



No Recourse to Public Funds Network

Assessing and supporting children and families who have no recourse to public funds (NRPF)

Practice guidance for local authorities

April 2018

ADCS
Leading Children's Services

Local 
Government
Association

Contents

1 Introduction	4
1.1 Upcoming legislative changes	5
1.2 Who has NRPF?.....	5
1.3 What are ‘public funds’?	7
1.4 Good practice points.....	8
2 Pre-assessment screening	10
2.1 Duty to undertake a child in need assessment.....	10
2.1.1 Threshold to undertake an assessment.....	10
2.1.2 Which authority must undertake an assessment?	11
2.2 Checking immigration status.....	13
2.2.1 Immigration documentation – non-EEA nationals	13
2.2.1 Continuing leave (3C leave)	14
2.2.3 EEA nationals and their family.....	15
2.2.4 How to request a Home Office status check.....	15
2.3 Exclusions from support	16
2.3.1 Duty to inform the Home Office	17
2.3.2 Families that are not excluded.....	18
2.4 Emergency support	19
3 Assessing need under section 17	20
3.1 Statutory framework	20
3.2 Child in need assessment.....	21
3.2.1 Ongoing duty to reassess need.....	22
3.3 Considerations specific to children in NRPF families	24
3.3.1 Assessment approach.....	25
3.3.2 Addressing information gaps.....	26
3.3.3 Limitations on the ability to self-support.....	29
3.4 Considerations when parents are in an excluded group.....	31
4 Assessments when the exclusion applies	32
4.1 Human rights assessment	32
4.2 Determining whether the family can freely return	33
4.2.1 Legal barriers to return	34
4.2.2 Practical barriers to return	36
4.3 Determining a breach of human rights	37

4.3.1 Best interests of the child	38
4.3.2 Protection cases.....	39
4.3.3 Medical cases	39
4.3.4 Family life.....	42
4.3.5 Private life	44
4.3.6 Legal proceedings.....	44
4.3.7 Country information.....	45
4.4 Determining a breach of EU treaty rights	45
4.5 Determining whether the child would be in need.....	46
4.6 Concluding the human rights assessment	47
5 Accommodation and subsistence support	49
5.1 Accommodation.....	49
5.1.1 Bed and breakfast accommodation	50
5.1.2 Placing families in another local authority area.....	51
5.1.3 Right to rent checks	51
5.2 Financial support (subsistence)	52
5.3 Additional family members.....	54
6 Resolving supported cases.....	56
7 Refusing or withdrawing support	61
7.1 Referring a family onto welfare benefits and housing.....	61
7.2 Preventing re-presentations.....	61
7.3 Families excluded from support	62
7.3.1 Home Office funded return	63
7.3.2 Local authority funded return.....	65
8 Adults with care and support needs	66
8.1 Pregnant women	67
9 EEA nationals and family members.....	68
9.1 European Economic Area (EEA) countries	68
9.2 The right to reside.....	68
9.3 Family members	70
9.4 Benefit eligibility	71
9.4.1 Benefit eligibility table.....	72
9.5 Irish nationals	73
9.6 Returning British citizens	74
9.7 Difficulties asserting the right to reside	74

10 Asylum seekers	76
10.1 Responsibility for providing support	76
10.2 Section 95 Home Office support	77
10.3 Section 4 Home Office support	77
11 Immigration information	79
11.1 Making an immigration application.....	79
11.1.1 Application fees and exemptions.....	80
11.1.2 Fee waiver policy	81
11.1.3 Evidence of identity	82
11.2 Refusal of leave due to NHS debt.....	83
11.3 Leave to remain with NRPF	83
11.3.1 Next steps after recourse is obtained	85
11.4 Destitution domestic violence concession.....	85
11.5 When is a child British?	86
12 Legal aid and accessing legal advice	88
12.1 Eligibility for legal aid	88
12.2 Exceptional case funding.....	89
12.3 How to find a legal aid adviser	89
12.4 How to find an immigration or asylum adviser.....	89
12.5 Law centres and other free advice providers	90
13 Eligibility for other services	91
13.1 Work related welfare benefits	91
13.2 Housing association tenancy	91
13.3 Education and student finance.....	91
13.4 NHS treatment.....	92
13.5 Child maintenance.....	93
13.6 Free school meals	93
13.7 Government funded child care.....	93
13.8 Free and concessionary travel.....	94
Glossary	95

1 Introduction

This guidance is intended to provide a reference for local authorities to use in order to apply statutory duties and powers in relation to safeguarding the welfare of children in households where the parents have no recourse to public funds (NRPF) and require accommodation and/or financial assistance. Such assistance can only be provided to families under section 17 of the Children Act 1989, where there is a child in need.¹

When assessing the needs of a child, practitioners must refer to and follow the Department for Education's statutory guidance, *Working together to safeguard children*.²

This practice guidance addresses the additional considerations that need to be made when determining whether assistance under section 17 can be provided to a NRPF family, as the parent's immigration status will affect what support options may be available:

- Parents with NRPF cannot access welfare benefits, homelessness assistance, social housing and, in some cases, employment.
- Exclusions to section 17 support apply to some parents, which mean that the local authority may only provide accommodation and financial support to such families when this is necessary to prevent a breach of the family's human rights or EU treaty rights, usually when there is a legal or practical reason why the family cannot return to the parent's country of origin.

Assistance provided by local authorities under section 17 has been recognised by the government and courts as being an essential safety net to protect the most vulnerable people from destitution. It is therefore necessary for thorough assessments to be undertaken so that support is provided to eligible families, and that proactive steps are taken to resolve supported cases.³

As well as this guidance, we have developed a web tool in partnership with COMPAS (University of Oxford) and Soapbox, which will help practitioners find out what considerations need to be made when a family requests support under section 17 by answering questions about the parent's immigration status. We recommend that the tool is used in conjunction with this guidance, and the information provided will link out to relevant sections of this guidance.⁴

Social care is a devolved power and the Children Act 1989 applies to England only, although the equivalent legislation in Wales, Scotland and Northern Ireland contains similar

¹ All UK legislation can be accessed at <http://www.legislation.gov.uk/>. It will be necessary to also refer to any amending legislation or refer to an online legal library which consolidates legislation.

² Department for Education, *Working together to safeguard children* (26 March 2015) <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

³ *R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73 <https://www.supremecourt.uk/cases/uksc-2015-0215.html>

⁴ <http://migrantfamilies.nrpfnetwork.org.uk>

responsibilities to safeguard the welfare of children. The immigration legislation referred to applies to the UK so local authorities nationally may find this guidance useful in helping establish how to implement the exclusions and manage NRPF cases.

For information specific to Wales, please see the Welsh Refugee Council's briefing:

- *Destitution, safeguarding and services under the Children Act 1989 (up to April 2016) and Social Services and Well-being (Wales) Act 2014 (from April 2016)*⁵

1.1 Upcoming legislative changes

The Immigration Act 2016 contains significant changes to the type of support that local authorities may provide to certain families with NRPF and to Home Office support for refused asylum seeking families.

At present the local authority support changes have been legislated for in England and the asylum support changes will apply UK-wide. However, neither are currently in force and the government has not provided any indication about when they will be implemented.

Local authorities therefore must comply with the law that applies now and which is set out in this guidance. Updates about any legislative changes will be provided on our website.

For more information, see our factsheet:

- *Immigration Bill 2015-16: local authority support for families (England)*⁶

1.2 Who has NRPF?

No recourse to public funds (NRPF) applies to people who are 'subject to immigration control' and, as a result of this, have no entitlement to certain welfare benefits, homelessness assistance and an allocation of social housing through the council register.

The definition of 'subject to immigration control' is set out in section 115 (9) of the Immigration and Asylum Act 1999 and applies to people with the immigration status types specified in the table below.

A non-EEA national who..	Examples
Requires leave to enter or remain in the UK but does not have it	<ul style="list-style-type: none">• Visa overstayer• Illegal entrant
Has leave to enter or remain in the UK which is subject to a condition that they have no recourse to public funds (NRPF)	<ul style="list-style-type: none">• Spouse of a settled person• Tier 4 student and their dependents• Leave to remain under family or private life rules – see note A
Has leave to enter or remain in the UK that is subject to a maintenance undertaking	<ul style="list-style-type: none">• Adult dependent relative of a British Citizen or person with settled status – see note B

⁵ <http://www.welshrefugeecouncil.org/migration-information/legal-briefings/children-and-families>

⁶ <http://www.nrpfnetwork.org.uk/Documents/immigration-bill-families.pdf>

People with the following types of immigration status **will** have recourse to public funds:

- Indefinite leave to remain or no time limit (apart from adult dependent relative – see note **B**)
- Right of abode
- Exempt from immigration control
- Refugee status
- Humanitarian protection
- Discretionary leave to remain, including:
 - leave granted to a person who has received a conclusive grounds decision that they are a victim of trafficking or modern day slavery
 - Destitution domestic violence concession
- Limited leave to remain granted under family and private life rules where the person is accepted by the Home Office as being destitute – see note **A**
- UASC leave

Notes

- A.** People with leave to remain granted under the family and private life rules, or outside of the rules, who are on a 10- year settlement route will have the NRPF condition imposed unless they can demonstrate to the Home Office that they are destitute, in which case, recourse to public funds will be granted. They may also apply for their leave to be varied by applying to the Home Office for a change of conditions in order for the NRPF condition to be removed.⁷
- B.** An adult dependent relative of a British citizen or person with settled status will have indefinite leave to enter or remain in the UK with a prohibition on claiming public funds for a period of five years, although they may apply for non-means tested benefits during this period. Once five years has passed, or if the person who made the undertaking has died, they will have full recourse to public funds.⁸

When a person has leave to remain with NRPF, 'no public funds' will be written on their immigration document.

If there is no such statement then it can be assumed that a person does have recourse to public funds, although they would need to satisfy the relevant benefit or housing eligibility requirements in order to access these.

European Economic Area (EEA) nationals and their non-EEA family members (who are lawfully present by having a right to reside or derivative right to reside in the UK) are not 'subject to immigration control' under section 115 of the Immigration and Asylum Act 1999. They are not excluded from claiming benefits and housing assistance. However, where they are ineligible for these because they fail the right to reside and/or habitual residence tests, they are often referred to as having NRPF. Immigration documentation issued to non-EEA

⁷ <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

⁸ Regulation 2 & Schedule of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 <http://www.legislation.gov.uk/ukxi/2000/636/schedule>; Home Office *Modernised Guidance on Public Funds* <https://www.gov.uk/government/publications/public-funds>

family members with a right to reside or derivative right to reside will not make any reference to public funds.

For more information, see sections:

- **2.2** **Checking immigration status**
- **9** **EEA nationals and family members**
- **11.3** **Leave to remain with NRPF**

1.3 What are ‘public funds’?

Section 115 of the Immigration and Asylum Act 1999 and paragraph 6 of the Immigration Rules specify the welfare benefits that a person who is subject to immigration control will be excluded from claiming:

- Attendance allowance
- Carer’s allowance
- Child benefit
- Child tax credit
- Council tax benefit
- Council tax reduction
- Disability living allowance
- Discretionary support/ welfare payment made by a local authority⁹
- Domestic rate relief (Northern Ireland)
- Housing benefit
- Income-based jobseeker’s allowance
- Income-related employment & support allowance
- Income support
- Personal independence payment
- Severe disablement allowance
- Social fund payment: budgeting loan, sure start maternity grant, funeral payment, cold weather payment and winter fuel payment ¹⁰
- State pension credit
- Universal credit
- Working tax credit

Section 118 of the Immigration and Asylum Act 1999 excludes a person subject to immigration control from being entitled to access an allocation of social housing through the council register and homelessness assistance.

There are several exceptions to the rules regarding public funds, which mean that a person who has leave to remain with NRPF may be able to claim certain benefits without this affecting their immigration status when they:

- are a national of a country that has a reciprocal arrangement with the UK;
- have an EEA national family member, including a British citizen;

⁹ Added on 6 April 2016. Replaces community care grants and crisis loans in England and Scotland; Northern Ireland implemented its scheme on 1 November 2016.

¹⁰ In Northern Ireland included crisis loans and community care grants until 1 November 2016.

- make a joint claim for tax credits with a partner who has recourse to public funds; or
- have indefinite leave to enter/remain as an adult dependent relative during the first five years they are in the UK (during which time they can claim non-means tested benefits).¹¹

There are many publicly funded services that are not classed as public funds under section 115 of the Immigration and Asylum Act 1999. Therefore, a person with NRPF may be able to access such services when the relevant eligibility criteria are satisfied, although these may include requirements relating to nationality or immigration status.

Assistance provided under social services legislation is not a public fund for immigration purposes but some groups of people with NRPF will only be able to get certain types of assistance if this is necessary to prevent a breach of their human rights or EU treaty rights.

For more information, see sections:

- **2.3 Exclusions from support**
- **13 Eligibility for other services**

1.4 Good practice points

Local authorities need to adopt a consistent, lawful and efficient response when assisting families with NRPF. The following good practice points have been established through our work over the last decade with partner authorities and agencies:

- A specialist and targeted response is required to administer services effectively; ensure there is an identified lead person or team to deal with NRPF cases.
- Establishing internal protocols and having regard for the legislation and case law referenced in this guidance will help ensure that NRPF cases are identified at point of referral and dealt with consistently.
- Provide an interpreter if this is required.
- Families should not be refused assistance solely because they have NRPF (because this in itself does not exclude them from social services assistance), or because the local authority does not receive funding from central government to provide support to NRPF families.
- The requirement to undertake a child in need assessment is based on an appearance of need and is not dependent on the parent's immigration status or whether the parent has a pending immigration application. The absence of a pending immigration application should not prevent an assessment being carried out or interim support being provided when this is necessary. The parent's immigration

¹¹ Home Office *Modernised Guidance Public Funds*
<https://www.gov.uk/government/publications/public-funds>

status and whether any applications have been made will be relevant factors when determining whether the exclusions to support apply.

- Section 17 of the Children Act 1989 requires local authorities to assist the family as a whole; offering to accommodate the child alone or taking the child into care will rarely be an appropriate response in the absence of any safeguarding concerns in addition to the risk to the child arising from the parent's lack of housing and income.
- Obtain immigration status information and monitor caseloads and expenditure using NRPF Connect, which will also inform the Home Office of local authority involvement in case. This information contributes to the only national data source on NRPF service provision.¹²
- When support is provided, this should be reviewed regularly and steps taken to resolve the case; this may involve monitoring the progress of the parent's immigration case by using NRPF Connect and working in partnership with the Home Office.
- Inform the family how and why information about them may be shared with other parties, and confirm this by written agreements signed by the lead applicant. Permission will be required in order to share or obtain information from legal representatives and voluntary sector agencies.

