



R (on the application of Wasif) v Secretary of State for the Home Department (rule 34 – “print and send”) IRJ [2015] UKUT 0270 (IAC)

**Upper Tribunal**  
**Immigration and Asylum Chamber**  
**Judicial Review Decision Notice**

In the matter of an application for judicial review

The Queen on the application of

Malik Muhammad Wasif

**Applicant**

**v**

Secretary of State for the Home Department

**Respondent**

**Before The Honourable Mr Justice McCloskey, President of the Upper Tribunal**

On this substantive application for judicial review and following consideration of the documents lodged by the parties and having heard Mr M Read, of Counsel, instructed by Adamsons Law, Solicitors on behalf of the Applicant and Mr S Skinner, of Counsel, instructed by the Government Legal Department on behalf of the Respondent at a hearing at Manchester Civil Justice Centre on 08 April 2015

- (i) *An application for leave to remain in the United Kingdom must comply with the requirements of paragraph A34 and all material provisions of paragraphs 34A – 34K of the Immigration Rules.*
- (ii) *Between June 2013 and August 2014, Tier 4 applicants had the choice of submitting their applications either on line or by the “Print and Send” mechanism.*
- (iii) *The correct construction of the Rules is as follows:*
  - (a) *The first of these options required the submission of the completed application form on line and the provision of supporting documents by post.*
  - (b) *The second option, “Print and Send”, required the applicant to print the completed*

*application form and send it, with accompanying supporting documents, by post. The "Print and Send" instruction does not amount to an on-line application.*

- (iv) A failure to comply with the requirements in 34A (per paragraph 34C) invalidates the application.

### **Judgment**

Handed down on 22 April 2015

1. The Applicant is a national of Pakistan, aged 31 years. On 03 October 2012 he entered the United Kingdom as a student in accordance with a visa issued by the Respondent, valid until 28 February 2014. Later, he made a combined application for further leave to remain as a Tier 4 (General) Student Migrant under the Points Based System and a Biometric Residence Permit. This application was refused by the Respondent's decision dated 24 March 2014.
2. In the refusal decision the Respondent stated that the Applicant had failed to demonstrate possession of the requisite level of funds in respect of the relevant period, 28 days. As a result, the Applicant was awarded no points for "maintenance (funds)" and failed accordingly since, under the Immigration Rules, ten points were necessary. As regards the other requirement of "attributes – Confirmation of Acceptance for Studies", the Applicant was awarded the full score of 30 points. The key passage in the decision is the following:

*"As the closing date of the bank statements submitted in support of your application is 01 March 2014, you need to show evidence of £7200 maintenance for 28 days from 01 February 2014 to 28 February 2014. However, your bank statements demonstrate that you are in possession of no more than £1850.94 at any point during that period. As such, you have not demonstrated that you have the level of funds requirement ....."*

The application was refused accordingly.

3. This is a classic legality judicial review challenge. The central issue is whether the Respondent's decision is in accordance with the relevant provisions of the Immigration Rules (hereinafter "*the Rules*"). Nothing turns on any of the provisions in the self-contained regime governing Tier 4 applications constituted by paragraph 245ZX and Appendix C of the Rules. Rather, the lawfulness of the Respondent's decision depends upon the correct construction of paragraph A34 of the Rules. It is necessary to reproduce this in full and, for convenience, I have done so in an appendix hereto.
4. What are the material facts? These are in some doubt, largely due to evident uncertainty on the part of the Applicant. When these proceedings were initiated in June 2014, the claim did not include any witness statement of the Applicant. This is regrettable, since the present case was crying out for one: see, in this context, R (Mahmood) v Secretary of State for the Home Department IJR [2014] UKUT 439 (IAC) at [19] – [23]. Permission to apply for judicial review was then refused on the papers. In October 2014, the Applicant applied for an oral hearing. Still no statement was provided. The oral renewal hearing was listed before me on 21 January 2015. An adjournment ensued, to enable both parties to comply with certain directions. The Applicant was directed to lodge and serve a comprehensive witness statement within 21 days. Simultaneously, I relisted the hearing to take place on 04 February 2015. On the date of the relisting, the Applicant had failed to comply with this direction and no acceptable explanation for this failure was available. The Applicant was given a substantially extended opportunity for compliance, largely due to the unscheduled rearrangement of the hearing of 04 February 2015 to 18 March 2015. On this latter date, the Applicant's failure continued. No satisfactory explanation was provided. Having indicated

