

**ILPA Briefing for the House of Lords' debate on the Asylum Support
(Amendment No. 3) Regulations 2015 (SI 2015/1501)
on Tuesday 27 October 2015**

Motions:

Baroness Hamwee to move that a Humble Address be presented to Her Majesty praying that the Regulations, laid before the House on 16 July, be annulled.

Lord Rosser to move that this House regrets that the Asylum Support (Amendment No. 3) Regulations 2015 will have a detrimental effect on families, and will punish the children of those seeking asylum through the removal of higher rates of allowance for child and adolescent asylum seekers which risks them being made homeless and pushed into destitution (SI 2015/1501).

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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Overview

ILPA supports the Humble Address in the name of Baroness Hamwee that the regulations be annulled.

The regulations impose a new standard rate of asylum support of £36.95 per person per week. This took effect from 10 August 2015. Prior to that date the sums were

- £36.62 - single adult
- £43.94 - lone parent
- £52.96 - child under 16
- £39.80 - child 16-18

The effect is thus a cut for households including children.

The House of Lords Committee Secondary Legislation Scrutiny Committee has provided very detailed information about the instrument. In addition, the rules and regulations on asylum support are very clearly set out in the House of Commons library briefing paper 19009 of 14 October 2015.¹

¹ <http://researchbriefings.files.parliament.uk/documents/SN01909/SN01909.pdf>

ILPA concurs with the House of Lords Secondary Legislation Scrutiny Committee which, in its report² identified that the abrupt change has caused considerable hardship.

Those who have watched the refugees arriving at the borders of the European Union, both by land and sea, will have some comprehension of the privations and fear persons have suffered to reach safety.

Anyone who has spent time while unwell or afraid in a damp uncomfortable lodging, with inadequate clothing and no money to get anything sustaining to eat after a hard day or week of physical work will have a tiny glimpse of the way in which asylum support levels impede rehabilitation and sap morale. But only a glimpse, for refugees have dreadful memories, concerns about the present safety of friends and family and fears for an uncertain future. They remain on asylum support for months and sometimes years and housing can be worse than uncomfortable, it can be unsafe.

It is very difficult in these circumstances for refugees to concentrate on presenting their claim for asylum. All too often, they are overwhelmed.

The evidence submitted to the court in *R (On the Application Of Refugee Action) v The Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) was that persons seeking asylum were missing meals, with parents prioritising feeding their children over themselves. People were struggling to buy adequate clothing, particularly in winter, to replace items of clothing and shoes when they wore out and to buy adequate toiletries or household cleaning products, and non-prescription medications.

Poppelwell J held in the *Refugee Action* case

141. Whatever the best intentions of the Secretary of State... asylum support is required for periods which average almost 18 months, and in a significant number of cases will be measured in years. It is not "temporary" in a sense which justifies any meaningful distinction from the position of those on Income Support, save that it justifies the provision of furnished and equipped accommodation

The Joint Committee on Human Rights summarised the situation in its 2007 report *The Treatment of Asylum Seekers*:

120. We consider that by refusing permission for most asylum seekers to work and operating a system of support which results in widespread destitution, the treatment of asylum seekers in a number of cases reaches the Article 3 ECHR threshold of inhuman and degrading treatment. This applies at all stages of the asylum claim process: when an individual is attempting to claim asylum, during the period of consideration of their claim and during the period after their claim is refused if they are unable to return to their country of origin. Many witnesses have told us that they are convinced that destitution is a deliberate tool in the operation of immigration policy. We have been persuaded by the evidence that the Government has indeed been practising a deliberate policy of destitution of this highly vulnerable group.¹ We believe that the deliberate use of inhumane treatment is unacceptable. We have seen instances in all cases

² Eighth report of session 2015-16.

where the Government's treatment of asylum seekers and refused asylum seekers falls below the requirements of the common law of humanity and of international human rights law."³

The refusal to grant permission to work exacerbates the problem. Even once an applicant has been waiting over 12 months and has made the relevant application for permission to work, he or she faces a long wait before a decision is made and often finds it difficult to find work of the kind specified in the relevant shortage occupation list

The conclusions of a cross party Parliamentary Inquiry into Asylum Support for Children and Young People published in January 2013, were that

"the current levels of support provided to families are too low to meet children's essential living needs... [and] do not enable parents to provide for their children's wider needs to learn, grow and develop".