This guidance is structured according to the two stages that a local authority will usually follow to establish whether it has a duty to provide support to a family with NRPF:

- Pre-assessment screening: establishing the facts of the case prior to assessment.
- Assessing need: determining eligibility for the provision of services.

For more information, see sections:

- **2 Pre-assessment screening**
- **3 Assessing need under section 17**
- **4 Assessing families when the exclusion applies**
- **6 Resolving supported cases**

¹² <http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx>

2 Pre-assessment screening

This chapter sets out what the local authority will need to consider when a family with NRPF is referred for or requests accommodation and/or financial support:

- Whether there is a duty to undertake a child in need assessment.
- What the parents' nationality and immigration status is in order to:
 - ascertain eligibility for employment, welfare benefits or asylum support, and
 - determine whether the family can only receive support if this is necessary to prevent a breach of their human rights or EU treaty rights.
- Whether emergency support needs to be provided whilst assessments are being carried out.

At this first point of contact the parent can be asked for information relating to their financial circumstances, which may be used to inform the child in need assessment to determine whether the family are eligible for support. Families should not be refused support without proper enquiries being made to identify needs of the child.

2.1 Duty to undertake a child in need assessment

The research report undertaken by COMPAS at the University of Oxford, *Safeguarding children from destitution: local authority responses to families with 'no recourse to public funds'*, found that the majority of NRPF families approached or were referred to local authorities at a point of crisis after an (often lengthy) period of stability.¹³

Depending at what point the family comes into contact with the local authority, it may be appropriate to explore what preventative action can be taken to sustain the family's living arrangements in order to avoid loss of accommodation and/or income. The local authority will consider whether any preventative action may be possible, but such intervention, even if effective initially, will not be sufficient if it cannot be maintained or the circumstances of the child are such that a child in need assessment is required.

For more information, see section:

- **6 Resolving supported cases**

2.1.1 Threshold to undertake an assessment

Regulation 5(1)(a)(i) of the Local Safeguarding Children Boards Regulations 2006 requires each board to develop policies and procedures in relation to:

'..the action to be taken where there are concerns about a child's safety or welfare, including thresholds for intervention.'

¹³ Jonathan Price and Sarah Spencer, *Safeguarding children from destitution: local authority responses to families with 'no recourse to public funds'* (COMPAS, University of Oxford, June 2013), p.29. <https://www.compas.ox.ac.uk/2015/safeguarding-children-from-destitution-local-authority-responses-to-families-with-no-recourse-to-public-funds/>

Each board is required to publish guidance and list factors that will require a child in need assessment to be carried out. The following are examples of factors which are likely to apply to a child in an NRPF household:

- The child regularly does not have adequate food, warmth, shelter or essential clothing.
- When a parent's limited financial resources or having no recourse to public funds increases the vulnerability of the children to criminal activity e.g. illegal working.
- When a parent is unable to provide for material needs, which negatively impacts on the child.

The threshold for assessing a child in an NRPF household is therefore low; a child in need assessment is likely to be required for any family presenting on the basis that they do not have adequate accommodation and/ or sufficient income to meet their living needs because of their inability to access benefits or employment, or where the child's circumstances suggest this may be the case.

2.1.2 Which authority must undertake an assessment?

Section 17(1)(a) of the Children Act 1989 specifies that:

'It shall be the general duty of every local authority... to safeguard and promote the welfare of children within their area who are in need.'

The courts have considered how to interpret the phrase 'within their area' in cases involving families who have been found to be intentionally homeless under homelessness legislation, and have subsequently needed to be referred to social services for support under section 17 when housing duties have come to an end.

The leading judgment that considers the meaning of 'within their area' is *R (Stewart) v LB Wandsworth & Ors* (2001). The Court found that the duty to assess under section 17(1)(a) of the Children Act 1989 is triggered by the physical presence of a child in need in the local authority's area.¹⁴

This was reaffirmed in *R(M) v Barking and Dagenham LBC and Westminster LBC* (2002), where Westminster Council had placed a family in temporary homeless accommodation in Barking and Dagenham. Barking and Dagenham was found to be the authority responsible for assessing the child's needs under section 17 Children Act 1989 when the family were evicted from the temporary accommodation.¹⁵

In the recent case of *R (BC) v Birmingham City Council* (2016), a Jamaican overstayer and her six year old son had been living with the mother's partner in London Borough of Bromley. The relationship broke down in early July 2016 and the mother moved in with her cousin in Birmingham. Her son stayed with a friend in London until October, when he joined his mother in Birmingham. A few days later, the family requested assistance from Birmingham City Council.

¹⁴ *Stewart, R (on the application of) v London Borough of Wandsworth & Ors* [2001] EWHC 709 (Admin). <http://www.bailii.org/ew/cases/EWHC/Admin/2001/709.html>

¹⁵ *M, R (on the application of) v Barking and Dagenham LBC and Westminster LBC* [2002] EWHC 2663 (Admin)

Birmingham City Council did not initially undertake a child in need assessment, instead offering the family transport back to LB Bromley, asserting that the other local authority was responsible because that was the family's area of origin in the UK. The judge found that, as the child had been living in Birmingham, the child's physical presence was sufficient to establish that it fell to Birmingham City Council to assess the child's needs under section 17, and the authority had acted unlawfully by asserting that the family's claim for support should be made at LB Bromley. The judge noted that, although a local authority would be responsible for assessing need that arose whilst the child was living in its area, this does not mean that a second local authority would have no responsibility should the family move into its area.¹⁶

More than one local authority may have the duty to undertake a child in need assessment. In the *Stewart* case, the child was attending school in a different local authority area to that where they were living. The duty to undertake an assessment was found to apply to both local authorities but the Judge stated that:

*'...in a case where more than one authority is under a duty to assess the needs of the child, there is clearly no reason for more than one authority to in fact assess a child's needs and there is a manifest case for co-operation under section 27 of the Children Act and a sharing of burden by the authorities.'*¹⁷

In instances where responsibility for undertaking an assessment or providing services is disputed, the courts have been very clear that a child's needs should be met whilst responsibility is determined.¹⁸

Local authorities are required to co-operate under provisions set out in the Children Act 1989 and Children Act 2004:

- Section 27 of the Children Act 1989 imposes a duty on other local authorities, local authority housing services and health bodies to cooperate with a local authority in the exercise of that authority's duties which relate to local authority support for children and families (under Part 3 of the Act). Where an authority requests the help of another authority or body, assistance must be provided if it is compatible with that organisation's statutory or other duties and obligations and does not unduly prejudice the discharge of any functions.
- Section 11 of the Children Act 2004 requires local authorities in England to make arrangements to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. The explanatory notes to the Act states that the aim of this duty is to:

'..ensure that agencies give appropriate priority to their responsibilities towards the children in their care or with whom they come into contact;

¹⁶ *BC, R (on the application of) v Birmingham City Council* [2016] EWHC 3156 (Admin)
<http://www.bailii.org/ew/cases/EWHC/Admin/2016/3156.html>

¹⁷ *R (Stewart) v LB Wandsworth & Ors* (2001), paragraph 28.

¹⁸ *R(M) v Barking and Dagenham LBC* (2002); *G, R (on the application of) v London Borough of Southwark* [2009] UKHL 26, <http://www.bailii.org/uk/cases/UKHL/2009/26.html> & *AM, R (on the application of) v The London Borough of Havering & Ors* [2015] EWHC 1004 (Admin).
<http://www.bailii.org/ew/cases/EWHC/Admin/2015/1004.html>

encourage agencies to share early concerns about safety and welfare of children and to ensure preventative action before a crisis develops.’¹⁹

2.2 Checking immigration status

When a family requests accommodation and/or financial support, the local authority will establish nationality and immigration status of the parents for several purposes:

- (1) To ascertain any possible entitlement to welfare benefits, housing assistance, employment or Home Office asylum support.
- (2) To identify whether the parent is in an excluded group and so can only be provided with support where this is necessary to prevent a breach of their human rights or EU treaty rights.
- (3) Where a parent is in an excluded group, find out whether there are any immigration claims pending with the Home Office or appeal courts, or other legal barriers preventing them from leaving the UK or returning to their country of origin.

Evidence of nationality and immigration status may be established on the basis of documents provided by the person requesting support but local authorities will routinely check immigration status directly with the Home Office.

2.2.1 Immigration documentation – non-EEA nationals

For non-EEA nationals, evidence of immigration status may be provided in the form of documents issued by the Home Office in the UK or overseas visa application centres/ entry clearance posts. Documents issued may be different depending on the type of immigration permission given and date this was granted.

A person may have one or a combination of the following documents:

- Biometric residence permit (BRP) – this is now issued to most people who have been granted leave to enter or remain for longer than six months
- Immigration status document
- Visa or residence permit in passport
- Stamp in passport
- Asylum registration card (ARC)
- Home Office issued convention travel document - for a refugee
- Certificate of travel - for a person with humanitarian protection who cannot get a national passport
- EEA family permit/ residence card/ permanent residence card/ derivative residence card issued to the family member of an EU national
- Home Office letter

The Council of the European Union maintains a public register of documentation issued by European Union countries and others. Note that the register it is not complete, so some UK immigration documents may not be included.²⁰

¹⁹ Children Act 2004, Explanatory Notes, para.67 <http://www.legislation.gov.uk/ukpga/2004/31/notes>

²⁰ PRADO - Public Register of Authentic travel and identity Documents Online
<http://www.consilium.europa.eu/prado/EN/prado-start-page.html>

The Home Office also publishes a guide for employers which provides an overview of different types of UK immigration documents that may be issued.²¹

There will be instances when a person will be unable to provide original documentation, for example, where they have submitted their passport and/or BRP to the Home Office with a pending application, or where the Home Office has retained documentation following a refusal of an application.

Sometimes Home Office systems do not immediately show that an application has been made, for example, if it has only recently been submitted, so this may not be identified in a status check. In such instances, alternative evidence provided by the person or their legal representative can be accepted, and the Home Office should be notified that an application has been made. Such evidence could include a copy of the application and proof of postage. A legal representative may also be able to provide a letter to confirm their client's current status and progress of any pending applications. The Home Office will usually issue an acknowledgement letter to confirm receipt of an application but this can often be issued several weeks later.

For more information, see sections:

- **1.2 Who has NRPF**
- **2.3 Exclusions from support**
- **4.2.1 Legal barriers to return**
- **10 Asylum seekers**

2.2.1 Continuing leave (3C leave)

When a person makes an application to extend their leave then they will continue to be lawfully present if certain conditions are satisfied, because their leave will be extended under section 3C of the Immigration Act 1971. When a person has 3C leave, any conditions attached to their previous leave will continue to apply until their application or appeal is concluded, for example, they may retain permission to work or recourse to public funds.

3C leave applies when a person submits an application for leave to remain before their previous leave expires and is still waiting for a decision from the Home Office after their leave has expired.

If the application is refused, 3C leave will only continue whilst the person is appealing this decision when:

- the application is refused after the person's leave to remain has expired; and
- the person has lodged their appeal within the given deadline.

3C leave will stop if a person lodges an appeal after the given deadline, even if the court later accepts it as being made 'out of time'.

Appeal time limits vary depending on the stage that the case is at in the appeal process so it will be necessary to need to seek advice from the person's legal representative or the Home Office to establish whether they have 3C leave and remain lawfully present. When 3C leave

²¹ Home Office, An employer's guide to acceptable right to work documents
<https://www.gov.uk/government/publications/acceptable-right-to-work-documents-an-employers-guide>

ends and the person has not been granted another form of leave to remain then they will become an overstayer.

For more information, see the Home Office Modernised Guidance:

- *3C and 3D leave*²²

2.2.3 EEA nationals and their family

European Economic Area (EEA) nationals and most of their family members are not required to obtain documentation from the Home Office to confirm their right to live in the UK because the right to reside under European law is acquired on the basis of a person's circumstances. This means that the local authority will need to ask questions about the person, and their family member's length of residence and activities whilst in the UK.

The Home Office will usually only be able to provide information about an EEA national or their family member when a person has applied for a document to confirm their right to reside or derivative right to reside in the UK, for example, an EEA registration certificate, family permit, residence card, permanent residence card, worker registration card or derivative residence card.

Where an EEA national or family member has a Home Office document, this still may not be sufficient to establish whether they have a right to reside if their circumstances have changed since the document was issued, so further enquiries will still need to be made.

For more information, see sections:

- **2.3.2 Families not excluded from support**
- **9 EEA nationals and welfare benefits**

2.2.4 How to request a Home Office status check

The Intervention and Sanctions Directorate (ISD) at the Home Office is responsible for providing immigration status information to local authorities.

Local authorities signed up to use the NRPf Connect database can obtain a status check by creating a new case on the system and a response will be provided in line with the service level agreement. Once a case has been created, the local authority can obtain further updates via NRPf Connect from the Home Office whilst the person remains in receipt of support, and can update the Home Office about a change of circumstances.²³

Local authorities that are not using NRPf Connect can access one of the Home Office Status, Verification, Enquires and Checking services:

- Free email status checking service: ICESSVECWorkflow@homeoffice.gsi.gov.uk
- Chargeable telephone checking service or on site immigration official – these must be arranged directly with the Home Office

²² <https://www.gov.uk/government/publications/3c-and-3d-leave>

²³ <http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx>

2.3 Exclusions from support

The primary reason for establishing the parent's nationality and immigration status is because local authorities need to find out whether the family can only receive 'support or assistance' under section 17 of the Children Act 1989 if such support is necessary to prevent a breach of their human rights or EU treaty rights.

This limitation is set out at section 54 and Schedule 3 of the Nationality Immigration Asylum Act 2002, and applies to specific groups:

- (1) A person who is not currently seeking asylum and is unlawfully present in the UK, for example:
 - Visa overstayer
 - Illegal entrant
 - Refused asylum seeker, where the person claimed asylum in-country (usually at the Asylum Screening Unit in Croydon), rather than at port of entry (for example, at an airport immediately on arrival to the UK before passing through immigration control)²⁴
- (2) EEA nationals (not UK nationals)
- (3) A person granted refugee status by another EEA State
- (4) Refused asylum seekers who fail to comply with removal directions, i.e., they have been issued with removal directions that provide a set time and means of leaving the UK and have failed to take this up
- (5) Refused asylum seekers with dependent children who have been certified by the Secretary of State as having failed to take steps to leave the UK voluntarily

The exclusion applies to a dependant of a person who falls under these groups, for example, the dependent family member of an EEA national.

Paragraph 1 of Schedule 3 sets out the legislation that the exclusion applies to. The legislation relevant to families requesting support is set out in the table below.

