

## Supporting justice

# The case for publicly-funded legal representation before the Asylum Support Tribunal

### Summary

Every year, more than half a million people use one of the various tribunals comprising the Tribunals Service to seek justice in a dispute about their employment, their welfare benefits or child support, their social care, their immigration status, or their child’s special educational needs. Many of these tribunal users are poor, and vulnerable. But among them there is one group of especially vulnerable people who often have no money even to buy food, accommodation and other essentials. They are the some 2,000 asylum seekers and failed asylum seekers who appeal to the Asylum Support Tribunal each year against a refusal or termination of asylum support by the UK Border Agency.

Based on our study of all the substantive decisions made by the Tribunal in the six-month period October 2008 to March 2009, this briefing shows this group of tribunal users to be notably disadvantaged in terms of two factors that bear heavily on their ability to present their case: their proficiency in English; and their socio-economic circumstances. Most require an interpreter to participate in the tribunal hearing, and the great majority – 80 per cent – are either already homeless and/or destitute, or will become so if their appeal to the Tribunal is dismissed. It also shows that legal representation before the Tribunal increases the chances of success from 39 per cent, to between 61 and 71 per cent – a ‘representation premium’ of 22-32 per cent.

Concluding that the Tribunal’s users are especially vulnerable and disadvantaged, relative to other tribunal users, this briefing – which is endorsed by the four organisations below – repeats our previous call for *publicly-funded* legal representation before the Tribunal. And it suggests that the annual up-front cost of providing such representation – of the order of £300,000 – could be met entirely from the savings that would flow from an evidently much needed improvement in the quality of the UK Border Agency’s initial decision-making on asylum support.



### Inside

<input type="checkbox"/> Introduction	Page 2
<input type="checkbox"/> Appellant vulnerability	Page 5
<input type="checkbox"/> Appeal outcome	Page 7
<input type="checkbox"/> The impact of legal representation	Page 9
<input type="checkbox"/> Conclusions and recommendations	Page 12

## Introduction

*"It should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases."*

**The Leggatt Review of Tribunals,  
August 2001<sup>1</sup>**

*"Legal aid is a fundamental element underpinning the justice system. It enables access to justice for the vulnerable and those who cannot afford to pay for legal advice and representation."*

**Lord Bach, Justice Minister,  
October 2008**

Every year, more than half a million people use one of the various tribunals comprising the Tribunals Service to seek justice in a dispute about their employment, their welfare benefits or child support, their social care, their immigration status, or their child's special educational needs. As the Tribunals Service itself points out, "many of these disputes involve society's most vulnerable people".<sup>2</sup> But every year, among these tribunal users there is one group of people who, as well as being especially vulnerable, often have no money even to buy food, accommodation and other essentials, let alone pay for legal advice and representation. They are the some 2,000 asylum seekers and failed asylum seekers who appeal to the Asylum Support Tribunal (AST) each year against a refusal or termination of asylum support.<sup>3</sup>

Welfare support for asylum seekers and qualifying failed asylum seekers – namely those who are unable to leave the UK for temporary reasons beyond their control – is provided by the UK Border Agency (UKBA). Accommodation is provided, on a no-choice basis, in so-called dispersal areas throughout the UK. Qualifying asylum seekers receive cash subsistence support, known as 'section 95 support', set at approximately 70 per cent of income support levels. However, qualifying *failed* asylum seekers receive cashless 'section 4 support' at a flat rate of £35 per week, in the form of vouchers.<sup>4</sup>

By law, neither asylum seekers nor failed asylum seekers are allowed to support themselves through paid employment. And, to qualify for either section 95 or section 4 support, an applicant must demonstrate that he or she would otherwise be destitute, as defined by section 95(3) of the Immigration and Asylum Act 1999: "he [or she] does not have adequate accommodation or any means of obtaining it (whether or not his [or her] other essential living needs are met); or he [or she] has adequate accommodation or the means of obtaining it, but cannot meet his [or her] other essential needs."

Where the UKBA refuses an application for such support, or decides to terminate an individual or family's existing support, there is in most cases a right of appeal to the AST, with the option of a full oral hearing, or a paper-only appeal. And, since its establishment in 2000, alongside the dispersal-based asylum support system, the AST has in many ways proved itself to be a model tribunal. The AST's senior judiciary has demonstrated a clear commitment to the training and development of both judicial and administrative staff, has shown itself to be responsive and sensitive to the needs of

<sup>1</sup> Leggatt, Sir A. (2001), *Tribunals for users: one system, one service*, The Stationery Office.

<sup>2</sup> *Annual Report and Accounts, 2007-08*, Tribunals Service.

<sup>3</sup> Known originally (and until April 2007) as the Asylum Support Adjudicators, in November 2008 the Asylum Support Tribunal transferred, along with most other tribunal jurisdictions, into a new, unified tribunal system, and became the First-Tier Tribunal (Asylum Support). However, for simplification, the name Asylum Support Tribunal (AST) is used throughout this report.

<sup>4</sup> The terms 'section 95' and 'section 4' support come from the relevant sections of the Immigration and Asylum Act 1999, under which support is provided by the UKBA. As of March 2009, the number of asylum seekers and failed asylum seekers so supported was 33,165 (including dependants) and 10,850 (excluding dependants) respectively. The UKBA plans to replace vouchers with a pre-paid payment card.

appellants, has been open in publishing its decisions and outcome statistics, and has run an effective stakeholder forum.

However, the time-frame for appeals to the AST is extremely narrow: appeals must be lodged within three working days of receipt of the UKBA's decision to refuse or terminate support, and must then be determined by the AST within a maximum of 12 working days.<sup>5</sup> In practice, oral appeals are normally heard on the eighth or ninth day after being lodged, and paper-only appeals are normally decided on the fourth or fifth day after being lodged. There is therefore only very limited time in which an appellant (or would-be appellant) can seek free legal advice and assistance from, for example, a refugee agency, law centre or Citizens Advice Bureau (CAB), and for any such provider of legal advice and assistance to gather and submit supporting evidence.

Furthermore, whilst asylum seekers and failed asylum seekers are dispersed throughout the UK, including in Scotland, the AST has only one hearing centre – in Croydon, south west London. So a CAB in, for example, Oldham, Leeds or Stoke cannot easily provide free legal representation at a hearing before the AST, even if it generally offers tribunal representation locally or regionally (before Employment Tribunals, for example). Not surprisingly, faced with the prospect of travelling long distances, alone, to attend an oral hearing in Croydon, about one in five appellants opt to have their appeal decided by an AST judge on the papers only.

