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ILPA training

**Asylum, housing & subsistence :
current problems & new measures
under the Nationality, Immigration &
Asylum Act 2002**

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Speakers: Sue Willman, Sue Lukes

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**ILPA training 6.5.03: Housing and welfare law for asylum-seekers -
Current problems and new measures under the Nationality, Immigration
and Asylum Act 2002**

Sue Willman

ELIIGIBILITY

Meaning of asylum-seeker for support purposes

- 1) Asylum support is provided under **s95 Immigration and Asylum Act 1999** to destitute asylum-seekers and their dependants. An '**asylum-seeker**' for support purposes is a person of 18 or over with an outstanding asylum or article 3 claim which has been recorded and 'has not been determined' (s94(1) Immigration and Asylum Act 1999). NASS may refuse to support an applicant who has made an article 8 application only (**ASA 01/11/1203**).
- 2) An asylum-seeker with a child under 18 remains 'an asylum-seeker' entitled to support even if s/he has been refused asylum and lost an appeal (s94(5)). An unaccompanied minor is not an asylum-seeker for support purposes until s/he reaches 18.
- 3) **Parts 2 and 3 Nationality and Immigration Act 2002** make some amendments to the support provisions but the majority require regulations or guidance before they come into force. The definition of asylum-seeker for support purposes is amended by s18 and s44 NIAA 2002 so that the claim must have been made at a designated place. S18 is in force for the purposes of s55 and the proposed accommodation centres.
- 4) It is possible to make a second claim for asylum which re-triggers the process but only in certain circumstances. **Onibiyo [1996] QB 768 CA** laid down the 'acid test' for what constitutes a 'fresh claim' to asylum. It must be one which is "sufficiently different" from the earlier claim so that, notwithstanding the failure of the earlier claim, there is a realistic prospect of success of the second claim. However, in deciding whether a 'fresh' claim has been made, only certain evidence will be considered (see para 346 Immigration Rules HC 395). See also **R (Kariharan)(Kumarapuraran) v SSHD CA 25.7.02** re right of appeal under article 3 against removal directions.
- 5) Where the original 'asylum' decision was made before 2nd October 2000, a second claim on human rights (article 3) grounds may count as a claim even though it would not qualify as a 'fresh' claim.
- 6) Entitlement to support ends on a prescribed date, the date of determination which is 28 days after notification of a positive asylum decision and 21 days after a negative one. If a decision is posted to the asylum-seeker or their adviser, notification is on the 2nd day after

posting (s94(9)). **The Immigration and Asylum Appeals (Procedure) Rules 2003** SI No 652 provide for a time-limit to appeal of 10 days or 5 days in certified cases. If an asylum-seeker fails to appeal, eligibility ends after this time limit has expired. Otherwise eligibility ends after the appeal has been determined and all rights to appeal have been exhausted. Childless asylum-seekers are not entitled to support pending a judicial review.

- 7) The National Asylum Support Service (NASS) started supporting asylum-seekers who claimed asylum at the port on 3 April 2000 and later took over new 'in-country' cases and other cases where asylum-seekers had lost their asylum claim. Local authorities are still providing asylum-seekers with 'interim support' for a period due to end on 1st April 2004. There may be 'new claims' for interim support where an asylum-seeker entitled to interim support is joined by dependants or becomes destitute after working.

Dependant

- 8) The definition of dependant is important where different family members arrive at different times and want to be accommodated together. It also affects the type of support - if a husband arrives today to join his wife who is receiving interim support, he is excluded from NASS support but must claim interim support as her dependant. If the wife is receiving income support as an asylum-seeker, she can claim income support for him as her dependent. If the wife has been granted leave to remain she cannot claim income support for her husband but he may get a top-up: **R (SSHD) v Asylum Support Adjudicators v Berkadle(1) and Perrera(2)** [2001] EWHC Admin 881). NASS Policy Bulletins 10 and 11 outline the various possibilities for 'mixed families'. The dependant of an asylum-seeker is defined by s94(1) and AS Reg 2(4) as:
 - (a) husband or wife (must be a married heterosexual couple)
 - (b) dependant child under 18
 - (c) member of the close family and under 18
 - (d) living in the applicant's household for 6 of the past 12 months/ since birth and under 18
 - (e) adult household member in need of care and attention from a member of the household
 - (f) unmarried partner living with applicant for 2 of the previous 3 years
 - (g) – (h) living as part of the household and receiving assistance under s17 of the Children Act before 6 December 1999 i.e. as the child of a destitute asylum-seeker
 - (h) dependant for purposes of asylum claim

