresh claim. During this period, the refused asylum-seeker is not eligible for s95 support, but will be entitled to s4.

The HO accept that it would not be reasonable to expect a refused asylum-seeker to leave the UK where:-

- a) They have lodged further submissions and
- b) The HO has not yet decided whether to record the submissions as a fresh claim or to refuse them; and
- c) The submissions 'are not clearly abusive, manifestly unfounded or repetitious'<sup>3</sup>

<sup>2</sup> Asylum support, section 4(2): policy and process, version 1, p13

<sup>3</sup> Asylum support, section 4(2): policy and process, version 1, p13

**ASAP****Factsheet 12****Breach of Human Rights; s4 support under reg 3(2)(e)**

The refused asylum-seeker will then remain on s4 support until the HO considers those further submissions. When it does, there are 3 possible decisions to be made:-

1. Grant status. Therefore s4 support will be discontinued, usually in 28 days.
2. Record the further submissions as a fresh claim for asylum or under Article 3, as they meet the Immigration Rule 353 threshold of being 'something new', but simultaneously refuse the application, with a right of appeal to the Asylum and Immigration Tribunal. In this scenario, your client has now switched from being a refused asylum-seeker to an asylum-seeker, and so will be entitled to s95 support. This may not happen automatically and so an application will need to be made.
3. Refuse the further submissions with no right of appeal. The s4 support will be discontinued, with a right of appeal. See Factsheets 5 and 6.

**Further Submissions not yet submitted**

The process for making further submission has changed since the March 2020. Claims are now made by post or email: <https://www.gov.uk/submit-new-evidence-asylum-claim>. Prior to this, further submissions were made in person at the Further Submission Unit (FSU) in Liverpool. The previous system which required an appointment to be booked, meant that there was often a delay of 6-10 weeks from booking the appointment and lodging the submissions in person. As the delay was not the fault of the applicant, many Judges at the AST would grant support when further submissions were prepared but not yet submitted.

Those who can demonstrate that they have further submissions that are not hopeless, abusive, and merely repetitious or manifestly unfounded, *may* be eligible for s4 support before their further submissions have been lodged, *if* the delay is outside of their control. This is because the applicant has done all that they reasonably can, and it would not be reasonable to leave the UK at this stage in their case. However, this approach is untested since the FSU closed in March 2020 and judges may refuse support when the submissions have not already been submitted. If the applicant is particular vulnerable, that may strengthen the case for support.

**Refused Asylum-seekers with outstanding applications for Leave to Remain under ECHR Article 8**

Individuals who have never claimed asylum but instead apply for leave to remain on Article 8 grounds (family and private life) are not eligible for asylum support under s95.

However, destitute refused asylum-seekers who have an outstanding Article 8 claim

The information contained in this Factsheet is intended for guidance only. While every effort is made to ensure it is correct at the time of publication, it should not be used as a substitute for legal advice. For client specific advice please contact ASAP

may be eligible for s4 support under regulation 3(2)(e). It would not be reasonable to expect such people to leave the UK until their Article 8 claim has been determined. In August 2015 the Principal Judge in [AS/14/11/32141](#) found that Article 8 applicants are eligible for s4 support. This judgment is persuasive on other judges and the HO, and should be followed. However, Article 8 applicants should seek immigration advice before applying for s4 support. They will need to prove their destitution to be eligible and in doing so they should not put forward any information to the HO which could contradict or weaken their Article 8 application. ASAP can advise further and assist with any appeal.

### Statelessness applicants

Since 2013 it has been possible to apply for leave to remain in the UK as a stateless person on a specified and detailed HO form. Once the application is lodged and whilst it is still outstanding, it is possible to apply for s4 support under reg 3(2)(e). However, this means that only stateless applicants who are also refused asylum-seekers can benefit. This is because only refused asylum-seekers can apply for s4 support.

### Potential Judicial Review Proceedings following the refusal of Further Submissions

Further submissions are usually refused, as the HO decides they do not meet the threshold of being a fresh claim. Therefore the applicant does not have a right of appeal to the First-tier Tribunal (Immigration and Asylum) and the only remedy is to challenge the decision by way of judicial review, on the basis that it is unlawful.

The AST is likely to grant support in the following circumstances:-

- The appellant has started the judicial review proceedings and is waiting for a judge to decide whether to grant permission for the application to proceed.
- The appellant has sent a pre-action protocol (PAP) letter to the HO threatening judicial review proceedings but is waiting for the prescribed period to end before issuing court proceedings. The Protocol is a set of rules which should be followed by claimants before they start judicial review proceedings against a government body. They must send a 'pre-action letter' setting out their arguments and requesting a response within a deadline (usually 14 days). AST judges generally accept that it would not be reasonable to expect the appellant to leave the UK while they are waiting for a response to this letter. There can then be further (reasonable) delays after a negative HO response to the PAP letter, as the appellant waits to be granted legal aid, without which their solicitor cannot issue the judicial review. Again this is something some the AST judges will take into account.

### European Court of Human Rights proceedings

Refused asylum-seekers who have exhausted all available appeals and remedies in

the UK sometimes make applications to the European Court of Human Rights (ECtHR). In decision [AS/11/06/26857](#) the Principal Judge set out guidance on when such applicants will be eligible for support.

### **Other Possible Human Rights Situations**

There may be other situations where it is not currently reasonable, or possible, to leave the UK. Therefore, there may potentially be a breach of human rights if support is refused or withdrawn. For example the applicant needs to remain in the UK temporarily because of civil or criminal court proceedings or care proceedings. Or they suffer from serious mental health problems, such that the AST judge considers it would be a breach of reg 3(2)(e) for their support to be discontinued whilst they are in the UK.

### **Public Health Risks**

The Principle Judge at the AST has found that discontinuing s4 support to those in an area under Tier 3 restrictions, may breach their Convention rights and those of the general public<sup>4</sup>. Please see Factsheet 20 for more information. However, eligibility on the basis of the public health risk will be effected by changes to covid related restrictions.

---

<sup>4</sup> A <https://www.gov.uk/asylum-support-tribunaldecisions/pa-and-ma-v-secretary-of-state-for-the-home-department-as-20-09-42386-and-as-20-09-42397> S