Furthermore, as there is no legal aid for representation before the AST, those who opt for an oral hearing are most unlikely to find a solicitor or barrister to represent them at the hearing in Croydon. Except where an appellant is lucky enough to find a solicitor and/or barrister willing to represent them on a voluntary (or *pro bono*) basis, just about the only *free* legal representation before the AST that is available to oral appellants is that

offered by the Asylum Support Appeals Project (ASAP), a small, independent charity. Since June 2004, the ASAP has run a 'duty representative' scheme at the AST's hearing centre in Croydon, providing free legal advice and representation to a small proportion of otherwise unrepresented AST appellants, partly using solicitors and barristers providing their services to the ASAP on a voluntary (or *pro bono*) basis.

Soon after the establishment of the AST, in 2000, Citizens Advice Bureaux in the asylum dispersal areas began to report to Citizens Advice their frustration at being approached by asylum seekers needing to appeal to the AST against a refusal or termination of support, and being unable either to provide representation at the hearing in Croydon themselves (due to their inability to provide tribunal representation outside their local area), or to refer the individual to any Croydon-based and publicly-funded provider of representation. Since the early 2000s, therefore, Citizens Advice has repeatedly called on the Government to provide publicly-funded legal representation before the AST.<sup>6</sup> We have taken this position because:

- a) The consequences for an AST appellant of his or her well-founded appeal being wrongly dismissed due to its inadequate presentation – street homelessness and destitution – are serious.
- b) Those appealing to the AST are particularly vulnerable: most speak little or no English; some have only recently arrived in the UK; many are already homeless and destitute at the time of the hearing/decision; and some have serious mental health problems (commonly linked to their precarious situation in the UK). And, as one Government-funded research study has concluded, "there are limits to the ability of tribunals to compensate for users' difficulties in presenting their case. In some circumstances, an advocate is not only helpful to the user and the tribunal,

<sup>5</sup> The Asylum Support Appeals (Procedure) (Amendment) Rules 2003.

<sup>6</sup> See, for example: *Shaming destitution: NASS section 4 support for failed asylum seekers who are temporarily unable to leave the UK*, Citizens Advice, June 2006.

but may be crucial to procedural and substantive fairness".<sup>7</sup>

- c) The law on asylum support has grown increasingly complex since 2000, not least due to a number of successful legal challenges to UKBA policy and practice in the High Court. Yet the great majority of the AST's oral appellants go unrepresented at the hearing, and almost one in three receive no pre-hearing legal advice or assistance of any kind.<sup>8</sup>
- d) All the available evidence suggests that the 'success rate' among the minority of oral appellants who *do* obtain specialist legal representation before the AST is significantly higher than that among unrepresented oral appellants.

The AST has itself expressed concern about "the lack of [legal] representation available to appellants at asylum support appeals", noting that "some appellants are therefore ill-prepared to argue their case".<sup>9</sup> And, in a report published in March 2007, the Joint Committee on Human Rights – a select committee of MPs and members of the House of Lords – concluded that "the absence of [legal aid] for representation before the Asylum Support [Tribunal] may lead to a breach of an asylum seeker's right [under Article 3 of the European Convention on Human Rights] to a fair hearing, particularly where the appellant speaks no English, has recently arrived in the UK, lives far from Croydon and/or has physical or mental health needs".<sup>10</sup>

In early 2007, Citizens Advice conducted a study of AST reasons statements (notices of decision), with a view to assessing the impact of legal representation on appeal outcome in oral appeals. We examined the 285 appeals (223 oral, and 62 paper-only) lodged in the four-month period January to April 2007 in

which the AST ultimately issued a reasons statement (excluding withdrawn and invalid appeals). The results of that study were published in the June 2007 edition of our quarterly social policy journal, *evidence*, and also in the July 2007 edition of *Adjust*, the e-newsletter of the then Council on Tribunals (now the Administrative Justice & Tribunals Council). Among the 223 oral appeals, the appellant was legally represented at the hearing in just 36 cases (16 per cent).<sup>11</sup> Yet, in all but four cases, the UKBA was represented at the hearing by a UKBA presenting officer specialising in asylum support law. And this inequality of arms was reflected in the outcome of appeals: among the 36 represented appellants, the success rate was 58 per cent, but among the 187 unrepresented appellants it was 29 per cent.

In rejecting the concern of Citizens Advice, the Joint Committee on Human Rights and others, the UKBA has argued that "providing public funding for representation at asylum support appeals would put such appellants in a better position than those refused social security and other welfare benefits who do not qualify for free legal representation at their appeal hearings."<sup>12</sup> However, this argument overlooks the fact that, unlike those refused mainstream welfare benefits, those appealing to the AST are not allowed to work. So, if wrongly denied asylum support for want of adequate legal representation before the AST, they have no other (legal) means of avoiding homelessness and destitution. And the cost of such homelessness and destitution falls not just on the men, women and children in question, and on charities and community support groups, but also on social services, the National Health Service, and – inevitably – the police, to the detriment of social cohesion and public policy more generally.

7 Genn, H., Lever, B. and Gray, L., *Tribunals for diverse users*, DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006.

8 Source: AST representative statistics, September 2008 to March 2009, unpublished but provided to Citizens Advice and other members of the AST's user group.

9 See, in particular, the Asylum Support Adjudicators annual reports for 2000-01 and 2004-05.

10 *The Treatment of Asylum Seekers*, Joint Committee on Human Rights, Tenth Report of Session 2006-07, HL 81-1, HC 60-1.

11 Twenty-nine appellants were represented by the ASAP, and seven by other legal representatives.

12 Letter, dated 6 June 2007, from the Performance and Resources Directorate of the Border and Immigration Agency (now the UK Border Agency).

With 2009 being the 60th anniversary of the creation of the legal aid system, we decided to repeat our 2007 study of AST decisions, but in doing so to collect a wider set of data relating to the vulnerability of appellants, as well as to appeal outcome and the impact of legal representation. For this new study, we examined the AST reasons statement (notice of decision) of the 616 appeals lodged in the six-month period October 2008 to March 2009 in which the AST ultimately issued a reasons statement (that is, excluding those appeals withdrawn by the appellant or conceded by the UKBA, and those appeals rejected by the AST as being 'out of time' or otherwise invalid). Table 1 gives a breakdown of the 616 appeals, by type of appeal and UKBA decision being appealed against. The study findings are then set out in three sections: appellant vulnerability; appeal outcome; and the impact of representation in oral appeals.

