Schedule 10 support

May 2021

Support for people on immigration bail is provided by the Home Office (HO) in limited circumstances under schedule 10 (sch 10), paragraph 9 of the Immigration Act 2016. This briefing explains who is eligible, how to apply and briefly examines the situation for individuals still supported under sch 10's predecessor, section 4(1) (s4(1)) support.

1. The law

Para 9, sch 10 states:

(1)Sub-paragraph (2) applies where—

(a)a person is on immigration bail subject to a condition requiring the person to reside at an address specified in the condition, and

(b)the person would not be able to support himself or herself at the address unless the power in sub-paragraph (2) were exercised.

(2)The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.

(3)But the power in sub-paragraph (2) applies only to the extent that the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power.

The HO published version 7 of their non-statutory guidance entitled Immigration Bail (the bail policy) on 15/01/21. Page 35 of that policy directs the reader to the Immigration bail interim guidance, (the interim guidance) dated 30/10/20, version 1, which is the section of the policy dealing with sch 10. This interim guidance was issued following the judgment in *R(Humnyntskyi, A, WP) v SSHD* [2020] EWHC 1912 (Admin) and is essential reading. The interim guidance should be used regarding sch 10 applications, not the bail policy version 7, pp 56-60.

However, the guidance does not accurately reflect the full extent of the HO's legal obligations (see 3.3.2 below).

On 5/4/18, the HO published a sch 10 application form for those applying on the basis of Article 3 of the European Convention of Human Rights (human rights cases) (BAIL 409 form - see 4.1 below).

In summary, support will be provided to a person who is:

- on immigration bail (see 3.1 below),

- required by their bail conditions to live at a specified address (a 'residency condition', see 3.2 below), and needs support to comply with this condition (see 3.4 below), and
- the Secretary of State accepts there are exceptional circumstances which justify the provision of support (see 3.3 below).

2. Exclusions from sch 10 support

The interim guidance, at p7, states that support under sch 10 will not be provided if a person is eligible for another kind of statutory support. With some exceptions (most commonly 'absconders', see 3.3.2 below), asylum-seekers and refused asylum-seekers should apply for s95 or s4(2) support; those with children or care needs should approach the local authority for support.

Under sch 10 there is no provision of support to dependants.

3. Sch 10 criteria

3.1 Immigration bail

Immigration bail can be imposed on any person who is detained or liable to be detained under immigration powers (see the bail policy p8 which references the legal powers to grant bail). Therefore, a period of prior detention is not a pre-requisite. Bail may be managed by the HO or the Immigration and Asylum Tribunal (IAT). A person on bail will be notified through a BAIL 201 form.

Prior to the bail regime brought into force by the Immigration Act 2016, those liable to detention may have been on immigration bail, temporary admission or some other kind of restriction. They would normally have been issued with a form called an IS96. The BAIL 201 form replaces the IS96 and anyone previously on these forms of restrictions will be treated as if they were granted bail (p7, the bail policy).

3.2 Residency condition

A residency condition can be imposed by the IAT or the HO depending on who is responsible for granting or managing a person's bail.

The wording in the legislation is confusing. In order to get support, it would seem that the applicant should already be subject to a residency condition naming a specified address where they are residing (see sch 10, para 9(1)(a), above). Yet they are asking for support specifically because they don't have an address and so can't possibly fulfil this criterion when they apply.

However, in a letter dated 26/03/18 to Bail for Immigration Detainees the HO confirmed that para 9(1)(a) should be read as meaning 'either an address that is already specified or one that

is to be specified'[1]. In practice, we have not received any reports of this wording causing a problem.

It would also seem that the HO automatically amends people's bail conditions when granting support, so it is not necessary to make a separate application for variation of bail alongside the sch 10 application. However, should advisers need to make a separate application for a variation of bail, they should check the OISC implications.[2]

3.3 Exceptional circumstances

Support will only be provided in exceptional circumstances, at the discretion of the Secretary of State. The bail policy gives three categories of exceptional circumstances:

(i) Special Immigration Appeals Commission (SIAC) cases (national security cases);

(ii) Other harm cases (offenders who pose a high or very high risk of harm to the public or who are at high risk of harmful re-offending);

(iii) Where the failure to provide support will breach their human rights (usually Article 3 of the European Convention on Human Rights) (pp6-10 of the interim guidance). This category warrants a bit more explanation (see 3.3.1 and 3.3.2 below).