UK region	Excluded legislation
England	Section 17 of the Children Act 1989
Wales	Part 4 of the Social Services and Well-being (Wales) Act 2014
Scotland	Sections 22 of the Children (Scotland) Act 1995 (c. 36)
Northern Ireland	Article 18 of the Children (Northern Ireland) Order 1995 (S.I. 1995/755 (N.I. 2))

Children are not excluded by Schedule 3, regardless of their nationality and immigration status. However, section 17(1)(b) of the Children Act 1989 imposes a general duty to promote the upbringing of children by their family, so local authorities are required to resolve the situation of the family as a whole. As accommodation and financial support is provided to the family, when parents fall into one of the excluded categories, the family as a whole will be treated as excluded. Whilst a child remains living with their parents, the duty of the local

²⁴ This distinction is set out in the case: *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (QB). <http://www.bailii.org/ew/cases/EWHC/QB/2005/2950.html>

authority to provide for the child's needs depends on whether the parent is ineligible under Schedule 3.²⁵

Local authorities are not prohibited by Schedule 3 from providing assistance (other than accommodation and financial support) directly to a child in an NRPF family, for example, help required to meet the needs of a disabled child.

Schedule 3 does not mean that assistance can automatically be refused to a family when the parent is in an excluded group, because support must be provided where this is necessary to avoid a breach of the family's human rights or rights under EU treaties.²⁶

The purpose of Schedule 3 is to restrict access to support for a family where the parent is in an excluded group because they either have no permission to remain in the UK, or can no longer self-support, and when returning to country of origin (where they may be able to access employment and receive services), would avoid a breach of human rights which may occur if they remain destitute in the UK. This means that, along with establishing whether there is a child in need, local authorities must identify whether there are any legal or practice barriers preventing the family's return to the parent's country of origin, as return cannot be considered unless these are cleared. This is done by undertaking a human rights assessment.

For more information, see section:

- **4.2 Determining whether the family can freely return**

2.3.1 Duty to inform the Home Office

Paragraph 14 of Schedule 3 of the Nationality Immigration Asylum Act 2002 requires a local authority to inform the Home Office when a person requesting support is, or may be, excluded from receiving care and support on the basis that they are:

- suspected or known to be unlawfully present in the UK,
- a refused asylum seeker who has not complied with removal directions, or
- a refused asylum seeker with dependent children who have been certified by the Secretary of State as having failed to take steps to leave the UK voluntarily.

This duty should be explained to a person when they present to the local authority and by any agencies referring people to social services. Local authorities using the NRPF Connect database will meet this requirement when they create a new case in order to obtain an immigration status check.

For more information, see section:

- **2.2.3 How to request a Home Office status check**

²⁵ *M v London Borough of Islington & Anor* [2004] EWCA Civ 235.

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/235.html>

²⁶ Paragraph 3 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

2.3.2 Families that are not excluded

The Schedule 3 exclusions do not apply to all families with NRPF. A family will not be excluded from receiving assistance under section 17 where the parent has one of the following immigration status types:

- Limited leave to enter or remain in the UK with the NRPF condition
- Derivative right to reside under European law, for example:
 - Primary carer of a British (or other EEA national) child (Zambrano carer)
 - Primary carer of a child (in education) of an EEA worker
 - Primary carer of a self-sufficient EEA national child
- Asylum seeker
- Refused asylum seeker who claimed asylum at port of entry (providing the other categories specific to refused asylum seekers do not apply)

Such families are not excluded from section 17 support and would need to be provided with assistance if they are found to be eligible for this following a child in need assessment.

Local authorities are often required to provide support to families where the parent is lawfully present, for example, has limited leave to remain with NRPF, or a derivative right to reside under European law as a Zambrano carer. These types of immigration status are commonly held by single parents who are caring for a British child, or child who has lived in the UK for seven years.

When a parent can work but is unable to claim benefits to top up a low income, such as housing benefit and tax credits, and cannot access more affordable social housing, they will face difficulties funding childcare and sustaining employment that enables them to afford accommodation and provide for their family's living needs. When the child is 'in need' as a result of this, local authorities will be required to provide accommodation and/or financial support in the absence of such benefits. The courts have found that this is a positive duty and also that national policies restricting access to mainstream welfare support are lawful because section 17 of the Children Act 1989 provides a safety net to protect destitute children.²⁷

Detailed information about Zambrano carers can be found in our factsheet:

- *Zambrano carers: local authority duties and access to public funds*²⁸

For more information, see sections:

- **3 Assessing need under section 17**
- **9.4 Benefit eligibility**
- **11.3 Leave to remain with NRPF**

²⁷ *AC & SH, R (On the Application Of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin) (14 July 2017) <http://www.bailii.org/ew/cases/EWHC/Admin/2017/1796.html>; *R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73 <https://www.supremecourt.uk/cases/uksc-2015-0215.html>

²⁸ <http://www.nrpfnetwork.org.uk/Documents/Zambrano-Factsheet.pdf>

2.4 Emergency support

Local authorities will undertake a detailed investigation into the family's financial and housing circumstances to establish whether the family will be eligible for support under 17 of the Children Act 1989.

Under section 17, a local authority has the power to provide emergency housing and/or financial support to a family when a child's welfare is at risk whilst assessments or enquiries are being carried out. The statutory guidance states:

*'Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family. In some cases the needs of the child will mean that a quick assessment will be required.'*²⁹

Additionally, refusing to provide support to a family who would otherwise be homeless and destitute would be a breach of Article 3 of the European Convention on Human Rights. To leave a family without accommodation or any financial support, when there is no alternative support available whilst assessments are being undertaken is likely to be unlawful.³⁰

²⁹ Department for Education, *Working together to safeguard children* (26 March 2015), paragraph 61. <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

³⁰ *Secretary of State for the Home Department v Limbuela & Ors* [2004] EWCA Civ 540. <http://www.bailii.org/ew/cases/EWCA/Civ/2004/540.html>

3 Assessing need under section 17

This chapter sets out how a local authority will determine whether it has a duty to provide accommodation and financial support to a family with NRPF.

3.1 Statutory framework

The local authority's responsibility to provide accommodation and financial assistance to families with NRPF arises from general duties to safeguard the welfare of children in need, which are set out in the Children Act 1989. Such assistance can only be provided to a family where there is a child in need and the local authority determines that it must use its power under this act to provide accommodation and/or financial support to meet the child's assessed needs.

Section 17(1) Children Act 1989 sets out the general duty of local authorities:

'(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families,

by providing a range and level of services appropriate to those children's needs.'

Section 17 goes on to define 'in need':

'(10) For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.'

In the Department for Education's statutory guidance, *Working together to safeguard children*, the phrase 'safeguard and promote the welfare of children' is defined as:

*'..protecting children from maltreatment; preventing impairment of children's health or development; ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and taking action to enable all children to have the best life chances.'*³¹

³¹ Department for Education, *Working together to safeguard children* (26 March 2015), Appendix A. <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

The Court of Appeal, in the case of *R (C, T, M and U) v LB Southwark* (2016), clarified that section 17 creates a target duty which provides a local authority with the discretion to decide how to meet a child's assessed need. Local authorities may take scarce resources and other support options available to the family into account and must decide what intervention is required on the facts and evidence of an individual case.³²

3.2 Child in need assessment

The Court of Appeal in *R (C, T, M and U) v LB Southwark* (2016) has been very clear that to determine whether support can be provided under section 17 to an NRPF family, an assessment must be undertaken in line with the framework set out in the statutory guidance, *Working together to safeguard children*. The Court of Appeal suggests that to follow a separate policy for a particular group of children would be difficult given that each child's needs are to be individually assessed by reference to the statutory assessment framework.³³

The statutory guidance requires local authorities to undertake an assessment of an individual child's needs with consideration of the child's wishes, in order to determine which services to provide and what action to take. The purpose of the assessment being to:

- gather important information about a child and family;
- analyse their needs and/or the nature and level of any risk and harm being suffered by the child;
- decide whether the child is a child in need (section 17) and/or is suffering, or likely to suffer, significant harm (section 47); and
- provide support to address those needs to improve the child's outcomes to make them safe.³⁴

The statutory guidance also sets out what is required of an assessment, i.e. it must cover the three areas of the Assessment Framework:

- The child's developmental needs, including whether they are suffering, or likely to suffer, significant harm.
- The parents' or carers' capacity to respond to those needs.
- The impact and influence of wider family, community and environmental circumstances.³⁵

Social services are required to decide what response is required within one day of the referral being received and to conclude the assessment no longer than 45 working days from the point of referral.³⁶

There is no specific reference in the statutory guidance to assessing children in NRPF families but there will be considerations specific to a child in an NRPF household that must be made to establish whether the child is in need. The local authority's response must therefore consider the impact on the child of the parent's lack of access to employment,

³² *C, T, M and U, R (on the application of) v London Borough of Southwark* [2016] EWCA Civ 707, paragraph 12 <http://www.bailii.org/ew/cases/EWCA/Civ/2016/707.html>

³³ *R (C, T, M and U) v LB Southwark* (2016), paras. 16 & 18

³⁴ DfE, *Working together to safeguard children*, paras. 26 & 29

³⁵ DfE, *Working together to safeguard children*, paras. 36-7

³⁶ DfE, *Working together to safeguard children*, paras. 58 & 60

welfare benefits and social housing due to their immigration status. The COMPAS research found that the welfare need of NRPF families at point of referral was overwhelmingly for accommodation. It follows that housing and financial support can be provided to a child and their family in order to safeguard and promote the welfare of the child when they are in need due to a lack of these.³⁷

In *R (C, T, M and U) v LB Southwark* (2016), the Court of Appeal confirmed that support under section 17 can only be provided in order to meet the needs of a child following an assessment in line with the statutory guidance. This means that local authorities will need to undertake a child in need assessment to determine eligibility for support.

In the case of *R (AC & SH), v LB Lambeth Council* (2017), the court considered the local authority's child in need assessment of a child in an NRPF household who had autism. The judge provided a useful explanation of the purpose of the child in need assessment and process that must be followed:

*'The duty of a local authority to assess the needs of a child who is apparently in need is not disputed. Other uncontroversial aspects of the case are that the Framework for the Assessment of Children in Need and their Families Guidance 2000 issued under s.7 Local Authority Social Services Act 1970 and the Working Together to Safeguard Children 2015 is relevant guidance for those charged with making an assessment of a child's needs. This guidance may only be departed from where there is good reason to do so, and its core feature is that the assessment of a child's needs should not be an end in itself. Rather, it is a process which will lead to an improvement in the well-being of the child, and the conclusion of the assessment should result in a realistic plan of action, identifying the services to be provided, allocating responsibility for such action as needs to be taken, laying down a timetable for that action, and specifying the mechanism by which that action can be reviewed. In the case of a disabled child the assessment is divided into an initial assessment and a core assessment, following which a care plan shall be drawn up indicating how the local authority intends to meet the assessed needs of the child in question.'*³⁸

3.2.1 Ongoing duty to reassess need

The courts have been clear that section 17 is an ongoing duty, so when a family's circumstances change the local authority must decide whether this means that the child's needs must be reassessed.

In the case of *R (U & U) v Milton Keynes Council* (2017) the court considered a legal challenge brought by a family, consisting of a Nigerian mother and her two children, against the local authority's refusal to provide support and to undertake a reassessment of the children's needs when the family's accommodation situation changed. The local authority had relied on a previous child in need assessment to refuse to provide support on the basis that that the mother had alternative sources of support available to her. The previous child in need assessment could be relied upon in this case, because further evidence provided by the mother was properly considered and was deemed not to have made a material

³⁷ Price & Spencer, *Safeguarding children from destitution*, p.28.

³⁸ *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin), paragraph 39 <http://www.bailii.org/ew/cases/EWHC/Admin/2017/1796.html>

difference to the original conclusion, even though there was accepted evidence that the family's current accommodation arrangement could not be sustained.

The judge sets out when a new assessment may be required and when a previous assessment could be relied upon:

'The duty under section 17 is an ongoing one: Holmes-Moorhouse v. London borough of Richmond Upon Thames [2009] UKHL 7. If an authority has assessed a child not to be in need but there is then a relevant change in circumstances or further material information comes to light which suggests that a child may be in need, the authority may have to reassess or, at least, make inquiries in order to decide whether a reassessment is required.'

...

*'The Defendant was entitled to rely on the conclusions reached in the assessment unless subsequently provided information cast doubt on those conclusions such that it could materially affect the outcome, or new information suggested that there was or might have been a change in the family's circumstances such that the children appeared to be in need.'*³⁹

Although the council was entitled to rely on a previous assessment, it's decision to refuse support was found to be unlawful for another reason, which is addressed in section 3.3.3.

Two earlier cases provide examples of instances when local authorities were found to have acted unlawfully by not undertaking reassessments of the children's needs following new information. In both cases the mothers had leave to remain with NRPF.

The case of *R(AC & SH) v LB Lambeth Council* (2017) involved a mother and two children of ages 4 and 10. In September 2016, following a detailed assessment of the family's financial and housing circumstances, the local authority found the children not to be in need and provided them with a 12 week notice period to leave their accommodation. In December, the family's solicitors informed the local authority that the elder child had received a formal diagnosis of autism in October. The local authority decided that, although the elder child was a child in need due to his autism, this information made no significant changes to the family's circumstances or outcome of the child in need assessment and did not undertake a new written assessment. The court found that the assessment had not been procedurally unfair because the entirety of the evidence failed to explain or reconcile the family's accommodation and support history but it lacked a proper evaluation of the child's needs at a time when the child was subject to additional education support and had a pending autism assessment, so was not compliant with statutory guidance. Following the formal autism diagnosis, no decision was made about what support was necessary and appropriate to meet the child's needs, including whether a failure to provide services (including accommodation) would mean the child would be unlikely to achieve or maintain a

³⁹ *R (U & U) v Milton Keynes Council* [2017] EWHC 3050 (Admin), paragraphs 27 & 38
<http://www.bailii.org/ew/cases/EWHC/Admin/2017/3050.html>

reasonable standard of health and development. The local authority was ordered to redo the child in need assessment and accommodate the family in the interim period.⁴⁰

In the extempore judgment of *R (CO & Anor) v LB Lewisham Council* (16 June 2017), involving a mother and two children aged 8 and 11 years old, the local authority found the children not to be in need because the mother had support from her sisters, family, friends and the children's father, in addition to her own resources. The assessment raised concerns about the mother's credibility as the local authority suspected that she had not been truthful about her financial and housing situation. Her sisters, and the children's father, later provided statements to confirm they had withdrawn their support, and since March 2017, the family stayed in hotels. The local authority's reassessment found that the children were still not in need, placing reliance on the first assessment and doubts about the mother's truthfulness. The court found that, as soon as the family left stable accommodation, a reassessment should have been carried out but the local authority failed to properly consider the new evidence and so did not obtain a full and accurate picture of the family's situation, which was that the mother's income was insufficient to support her children and fund accommodation.⁴¹

3.3 Considerations specific to children in NRPF families

Families with NRPF may present to social services because they are homeless or threatened with homelessness, and/or the parents have insufficient income to provide for their family's living needs. As their immigration status prevents them from claiming benefits and accessing affordable social housing, parents may also face challenges sustaining work where they have permission to do so.