<b>Table 1: Appeal type</b>			
<b>Oral appeals</b>	<b>s4</b>	<b>s95</b>	<b>Total</b>
Refusal of support	204	45	<b>249</b>
Termination of support	199	25	<b>224</b>
Refusal to add a dependant	3	1	<b>4</b>
<b>Total</b>	<b>406</b>	<b>71</b>	<b>477</b>
<b>Paper appeals</b>	<b>s4</b>	<b>s95</b>	<b>Total</b>
Refusal of support	38	16	<b>54</b>
Termination of support	82	2	<b>84</b>
Refusal to add a dependant	–	1	<b>1</b>
<b>Total</b>	<b>120</b>	<b>19</b>	<b>139</b>

From Table 1 it can be seen that the vast majority – 85 per cent – of the 616 appeals in our study were against a refusal or termination of section 4 support, showing that the appellant was a *failed* asylum seeker.

And 50 per cent of the 616 appeals were against a *termination* of support (section 95 or section 4).

## Appellant vulnerability

Our study gathered data on two appellant characteristics likely to bear heavily on their ability to present their case: the level and nature of their income; and, in the case of oral appellants, their proficiency in English. The 616 appellants came from 59 different countries of origin, with the six most common being: Iraq (22 per cent); Iran (19 per cent); Zimbabwe (seven per cent); Democratic Republic of Congo (five per cent); China (four per cent); and Eritrea (four per cent). Excluding the 56 oral appellants who, on the day, failed to attend the hearing, as well as the 18 oral appellants whose proficiency in English was not recorded, the great majority – 79 per cent – of oral appellants participated in the hearing through a tribunal-appointed interpreter. Only 86 oral appellants were recorded as being able to fully participate in English; almost one-third of these 86 appellants were from Zimbabwe (a largely English-speaking country).

Similarly, excluding the 101 appeals in which the matter of the appellant's destitution was not determined, the great majority – 82 per cent – of appellants were deemed, either by the AST alone or by a consensus of the AST and the UKBA, to be destitute (as defined by law) at the time of the oral hearing or paper-only decision. As Table 2 shows, only 93 appellants (15 per cent) were deemed to be *not* destitute; in each case, the appeal was dismissed (or, in two cases, struck out). Significantly, perhaps, the proportion of paper-only appellants deemed to be legally destitute (94 per cent) was somewhat higher than that of oral appellants (78 per cent). Although appellants who opt for an oral appeal can obtain a travel warrant for the return journey to the AST's hearing centre in Croydon, it may well be that would-be appellants who are

already homeless and destitute are more likely to opt for a paper-only appeal, rather than make the journey to Croydon.

**Table 2: Destitution of appellant at time of hearing/decision (all appellants)**

Deemed destitute	s4	s95	Total
Yes, by AST	101	11	112
Yes, by consensus of AST and UKBA	295	15	310
Destitution of appellant undetermined	55	46	101
No, appellant not destitute	75	18	93
<b>Total</b>	<b>526</b>	<b>90</b>	<b>616</b>

Of the 422 appellants deemed to be legally destitute at the time of the oral hearing or paper-only decision, 231 were in fact receiving asylum support. In each case, the appellant was appealing against a decision by the UKBA to *terminate* that support or, in five cases, against a refusal by the UKBA to include a dependant or partner. However, as Table 3 shows, of these 231 appellants, 222 (96 per cent) were failed asylum seekers in receipt of *cashless* section 4 support. And the other 191 legally destitute appellants were appealing against a refusal by the UKBA of their application for support, so were wholly unsupported. In other words, excluding the 101 appeals in which the matter of the appellant's destitution was not determined, at the time of the oral hearing or paper-only decision a total of 413 appellants (80 per cent) had no *cash* income, and 191 appellants (37 per cent) had no income *of any kind*.

**Table 3: Destitute appellants, by form of support and decision being appealed**

Decision being appealed	s4	s95	Total
Refusal of support	174	17	191
Termination of support	219	7	226
Refusal to include a dependant/partner	3	2	5
<b>Total</b>	<b>396</b>	<b>26</b>	<b>422</b>

It is important to appreciate the reality that lies behind these figures, in terms of the actual circumstances of some appellants. For example, in one oral appeal against a refusal of section 4 support, the AST judge accepted that the 23-year-old appellant had been "street homeless, relying on charities and the church for occasional accommodation, food vouchers and other handouts" for the previous 22 months. The judge further noted that "the Red Cross has provided him with a sleeping bag and clothes", and that "even the police have supplied a letter promoting the appellant's cause and asking for him to be provided with accommodation, given that because of his medical condition he is vulnerable and has been found frequently living on the streets". However, while acknowledging "the difficulty of the appellant's situation", the judge dismissed his appeal on the grounds that he did not meet the second part of the test for section 4 support.<sup>13</sup>

In another oral appeal against a refusal of section 4 support, the AST judge found "as a fact that the appellant has been sleeping rough ... his current living conditions fluctuate between being placed for one night with a

<sup>13</sup> To qualify for section 4 support, an individual must demonstrate both that he or she is destitute (as defined by law), and that he or she meets at least one of five conditions: (i) he or she is taking "all reasonable steps to leave the UK, or place themselves in a position in which they are able to leave the UK"; (ii) he or she is "unable to leave the UK by reason of a physical impediment to travel or for some other medical reason"; (iii) in the opinion of the Home Secretary, there is no "viable route of return" to his or her country; (iv) a court has granted permission to proceed in a judicial review of a decision on his or her asylum claim; and (v) the provision of support is otherwise necessary to avoid a breach of his or her human rights (including where he or she has made a fresh asylum claim, and this has been accepted and is still under consideration by the UKBA).

friend – often through the Congolese community – to sleeping rough in train stations”.

And again, in an oral appeal against a refusal of section 4 support, the AST judge concluded that “the position for the appellant is extremely grave. There can be no dispute that she suffers from a number of debilitating medical conditions. She is depressed and has mobility problems, [and] I have heard clear evidence that [she] has had to resort to night buses and sleeping in corridors within the past month or so. This is inappropriate for a woman with these medical conditions and who is nearly sixty years of age. The [appellant’s] family wish to help but they are in a difficult position themselves. In these circumstances, and upon a balance of probabilities, I do consider that the appellant does not have adequate accommodation and that it is certainly arguable that her essential living needs are not being met – she has had to resort to approaching British Red Cross, the provision of assistance from her family being somewhat infrequent”. In both cases, the appellant was represented at the hearing by the ASAP, and the appeal was allowed.