Duties toward children

We recall the statements made by the Conservative party spokesperson, Mr James Clappison, during the passage of the Bill that became the Immigration and Asylum Act 1999 when asylum support was debated:

*... We still support the principle of the 1989 Act—that all children on British soil should be given the same 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*⁴

The then Government was forced to change its position during the passage of the Bill and to provide that children would not receive a lesser level of support. The following exchange took place on 16 June 1999⁵

Mr Straw [Home Secretary] I have today tabled amendments to the Immigration and Asylum Bill to make clear that the Home Secretary will be under a new duty to meet the accommodation and essential living needs of destitute asylum seeker families. The assistance they receive in this way will be comparable to what would otherwise be available under section 17 of the Children Act 1989. All other safeguards for children contained in that Act will continue to apply.

I recognise that hon. Members want to ensure that the children of asylum seekers are not treated significantly differently because of their asylum status. They will not be. Local authorities are being relieved of their support powers. Local authorities—as it happens, many controlled by the Labour party, but some controlled by other parties—in inner London boroughs and in some Kent districts pleaded with us to relieve them of the burden of supporting asylum seekers in their areas because they could not cope.

Mr Clappison [Opposition Front Bench] The Government, however, have now retreated from clause 99. Indeed, there seems to be a wide consensus that it was a bad clause. I could say that

³ Joint Committee on Human rights, 10th report of the Session 2006 – 2007, "The Treatment of Asylum Seekers", HL Paper 81-I, HC 60-I, published 30 March 2007 10th Report of session 2006-2007 HL Paper 81, HC 60 <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf>

⁴ HC Report, 16 June 1999, 417 to 421.

⁵ HC Deb 16 June 1999 vol 333 cc408-79

a political spectrum is opposed to clause 99—now clause 108. Amendment No. 3 removes the clause from the Bill. It is signed by, among others, me, my right hon. Friends, the Secretary of State and the hon. Member for Islington, North (Mr. Corbyn).

Mr Straw *The new politics.*

Since that time the Home Office has been placed under a duty, as set out in s 55 of the Borders, Citizenship and Immigration Act 2009, to safeguard and promote the welfare of children. We see no evidence of how this is to be done, nor of how the Home Office will fulfil its obligations under this section and as described by the House of Lords/ Supreme Court in *EM (Lebanon) v SSHD* [2008] UKHL 64, *ZH (Tanzania) v SSHD* [2011] UHSC 4;; *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74.

History of Refugee Action case

In *R (On the Application Of Refugee Action) v The Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) Poppelwell J held that the Secretary of State failed to conduct a lawful and rational assessment of the real needs of destitute asylum seekers. The Secretary of State had failed, when assessing the level of support required, to factor in, *inter alia*,

- Essential household goods such as washing powder, cleaning materials and disinfectant; Nappies, formula milk and other special requirements of new mothers, babies and very young children;
- Non-prescription medication;
- The opportunity to maintain interpersonal relationships and a minimum level of participation in social, cultural and religious life.

The Secretary of State had also failed to consider whether other matters were essential living needs including:

- Travel by public transport to attend appointments with legal advisors, where this is not covered by legal aid.
- Telephone calls to keep in touch with families and legal representatives, and to progress an asylum case, for example talking to potential witnesses or those who might have pertinent evidence
- Writing material, including for educational purposes for children.

The decision to pay lower support for 16 and 17 year old children was held to be unlawfully discriminatory.