The courts confirmed that a child without accommodation will be a child in need in the housing case, *R v Northavon District Council, Ex p Smith* (1994).⁴²

It is highly likely that a lack of accommodation or a parent's inability to provide for their child's living needs will have an adverse impact on the child's health and/or development. Therefore, a child requiring accommodation and/or food, warmth and other essential needs, will have welfare needs which the local authority may be required to provide for in order to exercise its duty under section 17.

Although the COMPAS report highlighted that safeguarding risks were strongly linked to material deprivation, families were frequently found to be vulnerable to exploitation. Such risks to the child must also be considered.⁴³

As part of the assessment, the local authority would need to establish what other support options are available to the family in the UK, or whether return to country of origin may resolve the family's inability to self-support in the UK when the parent is in an excluded group. There will be many cases where such support options will be limited:

⁴⁰ *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin)

⁴¹ *R (on the application of CO & Anor) v Lewisham London Borough Council* (16 June 2017) QBD (Admin)

⁴² *R v Northavon District Council, Ex p Smith* [1994] 2 AC 402

⁴³ Price & Spencer, *Safeguarding children from destitution*, p.29.

- Where the parent has no current immigration permission, is in an excluded group and has a pending human rights application or appeal that has not been determined by the Home Office or courts which constitutes a legal barrier preventing the family from leaving the UK.
- Where the parent is the primary carer of a British (or other EEA national) child and has a right to reside under European law, is not in an excluded group, has permission to work but cannot claim benefits and social housing.
- Where the parent has leave to remain with the NRPf condition, is not in an excluded group, has permission to work but is excluded from benefits and social housing.

In such cases the courts have been clear that the purpose of section 17 is to provide a safety net of support for families who either cannot leave the UK or who are lawfully present in the UK but are prevented by their immigration status from being able to claim benefits usually provided to families with a low income.⁴⁴

In the case of *R(AC & SH) v LB Lambeth Council* (2017) the judge succinctly describes this duty:

*'The local authority is empowered to rescue a child in need from destitution where no other state provision is available.'*⁴⁵

3.3.1 Assessment approach

In *R (C, T, M and U) v LB Southwark* (2016), the Court of Appeal was clear that the local authority must gather information which is adequate for the purpose of performing its statutory duty under section 17 of the Children Act 1989, and must also have due regard to the child's best interests in the context of having regard to the need to safeguard and promote the welfare of children.⁴⁶

Any information and evidence already gathered by the local authority as part of its initial enquiries must be considered within the child in need assessment, in balance with other factors relating to the welfare of the child:

- How the family's financial and housing circumstances are affecting the child's health and development, what assistance the child needs and how the child would be affected if they do not receive such help.
- How urgently the family needs assistance.
- Details of any medical conditions affecting the child or their family members.
- Details of the child's current and previous schools.
- If the child's other parent is not in the family household, their details including nationality and immigration status, what contact the parent and child has with them and whether they are providing any support.

⁴⁴ *Birmingham City Council v Clue* [2010] EWCA Civ 460 (Admin)

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/460.html>

& *R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73

⁴⁵ *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin), paragraph 42

⁴⁶ *R (C, T, M and U) v LB Southwark* (2016), paragraph 12.

Depending on the family's particular circumstances, information and documents relating to the family's finances and housing will need to be requested. Any enquiries made must relate to the circumstances of the family and child. Local authorities cannot therefore work to a definitive list of documents and expect everything to be provided.

3.3.2 Addressing information gaps

In several cases examining local authority decision making with regards to whether a child in an NRPF family is in need under section 17, the courts consistently highlight that the child in need assessment is an evaluative exercise which must consider all the information in the round. Local authorities need to undertake thorough investigations and properly document findings, ensuring that any judgments on the parent's credibility are based on fact and not feel, and adverse inferences must not be made without first putting such concerns to the parent and providing them with an opportunity to respond. A significant body of case law has developed that has addressed how local authorities should approach assessments where information from the parent is lacking.

In the cases of *MN and KN v LB Hackney* (2013), and *N v LB Newham and Essex County Council* (2013), the Courts considered the lawfulness of local authority decisions to refuse assistance when parents were not forthcoming with the information that was necessary to establish whether the child was in need; in each case this was information about how the parents had supported themselves in the UK. The local authorities in each case were found to have acted lawfully because they had made their decisions based on detailed and documented investigations, providing the parents with adequate opportunity to supply the requested information.⁴⁷

The case of *O v LB Lambeth* (2016) concerned a family where the mother was a Nigerian overstayer. At the first child in need assessment, the mother had presented bank statements showing an income of £9000 over one year. The friend they were staying with claimed child benefit and child tax credit for O, which appeared to be retained in lieu of rent or for the purpose of funding O's needs. At the second assessment, the mother presented bank statements for the period following the first assessment which showed she had no income. The social worker concluded that funds remained available to the family and were not being paid into account to bolster the application for support. The Judge found that: the social worker could rationally conclude that the family had sources of income available to them on the basis that a reasonable level of support had been available until March 2015; those payments ceased without reasonable explanation following the first negative assessment; and the mother had failed to cooperate with further reasonable enquiries regarding the child's father and source of the money. In the determination, the Judge sets out how a local authority should approach cases where there is evidence that the family have resided in the UK for a number of years without access to public funds:

'19. If the evidence is that a family has been in this country, without recourse to public funds and without destitution for a number of years, reliant on either work or the goodwill and kindness of friends and family, then the local authority is entitled and indeed rationally ought to enquire why and to what extent those other sources of

⁴⁷ *MN & Anor v London Borough of Hackney* [2013] EWHC 1205 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2013/1205.html>; *N and N v London Borough of Newham & Anor* [2013] EWHC 2475 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2013/2475.html>

support have suddenly dried up. In order to make those enquiries, the local authority needs information. If the applicant for assistance does not provide adequate contact details for family and friends who have provided assistance in the past, or cannot provide a satisfactory explanation as to why the sources of support which existed in the past have ceased to exist, the local authority may reasonably conclude that it is not satisfied that the family is homeless or destitute, so that no power to provide arises.

20. Fairness of course demands that any concerns as to this are put to the applicant so that she has a chance to make observations before any adverse inferences are drawn from gaps in the evidence, but otherwise, the local authority is entitled to draw inferences of 'non-destitution' from the combination of (a) evidence that sources of support have existed in the past and (b) lack of satisfactory or convincing explanation as to why they will cease to exist in future.

21. In other words, if sufficient enquiries have been made by the local authority and if as a result of those enquiries an applicant fails to provide information to explain a situation which *prima facie* appears to require some explanation, then the failure by an applicant to give sufficient information may be a proper consideration for the local authority in drawing the conclusion that the applicant is not destitute: see per Mr Justice Leggatt in *R(MN) v London Borough of Hackney* [2013] EWHC 1205 (Admin) at [44]. But that does not absolve the local authority of its duty of proper enquiry.

22. I also note what was said by Leggatt J in the Hackney case at [26] as to the approach which the court should take to evidence in determining whether there has been such enquiry. He said that little or no weight should be given to witness statements prepared months after a decision had been taken for the purpose of litigation, with the obvious dangers of *ex post facto* rationalization; and more fundamentally:

*"What a public authority decided should in principle be ascertained objectively by considering how the document communicating the decision would reasonably be understood, and not by enquiring into what the author of the document meant to say or what was privately in his mind at the time when he wrote the document".*⁴⁸

The need for making sufficient enquiries about any gaps in evidence is stressed in *R (S & J) v LB Haringey* (2016), in which the court considered the lawfulness of a child in need assessment undertaken for two children. Their Ghanaian mother had leave to remain with NRPF, was working and receiving child maintenance. Although the conclusions drawn in the assessment were not found to be irrational, and the local authority was found to have had regard to the need to safeguard and promote the welfare of the children, the assessment was procedurally deficient. Concerns about the lack of information given by the mother about her wages and how she had paid rent in the past were not put to the mother before adverse inferences were drawn, causing unfairness to the family. The assessment was

⁴⁸ *O, R (on the application of) v London Borough of Lambeth* [2016] EWHC 937 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2016/937.html>

therefore unlawful and the local authority's decision not to treat the children as being in need was quashed.⁴⁹

The courts have acknowledged that there is a high threshold to be reached for an assessment to be found to be irrational. In the case of *R(OK) v Barking and Dagenham LBC* (2017), this threshold was reached because, in finding that the three children in a Nigerian family were not in need on four separate occasions, the local authority had failed to evaluate all the evidence and identify why that was to be disbelieved. It had failed to review the first negative assessment with a fair and open mind, ignoring material which pointed in an opposite direction. The case involved a Nigerian family of two parents and three children, with a pending application for leave to remain, who had not been inconsistent and had provided detailed explanations, supported with evidence, about why they could no longer rely on the support of family and friends. Failure to consider this, along with other information the family was willing to provide, led to the court to conclude that the assessments were not sufficiently diligent, were procedurally unfair and the conclusions made were irrational.⁵⁰

An example where a local authority's decision to refuse support was found to be rational is the case of *R(AE & AO) v Lewisham LB Council* (2016), where the court refused an application for judicial review of the local authority's child in need assessment of two children, aged seven and nine. Their Nigerian parents had lived in the UK for 12 years and were both overstayers. The father had lost his job and the family were evicted from their home. The local authority had undertaken a detailed assessment making numerous enquiries into the family's resources, drawing conclusions about the parent's credibility on a number of factors rather than by 'feel'. These findings entitled the local authority to be sceptical about the parent's claims and draw inferences from the fact that they only provided scant information about how they had supported the family in the past. Such findings were not outweighed by the factors in favour of the family that suggested destitution (the father's loss of employment and the eviction). The court stated that the assessment should be taken in the round, being an evaluative exercise, taking into account all facts and circumstances, with appropriate respect given to the expert judgment of social workers who should not be expected to provide an approach or analysis of a lawyer or court judgment.⁵¹

The case of *R (BC) v Birmingham City Council* (2016), illustrates that local authorities need to ensure that full investigations into a family's circumstances are undertaken in all circumstances. The local authority initially refused to undertake a child in need assessment when a Jamaican overstayer and her six year old son (who was born in the UK) presented, because they had previously been living in another local authority's area and had only recently moved to Birmingham. When Birmingham City Council did undertake an assessment, the child was found not to be in need, and concluded that the family could apply to the other local authority for support or rely on the help of the mother's cousin in Birmingham.

⁴⁹ *S And J, R (On the Application Of) v The London Borough of Haringey* [2016] EWHC 2692 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2692.html>

⁵⁰ *R (on the application of OK) v Barking and Dagenham London Borough Council* [2017] QBD (Admin) (Leigh-Ann Mulcahy QC) 24/03/2017 extempore judgement

⁵¹ *R (on the application of AE & AO) v Lewisham London Borough Council* (2016) QBD (Admin) (Langstaff J) 05/05/2016 - extempore judgment

The judge noted that the provision of accommodation and support by friends or family in another area was a proper consideration in the context of determining whether the child was in need, and in this case there were several reasons which indicated that the child was not in need: there was some evidence the mother's cousin would provide the family with accommodation in spite of the risk to her tenancy; the local authority might have concluded that the mother had failed properly to explain her previous sources of support and to demonstrate that they had dried up; and the possession of expensive clothing and a mobile phone might indicate undeclared sources of support.

However, the local authority failed to fully investigate these issues and document its findings. For example, no enquiries as to whether the cousin had space for the child were made. Additionally, the mother could not be found to have failed to cooperate by not producing documents when the requested bank statements and Home Office application did not exist. The judge noted that any conclusion that the mother had an undeclared support network could only fairly be drawn after proper investigation and fairly putting these points to the mother so that she could address them, in line with *R(O) v LB Lambeth*. The judge found that the principal factor in the local authority's decision was its view that the mother should have been seeking assistance from another local authority, which was found to be an error of law. This view led to the local authority failing to make sufficiently diligent enquiries into the availability and suitability of accommodation. The judge granted permission for the judicial review application and also quashed the local authority's decision not to treat the child as a child in need.⁵²

3.3.3 Limitations on the ability to self-support

When considering the parent's ability to self-support it is important to be aware of the restrictions imposed by the Immigration Act 2014 and Immigration Act 2016 that apply to people who do not have any current immigration permission:

- Since 12 December 2014, banks and building societies have been prohibited from allowing a person with no current immigration permission to open a new current account.
- A person with no immigration permission may have their bank accounts closed or frozen, as since 1 January 2018, banks and building societies have been required to check details of current account holders against a database of Home Office information on a quarterly basis.
- Since 1 February 2016, private landlords in England have not been able to legally rent or sub-let a property to a person who does not have any current immigration permission and who has not been granted permission to rent on an exceptional basis by the Home Office. This also applies to renting a room to paying lodgers.
- Since 1 December 2016, landlords have been required to take action to end a tenancy or evict a tenant when they find out or have reasonable cause to believe that the occupier does not have any immigration permission; when the Home Office

⁵² *BC, R (on the application of) v Birmingham City Council* [2016] EWHC 3156 (Admin)

<http://www.bailii.org/ew/cases/EWHC/Admin/2016/3156.html>

informs a landlord that this applies to their tenant, the landlord may undertake possession proceedings without having to obtain a court order.

- On 12 July 2016, undertaking work or self-employment became a criminal offence, punishable by imprisonment, for people who do not have any current immigration permission, or have a condition attached to their leave to remain restricting employment.

Local authorities must be fully aware of these measures in order to ensure that they do not inadvertently encourage or condone criminal activity when determining what alternative support options are available to a family.

These sanctions mean that the local authority may have to bear the cost of funding support, for example, where a parent would otherwise be committing a criminal offence by working illegally, or is unable to rent in the private sector despite having the means to do so. The courts have been clear that, when a local authority finds that a child is not in need because the parent can secure accommodation or has other housing arrangements available to them, the local authority must consider whether the family can realistically access this alternative support and whether the suggested accommodation arrangement is suitable for the child. Failure to consider both factors has led to the needs assessments of two local authorities being found to be unlawful.