Also, of the 477 oral appellants, 13 were identified as being a single parent; nine were heavily pregnant, and one had recently given birth; three were over the age of 60, and ten under the age of 20; 22 were identified as having significant mental health problems; 20 were identified as having significant physical health issues (other than pregnancy); and one was very recently bereaved. In one case, for example, the AST judge described the unrepresented, destitute and non-English speaking appellant as being “both psychologically and physically unwell ... [during the hearing] he was unable to focus and was shaking continually”. In another, the judge concluded that the similarly unrepresented, destitute and non-English speaking appellant was suffering from “complex chronic mental health problems” and had recently made a serious suicide

attempt. And, in another, the judge accepted evidence from the GP of the unrepresented, destitute and non-English speaking appellant that he was suffering from “quite severe diabetes and eye problems” as well as “depression and significant mental health problems”. In each case, the appeal was allowed or remitted.

## Appeal outcome

Once an appeal has been lodged with the AST, there are several possible outcomes. Not all appeals proceed to an oral hearing or paper-only decision: a small proportion are withdrawn by the appellant (perhaps because the UKBA has been persuaded to change the decision under appeal), while a much larger proportion are withdrawn – which, in most cases, means conceded – by the UKBA.<sup>14</sup> Also, a small proportion of appeals are rejected by the AST for being ‘out of time’ or otherwise invalid. The AST’s published outcome statistics show that over the six-month period covered by our study, October 2008 to March 2009, of the 1,027 new appeals lodged with the AST, 33 (three per cent) were withdrawn by the appellant, 277 (27 per cent) were withdrawn by the UKBA, and 85 (eight per cent) were rejected by the AST for being out of time or otherwise invalid.

The 616 appeals in our study represent the some 60 per cent of the appeals lodged in the six-month period October 2008 to March 2009 that were not withdrawn or rejected as invalid, and so proceeded to an oral hearing or a paper-only decision. In such cases, there are five possible outcomes:

- The AST judge allows the appeal. This is known as an unconditional substitute decision, and results in support being granted or continued, as appropriate.
- The judge allows the appeal, subject to conditions being met. This is known as a conditional substitute decision, and happens infrequently.

<sup>14</sup> In most such cases, the original decision to refuse or terminate support is rescinded, so that support is granted or continued, as appropriate.

- The judge remits the appeal to the UKBA for a fresh decision, pending which support continues if the decision under appeal was a *termination* of support.
- The judge dismisses the appeal. In this case, the original decision stands.
- The judge decides that the tribunal has no jurisdiction to hear the appeal.

An appeal can be regarded as 'successful' where it is either allowed or remitted to the UKBA for a fresh decision. Where the appeal is allowed, the decision under appeal is in effect reversed. And, although the fresh decision that will flow from the remittal of an appeal *may* not be different to the original decision, the fact is that the original decision has been successfully challenged, and quashed. In most cases, this is because the AST judge determines the decision to be flawed. And, as already noted, where the decision under appeal is a termination of support, and the appeal is remitted, support will continue until such time as the fresh decision is made. Of the 81 appeals in our study that resulted in a remittal, 53 (65 per cent) were against a termination of support.

As Table 4 shows, of the 139 paper-only appeals in our study, 59 were allowed or remitted to the UKBA – a success rate of 42.5 per cent. This is a much higher success rate than that among the 62 paper appeals analysed for our 2007 study (24 per cent). And, of the 477 oral appeals, 220 were allowed or remitted to the UKBA – a success rate of 46.1 per cent. Again, this is somewhat higher than that among the 223 oral appeals analysed for our 2007 study (33.6 per cent).

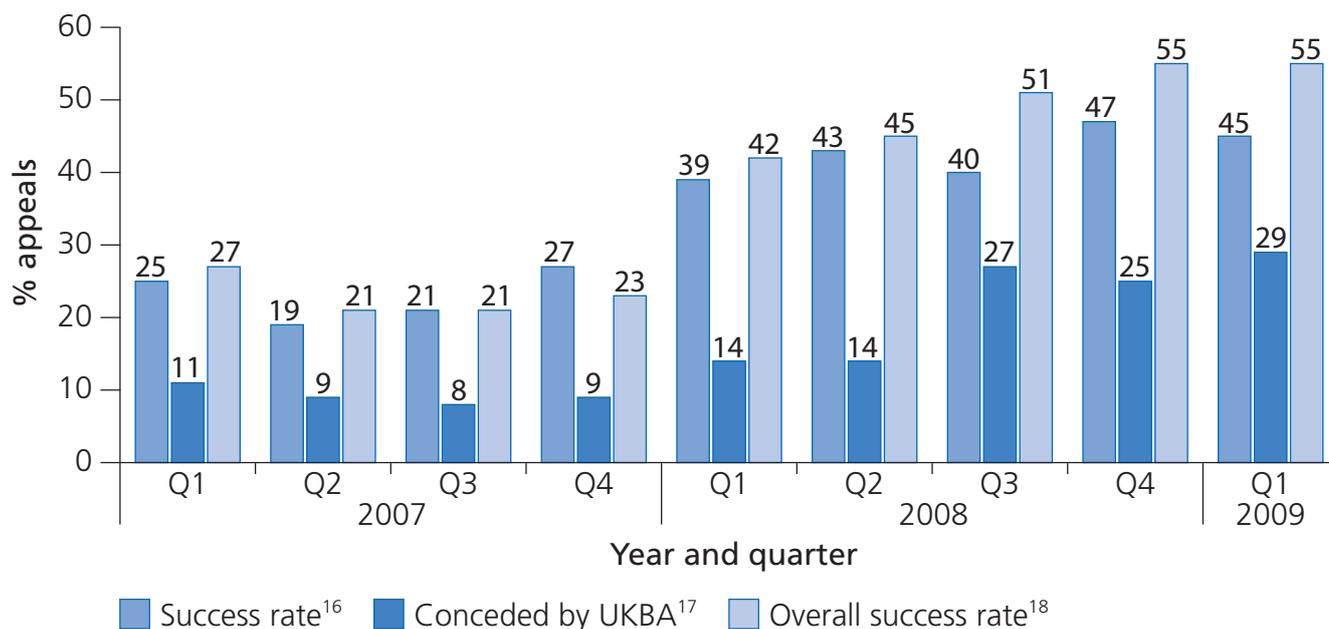
Table 4: Appeal outcome

Decision	Paper-only	Oral	Total
Allowed (unconditional)	40	157	197
Allowed (conditional)	–	1	1
Remitted to UKBA	19	62	81
Dismissed	66	233	299
No jurisdiction	14	24	38
<b>Total</b>	<b>139</b>	<b>477</b>	<b>616</b>

