



Law Society
of Scotland

Destitution, Asylum and Insecure Immigration Status in Scotland

Response to call for written evidence by The Law
Society of Scotland

8 March 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Immigration and Asylum Law Sub-committee welcomes the opportunity to consider and respond to the Scottish Parliament's Equalities and Human Rights Committee's call for written evidence on Destitution, Asylum and Insecure Immigration Status in Scotland. The Sub-committee has the following comments to put forward for consideration.

General Comments

There are many migrants who experience destitution including asylum seekers and others. Examples include those individuals who are in the United Kingdom (UK) under Appendix FM of the Immigration Rules whose relationships have broken down, single parents who have contact with their British Citizen children and married couples, all of whom may be suffering financial hardship. Typically, migrants in these positions will have a compelling case to stay in the UK; however, they may find that the cost involved in making an application is prohibitive. Whilst applications for asylum seekers and refugees are free; general human rights applications e.g. for those applying under the 10 year route as a partner or parent, can be expensive. Currently, the Home Office fees range from £811 for an individual to more than £5200 for a family of four.

Migrants who cannot afford to make an application must satisfy the Home Office's Fee Waiver policy.¹ The guidance makes provision for fees to be waived for an applicant who establishes that they are destitute or would be rendered destitute which is defined as follows:

- 1) The applicant does not have adequate accommodation or any means of obtaining it (and/or cannot meet their other essential living needs); or
- 2) Where the applicant does have adequate accommodation, and can meet essential living needs, but they:
 - a. have no additional disposable income such that they could;

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf

- i. pay the fee now; or
 - ii. save the required amount within a reasonable period (12 months); and
- b. They are not able to borrow the required amount from family or friends; and
- c. There is no reason to believe that the applicant's financial circumstances are likely to change within a reasonable period (12 months); or
- 3) Notwithstanding that the above criteria do not apply, there are other exceptional circumstances such that the fee waiver should be granted.²

It is the experience of members of the Sub Committee that if an applicant applies for further leave to remain with a fee waiver request, it is not uncommon for the application to be rejected. This is because Paragraph 34(3) of the Immigration Rules requires that the relevant fee must be paid in full for an application to be treated as valid. If the relevant criteria for a fee waiver are satisfied, that rule is treated as having been complied with. If the fee waiver is rejected, the Immigration Rule is treated as having not been complied with, the result of which is that the application is not a valid application.³ An invalid application discontinues the applicant's leave under section 3C of the Immigration Act 1971 if that migrant already had limited leave to enter or remain and made the application for variation in time.⁴ Thus, when the applicant is served with the notice rejecting their application, they become over-stayers. The impact of that rejection is significant and may include the following consequences for the migrant:

- they no longer have the right to work if they previously did so;
- an inability to rent property due to their status;
- no longer being able to apply for a change of conditions to allow them to access public funds; and
- the loss of any period of continuous residence already built up for the purposes of an application under Immigration Rule 276B(1)(a).

In order to maintain continuity of residence, Immigration Rule 276B (1)(v) allows for an applicant to be in breach of immigration laws in terms of paragraph 39E (for 14 days if there is a good reason for the delay beyond the control of the applicant or their representative). However, Home Office administration can result in migrants receiving rejection notices many weeks after they have been made, therefore losing the opportunity to remedy any defect and avoid a break in their continuous residence. Bona fide destitute migrants in this situation have very few options. They must quickly re-apply with a fresh fee waiver application or pay the relevant fee to avoid being liable to detention and removal. However, if an applicant who had valid leave, made an in-time application for further leave to remain and had their application rejected, regardless of the fact that the applicant may be eligible to re-apply within the 14-day period

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf at page 5

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf at page 13

⁴ *Mirza, Iqbal, Ehsan v Secretary of State for the Home Department* [2016] UKSC 63 at paragraph [33]

referred to in paragraph 39E, it would not cure the problem of that person being treated as an over-stayer in terms of paragraph 6 of the Immigration Rules. In simple terms, the second application (even if it is valid) would not re-instate or extend the applicant's previous leave because there would be a break for the purposes of S3C of the Immigration Act 1971. The applicant continues to be an over-stayer from the point their leave expired and throughout the period their application is pending. That reasoning applies even if the applicant legitimately met all the relevant requirements of the Immigration Rules and is granted a visa upon re-applying. That applicant would similarly be unable to work or rent etc. during the time the application is under consideration.

The Immigration Rules provide caseworkers with discretion in terms of Rule 34B(2) to allow an applicant a period of 10 working days to remedy an error or omission in the application which may otherwise have led to the application being deemed as invalid. This provision allows the Home Office to avoid the situation where the application is rejected for non-payment of fee where, in fact, there is merely an error or omission with the fee waiver application. In the experience of members of the Sub Committee, it appears as though this discretion is seldom used. This can result in destitute applicants finding themselves in extremely difficult circumstances.

Another significant omission from the guidance is the availability for applicants who are applying for Indefinite Leave to Remain (ILR) to have fees exempted (save those applying as a victim of domestic violence in terms of DVILR.1.1 of Appendix FM). The Home Office's reasoning behind this is that the fee waiver policy is only intended to make provision for those applicants who would otherwise be unable to exercise their rights under Article 8 or other ECHR rights⁵. Instead those applicants are expected to continue to apply for further leave to remain. The reality of the situation, as aforementioned, is that applicants who are eligible for ILR risk breaking their continuity of residence if the fee waiver is rejected.

Another balancing factor for the Home Office is that migrants are often unable to have recourse public funds if they have limited leave to remain or enter. This is often the case notwithstanding the fact that migrants can apply for a change of conditions to remove the "no recourse to public funds" requirement anyway. Introducing a fee exemption for applicants applying for ILR is likely to allow applicants to become financially stable by having an uninterrupted ability to work. This avoids the potential situation, as described above, where applicants may not have a right to work and are left in limbo.

In Scotland, there are few immigration and/or asylum lawyers who can assist migrants on a legal aid basis. For those migrants who are unable to source legal representation and who may also have limited English, they must apply in terms of complicated guidance which can be difficult to decipher only to face rejection for a reason which could have been clarified via a phone call, letter or email. In this area, Home Office guidance appears to restrict caseworkers' discretion by instructing them generally not to make any further enquiries beyond the evidence submitted by the applicant.⁶

⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf at page 4

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/420914/Fee_Waiver_Policy_-_April_2015.pdf at page 6



Members of our committee are concerned that the Fee Waiver Policy, although intended to accommodate the position of destitute migrants, is in practice creating additional problems for this vulnerable group. Home Office policy on Fee Waivers is, of course, not within your Committee's remit. However, we wish to bring Fee Waivers to the attention of the Committee because the hardship which the operation of the Fee Waiver Policy causes is relevant to your inquiry.

For further information, please contact:

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