In *R(N) v Greenwich LB Council (2016)*, the local authority was ordered to provide accommodation to a mother and child as interim relief, pending the hearing of their judicial review application against the council's decision that the child was not a child in need. The mother was a Gambian overstayer who was challenging a Home Office decision to refuse her a residence card, and her son was a French national. The local authority refused to provide accommodation on the basis that the family could stay with friends or family, or in a bed and breakfast. The assessment was found to be unlawful as the local authority had: not identified and specified which friends or family members would be able to provide accommodation; failed to consider the cost of staying in a B&B compared with the mother's resources; and not identified that there was no reasonable prospect of her renting in the private sector due to the right to rent scheme preventing her from doing so due to her immigration status.⁵³

In the case of *R(U & U) v Milton Keynes Council (2017)*, the local authority refused to provide support to a Nigerian overstayer and her two children, who were found not to be in need because the mother had funds available to secure hotel accommodation. Although the decision regarding the mother's access to funds was accepted as reasonable by the court, the local authority's failure to consider that the right to rent scheme would prevent such an arrangement meant the decision was unlawful. Stays in a hotel or bed and breakfast could amount to a residential tenancy agreement where this is the family's only or main residence, as opposed to being holiday accommodation. The judge suggested that, even if short stays in different hotels meant that the family were not treated as resident and so were not subject to the right to rent scheme, there would be the question of whether such an arrangement is

⁵³ *R (on the application of N) v Greenwich London Borough Council (2016) QB (Admin)* - extempore judgment

suitable for the children order to avoid them becoming children in need. As the local authority failed to address this, it could not lawfully find that the children were not in need.⁵⁴

In the extempore judgment of *R (CO & Anor) v LB Lewisham Council* (16 June 2017), where the family had stayed in hotels since March 2017 following the withdrawal of support from family members, the judge found that during this period:

*'...the family's accommodation had been hopelessly unstable and totally inappropriate. It was in the children's interests to be housed with their mother but the mother's income was not sufficient to support her children and fund accommodation. The local authority had acted irrationally in finding the children not to be in need and it had failed in its statutory duty to safeguard the children since March 2017.'*⁵⁵

The right to rent question did not arise because the mother had leave to remain with NRPF.

Note that in *R (S & J) v LB Haringey* (2016), when finding that the family in question could rely on support from other people, the fact that the local authority had not identified particular family members or friends was not in itself found to be an irrational conclusion on the basis of the evidence considered by the social worker. This serves to illustrate the point that a decision on whether a child is in need or not must be based on an evaluative exercise, drawing conclusions based on all of the information that has been obtained.

3.4 Considerations when parents are in an excluded group

When a parent is in one of the groups of people that are excluded from receiving accommodation and financial support under section 17, a human rights assessment will also need to be undertaken in conjunction with the child in need assessment in order to determine whether support must be provided to prevent a breach of the family's human rights or rights under EU treaties.

If return to country of origin is being considered, the child in need assessment should also address the child's needs within the country of origin and how they may or may not be met, as this information would be relevant to the human rights assessment.

For more information, see sections:

- **2.3 Exclusions from support**
- **4 Assessments when the exclusion applies**

⁵⁴ *R (U & U) v Milton Keynes Council* (2017) [2017] EWHC 3050 (Admin)

⁵⁵ *R (on the application of CO & Anor) v Lewisham London Borough Council* (16 June 2017) QBD (Admin)

4 Assessments when the exclusion applies

When a family with NRPF requests support from social services, the local authority must establish whether the parent is in an excluded group, and therefore the family can only be provided with the support or assistance that is necessary to prevent a breach of their human rights or European Union (EU) treaty rights. This chapter provides guidance on how the local authority will need to make this decision by undertaking a human rights assessment.

This chapter applies to families where the parent is in one of the groups set out at Schedule 3 of the Nationality Immigration Asylum Act 2002:

- (1) A person who is not currently seeking asylum and is unlawfully present in the UK, for example:
 - Visa overstayer
 - Illegal entrant
 - Refused asylum seeker, where the person claimed asylum in-country (usually at the Asylum Screening Unit in Croydon), rather than at port of entry (for example, at an airport immediately on arrival to the UK before passing through immigration control)
- (2) EEA nationals (not UK nationals)
- (3) A person granted refugee status by another EEA State
- (4) Refused asylum seekers who fail to comply with removal directions, i.e., they have been issued with removal directions that provide a set time and means of leaving the UK and have failed to take this up
- (5) Refused asylum seekers with dependent children who have been certified by the Secretary of State as having failed to take steps to leave the UK voluntarily

The exclusion also applies to a dependant of a person who falls under these groups, for example, if a parent is the dependent family member of an EEA national.

When the parent is not in one of the above groups, then a human rights assessment is not required because the family's eligibility for support depends only on the outcome of the child in need assessment.

4.1 Human rights assessment

When a parent is in an excluded group, the family can only be provided with support or assistance under section 17 of the Children Act 1989 where this is necessary for the purpose of avoiding a breach of the family's rights under the European Convention on Human Rights (ECHR) or European Union (EU) treaty rights.⁵⁶

The Court of Appeal, in the case of *R(Kimani) v LB Lambeth* (2003), found that:

⁵⁶ Paragraph 5 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

*'A State owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home.'*⁵⁷

In addition to a child in need assessment, the local authority will also need to conduct a human rights assessment to establish whether the family are able to return to the parent's country of origin to avoid remaining destitute and homeless in the UK, therefore preventing a breach of Article 3 of the ECHR. This will involve consideration of whether there are any legal or practical barriers in place which may prevent the person from doing so.

A practical way of approaching the human rights assessment is to consider key questions in a staged process:

- (1) Can the family freely return to the parent's country of origin?
- (2) If so, would return result in a breach of the family's human rights under the ECHR?
- (3) Would return result in a breach of the family's rights under European treaties? (EEA nationals and dependent family members of EEA nationals)

In order to assist local authorities in documenting the decision making process, we have developed a human rights assessment template, although questions will need to be tailored to each family member's specific circumstances. It is recommended that the human rights assessment is recorded separately from the child in need assessment, as although many considerations will be relevant to both assessments, it is important that the conclusions and reasoning in the human rights assessment are clearly set out.

The primary purpose of the human rights assessment is to establish the extent to which the local authority is required to support a family when the parent is in an excluded group, but the assessment also performs other important functions:

- Explores solutions to the family's destitution in the UK
- Facilitates an open conversation with the family about all their available options
- Seeks alternatives to enforced removal by the Home Office
- Provides transparency in the decision making process
- Documents why support may be provided to a family when parents are in an excluded group
- Assists the local authority to identify what action to take in terms of progressing and resolving a case when support is provided

4.2 Determining whether the family can freely return

The first stage of the assessment is to identify whether return is reasonably practicable, which means establishing if there are any legal or practical barriers preventing the family from leaving the UK. If there is a barrier preventing return, then it would be perverse and a misuse of resources for the local authority to make further considerations about the situation for a family on return when this cannot realistically happen. The human rights assessment in such cases may therefore be brief, simply documenting and evidencing the barrier, and noting at what point it may need reviewing.

⁵⁷ *R (K) v London Borough of Lambeth* [2003] EWCA Civ 1150, paragraph 49.
<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1150.html>

In the case of *Secretary of State v Limbuela* (2004), the court found that a decision which compels a person to sleep rough or without shelter and without funds usually amounts to inhuman treatment and therefore engages Article 3 of the ECHR. Therefore when a legal or practical barrier exists that prevents a family from leaving the UK, and the family are not provided with accommodation and financial support when the child has been assessed as being in need under section 17 of the Children Act 1989, then this is likely to result in the local authority breaching Article 3 of the ECHR, as such a decision is likely to result in the family experiencing inhuman and degrading treatment.⁵⁸

Support may only be denied to a family if the parent is in an excluded group and where the family are freely able to return to their country of origin, in accordance with *R (Kimani) v LB Lambeth* (2003). The courts have determined that the denial of support in such instances does not constitute a breach of human rights. To reach such a decision, the local authority must be clear that there are no legal or practical barriers preventing return and will also need to consider any potential breach of rights under the ECHR or EU treaties.⁵⁹

4.2.1 Legal barriers to return

An outstanding application or appeal made to the Home Office raising human rights grounds (for example, Article 3 and/or Article 8) would constitute a legal barrier to return:

- The Court of Appeal case of *Birmingham City Council v Clue* (2010) held that where the family has a pending application for leave to remain on human rights grounds, the local authority cannot refuse assistance under section 17 if this would require the family to leave the UK and therefore forfeit their immigration application, which was of a type that could not be pursued from outside of the UK.⁶⁰
- The High Court case of *KA v Essex County Council* (2013) took this principle further, finding that a family who had been refused leave to remain, but not yet issued with a decision to make removal directions, would be compelled to leave the UK if support under section 17 is refused.⁶¹

Removal and appeal processes have changed since *KA v Essex County Council* (2013) was heard, and the effect of these on people who are making human rights applications when they are overstayers is outlined in the table below.

⁵⁸ *Secretary of State for the Home Department v Limbuela & Ors* [2004] EWCA Civ 540.

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/540.html>

⁵⁹ *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

⁶⁰ *Birmingham City Council v Clue* [2010] EWCA Civ 460

<http://www.bailii.org/ew/cases/EWCA/Civ/2010/460.html>

⁶¹ *KA, R (on the application of) v Essex County Council* [2013] EWHC 43 (Admin)

<http://www.bailii.org/ew/cases/EWHC/Admin/2013/43.html>

Dates that appeal and removals processes are in force	In-country right of appeal when a non-asylum human rights application is made when a person has no leave to remain.	Removal decision with right of appeal issued.
Pre- 6 April 2015	No right of appeal	Could be issued at any time following refusal
6 April 2015 to 30 November 2016	Right of appeal (unless the claim is certified as 'clearly unfounded') – see note A	No longer issued
1 December 2016 onwards	Right of appeal depends on basis of claim and whether it is certified under 'remove first, appeal later' provisions – see note B – or as 'clearly unfounded' – see note A	No longer issued

Notes

- A.** Under section 94 of the Nationality, Immigration and Asylum Act 2002 a human rights application can be certified as being 'clearly unfounded'. There is a high threshold for imposing certification on this basis and it is not often used in non-asylum human rights claims.⁶²
- B.** Under section 94B of the Nationality, Immigration and Asylum Act 2002 any human rights claim can be certified unless there is a real risk of serious irreversible harm if the person is removed from the UK before any appeal is concluded. This provision is set out in the Immigration Act 2016, and means that most non-asylum human rights claims are unlikely to be issued with an in-country right of appeal on refusal. These 'remove first, appeal later' provisions were found to be unlawful by the Supreme Court and on 3 August 2017 the Home Office withdraw its guidance. It is therefore unclear whether human rights claims are being refused with no in-country right of appeal on this basis and if they are, which types of claim will be affected.⁶³

Although Home Office processes have changed since *KA v Essex* was heard, the principles established in that case, and *Birmingham City Council v Clue*, must still be followed, i.e., support will generally need to be provided to prevent a breach of the family's human rights whilst there is an ongoing procedural right to pursue a human rights claim from within the UK, for example, an in-country right of appeal. When a claim is certified (under section 94 or 94B), the person will only be able to bring an appeal from outside of the UK, for example, following their enforced removal or voluntary return, and so this will not be a barrier against removal. The local authority would only be able to give further consideration to the question of return once the person has had their claim finally determined, and is either 'appeal rights exhausted' or has had their claim certified with no in-country right of appeal. Local authorities using the NRPF Connect database can clarify this with the Home Office by raising a query.

⁶² Home Office, *Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*.

<https://www.gov.uk/government/publications/appeals>

⁶³ Home Office guidance: <https://www.gov.uk/government/publications/section-94b-of-the-nationality-immigration-and-asylum-act-2002>; *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 17 <https://www.supremecourt.uk/cases/docs/uksc-2016-0009-judgment.pdf>

The Court of Appeal in *Clue* is clear that the local authority cannot step into the shoes of the Home Office to determine the validity of a person's human rights claim before the Home Office has considered this. However, there is a caveat in *Clue*, as the Court confirmed that although the local authority must not consider the merits of the immigration application it is required to be satisfied that the application is not 'obviously hopeless or abusive.'

Several factors would need to be considered when determining whether an application is 'obviously hopeless or abusive':

- The stage at which the claim is being considered - is it a pending application or appeal (and the stage it is at in the appeal process)
- Previous decisions made by the Home Office and courts
- Whether there have been any changes to the family's circumstances or situation in the country of origin since the last application was made
- Immigration case law developments
- Changes to the Immigration Rules or Home Office policy

Only in the clearest of cases will the local authority be able to conclude that a family can return to their country of origin without this causing a breach of their human rights before the Home Office or courts have finally determined a human rights claim. It is highly advisable for a local authority to refer the case to their legal department before making such a decision.

For the majority of families with NRPF, the regularisation of their immigration status will be their route out of destitution and dependency on social services' support. However, the lack of legal aid for immigration cases and difficulties in making an application mean that local authorities will need to proactively support families in obtaining advice by making referrals and building links with local voluntary sector agencies that provide such services. A good awareness of immigration options will enable local authority practitioners to properly support and signpost families to obtain appropriate legal advice.

For more information, see sections:

- **11 Immigration information**
- **12 Legal aid and accessing legal advice**

4.2.2 Practical barriers to return

There may be a clear practical issue that prevents the family from being able to return, for example, where a family member is unable to:

- acquire identity or travel documentation, for example, due to the lack of a national embassy in the UK or functioning government in their country of origin; or
- travel due to ill health or a medical condition, such as pregnancy.

When such a barrier is temporary, it might be appropriate to provide support on a short term basis and to assist the person to overcome this.

For people who require documentation to be able to travel, then their national embassy should be able to explain how they can obtain this or this issue may be addressed if they return with assistance from the Home Office Voluntary Returns Service.

When a medical practitioner provides confirmation that a person is fit to travel, their health needs would need further consideration in order to establish whether, despite this need, they are able to return without this giving rise to a human rights breach

For more information, see sections:

- **4.3.3 Medical cases**
- **7.3.1 Home Office funded return**

4.3 Determining a breach of human rights

When the local authority is clear that return is reasonably practical because there are no legal or practical barriers preventing a family from leaving the UK, then it will need to determine whether the family can return to the parent's country of origin to prevent a human rights breach from occurring, or whether return would give rise to a human rights breach and therefore social services' support must be provided.

If a parent has dual nationality, or has the nationality of one country and a right of residency in another country, then return to both countries must be considered. If other members of the household have different nationalities, then their ability to comply with immigration requirements of the country of return would need to be considered.

The European Convention on Human Rights (ECHR) sets out fundamental rights that signatory states must adhere to. These rights have been incorporated into UK law under the Human Rights Act 1998.

For local authorities, when determining whether the exclusions to social care support apply, it is likely that only certain articles of the ECHR will need to be considered, but this will depend on the family's circumstances. The articles of the ECHR listed below are the most relevant, so consideration would need to be given as to whether these apply.