The Home Office reviewed support levels in line with the judge's findings. Rather remarkably, the came up with the exactly the same levels of support, factoring in the new matters. But it also concluded that it was paying more than it had to, to children under 16. It proposed to introduce cuts but the regulations that would have achieved this were withdrawn.

The history of the regulations: Eighth report of the House of Lords Secondary Legislation Scrutiny Committee.

The Committee wrote⁶:

⁶ <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldsecleg/34/3408.htm>

The Committee yesterday considered SI 2015/1501 laid on 16 July, which changes the payment of asylum support to a per capita rate. Its content appears to be exactly the same as SI 2015/645 which was commented on by the SLSC in its 33rd Report of the last session. The Committee's concerns about transitional provisions and how the decision was to be communicated to recipients were reiterated in its 2nd Report of this session in relation to SI 2015/944 which revoked the previous instrument. Given its critical comments, the Committee was therefore surprised and disappointed that no attempt has been made in the Explanatory Memorandum accompanying the current instrument to address those concerns.

We also note the Home Office's continuing failure to provide in its Explanatory Memoranda what is generally regarded as standard information; for example, in this instance, the number of households which are likely to be affected by the change and what is included in the definition of "essential needs".

This Committee has for many years made clear its view about the undesirability of laying controversial instruments, such as this one, on the cusp of a Recess, leaving no time for debate in Parliament before the legislation comes into effect. I made that point clearly in a recent discussion with Lord Bates. In the light of this, the Committee would be grateful if you could explain why this instrument was not laid earlier, particularly as no re-drafting was required.

...

The Committee is disappointed that this was necessary and that gaining an understanding of the policy background to this instrument has been achieved only by persistent questioning of the Government.

These Regulations are drawn to the special attention of the House on the ground that the explanatory material laid in support provides insufficient information to gain a clear understanding about the instrument's policy and intended implementation.

Erroneous calculation

In the *Refugee Action* case it was held that the Home Office's "erroneous and misleading" claim that support rates had increased by 11.5% was inaccurate: the court found that, rather, rates had decreased by 11%. There was more poor mathematics: an irrational assumption that inflation for essential items was zero. Comparisons with Office for National Statistics data on the income needs of the poorest 10% of the UK population was flawed.

Poppelwell J held

The Secretary of State's decision was flawed in that:

- (1) She erroneously treated the rates as being increased by 11.5% from their 2007 levels.*
- (2) She failed to identify and take into account the extent of the decrease in rates in real terms since 2007.*
- (3) She misunderstood or misapplied information which she treated as important in reaching her decision, namely:*

- (a) a comparison with Income Support rates; and*
- (b) a comparison with costs in the lowest 10% of UK households according to the ONS data.*
- (4) She failed to take reasonable steps to gather sufficient information to enable her to make a rational judgment in setting the asylum support rates for 2013/2014.*
- (5) She misdirected herself as to the legal position in relation to 16 and 17 year olds.*

Poor administration

A substantial part of the asylum support budget goes on administration, but administration is poor. 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. In 2014-15 the Asylum Support Appeals Project assisted 674 destitute asylum seekers at the Asylum Support Tribunal of which some 64.5% were able to access support as a result of the appeal. In the first quarter of 2015-2016 the project assisted 221 appellants, 73% of whom won their appeal or had it remitted. In 2014 72% of the 149 cases in which the question was whether the person was destitute and the project assisted, were allowed or remitted. In 2014, some 69% of the 288 appeals in which project assisted which were concerned with decisions to discontinue support were allowed or remitted.

The consequences of a wrong decision are that a person may be left homeless and destitute and at risk of harm.

International comparisons

On July 18, 2012, the German Federal Constitutional Court ruled⁷ that the asylum support levels in Germany were insufficient to meet essential living needs of asylum seekers in Germany. The Court held that an assessment of support required to meet essential living needs should not take into account residency status but should only consider the actual needs of a specific group of people. The court took notice of the difference between income support levels for people with settled residency and those for asylum seekers.