3.3.1 The human rights test

The question of whether being destitute in the UK leads to a breach of a person's Article 3 rights was considered by the House of Lords (as it was then called) in the test case of *R (Limbuela and others (Shelter intervener)) v Secretary of State for the Home Department* [2005] UKHL 66. In *Limbuela*, it was decided that where a person was left (in the UK) without access to shelter, food or the basic necessities of life by the state there could be a breach of Article 3.

Crucially, *Limbuela* and other subsequent cases established that destitution alone is not enough: there needs to be some kind of obstacle preventing the person from leaving the UK. In *Limbuela* that obstacle was a pending asylum claim. If there is no obstacle preventing departure, then the individual can 'cure' the breach of their Article 3 rights by leaving the UK. The destitution they may then face in their home country is not relevant. As the interim guidance sets out (p8), unwillingness on the part of the individual to return is not the same as an inability to return.

The case of *R (NS) v the First Tier Tribunal and SSHD* [2009] EWHC 3819 held that there are a variety of factual circumstances which may constitute an obstacle. A question that is often posed by the First-Tier Tribunal (Asylum Support) (AST) when considering this matter is whether or not it is reasonable to expect a person to take steps to return home at this time.

[1] BID's June 2018 report http://www.BiDuk.org/resources/76-BiD-briefing-on-post-detention-accommodation (see footnote 4).

[2] Asylum support law is not subject to OISC regulation but we understand that an application for variation of bail is.

3.3.2 Who meets the human rights test?

The interim guidance specifically mentions certain situations where support would be granted in human rights cases:

- Those unable to return home for a medical reason (p8).
- Those taking reasonable steps to leave the UK (p8)
- Those with who have withdrawn their asylum claims or whose claims are treated as withdrawn by the HO (usually 'absconders') *and* who are seeking to reopen their asylum claims (p9, see our May 2019 Absconders and withdrawn asylum claims briefing for more information).
- Those who claimed asylum as children and became appeals rights exhausted prior to turning 18 *and* who are seeking to pursue their asylum claims (p9)

In relation to those applying for medical or reasonable steps reasons, the wording used in the policy is similar to reg 3(2)(a) (taking all reasonable steps to leave) and reg 3(2)(b) (unable to leave because of a physical impediment or other medical reason) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-seekers) Regulations 2005 which cover the eligibility for s4(2) support (see our Factsheet 2 for information on the legal tests that are likely to apply).

The latter two categories concern individuals who have claimed asylum in the past but can't get s4(2) or s95 support because, for technical reasons, they do not meet the legal definitions (for support purposes) of an asylum-seeker or a refused asylum-seeker.

There are other groups of destitute migrants, not mentioned in the policy, but who may be entitled to sch 10 support (applying a similar logic to that used in s4(2) cases where large numbers of people are housed to prevent human rights breaches). These are:

- People with an outstanding immigration application (for example an Article 8 application or statelessness application) or some kind of ongoing challenge against the refusal of such an application. However, as an application for support may have an impact on the immigration application we would always advise a person to check with their immigration adviser before applying for sch 10. Such applications would need to meet a minimum merits test: claims which manifestly do not put forward new grounds[3], are hopeless and abusive or merely repetitious[4] would not qualify.
- Others who cannot be defined as asylum-seekers or failed asylum-seekers but have some kind of outstanding application eg someone who had refugee status, left and returned to the UK, and meanwhile their refugee status has expired.
- People who are obliged to stay in the UK in order to appear before a court or some other statutory body.

There may be other examples.

[3] *R(AW) v Croydon* [2005] EWHC 2950 (Admin)
[4] *Birmingham City Council v Clue* [2010] EWCA Civ 460

3.4 Destitution

Although the word 'destitution' does not appear in sch 10, the wording of para 9(1)(b) implies some form of destitution assessment (the person would not be able to support themselves unless sch 10 is granted).

(i) SIAC cases are dealt with by the SIAC who will decide what bail conditions to impose including residency conditions.

(ii) For harm cases, assessments as to whether an applicant has anywhere 'suitable to live' are undertaken by multiple agencies (bottom of p5, the interim guidance).

(iii) In human rights cases, applicants need to show that they lack access to shelter, food or basic necessities of life as discussed above. The interim guidance (p54) refers to a person being eligible if they don't have access to 'adequate accommodation'. The sch 10 application form (BAIL 409) uses almost the same questions as in the ASF1 form (used to apply for s4(2) and s95 support support). So in practice, an assessment of destitution will require, as a minimum, similar considerations to the destitution test used in s4(2) and s95 cases (see our Factsheet 5).

4 Applying for sch 10

4.1 The application form

Those applying for sch 10 support under the human rights criterion should use the BAIL 409 form. At the end of the interim guidance there is a very useful table setting out which type of Home Office support should be applied for (depending on the person's circumstances) and the application process to be used.