Among all 616 appeals the success rate was 45.3 per cent. And it must be noted that, in the six-month period covered by our study, October 2008 to March 2009, the UKBA withdrew (or conceded) no fewer than 277 (27 per cent) of the 1,027 new appeals lodged with the AST, before they reached an oral hearing or paper-only decision.<sup>15</sup> Indeed, including appeals conceded by the UKBA, the AST's own monthly outcome statistics show an overall success rate, in the six-month period October 2008 to March 2009, of 54.9 per cent. Such an overall success rate is strongly suggestive of poor quality (or, at least, inadequately informed) initial decision-making by the UKBA.

Furthermore, the success rate among the 616 appeals analysed for this study (45.3 per cent) is notably higher than that among the 285 appeals analysed for our 2007 study (29.6 per cent). This suggests a deterioration in the quality (or, at least, the sustainability) of UKBA initial decision-making since 2007 (but see also the next section). And, again, the AST's own outcome statistics show a marked increase in the success rate (among appeals actually determined by the AST) since early 2007, despite a marked increase, over the

Chart 1: Appeal outcomes 2007-09



same period, in the proportion of appeals conceded by the UKBA prior to an AST hearing or decision. Indeed, as Chart 1 shows, the *overall* success rate (that is, the proportion of new appeals that are either withdrawn by the UKBA, or are allowed or remitted by the AST), has more than doubled since 2007.

As Table 5 shows, a significant proportion (39 per cent) of the 90 appeals against a refusal or termination of section 95 support concluded in a 'no jurisdiction' ruling by the AST; and in 32 of these 35 appeals (22 oral, and 10 paper-only), the AST ruled that the appellant is a *failed* asylum seeker, so should have applied for section 4 support. It is arguable that, had these 32 individuals received proper and timely legal advice, their appeals would have been obviated (and those that qualified would have received section 4 support sooner). Alternatively, the UKBA itself could have identified that the individual needed to apply for section 4, rather than section 95 support, and acted accordingly.

Table 5: Appeal outcome, by type of support

Decision	s4	s95	Total
Allowed (unconditional)	177	20	197
Allowed (conditional)	1	–	1
Remitted to UKBA	69	12	81
Dismissed	276	23	299
No jurisdiction	3	35	38
<b>Total</b>	<b>526</b>	<b>90</b>	<b>616</b>

## The impact of legal representation

Among the 477 oral appeals, a UKBA presenting officer specialising in asylum support law represented the UKBA at the hearing in 197 cases (41 per cent). This is a

<sup>16</sup> Calculated as: the number of appeals allowed or remitted, as a proportion of the total number of appeals determined (that is, excluding withdrawn, out of time and otherwise invalid appeals).

<sup>17</sup> Calculated as: the number of appeals withdrawn by the UKBA, as a proportion of the number of new appeals received by the AST.

<sup>18</sup> Calculated as: the number of appeals allowed or remitted, plus the number of appeals withdrawn by the UKBA, as a proportion of the number of new appeals received.

markedly lower proportion than in early 2007, when a UKBA presenting officer attended in all but four of the 223 oral appeals analysed for our study. The UKBA lost 84 (42.6 per cent) of the 197 appeals in which it appeared (that is, the appeal was allowed or remitted), but lost 135 (48.2 per cent) of the 280 appeals in which it did *not* appear. This could well be a (relatively minor) factor in the higher overall success rate, relative to 2007.

The appellant was legally represented at the hearing in just 115 cases (24 per cent); in all but two cases, the legal representative was from the Asylum Support Appeals Project (ASAP). This is a notably lower proportion of representation than in other tribunals with especially vulnerable users, such as the Mental Health Review Tribunal, in which it is 99 per cent, and the Asylum and Immigration Tribunal, in which it is 90 per cent.<sup>19</sup> However, it is a slightly higher proportion than in early 2007, when the appellant was represented at the hearing in just 16 per cent of the 223 oral appeals analysed by Citizens Advice. Again, this might well be a (relatively minor) factor in the higher overall success rate, relative to 2007.

Of these 115 appeals, 82 were allowed or remitted to the UKBA for a fresh decision – a success rate of 71.3 per cent. Including the 46 cases in which the ASAP gave advice to the appellant immediately prior to the hearing, but did not represent him or her at the hearing, the success rate among the 161 appellants who received pre-hearing advice from the ASAP, or were legally represented at the hearing, was 60.9 per cent.<sup>20</sup>

Among the 316 oral appellants who received neither representation at the hearing nor pre-hearing advice from ASAP, however, the success rate was just 38.6 per cent. This is little more than half that among appellants represented at the hearing, and less than two-thirds that among appellants advised by the

ASAP or represented at the hearing. In other words, over the six-month period covered by our study, the ‘premium’ associated with representation at the hearing was 32.7 per cent, and that associated with either pre-hearing advice by the ASAP or representation at the hearing was 22.3 per cent. Furthermore, it is conceivable that, were the ASAP to have *earlier* access to both the appellant and the appeal bundle, the impact of its advice and representation might be even greater than it evidently is now.

This apparent ‘representation premium’ must be seen in the context of how the ASAP operates. Due to its very limited resources, the ASAP is not able to provide advice or legal representation in *all* of the appeals listed for hearing each day. When each day’s appeals are first listed (between two and four days before the hearing date), the ASAP requests from the AST a copy of the appeal bundle for as many appeals as it anticipates being able to offer representation in on the day. As well as specifying the language in which interpretation will be required, the listings notice sets out whether the appeal is against a refusal or termination of either section 4 or section 95 support. Clearly, from this information, the ASAP has no way of assessing the relative merits of any appeal.

However, the listings notice sometimes also contains a one-word description of the type of refusal or termination involved, such as ‘assets’ for a case in which the refusal or termination is based on the UKBA’s belief that the individual concerned has income from (illegal) paid work or another source, or ‘AWOL’ for a refusal or termination based on an alleged breach of conditions. Accordingly, there is scope for the ASAP to exercise a degree of selection in the *type* of appeal for which it will request the bundle (and so plan to provide representation). Crucially, however, in the great majority of cases (the exceptions being the small number of direct referrals

<sup>19</sup> Source: Table 1 (the extent of representation at tribunals) in: Adler, M. and Gulland, J. (2003), *Tribunal users’ experiences, perceptions and expectations: a literature review*, Council on Tribunals (now the AJTC), November 2003.

