

Proposed changes to Asylum Support ILPA briefing 7 September 2015

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, and other, consultative and advisory groups.

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People will be left destitute

Proposed repeal of section 4(1) of the Immigration and Asylum Act 1999

Those who will no longer be eligible for support if it section 4(1) is repealed are:

- Those released from detention and given temporary admission or given bail by a Chief Immigration Officer, by the High Court/Outer House of the Court of Session or by the Tribunal. Includes those unlawfully detained, detained contrary to policy (for example trafficked persons) and persons needing release for health reasons.
- Those who have never claimed asylum who are attempting to return to their country of origin but where that country will not admit them or where there are delays in documenting them for return.
- Those who have never claimed asylum and are waiting for the Home Office to determine a claim to regularise their status. This category includes those brought to the UK as children who only realised in adulthood or old age that they had no status.
- Persons who have succeed in their claims for asylum or humanitarian protection but have yet to be given the papers that would allow them to work or claim mainstream benefits.

Home Office policy is that to qualify for support under section 4(1) a person must have 'truly exceptional circumstances' and provision of support must be required to avoid a breach of their human rights, in particular under Article 3, the prohibition on torture, inhuman or degrading treatment or punishment. It is used to support persons who would otherwise be unlawfully detained and section 4(1)(c) is used to supply a bail address, an essential precursor for a proportion of detainees to being able to lodge and have heard an application for on bail.

Proposal to terminate support where families are not cooperating with removal

When the Immigration and Asylum Act 1999 was going through parliament, Mr James Clappison MP, for the then opposition, put the case for support to be provided to families until removal:

"We were concerned—and so were many others—that children could slip through the safety net that the Government were seeking to put in place and that, as a result, children and families could suffer hardship, especially children who were taken into care and separated from their families—which is undesirable and should be avoided if possible—or even worse. ... We want there to be a safety net for all children, because no child should go without protection.... We are concerned about the welfare of children, who should not suffer under any circumstances,

whoever their parents are and whatever their basis for being in the country. The intention of the original Children Act 1989 was that any child on British soil should benefit from its comprehensive protection which puts their interests first.¹

The consultation paper nowhere confronts what is to happen to a family in the period between termination of support and their leaving the UK, be that period a day, 10 days, 10 months or years. For the children in the family the possible outcomes are

- they die from lack of food and/or shelter (see the child EG² case where, following a grant of leave to his mother, who had a rare brain disease, EG starved to death in the gap between asylum support being terminated and the family being able to access mainstream support)
- the family disappear underground where the children are supported through the unlawful work of the parents.
- they are the beneficiaries of charity, whether from individuals or organizations
- the family applies to local authorities for emergency assistance under, including assistance under the Children Act 1989 to avoid a breach of their human rights and of the local authorities duties toward children. Either the family is supported to stay together, or the children are taken into care.
- They receive emergency assistance as a result of emergency interventions by the police or other emergency services, including child protection services.

None of the above outcomes, with the exception of iv) where the family is kept together, is compatible with the Home Office's duties under s 55 of the Borders, Citizenship and Immigration Act 1999 to have regard to the need to safeguard and promote the welfare of children. Nor do we consider them to be compatible with the wider framework of duties under the UN Convention on the Rights of the Child or with the positive duties on local authorities and devolved administrations, so far as is consistent with their safeguarding duties, to promote the upbringing of children by their families.

The pilot of s 9 demonstrated that it was a singularly unsuccessful provision.³ Among the 116 cases in the cohort made subject to the pilot there was only one removal. In the control group, there were nine removals. Thirty-two of the 82 cases in the cohort lost touch with asylum support officials (39%), in contrast to just 21% (18 out of 86) in the control group. There has been no suggestion, let alone evidence, that these results would not be repeated were the experiment, as is proposed, tried again.

Local authorities will pick up the bill

Those who can find no other means of support will turn to local authorities. Local authorities will have to determine these applications, including dealing with legal challenges to their refusal to provide support. Local authorities are under a duty to act in a way that it is compatible with

¹ *Ibid.* 417-421.

² Executive Summary of the Westminster Council Safeguarding Board Serious Case Review, as amended as directed by the High Court April 2012. Available at <http://www.westminster.gov.uk/workspace/assets/publications/EG-Executive-Summary-April-2012-1336483036.doc> (

³ Border and Immigration Agency, *Family Asylum Policy: The section 9 implementation project* (undated) <http://webarchive.nationalarchives.gov.uk/20140110181512/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/section9implementationproj.pdf> (accessed 5 September 2015). See further Immigration, Asylum and Nationality Bill i Standing Committee E, 25 October 2005, Tony McNulty MP, at Col.237

the Human Rights Act 1998. The Home Office could, if it so chose, walk away from the provision of support entirely and restore access to mainstream provision for persons under immigration control, including those seeking asylum. Local authorities cannot walk away from the web of duties they possess and the obligation to exercise these without discrimination, in conformity with the Human Rights Act 1998 and in a manner that gives effect to all their other obligations, including to safeguard and promote the welfare of children.

The evaluation of the section 9 pilot, as well as identifying ethical conflicts for local authorities, identified that the “pilot placed significant demands upon local authority resources”.

Despite the sanguine attitude to the burden on local authorities in the consultation paper, the predicted costs to local authorities in the impact assessment are nonetheless some £32 million over 10 years. It is unclear whether this estimate includes the costs of processing applications and dealing with legal challenges.

Poor decisions will escape scrutiny

A right of appeal should be retained against all decisions to refuse or to withdraw asylum support, to ensure scrutiny of Home Office decision-making in an area where decisions are frequently not sustainable. The Asylum Support Tribunal’s latest statistics show that in 65% of the 837 appeals received either the decision was withdrawn by the Home Office or the appeal allowed or remitted. Decisions were withdrawn in 25% of the cases in which appeals were lodged. Of the 575 cases which proceeded to an oral or paper appeal, 56% were either allowed or remitted.

Cases

Case of N

N was seven months pregnant and had been street homeless and sleeping inside a church and on a park bench for two months. She was waiting for the Home Office decision on her fresh claim for asylum. She had become street homeless after the person with whom she had been living had asked her to leave. A voluntary sector organisation had assisted her to apply for section 4 support. The Home Office refused to say when a decision would be made. At the time when she saw a lawyer, the application had been outstanding for 14 days, during which time N continued to be sleeping in the church and outside. The lawyers sent the Home Office a letter before claim threatening judicial review due to the delay in making a decision on N’s section 4 application. She was provided with section 4 accommodation that day.

Case of D

D, with the help of a voluntary sector organisation, had applied for section 4 support as he, his wife and his children (aged three, four, and seven) had been told to leave their relative’s accommodation and had nowhere else to go. The Home Office refused this application as D was not treated as having made a fresh claim for asylum as he had not submitted this in person at the Liverpool. D had not done so because he could not afford to travel to Liverpool. A duty barrister from the Asylum Support Appeals Project, acting *pro bono*, represented D at his appeal to the First-tier Tribunal (Asylum Support), but the appeal was refused, although it was accepted that D was destitute. D was referred to legal aid lawyers for advice about challenging those decisions. D’s immigration background was unusual and complicated, and it was advised that rather than challenge the section 4 decisions, under which support is provided to persons whose claims for asylum have failed, he should instead apply for section 95 support, which is paid to persons who have an outstanding, unresolved claim for asylum. D was provided with emergency accommodation (available in these circumstances but not in cases of section 4 support) within two days and subsequently went on to receive section 95 support