Destitution

- 9) An asylum-seeker is destitute if s/he cannot obtain adequate accommodation or cannot meet other essential living needs for him/herself and any dependants during a prescribed period (s95(3)). This period is 14 days for new applicants and 56 days for those already receiving NASS support. The destitution test is amended by s19 NIAA 2002 (not yet in force) so that a household is destitute if the applicant and any dependants 'does not have and cannot obtain both - adequate accommodation, and food and other essential items'.
- 10) Local authorities have been left to develop their own test of destitution and should follow the approach in **R v Westminster CC ex parte M.** (1997) 1 CCLR 85 CA.
- 11) NASS must follow the definition in the Asylum Support Regs 2000...Cash, savings, investments, land, cars, and business assets or tools must be taken into account (reg 6). Jewellery is excluded but NASS must be informed if it is sold, as this is a change of circumstances under AS Regs, reg 19. **NASS Policy Bulletin 65** describes the thresholds, which NASS uses when looking at an asylum-seeker's income and capital to assess whether asylum-seeker is destitute see also **ASA 01/03/0234**.

CHALLENGING NASS DECISIONS

When may NASS refuse, withdraw or suspend support (reg 19 and 20(1))?

- 12) Asylum support may be refused or withdrawn if the applicant does not qualify for support under s95 IAA 1999 because s/he does not fall within the s94(1) definition of 'asylum-seeker' or 'dependant of an asylum-seeker', is not destitute, or is excluded from eligibility, e.g. because of entitlement to income support. Support may be refused, if a supported person breaches conditions (AS Regs, reg 19).
- 13) Since 8 January 2003, NASS has been entitled to refuse to provide s98 or s95 support to asylum-seekers who it believed came within s55 of NIAA 2002 (see letter in bundle). It may also refuse support under s57 to those who it believes have not provided adequate information or co-operated with enquiries. **The Asylum Support (Amendment) (No 3) Regulations 2002** SI no 3110 came into force on 8 January 2003, amending the Asylum Support Regulations 2000. They also amend the NASS application form so that it includes new questions about the applicant's route to the UK and method of entry
- 14) Support may be suspended or discontinued under reg 20(1)) if one or more of the following apply:

- (a) Suspected breach of asylum support condition without reasonable excuse
- (b) suspected offence in relation to obtaining support
- (c) intentional destitution
- (d) one or more of supported household not living at authorised address
- (e) unauthorised absence from authorised address for 7 consecutive nights, or 14 nights in a 6 month period

13) The ASA have found a reasonable excuse to breach conditions in cases of:

- the conditions of support not interpreted/translated: **ASA 01/03/0237**
- dispersal travel arrangements not communicated: **ASA 00/09/0046**
- 2 days was insufficient notice of travel arrangements: **ASA 01/04/0269**
- Receiving counselling due to psychological problems following torture, rape and beatings, GP letter stating travel should be postponed due to abdominal pain: **ASA 01/06/0365**.

14) There has been an increase in the number of appeals where support is withdrawn due to a breach of conditions where it is alleged the asylum-seeker has failed to report that s/he is working. In **ASA 01/10/0928** an asylum-seeker who had reported his employment to the accommodation provider and was unaware of the requirement to report to NASS won his appeal. If there is a clear breach of conditions, consider withdrawing the appeal/ NASS claim and re-applying for support. In **ASA 02/04/2475** NASS officials had discovered the asylum-seeker working as a pizza chef and owning IT and stereo equipment.

15) Support may be withdrawn if the asylum-seeker is suspected of an offence under s105-6 of the IAA 1999. An appeal may be allowed if there has been no proper warning, see **ASA 00/09/0061**.