Asylum Support: future developments

In the Immigration Bill currently before the House of Commons there is no power to support persons who have never claimed asylum, even if they cannot be returned. Where their destitution imperils their human rights, which is likely to be the case as they cannot work, they will be the responsibility of local authorities if their support needs are not met.

It is proposed that the Secretary of State be able to certify that families with children whose claims for asylum have failed and who do not have "a genuine obstacle to removal" as defined are not taking steps to leave the UK voluntarily. At this point they will no longer be entitled to Home Office support. The provision is similar to section 9 of the Asylum and Immigration

⁷ 1 BvL 10/10, 1 BvL 2/11.

(Treatment of Claimants etc.) Act 2004, which was the subject of an unsuccessful pilot in 2005,⁸ of which the Joint Committee on Human Rights said

97. The section 9 pilot has caused considerable hardship and does not appear to have encouraged more refused asylum seeking families to leave the UK. ... We believe that using both the threats and the actuality of destitution and family separation is incompatible with the principles of common humanity and with international human rights law and that it has no place in a humane society. We recommend that section 9 be repealed at the earliest opportunity.⁹

Families in these circumstances are likely to turn to local authorities.

A new s 95A replaces s 4 of the Immigration Act 1999. It will provide a power, not a duty, to support those whose claim for asylum is refused but who have a “genuine obstacle to removal” and those with pending further submissions or judicial review challenges to these. Support can still be provided in the form of vouchers but does not have to be. Only those with protection claims will be able to obtain this support, not those with claims based on private and family life. Unlike s 4 support, support need not be full board. Section 95A appears to be a result of responses to the Home Office consultation on asylum support which identified that the Home Office proposals would impose a massive burden on local authorities.¹⁰ There is thus no detail on what s 95A support will look like.

The asylum support part of UK Visas and Immigration will be further protected from scrutiny because, there will be no right of appeal against a decision to refuse or to discontinue support for those whose claims for asylum have failed. There will be no right of appeal against a decision to discontinue support when any further submissions are rejected. These appeal rights also will be lost by those who continue under the old support regime under transitional protection. The only remedy will be that of judicial review.

Recommendations

- **Asylum support levels should be set on the basis of need and not on the basis of immigration status.**
- **Grant those seeking asylum permission to work and to support themselves.**
- **Rates of support should be raised now and then in future raised in line with benefit payments so that persons seeking international protection can live in dignity.**
 - **The Home Office currently has a network of regional reporting centres with counter services where people could make their claims for asylum rather than being sent to Croydon, which in itself can often**

⁸ 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 Refugee Council and Refugee Action’s 2006 report *Inhumane and Ineffective - Section 9 in Practice*, 2006 Immigration, Asylum and Nationality Bill in Standing Committee E, 6th session, afternoon 25 October 2005, Tony McNulty MP, at Col.237.

⁹ Joint Committee on Human Rights, *The Treatment of Asylum Seekers* 10th Report of session 2006-2007 HL Paper 81, HC 60 <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf>

¹⁰ ILPA’s response to the consultation can be read at <http://www.ilpa.org.uk/resources.php/31352/ilpa-response-to-home-office-consultation-on-asylum-support-8-september-2015>

result in delay, particularly if the person is destitute and unable to afford to travel. Or it could

- **return to a system where asylum claims could be made by post. Once a postal claim for asylum was received, arrangements could be made for the asylum seeker to attend a screening interview**
- **A through-going review of serious case review reports should be conducted and an analysis with local authority and health services teams looking after both children and adults to understand what costs implications arise from the current support proposals, where the concerns lie**

ANNEX: Asylum Support: background

This is taken from the judgment of Poppelwell J in the Refugee Action case.

Section 115 of the Immigration and Asylum Act 1999 excludes asylum seekers and their dependants from entitlement to most social security benefits, including income support, disability related benefits, social fund payments and child benefit. Asylum seekers are ordinarily prohibited from working while they are waiting for a decision on their claim; they may apply for permission to work if they have been waiting for 12 months or more for an initial decision from the Defendant; if permission to work is granted, it is restricted to employment in one of the Defendant's list of shortage occupations and they are not permitted to engage in business or self-employed activities (paragraphs 360-360B of the Immigration Rules HC395).