Article 3

'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

Article 3 is an absolute right, which means it is never defensible to breach this right.

Article 8

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.'

'(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Article 8 is not an absolute right, but is a qualified right, so a certain level of infringement of this right can be permitted so long as there is a lawful basis and legitimate public end, for example, to maintain immigration control.

The tribunals of the Immigration and Asylum Chamber must follow the steps set out in the House of Lords case of *R(Razgar) v SSHD* (2004) in order to establish whether refusal of an immigration application would breach a person's rights under Article 8. If a local authority refuses or withdraws support then it is generally accepted that this would be necessary in order to protect the economic well-being of the country, which is a legitimate public end. However, in order to reach such a conclusion, the local authority must consider the questions set out in *Razgar*:

- Would the refusal/withdrawal of support amount to interference by the local authority with the exercise of each family member's right to respect for their private or family life?
- If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- Is such interference proportionate to the legitimate public end sought to be achieved?⁶⁴

Article 6

'..everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'

Sections 4.3.2-6 below will outline how these must be considered within the human rights assessment. In family cases it will always be necessary to consider the best interests of the child.

4.3.1 Best interests of the child

In the case of *ZH (Tanzania) v SSHD* (2011), which was an appeal against the Home Office's decision to remove two British Citizen children with their Tanzanian mother from the UK, the Supreme Court held that the ECHR must be interpreted in harmony with the general principles of international law, so provisions set out in the United Nations Convention on the Rights of the Child 1989 were found to be relevant and must be adhered to.⁶⁵

Article 3(1) of the United Nations Convention on the Rights of the Child 1989 states:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

In *(ZH) Tanzania* the court determined that the best interests of the children must be considered and given paramount weight when determining whether their removal is proportionate under Article 8 ECHR.

This obligation is reflected in section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Home Office to carry out its functions in a way that takes into account the need to safeguard and promote the welfare of children in the UK, for example

⁶⁴ *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27, paragraph 17. <http://www.bailii.org/uk/cases/UKHL/2004/27.html>

⁶⁵ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 <http://www.bailii.org/uk/cases/UKSC/2011/4.html>

when making an immigration decision that involves a child. This duty is set out in the UK Border Agency statutory guidance, *Every Child Matters*, published in November 2009.⁶⁶

Section 11 of the Children Act 2004 requires local authorities to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. Local authorities must therefore consider the best interests of the child within the human rights assessment. Much of this information will already have been gathered and be documented in the child in need assessment.

UNICEF and UNHCR have produced guidance setting out what states can do to ensure respect for the best interests of unaccompanied and separated children in Europe, which provides a useful reference of the types of considerations and approach to assessing best interests of children: *Safe and Sound*, published in October 2014.⁶⁷

4.3.2 Protection cases

When a family states that they cannot return to their country of origin because they will be at risk of persecution, torture, or inhuman or degrading treatment, then return could engage Article 3 of the ECHR. The family must be referred for legal advice to establish whether they can make an application to the Home Office to assert this claim. This is usually done by claiming asylum, or making a fresh claim for asylum if they have previously been refused.

The local authority must have regard to determinations by the Home Office and courts. It is therefore unlikely that the local authority would make a different conclusion regarding risk on return when the Home Office or courts have made a recent finding on this. The local authority would also need to reference any recent legal advice the family have obtained about whether they can pursue further claims.

There are several factors a local authority will need to consider within the human rights assessment:

- The parent's immigration history, i.e. on what basis did they come to the UK, and what applications have been made since arrival
- Previous decisions made by the Home Office and courts
- Whether the person is from a country on the designated list of states; if they were to make an asylum or human rights protection claim this would normally be certified as clearly unfounded and therefore not awarded an in-country right of appeal⁶⁸
- When advice from an immigration adviser was last sought and whether further advice is required, for example, about claiming asylum or making a fresh asylum claim

4.3.3 Medical cases

When a member of the household is receiving treatment in the UK for a medical condition, they may claim that they cannot return to the parent's country of origin because they will be deprived of the type or level of medical treatment that they are receiving in the UK. This

⁶⁶ <https://www.gov.uk/government/publications/every-child-matters-statutory-guidance>

⁶⁷ <http://www.unicef.org/protection/files/5423da264.pdf>

⁶⁸ For the current list of designated states see the Home Office guidance, *Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*. <https://www.gov.uk/government/publications/appeals>

issue has been considered by the Courts in the context of whether the removal of such a person from the UK engages Article 3 and/or Article 8.

The family must be referred for legal advice to find out if they can assert this claim to the Home Office as a basis of remaining in the UK. Usually they would need to complete an application form and submit this to the Home Office with supporting evidence.

However, the threshold for being granted leave to remain on medical grounds alone is very high. The leading case is *N v Secretary of State for the Home Department* (2005), in which the House of Lords held that the Secretary of State's decision to return a Ugandan woman with AIDS did not breach her Article 3 rights, even though she could live for decades on treatment in the UK but would most likely die within a matter of months if returned to Uganda. Baroness Hale stated:

'The test in this sort of case, is whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity..

*There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling.'*⁶⁹

This means that even where the medical care a person would receive in their country of origin is less than what they require and can access in the UK, return would only breach the person's human rights if there is insufficient care to enable them to die with dignity.

In 2017, the European Court of Human Rights provided some guidance on the health and social circumstances which would meet the test set out in *N*, in a case of a person in Belgium who had multiple health issues including TB and Leukaemia, which extends the scope in which Article 3 may be engaged. The court stated:

*'... that the "other very exceptional cases" within the meaning of the judgment in N v the United Kingdom (§43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.'*⁷⁰

The Court of Appeal has found that although the high test for exceptionality in Article 3 cases will apply to children, the threshold for meeting that test may be lower. In *SQ (Pakistan) v Upper Tribunal IAC* (2013), the Court of Appeal considered the case of a child with beta thalassaemia, a condition requiring regular blood transfusions and chelation therapy. Very limited treatment was available in Pakistan to the extent that the child's life expectancy

⁶⁹ *N v Secretary of State for the Home Department* [2005] UKHL 31, paragraphs 69-70.
<http://www.bailii.org/uk/cases/UKHL/2005/31.html>

⁷⁰ *Paposhvili v. Belgium*, Application no. 41738/10, Council of Europe: European Court of Human Rights (13 December 2016), para. 183

would be until late teens or early twenties whereas the child would have led a normal life in the UK. As the child would not be returning to an early and solitary death in Pakistan, his circumstances did not engage Article 3. However the Court acknowledged that there are circumstances where the threshold would be reached in relation to a child when it would not be reached for an adult, due to the special vulnerability of children in terms of the state's obligation to protect them from inhuman and degrading treatment.⁷¹

In an adult social care case, *De Almeida v Royal Borough of Kensington and Chelsea* (2012), the High Court found that there would be a breach of Article 3 if the Portuguese national in question, who was terminally ill with AIDS and also suffered from depression and skin cancer, was refused accommodation under section 21 National Assistance Act 1948 (pre-dating the Care Act 2014) and returned to Portugal. It was found that Mr De Almeida was a very exceptional case, as referenced in *N*: he was at the end of his life, and, despite Portugal having a health and welfare system, returning him to Portugal would have led to an undignified and distressing death, with him facing delay and difficulty in obtaining accommodation and benefits, whilst being away from his existing support network of friends and healthcare professionals.⁷²

It will also be necessary to consider whether return would result in a breach of Article 8 in medical cases. The High Court also found in *De Almeida* that return to Portugal would be a breach of the claimant's private life under Article 8, in terms of his physical and psychological integrity. Due to his weakened physical condition, his vulnerable mental state, the absence of any friends or family in Portugal to assist him, and the 'cumbersome' and slow welfare assessment procedures in Portugal, he would not be able to access the immediate support which he needed on return. Such a breach was not justified due to the relatively small cost saving to be gained from returning him.

In *SQ (Pakistan)* the Court of Appeal held that, as the best interests of the child must be a primary consideration, a claim from a child would require careful consideration under Article 8. In this case, the child arrived in the UK with the health condition, so although entered lawfully, consideration must be given to whether his arrival was a manifestation of health tourism and in light of all the evidence of the case, whether it would be disproportionate to remove the child.

In the case of *MM (Zimbabwe) v SSHD* (2012), the Court of Appeal provided guidance in a deportation case regarding a Zimbabwean national, who was receiving medication for a serious psychotic illness, about when Article 8 may be engaged in medical cases:

'The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between

⁷¹ *SQ (Pakistan) & Anor, R (on the application of) v The Upper Tribunal Immigration and Asylum Chamber & Anor* [2013] EWCA Civ 1251. <http://www.bailii.org/ew/cases/EWCA/Civ/2013/1251.html>

⁷² *De Almeida, R (on the application of) v Royal Borough of Kensington and Chelsea* [2012] EWHC 1082 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2012/1082.html>

*medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.*⁷³

In order to determine how health or medical issues may impact on a person's return there will be a number of factors to consider:

- Previous decisions made by the Home Office and courts on a medical claim
- Medical confirmation of the person's condition, prognosis, and the healthcare they are currently receiving and require
- What treatment would be available in the country of origin - note that there does not need to be parity, and it may not even need to be accessible. To help establish this the local authority may refer to:
 - World Health Organisation (for medical services)⁷⁴
 - The relevant national embassy
- What support the person currently receives from family or other people in the UK and whether this or other support would be available on return
- What access to services, housing and income the person would have in their country of origin when their medical condition deteriorates, if this is the expected consequence of the withdrawal of the medical care they are receiving in the UK

4.3.4 Family life

Family life for the purpose of Article 8 can include relationships between an unmarried couple, an adopted child and the adoptive parent, a foster parent and fostered child, and other family members depending on an individual's circumstances.

The lead immigration case where Article 8 was considered is the Supreme Court case of *ZH (Tanzania) v SSHD* (2011), regarding the removal of two British Citizen children (aged 12 and nine) with their mother to Tanzania. The Supreme Court's reasoning in finding that removal would be unlawful sets out the key factors to consider:

- The best interests of the child must be a primary concern; over-emphasis of the mother's immigration status (a refused asylum seeker who had made three unsuccessful claims using different identities) meant that proper weight was not given to the children's best interests.
- The question of whether it would be reasonable for the children to relocate with their mother to Tanzania is a factor of secondary importance to the child's best interests when considering whether return is proportional under Article 8.
- The children, as British citizens, had rights which they would not be able to enjoy if they were resident in another country, losing the advantages of growing up in the UK, their own language and culture; nationality is a factor in determining where the child's best interests lie and is also a factor that must be weighed in the balance of the decision as to where the child should live.
- It is necessary to seek the child's views.⁷⁵

⁷³ *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279, paragraph 23. <http://www.bailii.org/ew/cases/EWCA/Civ/2012/279.html>

⁷⁴ <http://www.who.int/en/>

Further guidance about best interest considerations in immigration cases is given by the Court of Appeal in *EV (Philippines) & Ors v SSHD* (2014), which determined the case of a mother who came to the UK on a work permit but was underpaid by her employer and so further leave had been refused, father and three children, aged 13, 12 and 9 at the time of the appeal, who had been in the UK for three years when the Home Office issued the removal decision. The appeal was unsuccessful and the courts offered the following guidance:

'35. A decision as to what is in the best interests of children will depend on a number of factors such as (a) their age; (b) the length of time that they have been here; (c) how long they have been in education; (c) what stage their education has reached; (d) to what extent they have become distanced from the country to which it is proposed that they return; (e) how renewable their connection with it may be; (f) to what extent they will have linguistic, medical or other difficulties in adapting to life in that country; and (g) the extent to which the course proposed will interfere with their family life or their rights (if they have any) as British citizens.

*36. In a sense the tribunal is concerned with how emphatic an answer falls to be given to the question: is it in the best interests of the child to remain? The longer the child has been here, the more advanced (or critical) the stage of his education, the looser his ties with the country in question, and the more deleterious the consequences of his return, the greater the weight that falls into one side of the scales. If it is overwhelmingly in the child's best interests that he should not return, the need to maintain immigration control may well not tip the balance. By contrast if it is in the child's best interests to remain, but only on balance (with some factors pointing the other way), the result may be the opposite.'*⁷⁶

The best interests of the child need to be a primary consideration when determining whether it would be proportionate to refuse support when this would result in a breach of family life.

There will be a number of factors to consider within the human rights assessment:

- Previous Home Office and court decisions that consider Article 8
- Family life that exists in the UK
- Whether each family member will preserve their family life with the family group that is returning
- Where there is identified family life with family members that will remain in the UK, and how this would be maintained on return
- Where there is identified family life with family members residing in the country of origin, how this is currently maintained
- When members of the household have different nationalities, whether there are any restrictions that may prevent them from permanently residing in the country of return

⁷⁵ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

⁷⁶ *EV (Philippines) & Ors v Secretary of State for the Home Department* [2014] EWCA Civ 874
<http://www.bailii.org/ew/cases/EWCA/Civ/2014/874.html>

4.3.5 Private life

Private life is the right of a person to live their own life with such personal privacy as is reasonable in a democratic society, taking into account the rights and freedoms of others. Examples would be respect for an individual's sexuality or the right to control information that is disseminated about a person's private life. Any interference with a person's body or the way that the person lives their life is likely to affect their right to respect for their private life under Article 8.

A child of school age is likely to have a private life so this must be considered. In *MK and KN v LB Hackney* (2013), the local authority's conclusion that the family (Jamaican nationals with no immigration permission) could return to Jamaica was found to be unlawful because the local authority had not properly considered the impact of removal on the social and cultural ties which the children enjoyed in the UK when making the Article 8 assessment.⁷⁷

The best interests of the child need to be a primary consideration when determining whether it would be proportionate to refuse support when this would result in a breach of private life.

There will be a number of factors to consider for each family member within the human rights assessment:

- Previous Home Office and court decisions that consider Article 8.
- Age of the child, whether they are in education and what social/cultural ties they may have.
- Length of residence in the UK: an application for leave to remain can be made by a child that has lived in the UK for seven years; an adult age 18-25 who has lived in the UK for over half their life and an adult who has lived in the UK for 20 years. A child born in the UK who has lived here for 10 years or longer will be entitled to register as a British Citizen.
- Whether each family member can reasonably be expected to establish a meaningful level of existence in their country of origin, i.e. whether they can work or study; what services exist and their ability to access these; any support that is available from family members to do these things etc.

4.3.6 Legal proceedings

When a family member is a defendant in criminal proceedings or a party in civil proceedings then Article 6 may be engaged and it is likely that the person will be required to remain in the UK whilst the trial or proceedings are pending.