The Bail 409 form only specifies a postal address to which applications should be sent. However, the form can also be emailed to ASCorrespondence@migranthelpuk.org. Migrant Help is unable to provide advice related to sch 10 support or complete the Bail 409 form on behalf of individuals as their HO contract does not provide for this service. However, they will submit the application to the HO in the usual way.

4.2 Decision making timeframe

Applications for support made outside detention must normally be considered within 5 working days although if the applicant is street homeless or otherwise vulnerable, a decision should be made within 2 working day (p12, the bail policy). There is no timeframe for applications within detention.

4.3 No right of appeal

There is no right of appeal against a decision to refuse or stop sch 10 support. Therefore the only remedy against these decisions is judicial review.

4.4 The grant letter

The grant letter contains a number of puzzling paragraphs which have caused significant and justified anxiety to its recipients. ASAP has repeatedly asked for this letter to be amended but at the time of writing this has not happened.

The letter contains an ambiguous warning that support will only be provided for 3 months 'unless you are told otherwise'. Advisers should reassure their clients that their support should not actually stop after three months if the reason that they got support in the first place is still valid (eg their further submissions have not been dealt with or there is no change to their medical condition or they are continuing to try to leave the UK…etc). If support is stopped prematurely, then advice on challenging this decision should immediately be sought from a specialist solicitor.

The grant letter also informs the recipient that they are expected to take reasonable steps to leave the UK whilst on support. Clearly, this is inappropriate in cases where the person has support because there is an obstacle preventing departure (ie medical cases, further submissions cases…etc). Advisers should write to the HO accepting the support but pointing out that this request is inappropriate in the circumstances.

Finally, the letter contains a warning that support will not be extended beyond three months if the person has not taken steps to find alternative accommodation. We are not sure what is meant by this threat however, in most cases, support will be provided because the person has no alternative accommodation available to them. We recommend advisers write to the HO inviting them to explain how they suggest the recipient meets this requirement.

5. What does the support consist of?

The bail policy is confusing because it was drafted with detainees and FNOs in mind. However, as far as we are aware, support under sch 10 is provided to individuals in same way as s4(2) support: housing is provided by the usual HO housing providers (Mears, Clearsprings or SERCO) using the same housing estate as with other forms of asylum support; the same dispersal rules apply; the rates of financial support are the same as with s4(2); financial support is provided through the ASPEN card which can only be used to buy goods but can't be used to withdraw cash.

The only practical differences between s4 and sch10 support are that there is no support available for dependants; there are no conditions attached to the provisions of support specified in the legislation (although under common law the HO will have the power to attach reasonable conditions to the provision of support); there are no in additional payments available under sch 10 support).[5]

[5] Under s4 support it is possible to get additional payments, mainly for travel or supporting the additional needs of families with young children. These are not available under sch 10 support.

For FNOs, p11 of the interim guidance refers to the type of accommodation which might be appropriate.

The interim guidance states that the accommodation support is for a limited period only, normally 3 months, unless exceptional circumstances justify continuing it (p9). The examples given are Article 3 cases, public protection issues and where a person is compliant with the returns process and is likely to be returned within a reasonable timescale.

There is no option for subsistence-only support under sch 10 support.

6. Individuals still supported under s4(1)

Prior to 15/01/18 when sch 10 came into force, there was a very similar scheme called s4(1) support. Anyone who was on this support on 15/01/18 will continue to be helped under s4(1)[6]. The HO's policy on these "transitional cases" (Asylum Support: section 4(1) handling transitional cases, p6) explains that support entitlement should be reviewed at least every three months. Where possible, a person should be transferred onto s4(2), s95 or sch 10 support and they should be notified of this change. If not, they will remain on s4(1) support but only if discontinuing support would amount to a breach of their human rights (see 3.3 above). For people who got s4(1) support following release from detention this may be a problem as often support was provided simply because the person was on bail. ASAP therefore recommends that any person who is on s4(1) and has no outstanding further submissions or other obstacle to seek immigration and support advice as soon as possible.

Any decision to discontinue support will be subject to a right of appeal. Please call our advice line if you are unsure how to proceed.

7. Useful web links

- Asylum support policy: www.gov.uk/government/collections/asylum-support-asylum-instructions
- Bail policy: www.gov.uk/government/publications/offender-management
- AST decisions: www.gov.uk/asylum-support-tribunal-decisions
- ASAP factsheets: http://www.asaproject.org/resources
- ASAP training: http://www.asaproject.org/training

6