Asylum support is limited to those who are "destitute", defined in s. 95 of the 1999 Act as those who do not have any adequate accommodation or means of obtaining it and those who cannot meet their essential living needs. Support is provided to those who apply for it and who are determined by the Defendant to meet the eligibility threshold of destitution.

Poppelwell J commented:

8. *Although this support for asylum seekers is temporary, it is often required for a substantial period. On 27 February 2013, Mark Harper MP, then Minister for Immigration, gave the average time which asylum seekers spend on s. 95 support as 525 days. The most recent statistics I was given were that, of the 13,412 asylum applicants who came off s. 95 support in 2013, about 42% had been on it for less than 6 months, 15.5% for 6 to 12 months, 15% for 1 to 2 years, and 27.5% for over 2 years.*

...

Regulation 11 formerly provided for the making of single additional payments of £50 to those who had been in receipt of asylum support for at least six months, where the delay in determining the asylum claim was not the applicant's fault. That Regulation was revoked on 4 June 2004, to reflect the change made in April 2002 to provide all s. 95 payments in cash rather than vouchers.

The Asylum Seekers (Reception Conditions) Regulations 2005 (SI 2005/7) set out the previous rates of payment

Single adult £36.62

(other than a small legacy remnant of over 25s who have been on support since 2009 who receive £42.62)

Qualifying couple £72.52

Lone parent aged 18 or over £43.94

16 & 17 year olds £39.80

Children under 16 £52.96

In addition to the Regulation 10(2) payments, additional cash payments are made to pregnant women and children under the age of three:

Pregnant women £3

Babies under the age of one £5

Children aged one and two £3

Pregnant women are granted a maternity payment (for each pregnancy) of £300 which is payable in the period from 8 weeks before the estimated delivery date to 6 weeks after birth.

These are unchanged.

The Home Office argued that the rates originally laid down in Regulation 10(2) in 2000 were set at 70% of Income Support rates for adults, and 100% of the Income Support rates for children.

The justification for setting the adult rates at 70% of Income Support was that

(1) asylum seekers were provided with furnished and equipped accommodation with all utility bills paid and

(2) asylum support was intended to be a measure of last resort provided on a short-term basis.

This involved adopting two different rates for single adults, one for those aged 18 to 24 and a higher rate for those aged 25 and over, because such a differentiation was (and still is) drawn in Income Support rates.

Until 2008, increases to the Regulation 10(2) rates were made on an annual basis and broadly in line with increases to income support, save in the case of 16 and 17 year olds.

In 2008 the link to Income Support was broken and for 2009 the separate rate for single adults aged 25 and over was removed: a unitary rate for all single adults was introduced, based on the lower sum previously paid to those aged 18 to 24. Those aged 25 and above who were receiving support at that time were allowed to stay on the higher 25 plus rate. There are now very few asylum seekers left in this 25 plus legacy category.

The amounts were increased by the Consumer Price Index rate of inflation ("CPI") each year for 2010/11 and 2011/12 (except for the legacy 25 plus group on the old rates). No increase was made for 2012/13 or 2013/2014.

The effect of decoupling the rates from Income Support and freezing them has been that they have increasingly become a smaller proportion of the amount payable for Income Support. For 2013/2014 the Regulation 10 payments to asylum seekers represent the following percentages of the relevant Income Support rates:

- Single adult 25+ 51%
- Single adult 18-24 64%
- Qualifying couple 64%
- Lone parent 49%
- 16-17 yr. old 61%
- Under 16 81%

The Regulation 10A supplementary payments for pregnant women and children under three have not been increased since their introduction in 2003.

ⁱ In its response to the JCHR report, the Government "strongly refute[d] the Committee's claim of a deliberate policy of destitution towards asylum seekers"