In proceedings involving children, the local authority must consider whether return would result in a breach of Article 8. In the case of *R(PB)v Haringey* (2006) a mother was found to have a family life with her four children who were in care, through regular contact, which would be interfered with should she be required to return to her country of origin, Jamaica, rather than be provided with accommodation under section 21 of the National Assistance Act 1948 by the local authority. As care proceedings were ongoing, the court also found that return would mean that the mother would be unable to participate in these, including crucial social work assessments which would have an effect on the court's determination of the case. The court determined that there would be a breach of the mother's rights under Article

⁷⁷ *MN & Anor v London Borough of Hackney* [2013] EWHC 1205 (Admin)

8 if support was refused on the basis that she could return to Jamaica and the local authority had failed to consider these aspects of the case adequately.⁷⁸

There will be a number of factors to consider within the human rights assessment:

- If a child is subject to care or contact proceedings.
- If a family member is a defendant in criminal proceedings or a party in civil proceedings what requirements are made of them by the court.

4.3.7 Country information

Should the local authority need to refer to information about the family's country of origin, for example, what welfare provision may be available, a number of sources can be accessed:

- Home Office - Country information and guidance reports⁷⁹
- US State Department - Human rights reports⁸⁰
- Amnesty International - Annual human rights reports⁸¹
- International Labour Organisation⁸²
- IOM Information about return for migrants⁸³
- Routes Home (support services in EU countries)⁸⁴

4.4 Determining a breach of EU treaty rights

Where it has been established that there are no legal or practical barriers preventing the family from returning and there is an EEA national or dependent family member of an EEA national in the household, the local authority must consider whether support or assistance is necessary to prevent a breach of the family's rights under European Union (EU) treaties.

The local authority must identify:

- (1) Whether a member of the household has a right to reside in the UK under European law, through their own activities or as the family member of an EEA national. This could be established through their:
 - length of residence and activities in the UK, e.g. have they studied, worked etc.; or
 - relationship with an EEA national family member living in the UK currently or in the past, and the length of residence and activities undertaken by that family member.
- (2) When a member of the household has a right to reside, would they be able to exercise their right to reside if accommodation and financial support is not provided to the family by the local authority?

⁷⁸ *R(PB) v Haringey LBC* [2006] EWHC 2255 (Admin)

⁷⁹ <https://www.gov.uk/government/collections/country-information-and-guidance>

⁸⁰ <http://www.state.gov/j/drl/rls/hrrpt/>

⁸¹ <http://www.amnesty.org/en>

⁸² <http://www.ilo.org/global/lang--en/index.htm#>

⁸³ <http://irrico.belgium.iom.int/>

⁸⁴ <http://www.routeshome.org.uk/>

In almost all cases when a member of the household has a right to reside, either due to their own activities or as a family member of an EEA national, a refusal to provide assistance is likely to prevent that person from exercising their right to reside in the UK, resulting in a breach of their EU treaty rights. The situation may be less clear when a parent is an EEA jobseeker, which is a right to reside that can usually only be maintained for three months, as consideration would need to be given as to whether they must be provided with assistance to enjoy their right to seek work in the UK.

Additionally, EEA workers and their family members must not be discriminated against and must be provided with same level of assistance as a British citizen, due to the equal treatment clause of the free movement directive, so support should never be refused to a family where the child has been assessed as being in need and the parent is an EEA worker or family member of an EEA worker.⁸⁵

When a parent is identified as having a right to reside, then it will be necessary to check whether this means that they would be eligible for welfare benefits and housing assistance.

Where a local authority determines that the provision of support is not necessary to prevent a breach of EU treaty rights, the local authority must consider whether the family's return would breach their human rights, in line with the considerations set out in the previous section of this guidance.

For more information, see section:

- **9 EEA nationals**

4.5 Determining whether the child would be in need

In *R(M) v Islington LBC* (2005), the court determined that the local authority had to be confident that a child would not be in need in their country of origin, if it were to lawfully discharge its duty under section 17 Children Act 1989 by funding travel to the family's country of return.⁸⁶

In *MN and KN v LB Hackney* (2013), the judge interpreted this as meaning that section 17 could only be used to fund travel assistance to the country of origin when the local authority is confident that the child would no longer be 'in need' in that country. The Judge found that the local authority has the power to fund travel costs under section 2 of the Local Government Act 2000, which the Court of Appeal had held in *Grant v Lambeth LBC* (2004), after *R(M) v Islington LBC* had been determined. This meant that when a local authority does not propose to use its powers under section 17 to fund a return the question of whether the child would be in need in the country of origin does not therefore arise.⁸⁷

In practice, when return to country of origin is being considered, the child's needs, for example, access to education and healthcare, will be considerations that are relevant for determining whether there would be a breach of Article 8 (right to family and private life). It is therefore appropriate for the child's needs in the country of origin to be addressed within the

⁸⁵ Article 24 of the European Parliament and Council Directive 2004/38/EC (29 April 2004) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum:l33152>

⁸⁶ *M v London Borough of Islington & Anor* [2004] EWCA Civ 235

⁸⁷ *MN & Anor v London Borough of Hackney* [2013] EWHC 1205 (Admin); *London Borough of Lambeth v Grant* [2004] EWCA Civ 1711 <http://www.bailii.org/ew/cases/EWCA/Civ/2004/1711.html>

child in need assessment when the parents are in an excluded group, and this information referenced within the human rights assessment. This will also ensure that any risks on return or safeguarding factors are identified.

There will usually be an expectation that on return to country of origin, the parent will no longer be barred from accessing employment and/or public services, and so the material deprivation which has resulted in the child being in need in the UK will, in the majority of cases, no longer be the case on return. If the family undertake a Home Office funded assisted voluntary return, then the fact that they will be returning with a financial package will also be a relevant consideration in the human rights assessment.

4.6 Concluding the human rights assessment

The human rights assessment must balance the views expressed by the parents and child(ren) and the information that is known to the local authority about the country of origin, in order to draw clear conclusions.

The courts have been clear that it is the role of the Home Office, rather than the local authority in determining whether a person should be granted leave to remain in the UK on human rights grounds.⁸⁸

Therefore, the local authority will need to have regard to the determinations of the Home Office and courts, and provide good reasons if departing from the stated conclusions. This is an unlikely position for the local authority to take following a recent final decision on an asylum or immigration claim, but there will be instances where the local authority may not be able to conclude its human rights assessment unless the family have sought legal advice and it is clear that they have no further grounds to raise that the Home Office needs to consider. For example, where a parent asserts that since their last Home Office/court decision the family's circumstances have changed, then they would need to be signposted to an immigration adviser for advice about their options. When it is clear from previous decisions and/or legal advice received that the parent has no further grounds for pursuing an application for leave to remain, the human rights assessment will need to make reference to this.

When concluding that the provision of accommodation and financial support under section 17 of the Children Act 1989 is not required because the family can return to the parent's country of origin to avoid a breach of human rights which may be incurred if they remain destitute in the UK, then this must be clearly documented in the human rights assessment. Potential barriers to return must be addressed and a detailed assessment of return must be documented.

The human rights assessment must also outline what options the family may be offered in order to prevent a breach of human rights/EU treaty rights:

- Whether accommodation and financial support will be provided pending return
- What method of return has been recommended and whether any additional support will be provided, for example, through a Home Office assisted return

⁸⁸*O v London Borough Of Wandsworth* [2000] EWCA Civ 201
<http://www.bailii.org/ew/cases/EWCA/Civ/2000/201.html> ; *Birmingham City Council v Clue* [2010] EWCA Civ 460

When the local authority determines that the provision of provision of accommodation and financial assistance is necessary to prevent a breach of the family's human rights or EU treaty rights, then support must be provided if the child is assessed as being in need under section 17 of the Children Act 1989, and must be reviewed regularly.

For more information, see sections:

- **3 Assessing need under section 17**
- **7.3 Families excluded from support**
- **12 Legal aid and accessing legal advice**

5 Accommodation and subsistence support

This chapter provides guidance on what may be provided to a family when the local authority has established that a child is in need. The local authority has a power to provide a wide range of services in order to meet assessed needs under section 17 of the Children Act 1989. The local authority is not under a duty to meet all formally assessed needs; section 17 is a target duty and may take into account its resources in determining which needs are to be met, but such a decision must be reached rationally and the local authority must act reasonably.⁸⁹

Section 17(6) of the Children Act 1989 allows a local authority to provide accommodation and financial support to meet a child's needs:

'The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.'

Section 17(3) permits a local authority to provide assistance to a child's family:

'Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.'

The legislation and statutory guidance does not state exactly what type of accommodation and financial support should be provided when this is an assessed need. However, the courts have examined the lawfulness of how local authorities have determined what support is provided to a family, which has established some basic principles that local authorities must adhere to. The courts have been very clear that such provision is always a response to meeting the assessed needs of a child.

5.1 Accommodation

There is much variation in practice in terms of the type of accommodation that is provided to families under section 17 of the Children Act 1989. Due to housing demand, cost and supply, many local authorities are presented with very significant challenges and costs in sourcing suitable temporary accommodation. Accommodation can therefore range from private tenancies, where the local authority may have made arrangements with specific providers to Bed and Breakfast (B&B) or hotel rooms. Some voluntary sector agencies provide housing units with an additional support element.

The Court of Appeal has ruled that when the local authority is providing accommodation to meet the needs of a child under section 17, guidance relating to other statutory schemes of support does not need to be adhered to.⁹⁰

⁸⁹ See: *R (C, T, M and U) v LB Southwark* (2016) & *R(G) v Barnet LBC* [2003] UKHL 57.

<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031023/barnet-1.htm>

⁹⁰ *C, T, M and U, R (on the application of) v London Borough of Southwark* [2016] EWCA Civ 707, paragraph 15 <http://www.bailii.org/ew/cases/EWCA/Civ/2016/707.html>;

This means that the statutory guidance on the suitability of certain types of accommodation in the context of discharging homelessness duties under the Housing Act 1996 (the Homelessness code of guidance) does not directly apply to decisions relating to the accommodation provided to NRPF families in order to safeguard the welfare of a child in need. However, the guidance contains some important good practice points that social services may wish to take note of.⁹¹

There is one reported judgment that has considered the suitability of temporary accommodation provided to families under section 17: the High Court case of *C, T, M & U v LB Southwark* (2014), which was brought by a mother and four children who were supported by the local authority for two and a half years, with the mother's partner joining them after one year. The court's findings are set out below. The family's subsequent appeal challenging the High Court's decision to the Court of Appeal did not raise grounds in relation to the local authority's provision of accommodation.

5.1.1 Bed and breakfast accommodation

In *C, T, M & U v LB Southwark* (2014), the family were placed in Bed and Breakfast (B&B) accommodation for eight months, from June 2012 to January 2013. The Judge recognised that accommodating the family in B&B accommodation for longer than a few weeks was inappropriate and was bound to have some adverse impact on the family. However, when considering whether this amounted to a breach of the local authority's duty, the facts that the accommodation was in the family's preferred area, facilitated family life, enabled the children to continue to attend their existing school and maintain social networks were all relevant considerations, as was the chronic shortage of suitable rental accommodation available, and that offers of alternative accommodation were made to the mother but were not considered by her to be ideal. The Judge concluded that the local authority was not required to follow the Homelessness Code of Guidance 2002, which states that B&B accommodation is not suitable for families, must be used only as a last resort and for no more than six weeks. The Judge found that even if the local authority had failed to follow the guidance, placing this family in B&B for the time that it did would not have been unlawful or unreasonable given the 'peculiar circumstances' of this situation.⁹²

In 2017, the Local Government and Social Care Ombudsman investigated a complaint made by a family with NRPF consisting of two parents and two children, one of whom had special educational needs. The family had been placed in a hotel by Hertfordshire County Council on a bed and breakfast basis. There were no cooking facilities so the family could only access hot food if they cooked it at a Children's Centre just less than a mile away, which was not open at weekends or on public holidays. Six months later, the council offered the family a lodge on a caravan park which was turned down by the family. The Ombudsman did not find the council to be at fault for initially placing the family in the hotel or for offering accommodation in the caravan park, which was deemed to be appropriate and reasonable. However, the council was at fault for failing to identify appropriate long term accommodation and for causing the children distress due to the lack of space, with nowhere to do their

⁹¹ DCLG Homelessness Code of Guidance (February 2018)

<https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities>

⁹² *C, T, M & U, R (On the Application Of) v London Borough of Southwark* [2014] EWHC 3983 (Admin)
<http://www.bailii.org/ew/cases/EWHC/Admin/2014/3983.html>

homework or to play safely outside. The council was ordered to pay the children £100 each.⁹³

5.1.2 Placing families in another local authority area

The High Court also considered whether the local authority's decision to provide the family of C, T, M & U with accommodation in another region of the UK (Rochdale). The Judge found that no specific assessment evaluating the impact of the move on the family was necessary given that the mother had agreed to the relocation and that the local authority had undertaken periodic assessments, which focused on the wellbeing and needs of the children, with the overwhelming need being for suitably large accommodation close to suitable education provision. The Judge found that the home provided in Rochdale met the family's needs very well. This finding was not challenged by the family at the Court of Appeal.

The Court of Appeal in the case of *C, T, M & U v LB Southwark* (2016) has been very clear that local authorities are not required to follow statutory guidance relating to other statutory responses to homelessness, but must ensure that in making a decision regarding providing services to meet an assessed need, due consideration must be given to the need to safeguard and promote the welfare of children.

Local authorities placing outside of their area retain responsibility for funding accommodation and financial support under section 17 until that duty is no longer owed. However, placing families in different areas leads to wider service pressures on the receiving authority. The placing authority should notify the receiving authority when a child in need is being placed in that area. Local authorities using NRPf Connect will be able to identify when a family is being supported by another authority using the system.

5.1.3 Right to rent checks

The government introduced right to rent checks in England on 1 February 2016, which prevent private landlords from renting a property to a person who does not have any immigration permission to stay in the UK. Landlords are required to conduct immigration status checks and this requirement also applies to people sub-letting properties and people who are accommodating paying lodgers. The right to rent scheme has operated in the West Midlands (Birmingham, Wolverhampton, Dudley, Walsall and Sandwell) since 1 December 2014.

It is common practice for local authorities to provide families supported under section 17 Children Act 1989 with property in the private rented sector and this is not prevented by the right to rent scheme, as such accommodation is exempt under paragraph 7 of Schedule 3 of the Immigration Act 2014, as explained at paragraph 3.7 of the Home Office *Code of practice on illegal immigrants and private rented accommodation*:

'Residential tenancy agreements which grant a right of occupation in any circumstances where the accommodation is arranged by a local authority which is acting in response to a statutory duty owed to an individual, or which is exercising a relevant power with the intention of providing accommodation to a person who is

⁹³ Local Government and Social Care Ombudsman, Hertfordshire County Council (16 010 518) (17 March 2017) <https://www.lgo.org.uk/decisions/children-s-care-services/child-protection/16-010-518>

homeless, or who is threatened with homelessness, is exempt from the scheme. This includes instances where the occupier is to be placed into private rented property by the local authority.