<sup>20</sup> This information was not apparent from the reasons statements, but the AST reference numbers for the 46 cases in which the ASAP provided advice but not representation have been provided to Citizens Advice by the ASAP.

**Table 6: Oral appeal outcome, by appellant's representation**

Decision	Unrepresented		Represented at oral hearing		Given advice only by ASAP		Total	
		%		%		%		%
Allowed (unconditional)	81	25.6	65	56.5	11	23.9	157	32.9
Allowed (conditional)	1	–	–	–	–	–	1	–
Remitted to UKBA	40	12.7	17	14.8	5	10.9	62	13.0
Dismissed	176	55.7	28	24.3	29	63.0	233	48.8
No jurisdiction	18	5.7	5	4.3	1	2.2	24	5.0
<b>Total</b>	<b>316</b>	<b>100</b>	<b>115</b>	<b>100</b>	<b>46</b>	<b>100</b>	<b>477</b>	<b>100</b>

from other agencies), the ASAP first sees both the appellant and the appeal bundle only on the morning of the hearing – in some cases as little as 15 minutes before the hearing commences.

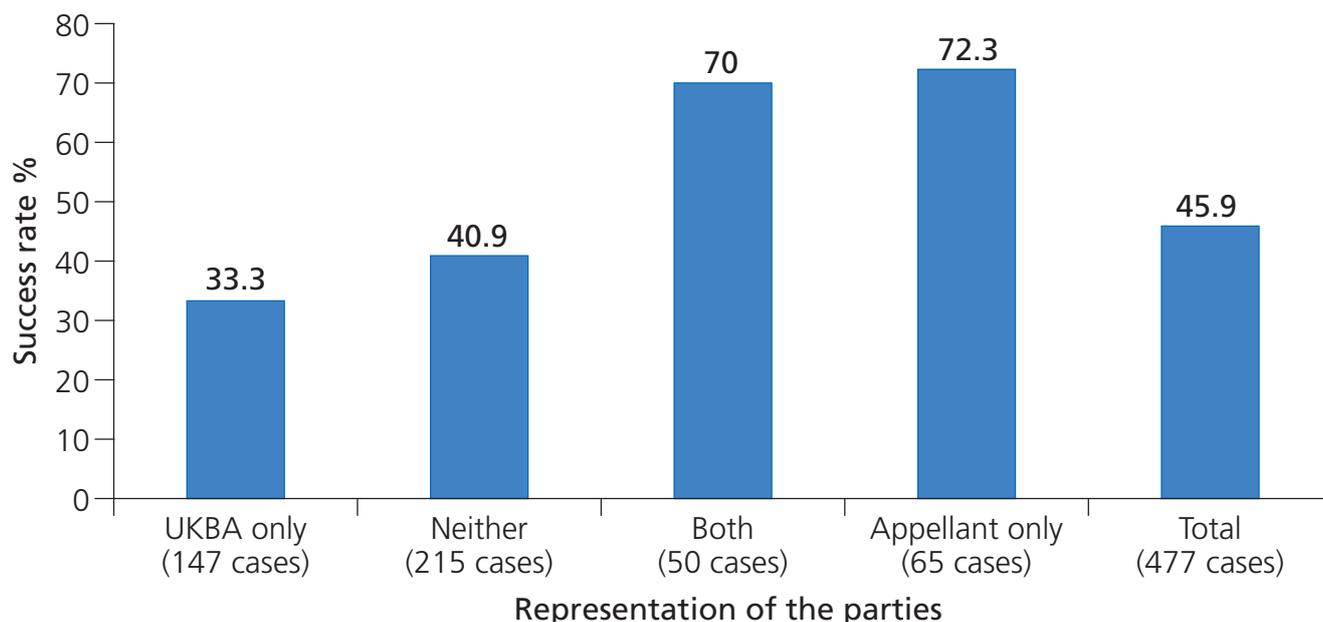
On the day, an appellant may be given advice only, rather than representation at the hearing, because – having had sight of the bundle and an opportunity, however brief, to talk to the appellant – the ASAP considers the appeal to have no merit, or because the ASAP is unable to provide a representative at the time of that appellant's hearing (several appeals being heard, by different judges, at the same time), or for other resource-related reasons. And, occasionally, an appellant will decline the ASAP's offer of representation at the hearing. On the other hand, the ASAP sometimes decides to provide representation at the hearing, despite concluding that the appeal has relatively little merit, because it considers the appellant to be especially vulnerable and/or unable to present his or her case (for example, he or she has serious mental health problems).

In short, in deciding which appeals it will provide representation in at the hearing, the ASAP does exercise a *degree* of selection, on merit. But there is no reason to believe that

this limited degree of selection accounts for all – or even much – of the substantial 'representation premium' of between 22 and 32 per cent suggested by our study findings. The 113 appeals in which the ASAP provided representation were a broad mix of appeal types (refusal or termination, section 95 or section 4), and included 47 appeals in which the appellant's destitution was disputed by the UKBA; at least some of these 47 appeals would have been identified as an 'assets' case in the AST's listings notice. And, as Table 6 shows, the ASAP does 'lose' over a quarter of the appeals in which it provides representation – which it would not do if it was somehow selecting only 'easily winnable' cases.

As Chart 2 shows, only in 50 cases were *both* the appellant and the UKBA represented at the hearing. Twenty-seven of these 50 appeals were allowed, eight were remitted to the UKBA, 12 were dismissed, and three resulted in a 'no jurisdiction' ruling – a success rate (for appellants) of 70.0 per cent. But when only the UKBA was represented at the hearing, this appellant success rate fell to just 33.3 per cent. And, among the 187 appeals in which neither party was represented at the hearing, it was 40.9 per cent. In other words, the UKBA did best when one of its presenting officers appeared at the hearing, but the

Chart 2: Appeal outcome, by representation of the parties



appellant was unrepresented. Such findings further illustrate the value *to appellants* of representation before the Tribunal.