the real risk of a wasted costs order, a generous further adjournment was granted, with time extended to 27 March 2015. The Tribunal received the Applicant's purported compliance with the January 2014 direction at the relisted hearing on 08 April 2015, again well out of time and without any explanation. This is unacceptable and disturbing. I shall revisit the issue of wasted costs presently.

5. Against this highly unsatisfactory background, two witness statements in the Applicant's name were provided. The first, unsigned and undated, contains the following averments, in [6]:

*"On 28 February 2014, I made an online application for leave to remain .... and paid associated fee online after which I was advised to post all my official and supporting documents to UK Visas and Immigration within 15 days of my online application ....*

*On the very next day on 01 March 2014, I posted all my documents to the UK Visas and Immigration along with the downloaded application form with my signatures."*

The second version of the Applicant's statement, which is both signed and dated, embodies a very different account [6]:

*"On 28 February 2014, I completed an online application for leave to remain .... and paid associated fee online after which the last step was to 'print and subject online'. It was to my understanding that this meant once I have submitted my application it will send to the Home Office and I will receive a copy of the application for my own records. After clicking 'print and submit online' I received an email from the Home Office stating that my application has been accepted. I was advised to post all my official and supporting documents to UK Visas and Immigration within 5 days of my online application."*

To summarise:

- (i) The key averments in the Applicant's witness statements are significantly different.
  - (ii) No explanation of how this came about was proffered.
  - (iii) The Home Office email mentioned in the longer of the two versions was not exhibited, again without explanation.
6. The Respondent's compliance with the Tribunal's initial directions of January 2014 confirms that the copy of the Applicant's completed application contained in his judicial review papers is reliable and complete. The Respondent's version of this document differs from the Applicant's in two respects only: it contains the Applicant's photograph, stapled to the first page and it also has a copy of the Royal Mail stamp. In the completed application the following are the material passages:
- (a) The "date completed" is stated to be 28 February 2014.
  - (b) The "date charged" of the credit card payment of the application fee, £406, is also stated to be 28 February 2014.
  - (c) On the second page, the following statement appears:  
*"This is your official document for your application. You need to submit this to us by post in order to make your application."*
  - (d) On the penultimate page, the Applicant's manuscript signature is inserted, accompanied by the date, also in manuscript, of 28 February 2014.

- (e) The Applicant formally declared (on page 8) that the amount needed to comply with the maintenance requirement was £3980, made up of £2380 which he had paid to his sponsor and £1600 for himself, both confirmed by the provision of the relevant “specified evidence”.
- (f) On the final page of the application it is stated:

**“Next steps for your application –**

*Collate your supporting documents together and post them with your official document, within 15 working days, to UK Visas and Immigration ..... [at specified address].”*