16) Where a heart-patient had left a hostel due to a rigid regime and poor conditions, the adjudicator found there was inhuman and degrading treatment under article 3, providing a reasonable excuse to leave the accommodation (**ASA 00/11/0106**).

17) Whether or not racial harassment provides a reasonable excuse for absence from/ leaving accommodation depends on its frequency and severity and the effect on the individual (**ASA 00/08/0036** applying **R v Brent LBC ex p McManus** (1993) 25 HLR 643). In **ASA 00/07/0024** and **0025** the adjudicator allowed the appeals. In **ASA 00/08/0034**, the appeal was dismissed because of less credible evidence about the degree of harassment, its effect on the appellant and the degree of racist activity at the time he decided to leave.

Asylum Support Adjudicator appeals (s102-104)

18) All ASA decisions are published on their website www.asylum-support-adjudicators.gov.uk with an index under case subject or use the

www.google.uk search engine. The ASA can only hear appeals brought by an asylum-seeker or dependant against a decision by NASS (formally the Home Secretary) to refuse, withdraw or suspend support provided under the Asylum Support Regulations. Appeals against ASA decisions are by judicial review. If an asylum-seeker wants to challenge the *adequacy* of support, the remedy is judicial review. Judicial review also applies in any case involving interim support. Although there is no appeal from a refusal of interim support to the ASA, aspects of ASA decisions are relevant considerations for local authorities when deciding whether to refuse or withdraw support.

- 19) The High Court has decided that asylum support is a civil right under article 6 ECHR and that the ASA is an independent tribunal in **R (Husain) v Asylum Support Adjudicator, S of S for the Home Dept interested party** [2001] EWHC Admin 852. The judge decided that *withdrawal* of support may be inhuman and degrading treatment under article 3. This was confirmed by the Court of Appeal in **R (Q and others) v S of S for the Home Department** [2003] EWCA Civ 364 who found that *refusal* of support may also breach article 3 but made it clear there is a high threshold for 'inhuman and degrading treatment'.
- 20) NASS's procedure when refusing or withdrawing support is to send the applicant a refusal letter and a reasons letter, together with a notice of appeal form and explanatory letter (NASS Policy Bulletin 12). There is a 2 day time limit in which to appeal to the ASA and generally no 'support pending the appeal'.
- 21) The procedure is contained in the **Asylum Support Appeals (Procedure) Rules 2000**. The appeal form is on the ASA website. The ASA may extend the time limit in the interests of justice if the appellant or representative was prevented from complying with the time limit by circumstances beyond his/her control (reg 3).
- 22) LSC funding of appeals is currently through Legal Help only, under housing, welfare benefits, community care or immigration contracts.
- 23) If an appeal is unsuccessful, NASS have a discretion to refuse to consider a new application for support under **AS Regs, reg 21** if there is no material change of circumstances. A material change of circumstances is one of those listed at **AS Regs, reg 15**. Otherwise NASS need not consider a further application 'unless the Secretary of State considers there are exceptional circumstances which justify it being entertained'.

COMMUNITY CARE RIGHTS

Adult community care services

24) Community care services under various Acts are contained in the **National Health Service and Community Care Act 1990** which has the S47 duty to carry out an assessment and, depending on the assessment, to provide services. The assessment process leads to a care plan setting out the services to be provided. The relevant statutory duties are:-

* National Assistance Act 1948 s21 (residential accommodation) S21(1) a local authority.....shall make arrangements for providing:

(a) residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them and

(aa) residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.

- NAA s29 and the Chronically Sick and Disabled Persons Act 1970 s2 (services for the disabled, including services at home and adaptations)
- National Health Service Act 1977 s21 and Sch 8 (services for the social care and after care of the ill, including home helps, equipment and adaptations)
- Health Services and Public Health Act 1968 s45 (services for the elderly, including day centres)
- Mental Health Act 1983 s117 (accommodation and aftercare for mentally ill persons following discharge after detention in hospital)

25) . S.21 was amended by s116 IAA, so as to exclude the majority of asylum-seekers:

s.21(1A) A person to whom s115 of the IAA (exclusion from benefits) applies may not be provided with residential accommodation under subsection (1)(a) if his need for care and attention has arisen solely – because he is destitute; or

(a) because of the physical effects, or anticipated physical effects, of his being destitute.