The above findings are confirmed by the AST's own statistics on appellant representation. The AST collects data for each appeal determined on whether the appellant received any legal advice or assistance with the appeal, and if so at what stage. This data shows that, in the seven-month period September 2008 to March 2009, the success rate among the 133 oral appellants who did not receive any advice or assistance with their appeal at any stage was 30.8 per cent, while that among the 285 oral appellants who received advice or assistance with lodging their appeal but not representation at the hearing was 41.7 per cent. But the success rate among the 149 oral appellants who received legal representation at the hearing was 69.8 per cent. In other words, the 'premium' associated with pre-hearing advice or assistance (from, for example, a solicitor, a CAB, or a refugee agency) was 10.9 per cent, while that associated with legal representation at the hearing (in most cases, by the ASAP) was 28.1 per cent.<sup>21</sup>

## Conclusions and recommendations

The findings of this study show that AST appellants are particularly vulnerable, and notably disadvantaged, in terms of two factors that bear heavily on any tribunal user's ability to present their case: their proficiency in English, and their socio-economic circumstances. The great majority – 79 per cent – of oral appellants are not sufficiently proficient in English to present their case without an interpreter. (It seems reasonable to assume that, in general, those appellants who opt for a paper-only appeal are no more proficient in English). And a similar proportion – 82 per cent – of appellants are homeless and/or destitute, as defined by law, at the time of the oral hearing or paper-only decision, with the vast majority of these legally destitute appellants having no *cash* income, and one in four having no income of any kind.

Furthermore, given their general lack of proficiency in English, and the fact that many have only been in the UK for a relatively short period, it seems reasonable to conclude that,

as a group, AST appellants are also at a disadvantage in terms of their knowledge of the law, legal processes and how to seek legal advice and assistance.

Given this particular vulnerability and disadvantage of AST appellants, it is not surprising that the findings of our study suggest a significant 'representation premium'. The success rate among the minority of oral appellants who received legal representation at the hearing was 71 per cent, while among the oral appellants who received either legal representation at the hearing or pre-hearing legal advice from the specialist Asylum Support Appeals Project (ASAP) it was 61 per cent. But among the majority of oral appellants who did not benefit from such advice or representation it was just 39 per cent. That is, our study suggests a 'representation premium' of between 22 and 32 per cent. And the AST's own outcome and representation statistics suggest a 'representation premium' of 28 per cent.

It has long been the 'accepted wisdom' that legal representation at the hearing has a significant impact on tribunal outcome. A landmark research study, published in 1989, indicated that such legal representation increased the chances of success from 30 per cent to 48 per cent in Social Security Appeal Tribunals, from 20 per cent to 38 per cent in Immigration Tribunals, from 20 per cent to 35 per cent in Mental Health Review Tribunals, and from 30 per cent to 48 per cent in Industrial (now Employment) Tribunals – a 'representation premium', across the board, of 15-18 per cent.<sup>22</sup> And a further academic study, published in 2006, found a 'representation premium' of 14 per cent among a sample of 1,697 users of Social Security and Child Support Tribunals.<sup>23</sup>

More recent (but not yet fully published) research on the impact of representation in

a smaller sample of 870 users of four different tribunals – Social Security and Child Support Tribunals, Criminal Injuries Compensation Appeal Panels (CICAP), Special Educational Needs and Disability Tribunals, and Employment Tribunals – appears to suggest a more "nuanced" situation, with a 'representation premium' of 15 per cent among its sample of 80 CICAP users, but a significantly lower 'representation premium' among users of the other three tribunals.<sup>24</sup> However, in terms of their proficiency in English, their socio-economic circumstances, and the potential consequences of a wrongly dismissed appeal, the users of these four tribunals are simply not comparable with users of the AST. And, in the words of one Government-funded research study, already cited above, "tribunals cannot be expected to compensate entirely for the disadvantages of some users. It has to be recognised that there are situations in which an advocate is not merely *helpful*, but is *necessary* to the requirements of procedural fairness and may also be crucial to substantive outcome".<sup>25</sup>

Of all tribunal users, those with whom AST appellants are most comparable, in terms of vulnerability, socio-economic circumstances and associated likely ability to present their case, are users of the Asylum and Immigration Tribunal, and Mental Health Review Tribunals. And, significantly, these tribunals are two of only three first-tier (or equivalent) tribunals in which legal aid is currently available for representation. **On the basis of the study findings set out in this report, Citizens Advice repeats its call for publicly-funded representation before the AST.**

There are a number of different ways in which such publicly-funded representation could be delivered to appellants. One obvious and straightforward way would be for the Legal Services Commission to fund (and expand) the existing work of the Asylum Support Appeals

22 Genn, H. and Genn, Y. (1989), *The effectiveness of Representation at Tribunals*, Lord Chancellor's Department (now the Ministry of Justice), 1989.

23 Genn, H., Lever, B. and Gray, L. (2006), *Tribunals for diverse users*, DCA research series 01/06, Department for Constitutional Affairs (now the Ministry of Justice), January 2006.

24 Adler, M. (2009), *Self-representation, just outcomes and fair procedures in tribunal hearings: some inferences from recently completed research* (unpublished).

25 *Ibid*, note 23.

Project (ASAP), so as to provide (subject to appropriate means and merits tests) a truly comprehensive pre-hearing advice and representation service, including capacity to take early referrals from refugee agencies and other advice providers in the asylum dispersal areas. Alternatively, the Legal Services Commission could offer contracts to provide such pre-hearing advice and representation before the AST to a select number of law firms and/or voluntary sector agencies.

We recognise that, at a time of “extraordinary economic circumstances” and associated restraint in all areas of public expenditure, including legal aid, it is – as the Justice Minister, Lord Bach, has said – “important that the taxpayer is assured that we are using their money wisely and effectively”. However, setting aside for one moment the matter of the evident ‘representation premium’ for AST appellants, it is widely accepted – not least among the tribunal judiciary – that there is a ‘representation premium’ for *tribunals*. Legal representation of *both parties* reduces the need for a tribunal to adopt a more interventionist or enabling approach, and allows it to focus solely on making an independent and impartial adjudication of the disputed matters put before it, thereby reducing the length of hearings and improving overall efficiency.

For example, in one of the oral appeals examined for our study, the decision under appeal (a refusal of section 4 support) relied on an opinion of the UKBA’s medical adviser that the epileptic and chronically depressed applicant was fit to travel and therefore able to leave the UK. Allowing the appeal, the AST judge noted that it was “extremely unfortunate” that a UKBA presenting officer had not attended the hearing, as they “would have immediately recognised that [the UKBA’s medical adviser] had very little evidential material upon which to base his conclusions”. In other words, attendance by the UKBA presenting officer would have simplified the

task of the AST judge, and reduced the length of the hearing.