- 7. The Respondent’s case on the relevant factual issues has been made at three stages: first, in the response to the pre-action protocol letter; second, in the Acknowledgement of Service; and, third, in a witness statement provided following the Tribunal’s directions of January 2015. At each of these stages, the Respondent has consistently made the case that the Applicant did not submit his application online. Rather, it is claimed, his application, in its entirety, was submitted by post. Further, the application, with supporting documents, was received by the Respondent on 01 March 2014. The latter, the Respondent contends, is, therefore, the operative date. The Respondent accepts, in substance, that the Applicant made the requisite payment online, on 28 February 2014.
- 8. I resolve the factual issues which have arisen in the following way. The Applicant asserts that he “submitted” his application online on 28 February 2014. I reject this assertion. The onus is on the Applicant to make good this assertion and he must do so to the civil standard viz on the balance of probabilities. I find that he has failed to discharge this burden on account of the unexplained discrepancies between his unsigned witness statement and his signed witness statement; the unsatisfactory and incomplete description in the witness statements of what he actually did on the relevant occasion; the failure to exhibit the email from the Home Office allegedly confirming acceptance of the application; the absence of any explanation for this failure; the lack of detail and particularity in the initial judicial review application; the related absence of a satisfactory witness statement, then or at any time subsequently; and the consistent terms in which the Respondent’s case has been formulated.
- 9. To summarise, the facts which I find are the following:
  - (a) On 28 February 2014, the Applicant made the requisite payment of £406 online.
  - (b) On the same date, he completed his application electronically and downloaded it, following which he manually signed the document and inserted the date.
  - (c) In the electronic exercise described immediately above, at the stage when the Applicant had completed his application on line, the instruction “**PRINT AND SEND**” was displayed.
  - (d) The Applicant obeyed this instruction by downloading/printing the completed application and, on the same date, posting it accompanied by the appropriate supporting documents to the Respondent. Notably, there is an unchallenged averment in the Respondent’s affidavit that the completed application posted by the Applicant included manuscript alterations.
  - (e) On 01 March 2014, the Respondent received the downloaded application and supporting documents.
- 10. For completeness, I record that the witness statement provided on behalf of the Respondent explains, in some detail, the background to and rationale of the introduction of the “*print and*

send” optional mechanism for Tier 4 applications, stimulated by Basnet (validity of application – respondent) [2012] UKUT 00113 (IAC); the success which this mechanism experienced; the subsequent introduction, in June 2013, of the online application mechanism; the simultaneous withdrawal of the “original application” mechanism; and the ultimate abandonment of the “print and send” mechanism in 2014. In short, between June 2013 and August 2014 Tier 4 applicants had a choice of the “print and send” option and the “online” option. This is interesting background information which enhances and augments the Tribunal’s understanding of the broader landscape. However, I make clear that the construction of the relevant provisions of the Rules is a pure question of law, uninfluenced and unilluminated by this evidence.

11. The legal principles governing the exercise of construing paragraph A34 of the Rules are uncontentious. In Mahad (And Others) v Entry Clearance Officer [2009] UKSC 16, Lord Brown, collating and summarising earlier dicta of the Court of Appeal, stated, at [10]:

*“Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy .....*

*[The intention of the Secretary of State] is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State’s intention to be discovered from the Immigration Directorates Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules .... pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act .....*

Furthermore, the process of rewriting any provision of the Rules under the guise of purposive construction is a forbidden one: Iqbal (And Others) v Secretary of State for the Home Department [2015] EWCA Civ 169 at [31]. It is also an established principle of statutory interpretation, the Court will lean against an absurd construction where the words in question can bear the preferred alternative meaning: Lewis v Eliades [2004] 1 WLR 692, at [58] – [61], per Jacob LJ. Finally, the Court:

*“.... cannot and should not construe the Secretary of State’s Rules to mean something different from what, on a fair objective reading, they actually say.”*

[Iqbal at [33]].

12. The “print and send” mechanism was first introduced in the Rules in October 2012. I have, for convenience, reproduced in the Appendix to this judgment the version of paragraph A34 of the Immigration Rules which governed the Applicant’s application at the material time (it has been superseded subsequently). Giving effect to the above principles I construe this as follows:

- (i) The opening paragraph establishes, in unambiguous language, two options: the applicant is to either complete “*the relevant online application process*” in accordance with the requirements of paragraph A34(iii) or make use of “*the specified application form*” in accordance with paragraphs 34A – 34D.

### **Option 1**

- (ii) The first option requires the application to be made via the UKBA website, in accordance with the process therein stipulated. This requires the applicant to, *inter alia*, select the appropriate “*immigration category*”.
- (iii) Invocation of the online option requires any specific fee to be paid in accordance with

the “*method specified*”.