4 Westminster CC v NASS [2001] EWHL 38

25) The House of Lords gave judgement on 17/10/02, confirming the decision the Court of Appeal (2001 4 CCLR 143). Westminster council originally applied for a judicial review when NASS refused to accommodate an asylum-seeker, who needed wheelchair-accessible accommodation for herself with room for her daughter and a carer, near the hospital where she received cancer treatment. The House of Lords unanimously decided that the council were liable to provide her

with residential accommodation under s21 National Assistance Act 1948.

- 26) Lord Hoffman drew a distinction between and 'the infirm destitute', who remain the responsibility of social services if they are 'in need of care and attention' under s21 and 'the able-bodied destitute', for whom NASS have a 'residual' responsibility under s95 (1) IAA 1999. Lord Hoffman suggested that it would be unlawful for NASS to interpret s21 (1A) as excluding asylum-seekers from residential accommodation under s21 even if the only reason they needed it was that they could not access mainstream housing as homeless. If a local authority has a duty under s21, NASS has no power to provide support.
- 27) The court refused to decide whether the Court of Appeal's wide test for deciding whether a 'PSIC' is in need of care and attention 'solely because he is destitute' from **R v Wandsworth LBC ex parte O** [2001] 1WLR 2539 CA was correct. However, Lord Hoffman referred to the case of **R (Mani) v Lambeth LBC** as the logical conclusion of ex parte O. In Mani the High Court decided that a destitute asylum-seeker with a leg abnormality who needed help with bedmaking hoovering and heavy shopping was found to be in need of care and attention. The cases of Tasci, which was heard at the same time as Mani, and **R (J) v Enfield LBC** [2002] EWHC 735 are due to be considered by the Court of Appeal
- 28) In **R (AA) v Lambeth LBC** [2001] 5 CCLR 36, the applicant was an ex-asylum-seeker from Eritrea. He had previously been assisted under the Interim Regs. He suffered from hepatitis B, and applied for assistance under s21. Lambeth argued unsuccessfully that there was no power to assist under s21 until an assessment was carried out under the s47 of the 1990 Act. It was found that s21 does include a power to make temporary provision pending an assessment.
- 29) In **Murua and Gichura v Croydon LBC** [2002] 5 CCLR 51. The applicants were Kenyan asylum-seekers. M had a thoracic spinal injury and urinary incontinence. G had polio, severe migraines and leg ulceration. Neither could stand without crutches or calipers. They needed wheelchairs and adaptations. Westminster v NASS (CA) was followed and Croydon was found to be responsible under s21.
- 30) In **Ex parte Mani and others v Lambeth and Enfield** (see above). There were 3 applicants. Mani had one leg 75% shorter than the other. Tasci, aged 50, had a condition which meant that he had no movement in his neck and very slight mobility in his spine. Both of his hips had been replaced, and he had pain in his neck, spine, hips and knees. He and his wife were both depressed. She was his carer. J had AIDS at an advanced stage. It was accepted that Mani and Tasci did not need residential accommodation as defined by s21(5). Lambeth and Enfield pointed out that if they were British they would not need s21

accommodation, and then attempted to argue that need for care and attention must be such that it could only be met by the provision of a care home. Wilson J rejected this argument, and found that s21 accommodation can be ordinary accommodation.

- 31) The Department of Health has issued new guidance on the correct approach to assessing adult asylum-seekers with community care needs. The guidance is contained in 'Fair Access to Care Services - Guidance on Eligibility Criteria for Adult Social Care', which forms part of Local Authority Circular LAC (2002) 13.

Children of Asylum-seekers

- 32) Asylum-seekers with children are accommodated and supported by NASS or under the interim regulations. Extra support can be provided by the local authority if required due, for example, to a child's disability. In **R (Ouji) v SSHD** 20/8/02, unreported, the asylum-seeker had a 13 yr old disabled daughter and an unsuccessful attempt was made to obtain extra 'essential living needs' from NASS. It was found that the local authority (not party to the proceedings) was responsible for providing the additional services.