Furthermore, by ensuring transparently independent and impartial tribunal decision-making, in ‘citizen v state’ tribunals representation of *both* parties guarantees meaningful feed-back for the initial decision-maker – in this case, the UKBA – on the quality and sustainability of its initial decision-making. And our study’s findings, as well as the AST’s own outcome statistics, suggest that the UKBA could benefit enormously from such feed-back, in terms of improving its evidently poor initial decision-making.

We understand that the UKBA already accepts that “a portion of [its] decision letters have been of a lower quality than they should have been”, and that it has recently established a new Quality Assurance Framework with the aim of “improving the quality of all casework decisions ... including support decisions”.<sup>26</sup> This is to be welcomed, but it remains to be seen whether this measure will bring about a sufficient improvement in the quality of asylum support decisions. And it is not clear whether this measure incorporates feedback from the AST on appeal outcome.

We also understand that the UKBA plans to increase the extent of its representation by UKBA presenting officers in appeals before the AST – which has fallen from 98 per cent in early 2007 to just 41 per cent in the six-month period covered by our study. Again, this is to be welcomed, but it must be matched by publicly-funded representation for AST appellants. Otherwise, it will simply result in an even greater inequality of arms, with all that that implies for the fairness, impartiality and efficiency of the AST’s decision-making and the impact of avoidable destitution on other public bodies.

The up-front cost to the Legal Services Commission of providing such publicly-funded representation would be relatively modest. The number of appeals to the AST is small –

currently, about 2,000 appeals per year, of which about 40 per cent do not proceed as far as an oral hearing or paper-only decision in any case. Clearly, the availability of publicly-funded representation might well lead to an increase in the number of new appeals, and to an increase in the proportion of appellants opting for an oral hearing (currently, about 80 per cent). However both these factors could be more than offset by an improvement in the quality of the UKBA's initial decision-making on asylum support.

Assuming that, on balance, the number of appeals proceeding to an oral hearing fell or remained the same, and that funding was provided at about the same level as it is under the fixed fees regimes governing publicly-funded representation before the Asylum and Immigration Tribunal and Mental Health Review Tribunals, the up-front cost of publicly-funded representation before the AST would be less than £300,000. And, even if the number of oral appeals increased by 50 per cent, the cost would be less than £450,000 – that is, less than 0.02 per cent of the annual legal aid budget of £2.2 billion.

Furthermore, we suggest that, were this up-front cost to the Legal Services Commission to be underwritten by the UKBA, then the UKBA would have a clear financial incentive to reduce the number of appeals to the AST, by improving and then maintaining the quality of its initial decision-making. Indeed, we would suggest that the up-front cost, as well as being at least partially offset by increased tribunal efficiency and a reduced impact of avoidable destitution on other public bodies, could be met entirely from the savings to the taxpayer that would flow from an improvement in the UKBA's currently poor administration of asylum support. For, as well as the poor initial decision-making indicated by the high overall success rate amongst appeals to the AST, some of the reasons statements examined for our study reveal a shocking degree of administrative failure and associated misuse of public funds on the part of the UKBA more generally.

For example, in a (dismissed) appeal against a refusal of section 4 support, it emerged that the appellant had been on section 4 support for nearly three years after she ceased to qualify for such support (the UKBA having determined the fresh asylum claim which formed the original basis for the grant of section 4 support). And in a (remitted) appeal against a termination of section 4 support, it emerged that the appellant – a single mother – and her daughter had remained on section 4 support for two and a half years (that support having been granted on the basis that the appellant was then pregnant). The appellant's support had then been terminated without prior notification (that is, the UKBA failed to follow its own procedure on termination), and her appeal was remitted to the UKBA by the AST judge because, by this time, she was once again heavily pregnant – a fact that would have been known to the UKBA, thereby obviating the appeal, had it only followed its own procedure on termination.

Citizens Advice has previously recommended – in our June 2006 report, *Shaming destitution* – that asylum support for otherwise destitute failed asylum seekers should continue automatically (and in *cash*) until such time as they are removed or voluntarily depart from the UK. We have suggested that this would improve the overall cost-effectiveness of the asylum determination system, by increasing the likelihood of failed asylum seekers departing voluntarily under the Voluntary Assisted Return and Reintegration Programme (VARRP), rather than having to be subjected to far more costly enforced removal. Adoption of such an approach would also drastically reduce the workload of the AST, since the vast majority of the appeals against a refusal or termination of section 4 support made now would not be necessary. Over the six-month period covered by our study, 85 per cent of the appeals determined by the Tribunal were against a refusal or termination of section 4 support.

The Government has firmly rejected this suggested approach. One consequence of this decision is that the AST will continue to need to deal with a significant number of appeals against decisions to refuse or terminate section 4 support.

**Given this situation, we make the following recommendations:**

- The Ministry of Justice should provide for publicly-funded legal representation in oral hearings before the Asylum Support Tribunal. The mechanism for providing such representation should ensure a comprehensive pre-hearing advice and representation service, including capacity to take early referrals from refugee agencies and other advice providers in the asylum dispersal areas. The entire cost of this publicly-funded legal representation should be underwritten by the UK Border Agency.
- The UK Border Agency should take urgent steps to improve the quality of its initial decision-making on asylum support, and especially on section 4 support.
- The UK Border Agency should work with the Asylum Support Tribunal to establish feed-back mechanisms that enable the UK Border Agency to use data on appeal outcomes to monitor the quality of its initial decisions on asylum support.
- The UK Border Agency should set, and publish, targets for the quality of its initial decision-making on asylum support, with reference to the number of appeals to the Asylum Support Tribunal that are withdrawn by the UK Border Agency, and to the outcome of appeals determined by the Tribunal.
- The UK Border Agency should revise its processes and instructions to caseworkers so that an application for section 95 support by a person who is clearly a failed asylum seeker can be treated as an application for section 4 support (and vice versa).
- The Asylum Support Tribunal should monitor decisions by the UK Border Agency to withdraw an appeal to the Tribunal, to ensure that those seeking to challenge an initial decision to refuse asylum support are not repeatedly denied a hearing before, or a paper-based decision by, the Tribunal.

Written by

Richard Dunstan

Published by

Social Policy Department  
Citizens Advice  
115-123 Pentonville Road  
London N1 9LZ  
Telephone 020 7833 2181  
Fax 020 7833 4371  
[www.citizensadvice.org.uk](http://www.citizensadvice.org.uk)  
Registered charity number: 279057