- (iv) Invocation of the online application option clearly requires the completed application to be submitted on line by the relevant date.
- (v) Where the online application option is selected, the Rule is unequivocal in the requirement relating to the provision of “*supporting documents*”: these must be submitted by post “*in the specified manner within 15 working days of submission of the online application*”.
- (vi) Where the online application option is selected, the sanction for non-compliance with the relevant requirements is unambiguous: the application “... *will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.*”

## **Option 2**

- (vii) Where the second of the two options offered is selected, the “*specified application form*” must be used and completed. This is accessed via the UKBA website.
  - (viii) In this event, the appropriate fee must be paid in the manner prescribed.
  - (ix) The specified types of information must be provided.
  - (x) The completed application must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes and the form must be signed by the applicant.
  - (xi) Transmission of the completed application form, accompanied by the stipulated photographs and documents, must be by pre-paid post to UKBA or in person at a public enquiry office of UKBA, subject only to the exceptions listed.
  - (xii) Where the “Print and Send” option is selected, the sanction for non-compliance with the relevant requirements is unambiguous: the application “... *will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.*”
13. The argument advanced on behalf of the Applicant was that the “**print and send**” instruction generates confusion and ambiguity. I find no merit in this contention. This instruction, in my view, would have conveyed unambiguously to the hypothetical reasonably attentive and informed student the necessity of (i) printing the application form completed on line and, thereafter, (ii) sending it to the Respondent in the manner summarised above viz in accordance with paragraph 34B of the Rules. Giving effect to the principles of construction summarised in [11] and my view of the correct construction of the Rule in [12], I conclude that the Applicant’s challenge to the Rule must fail. Regrettably though many “near miss” cases are, I consider this conclusion unavoidable.
14. I further reject the Applicant’s second, alternative ground of challenge. The contention that the Respondent had a discretion to waive the non-compliance with the Rules finds no support in either the terms of the Rules themselves or any legal principle. No authority in support of this ground was cited. The Applicant has failed to establish that any discretion exists. Thus the further, separate question of whether discretion should have been exercised in the Applicant’s favour does not arise.
15. Tribunals and practitioners should be alert to two subsequent changes in the Rules. First, in June 2013, an on-line application mechanism was introduced, co-existing with the “print and send” option. This change was motivated by perceived administrative advantages. Second, in August 2014, the “print and send” option was removed. From that date the on-line application became the exclusive mechanism.

**Order**

16. Giving effect to the above analysis and conclusions:

- (i) The application for judicial review is dismissed.
- (ii) Subject to any representations to the contrary within 14 days of the date hereof, the Applicant will pay the Respondent's costs, to be assessed in default of agreement.
- (iii) I refuse permission to apply to the Court of Appeal since this decision has involved a relatively straightforward exercise of construing the relevant provisions of the Immigration Rules and gives rise to no general point of law of importance.

**Signed :**

*Seamus McCloskey*

**The Honourable Mr Justice McCloskey  
President of the Upper Tribunal, Immigration and Asylum Chamber**

**Dated:** 22 April 2015

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**Applicant's solicitors:**  
**Respondent's solicitors:**  
**Home Office Ref:**  
**Decision(s) sent to above parties on:**

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

# **APPENDIX**

## **Specified forms and procedures for applications or claims in connection with immigration**

- A34. An application for leave to remain in the United Kingdom under these Rules must be made either by completing the relevant online application process in accordance with paragraph A34 (iii) or by using the specified application form in accordance with paragraphs 34A to 34D.
- (i) "The relevant online application process" means the application process accessible via the website of the United Kingdom Border Agency and identified there as relevant for applications for leave to remain for the immigration category under which the applicant wishes to apply.
  - (ii) "Specified" in relation to the relevant online application process means specified in the online guidance accompanying that process.
  - (iii) When the application is made via the relevant online application process:
    - (a) any specified fee in connection with the application must be paid in accordance with the method specified;
    - (b) if the online application process requires the applicant to provide biometric information that information must be provided as specified;
    - (c) if the online application process requires supporting documents to be submitted by post then any such documents specified as mandatory must be submitted in the specified manner within 15 working days of submission of the online application;
    - (d) if the online application process requires the applicant to make an appointment to attend a public enquiry office of the United Kingdom Border Agency the applicant must, within 45 working days of submission of the online application, make and attend that appointment; and comply with any specified requirements in relation to the provision of biometric information and documents specified as mandatory.
  - (iv) Where an application for leave to remain in the United Kingdom is made by completing the relevant online application process, the application will be invalid if it does not comply with the requirements of paragraph A34(iii) and will not be considered.



Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

34. An application form is specified when:

- (i) it is posted on the website of the United Kingdom Border Agency of the Home Office,
- (iii) it is marked on the form that it is a specified form for the purpose of the immigration rules,
- (iv) it comes into force on the date specified on the form and/or in any accompanying announcement.

34A Where an application form is specified, the application or claim must also comply with the following requirements:

- (i) Subject to paragraph A34 the application or claim must be made using the specified form,
- (ii) any specified fee in connection with the application or claim must be paid in accordance with the method specified in the application form, separate payment form and/or related guidance notes, as applicable,
- (ii) any section of the form which is designated as mandatory in the application form and/or related guidance notes must be completed as specified,
- (iv) if the application form and/or related guidance notes require the applicant to provide biographical information, such information must be provided as specified,
- (v) an appointment for the purposes stated in subparagraph (iv) must be made and must take place by the dates specified in any subsequent notification by the Secretary of State following receipt of the application, or as agreed by the Secretary of State,
- (vi) where the application or claim is made by post or courier, or submitted in person:
  - (a) the application or claim must be accompanied by the photographs and documents specified as mandatory in the application form and/or related guidance notes,
  - (ab) those photographs must be in the same format specified as mandatory in the

application form and/or related guidance notes, and

- (b) the form must be signed by the applicant, and where applicable, the applicant's spouse, civil partner, same-sex partner or unmarried partner, save that where the applicant is under the age of eighteen, the form may be signed by the parent or legal guardian of the applicant on his behalf,

34B Where an application form is specified, it must be sent by prepaid post to the United Kingdom Border Agency of the Home Office, or submitted in person at a public enquiry office of the United Kingdom Border Agency of the Home Office, save for the following exceptions:

- (i) an application may not be submitted at a public enquiry office of the United Kingdom Border Agency of the Home Office if it is an application for:
  - (a) limited or indefinite leave to remain as a sole representative or retired person of independent means
  - (ba) limited or indefinite leave to remain as a **Tier 1** (Exceptional Talent) Migrant, Tier 1 (Entrepreneur) Migrant, Tier 1 (Investor) Migrant or Tier 1 (Graduate Entrepreneur) Migrant,
  - (b) indefinite leave to remain as a victim of domestic violence,
  - (c) a certificate of approval for a marriage or civil partnership,
  - (d) a Tier 2, Tier 4 or Tier 5 (Temporary Worker) sponsorship licence,
  - (e) Indefinite leave to remain as a businessperson, investor or innovator,
  - (f) an extension of stay or indefinite leave to remain on the basis of long residence in the United Kingdom, or
  - (g) a Designated Competent Body endorsement under the Tier 1 (Exceptional Talent) category.
  
- (ii) an application may be sent by courier to the United Kingdom Border Agency of the Home Office if it is an application for:
  - (a) limited or indefinite leave to remain as a sole representative, retired person of independent means or as a Tier 1 Migrant or Tier 2 Migrant;
  - (b) limited leave to remain for work permit employment, as a seasonal agricultural worker, for the purpose of employment under the Sectors-Based Scheme.
  - (c) Indefinite leave to remain as a businessperson, investor or innovator, or
  - (d) limited leave to remain as a Tier 5 (Temporary Worker) Migrant.
  
- (iii) an applicant may submit an application online where this option is available on the United Kingdom Border Agency's website

- (iv) an application may not be sent by pre-paid post, and must be made online, if it is an application for a Tier 2, Tier 4 or Tier 5 (Temporary Worker) sponsorship licence.