- 33) If an asylum-seeker family is not entitled to asylum support, then the Children Act does apply. Local authorities have the power to accommodate families under s17 of the CA, **R (W) v Lambeth LBC** [2002] HLR 41.

Unaccompanied Minors

- 34) Unaccompanied children under 18 cannot apply to NASS, as an 'asylum-seeker' is defined for the purposes of asylum support under Part 6 of the IAA 1999 as a person not under 18, s94(1). They are therefore the responsibility of social services, and are entitled to the same assistance as UK children taken into care. Accommodation is provided under Children Act s20, and maintenance via s23(1). If the authority is already accommodating a sibling, then they should be placed together, s23(7)(b).
- 35) The usual practise of local authorities has been to make an application to NASS for the child in time for their 18th birthday, such that NASS then takes over responsibility. However the local authority will now continue to have duties to the child until his/her 21st birthday, due to the amendments to the Children Act brought in on 1/10/01 by Children (Leaving Care) Act 2000 and The Children (Leaving Care) (England) Regulations 2001 no 2874. The local authority is required, to an extent, to adopt the role of parent and provide various types of help until the young person is at least 21. Compulsory guidance to the Act has been brought in by s7 of the Local Authority Social Services Act 1970.

36) NASS Policy Bulletin 29 covers "Transition at age 18". It is anticipated that at 18 an application will be made to NASS, but if possible, the person will remain in the same accommodation. Para 10 of the Guidance sets out that it is the responsible authority's responsibility to provide and manage the accommodation, and then invoice NASS. Therefore a decision by a local authority to conclude responsibility for a child by submitting a NASS application, or sending them to the Refugee Council, would be unlawful.

s54 and Schedule 3 of NIAA 2002

37) From 8 January 2003, local authorities' power to house, support and provide other community care services to various categories of immigrants were removed. Paragraph 1(1) lists the duties and powers of the various Acts for which such persons will not be eligible. The list includes all the community care services listed above, except MHA s117. It also includes the Children Act s17, 23C, 24C and 24B and s2 the Local Government Act 2000.

There are 4 classes of ineligible persons:

1. someone with refugee status abroad (eg from another EEA country) and their dependants
2. EEA nationals and their dependants
3. failed asylum-seekers and their dependants who have not complied with removal directions
4. non asylum-seeker immigrants in breach of immigration laws eg overstayers

38) There is an attempt to make the schedule compliant with the Human Rights Act. Local authorities will have the power or duty to provide community care services to the 4 ineligible classes if it is necessary for the purpose of avoiding a breach of a person's Convention rights or their rights under the Community Treaties.

39) The Home Office has published statutory guidance to local authorities and housing authorities entitled 'Immigration and Asylum Act 2002 Section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002' see www.ind.homeoffice.gov.uk accessible via the press release of 20.12.02. The guidance describes how local authorities should approach decisions about when the Schedule applies. New NASS Policy Bulletins provide non-statutory guidance to assist its case-workers in interpreting Schedule 3: Policy Bulletin 76 – Asylum Support for Asylum-seekers and Dependants who are nationals of a European Economic Area or who have Refugee Status Abroad and Policy Bulletin 77 – Failure to Comply with Removal Directions.

40) The effect of Schedule 3 was considered in R (K) v Lambeth LBC. K is the separated spouse of an EEA national who was refused help under

s17 of the Children Act 1989. She argued that there was an error in statutory construction, that the decision interfered with her rights as an EEA national and that to refuse her support would breach her rights under articles 3, 8 and 14 of the Human Rights Convention.

- 41) Councils have acquired new powers to provide temporary accommodation and return travel with the Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 SI No 3078. These Regulations empower local authorities to make travel arrangements for EEA nationals and refugees to return to their European country of origin. They introduce a new power to provide temporary accommodation to the family of a dependent child in the above 2 categories and a person who is unlawfully in the UK, provided s/he has not refused to cooperate with removal directions.
- 42) It is a criminal offence for persons who have left the UK under paragraph 8 to return to the UK and request assistance under the Schedule. It will also be a criminal offence to request assistance without mentioning previous requests made for assistance.