

Briefing Note: Article 8 applications and eligibility for s4 support

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It is well established that destitute refused asylum seekers who have outstanding further submissions relating to asylum or Article 3 ECHR (a 'fresh claim') are eligible for s4 support. They come within reg 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005:-

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 Home Office usually decides (after a few months or longer) that their further submissions do not meet the threshold set out in Rule 353 of the Immigration Rules to qualify as a fresh claim, and so refuses them without granting a right of appeal. Section 4 support is then discontinued.

It is also the case that those who have outstanding Article 8 applications are eligible under reg 3(2)(e). This was established via the *Mulumba* case (see below) and the Asylum Support Tribunal (AST) decision of Principal Judge Storey's decision of 10/8/15. This decision is on <https://www.gov.uk/asylum-support-tribunal-decisions>

29. In my judgment, there is no legal basis for the Secretary of State's argument that only a protection-based application entitles a failed asylum seeker to Section 4 support under Regulation 3(2)(e). This is not what the regulations state and it is not what the Secretary of State's own policy promotes. In the circumstances, I find that any application for leave to remain may entitle the applicant to Regulation 3(2)(e) support where the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, subject to the requirement that the application is not obviously hopeless or abusive.

https://assets.publishing.service.gov.uk/media/584e94f740f0b60e4a000087/AM_v_SOS_A_S_14_11_32141.pdf

Notwithstanding this decision, the Home Office on occasions still refuses these s4 applications, simply because the outstanding immigration application is not a 'protection claim'. However, as confirmed by PJ Storey, there is nothing in the regulation to suggest that the further submissions have to relate to asylum or Article 3 (together known as 'protection' claims). The logic of granting s4 support to a destitute person with an outstanding application (of any sort) is as follows:-

- Being left destitute in the UK is a breach of a person's Article 3 rights – 'inhumane or degrading treatment'
- A person can remedy this breach by leaving the UK
- However, it would not be reasonable to expect them to leave the UK when they have an outstanding application

In 2014 ASAP intervened in the Article 8 s4 case of *R (Mulumba) and First-tier Tribunal (Asylum Support) and the Secretary of State for the Home Department*. The case settled, as the Home Office conceded that those with outstanding Article 8 applications may also be eligible for s4 support.

Home Office policy on reg 3(2)(e) is contained in the *Asylum support, section 4 policy and process instruction* para 1.14. Notwithstanding the Mulumba settlement and PJ Storey's decision, this has not been amended to state specifically that Article 8 applicants are eligible.

Should I encourage all my destitute clients with outstanding Article 8 applications to apply for section 4 support?

No. It is important for your client to seek immigration advice before applying for s4 support on this basis. It is essential that none of the information in the s4 application contradicts or could be construed to contradict anything in your client's outstanding Article 8 application. For example, their Article 8 cases might be based on being in a stable committed couple. While your client's partner's inability to accommodate or support them financially is not necessarily incompatible with having a strong subsisting relationship, applying for s4 support could damage that claim. It is imperative that they seek immigration advice before providing destitution evidence from their partner in support of their s4 application.

Which type of case is more likely to succeed?

One example would be fathers who no longer live with their children (or with the children's mother) but have maintained strong relationships with their child or children, which forms the basis of their Article 8 claim. Whilst it is not the role of the AST judge to consider the substantive merit of an outstanding immigration application, they may take into account whether it is repetitious or hopeless. Therefore, just as with further submissions on protection grounds, support will not be awarded where it appears the Article 8 case has little or no merit. Applying for s4 support may trigger a decision on any outstanding application, especially if the facts are weak.

What if there has already been a decision on the Article 8 claim?

This is more tricky, and ASAP's advice should be sought. If the person was given a right of appeal, and they are waiting for that appeal to be heard, then they are in a strong position, as it would not be reasonable for them to abandon their appeal, which would happen if they left the UK. If, as is more likely, they were not given a right of appeal, then their immigration advisor may be considering challenging the decision by way of judicial review. If the decision is to be judicially reviewed, then it is worth applying for s4 support (assuming the immigration advisor agrees). In all cases check with the immigration advisor.

What if my client never applied for asylum?

Support under section 4(2) Immigration and Asylum Act 1999 (IAA 1999) is only for refused asylum seekers. In the past, non-asylum seekers had the option of applying for s4(1) support, which was abolished on 15/1/18. They might now be able to apply for the new Immigration Act 2016 Schedule 10, para 9 support. Further advice should be sought.