34C Where an application or claim in connection with immigration for which an application form is specified does not comply with the requirements in paragraph 34A, such application or claim will be invalid and will not be considered.

Notice of invalidity will be given in writing and deemed to be received on the date it is given, except where it is sent by post, in which case it will be deemed to be received on the second day after it was posted excluding any day which is not a business day.

34D Where the main applicant wishes to include applications or claims by any members of his family as his dependants on his own application form, the applications or claims of the dependants must meet the following requirements or they will be invalid and will not be considered:

- (i) the application form must expressly permit the applications or claims of dependants to be included, and
- (ii) such dependants must be the spouse, civil partner, unmarried or same-sex partner and/or children under the age of 18 of the main applicant.

#### **Variation of Applications or Claims for Leave to Remain**

34E. If a person wishes to vary the purpose of an application or claim for leave to remain in the United Kingdom and an application form is specified for such new purpose or paragraph A34 applies, the variation must comply with the requirements of paragraph 34A or paragraph A34 (as they apply at the date the variation is made) as if the variation were a new application or claim, or the variation will be invalid and will not be considered.

34F Any valid variation of a leave to remain application will be decided in accordance with the immigration rules in force at the date such variation is made.

#### **Determination of the date of an application or claim (or variation of an application or claim) in connection with immigration**

34G For the purposes of these rules, the date on which an application or claim (or a variation in accordance with paragraph 34E) is made is as follows:

- (i) where the application form is sent by post, the date of posting,
- (ii) where the application form is submitted in person, the date on which it is accepted by a

public enquiry office of the United Kingdom Border Agency of the Home Office,

- (iii) where the application form is sent by courier, the date on which it is delivered to the United Kingdom Border Agency of the Home Office, or
- (iv) where the application is made via the online application process, on the date on which the online application is submitted.

34H. Applications or claims for leave to remain made before 29 February 2008 for which a form was prescribed prior to 29 February 2008 shall be subject to the forms and procedures as in force on the date on which the application or claim was made.

34I. Where an application or claim is made no more than 21 days after the date on which a form is specified under the immigration rules and on a form that was permitted for such application or claim immediately prior to the date of such specification, the application or claim shall be deemed to have been made on the specified form.

#### **Withdrawn applications or claims for leave to remain in the United Kingdom**

34J. Where a person whose application or claim for leave to remain is being considered requests the return of his passport for the purpose of travel outside the common travel area, the application for leave shall, provided it has not already been determined, be treated as withdrawn as soon as the passport is returned in response to that request.

34K. Paragraph 34J does not apply to an applicant who is applying as a Tier 2 Migrant or a Tier 5 Migrant and whose application is supported by a Certificate of Sponsorship from a Premium Sponsor.

#### **Undertakings**

35. A sponsor of a person seeking leave to enter or remain in the United Kingdom may be asked to give an undertaking in writing to be responsible for that person's maintenance, accommodation and (as appropriate) personal care for the period of any leave granted, including any further variation or for a period of 5 years from date of grant where indefinite leave to enter or remain is granted. Under the Social Security Administration Act 1992 and the Social Security Administration (Northern Ireland) Act 1992, the Department of Social Security or, as the case may be, the Department of Health and Social Services in Northern Ireland, may seek to recover from the person giving such an undertaking any income support paid to meet the needs of the person in respect of whom the undertaking has been given. Under the Immigration and Asylum Act 1999 the Home Office may seek to recover from the person giving such an undertaking amounts attributable to any support provided under section 95 of the Immigration and Asylum Act 1999 (support for asylum seekers) to, or in respect of, the person in respect of whom the

undertaking has been given. Failure by the sponsor to maintain that person in accordance with the undertaking, may also be an offence under section 105 of the Social Security Administration Act 1992 and/or under section 108 of the Immigration and Asylum Act 1999 if, as a consequence, asylum support and/or income support is provided to, or in respect of, that person.