In such circumstances, landlords should ask for written confirmation from the local authority that the authority is acting in response to a statutory duty and keep this on file.⁹⁴

Residential tenancies that grant a right of occupation in a hostel or refuge are also exempt from the right to rent checks when the hostel or refuge is managed by a social landlord, voluntary organisation or charity, or which is not operated on a commercial basis and whose operating costs are provided either wholly or in part by a government department or agency or a local authority.

5.2 Financial support (subsistence)

The courts have examined the rationale applied by local authorities in determining the amounts of financial support (subsistence) paid to meet the needs of children under section 17 Children Act 1989.

The leading case is that of *C, T, M & U v LB Southwark* (2016), in which a mother and four children were supported under section 17 for two and a half years, with the mother's partner joining the family after one year. During this time the local authority undertook six needs assessments, reviewing the subsistence payments six times. The local authority did not have a policy regarding payments but for the last few months had been checking rates against those provided by the Home Office to refused asylum seekers. The Court of Appeal considered whether the local authority had an unlawful policy or practice of setting financial support at the level of child benefit or at the level of Home Office payments which are made to asylum seekers or refused asylum seekers. The Court dismissed the appeal, finding that the local authority had not used the levels of child benefit and asylum support as a starting point when determining how much financial support to provide to the family, although had regard for these rates and determined the amount of support on the basis of the needs assessments, providing for any changes in the family's circumstances.⁹⁵

The Court of Appeal is very clear that section 17 is a target duty and decisions regarding the provision of support must be made to meet a child's assessed need.

In the cases of *PO v LB Newham* and *Mensah v Salford City Council*, the High Court found that it was lawful to have a policy standardising rates, so long as there is flexibility to meet arising or additional needs. LB Newham's policy of setting rates against Child Benefit payments was found to be unlawful.⁹⁶ Salford City Council was found to have acted lawfully in providing payments in line with Home Office section 4 support for refused asylum seekers and additional items of furniture and payments to meet specific needs.⁹⁷

⁹⁴ <https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice>

⁹⁵ *C, T, M and U, R (on the application of) v London Borough of Southwark* [2016] EWCA Civ 707 <http://www.bailii.org/ew/cases/EWCA/Civ/2016/707.html>

⁹⁶ *PO & Ors, R (On the Application Of) v Council of the London Borough of Newham* [2014] EWHC 2561 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2561.html>

⁹⁷ *Mensah v Salford City Council* [2014] EWHC 3537 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2014/3537.html>

In *C, T, M & U v LB Southwark* (2016), the Court of Appeal goes further in specifying the extent to which local authorities should have regard to standard payments and rates set by another public body, and local authorities must ensure that they adhere to these principles:

- An assessment must be carried out to determine the needs of a particular child, in line with statutory guidance and with proper consideration of the best interests of the child.
- Support for families with NRPF should not be fixed to set rates or other forms of statutory support without any scope for flexibility to ensure the needs of an individual child are met.
- Local authorities must undertake a rational and consistent approach to decision making, which may involve cross-checking with internal guidance or other statutory support schemes so long as this does not constrain the local authority's obligation to have regard to the impact of any decision on a child's welfare.

The Court of Appeal has confirmed that to avoid unjustifiable and unfair differences in providing subsistence to families, the local authority may cross check payments against internal guidance. Local authorities that do not have any internal guidance would need to consider what staffing resources would be required to undertake a 'shopping list' exercise, such as LB Southwark did, whether this is practical and proportionate to administer and how a consistent approach to decision making would be undertaken by practitioners.

If following internal guidance, local authorities need to be mindful of the findings made by the High Court in *PO v LB Newham* relating the amount of support provided:

- Child benefit is not designed to meet the subsistence needs of children so it is not rational or lawful to set standard rates in line with these amounts.
- When it is in the child's best interests for the family to remain together, payments for the parents should be made in addition to those considered appropriate to meet the needs of the children, but are not required to exceed what is necessary to avoid a breach of the parent's human rights.
- Lack of complaint from a family does not mean that the local authority can be satisfied that it is making payments appropriate to meet the child's needs.

In *Mensah v Salford City Council*, the High Court found that support for refused asylum seekers under section 4 Immigration and Asylum Act 1999 is designed to provide for food and toiletries only, therefore any policy aligning subsistence payments with these rates must allow for additional assistance to be provided in order to meet the child's needs. The Court of Appeal in *C, T, M & U v LB Southwark* did not make a finding on that decision but observed that:

'...a level of support considered adequate simply to avoid destitution in the case of a failed asylum-seeker is unlikely to be sufficient to safeguard and promote the welfare of a child in need and by extension the essential needs of the parent on whom the

child depends for care. Ultimately what matters is whether the assessment when completed adequately recognises the needs of the particular child.’⁹⁸

The Local Government and Social Care Ombudsman has investigated complaints made against local authorities with regards to subsistence payments, and its findings highlight the need for councils to ensure that any changes to rates are administered immediately after they are implemented and that policies are reviewed promptly following relevant case law developments:

- In 2015, Southwark Council was found at fault where it failed to pay a family the new subsistence rates following an agreed rate increase, and, to remedy the injustice caused to the family by the resulting financial hardship, paid the family £1590.⁹⁹
- In 2017, Croydon Council was found at fault for delaying the review of its subsistence policy in light of the court’s findings in *R(PO) v LB Newham* (2014), which resulted in a family receiving £140 less than they should have done for a two-week payment. As the local authority had taken 22 months to review and implement its new policy, it was found at fault for taking too long, given that the law relating to vulnerable families and housing is fast moving. The local authority paid the additional £140 to cover the period prior to the policy revision.¹⁰⁰

For more information, see our factsheet:

- *Subsistence support for families under section 17 Children Act 1989*¹⁰¹

5.3 Additional family members

Local authorities may be asked to provide section 17 support for additional family members, such as an adult in the household who is not the child’s parent, or for a child who does not permanently reside in the household. The courts have considered each of these situations.

In the case of *R(MK) v Barking & Dagenham LBC* (2013), a mother and her two children were supported by the local authority under section 17 of the Children Act 1989. The mother’s adult niece, MK, had been living with the family but was then prevented from doing so by the local authority. MK entered the UK illegally as a child and had subsequently been granted temporary admission and had an appeal pending against a decision to remove her.

It was found by the court that it would be improper use of section 17 to provide accommodation and cash support to MK as this power can only be exercised for the benefit of children. Additionally, the local authority had already concluded, within its assessments, that MK’s residence with the family was not necessary to promote or safeguard the welfare of the two children. The court also found that Parliament did not intend for section 1 of the Localism Act 2011 or section 17 to be used to circumvent statutory restrictions prohibiting the provision of all kinds of benefits to people without any immigration permission. In this

⁹⁸ *R (C, T, M and U) v LB Southwark* (2016), paragraph 43.

⁹⁹ Local Government and Social Care Ombudsman, London Borough of Southwark (14 009 121) (12 August 2015) <https://www.lgo.org.uk/decisions/children-s-care-services/other/14-009-121>

¹⁰⁰ Local Government and Social Care Ombudsman, London Borough of Croydon (16 011 275) (23 August 2017) <https://www.lgo.org.uk/decisions/children-s-care-services/other/16-011-275>

¹⁰¹ <http://www.nrpfnetwork.org.uk/Documents/Subsistence-support-families.pdf>

case, the statutory provision of support available to MK was section 4 of the Immigration and Asylum Act 1999, administered by the Home Office.¹⁰²

In the interim relief application for accommodation of *R (KO) v LB Lambeth* (2013), the court considered whether accommodation must be provided to a child who did not reside with the household the local authority was supporting under section 17.

The local authority had provided hostel accommodation to a mother and her baby, who had been assessed as being a child in need. The mother's elder son had been living with his half-sister for the previous four and a half years. Two years prior to the hearing the mother obtained an order prohibiting her elder son's father from taking him to Nigeria, and during those proceedings contact was ordered to take place with the mother. The mother had failed to obtain an order permitting overnight contact because her current accommodation had been assessed as unsuitable for him to stay in, so the arrangement could not be tested.

The Court found that the likelihood of the elder child being provided with accommodation to enable contact following a section 17 child in need assessment would be low because:

- there was no positive evidence that the elder son's health or development is likely to be significantly impaired or further impaired without the provision of section 17 services; and
- evidence of a strong bond between the elder child and his mother fell a long way short of evidence that the baby needed to live with his brother.

The Court also found that Article 8 does not give a freestanding right or claim for accommodation for the whole family. The Judge found that the public interest weighed heavily against granting interim relief, there being many other families in similar, if not worse positions than this family, but permission was granted for the judicial review to be heard and expedited.¹⁰³

¹⁰² *R(MK) v LB Barking & Dagenham* [2013] EWHC 3486 (Admin)

¹⁰³ *R (on the application of KO) v London Borough of Lambeth* [2013] All ER (D) 171, extempore judgment.

6 Resolving supported cases

Once a family has been assessed as requiring support under section 17 of the Children Act 1989, this will need to be provided whilst the child remains in need, or, where the parents are in an excluded group, whilst support is necessary to prevent a breach of the family's human rights or EU treaty rights. It will be necessary to take proactive steps to resolve cases and plan how the family can move out of social services support, in order to act in the best interests of the child and reduce costs incurred by the local authority.

This chapter sets out suggested steps that can be taken to assist a family to resolve their case on the basis of the parent's immigration status for types of cases commonly encountered by local authorities:

- Leave to remain with NRPF (10-year settlement route or outside of the rules)
- Leave to remain with NRPF (Spouse/ partner of a British Citizen/settled status)
- Derivative right to reside under European law as a Zambrano carer
- EEA national
- Asylum seeker
- Refused asylum seeker (claimed at port of entry)
- No immigration permission (visa overstayer; refused in-country asylum seeker)

The information can also be used to advise families at the point of presentation when there may be an opportunity to undertake immediate steps to resolve their homelessness and destitution before support needs to be provided.

Leave to remain with NRPF

FM family/private life 10 year settlement route or outside of the rules

Excluded under Schedule 3?	No
Entitlement to public funds	Cannot access welfare benefits, homelessness assistance or social housing; will not be able to access benefits usually claimed to top up a low income, e.g. housing benefit, tax credits. Can claim child benefit for a British child.
Entitlement to employment	Can undertake employment.
Right to rent from a private landlord (England)	Limited right to rent.
Suggested steps to resolve the case	Refer to an immigration adviser (OISC level 1) for advice about whether they can apply to Home Office for leave to be varied to remove the NRPF condition by making a change of conditions application. Provide guidance and support in accessing employment.

Leave to remain with NRPF

Spouse or partner of a British Citizen or person with settled status

Excluded under Schedule 3?	No
Entitlement to public funds	Cannot access welfare benefits, homelessness assistance or social housing. Can claim child benefit for a British child.
Entitlement to employment	Can undertake employment.
Right to rent from a private landlord (England)	Limited right to rent.
Suggested steps to resolve the case	Signpost to an immigration adviser to see what immigration options they have – including whether they can apply for Indefinite Leave to Remain under the domestic violence rule and therefore apply for the destitution domestic violence concession. Provide guidance and support in accessing employment.

Derivative right to reside under European law as a Zambrano carer

Primary carer of a British (or other EEA national) child

Excluded under Schedule 3?	No
Entitlement to public funds	Excluded from most welfare benefits, homelessness assistance and social housing due to the benefit eligibility rules; will not be able to claim benefits usually claimed to top up a low income, e.g. housing benefit, child tax credit. Cannot claim child benefit for a British child. Can claim working tax credit.
Entitlement to employment	Can undertake employment.
Right to rent from a private landlord (England)	Limited right to rent.
Suggested steps to resolve the case	Refer for legal advice to see if the parent can make an application under the Immigration Rules with a view to gaining recourse to public funds. Provide guidance and support to access employment.

EEA national

Excluded under Schedule 3? Yes – unless:

- there is a legal or practical barrier in place preventing the family from leaving the UK, or
- the local authority has otherwise determined that support is necessary to prevent a breach of human rights or European Treaty rights.

Entitlement to public funds

Can access welfare benefits, homelessness assistance or social housing if eligible (i.e., satisfies the right to reside/habitual residence tests). An EEA national will generally only satisfy the right to reside test if they are one of the following:

- A worker, self-employed person or person who recently became unemployed
- The family member of an EEA national who is one of the above
- The primary carer of a child, who is in school, of an EEA national who is working or has worked in the UK
- A person with a permanent right of residence

Entitlement to employment

Can undertake employment.

Right to rent from a private landlord (England)

Unlimited right to rent.

Suggested steps to resolve the case

If there is a barrier to return in place, ensure the status of the barrier is regularly reviewed.

Signpost to a specialist benefits or immigration adviser to establish whether the parent is exercising a right to reside and therefore can access benefits.

Provide guidance and support accessing employment.

Support the family to make benefit applications if appear to be eligible.

Asylum seeker

Has a pending asylum application or is appealing a refusal of their asylum claim

Excluded under Schedule 3?	No
Entitlement to public funds	Cannot access welfare benefits, homelessness assistance or social housing. Can get accommodation and financial support from the Home Office – section 95 asylum support and also section 98 emergency support.
Entitlement to employment	Cannot undertake employment unless the Home Office has granted permission to work (granted in limited circumstances and work is restricted to professions on shortage occupation list).
Right to rent from a private landlord (England)	No right to rent unless the Home Office grants permission to rent.
Suggested steps to resolve the case	Assist the family to apply for section 95 asylum support from the Home Office. Use NRPf Connect to chase up progress of asylum support application.

Refused asylum seeker

Claimed asylum at port of entry

Excluded under Schedule 3?	No
Entitlement to public funds	Cannot access welfare benefits, homelessness assistance or social housing. Can apply for accommodation and financial support from the Home Office – section 4 asylum support - when certain conditions are satisfied.
Entitlement to employment	Cannot undertake employment unless the Home Office has granted permission to work (granted in limited circumstances; work is restricted to professions on shortage occupation list).
Right to rent from a private landlord (England)	No right to rent unless the Home Office grants permission to rent.
Suggested steps to resolve the case	Signpost to an immigration adviser for advice about options to pursue asylum case or other claims. Advise on voluntary return options. If there is no further basis to pursue asylum or any other claim, use NRPf Connect to establish involvement of Home Office family returns team. Find out whether asylum support may be available from the Home Office, but note that a family can only be referred for section 4 support when this support is available and is sufficient to meet the needs of the child.

No immigration permission

For example: visa overstayer, illegal entrant, refused in-country asylum seeker

Excluded under Schedule 3? Yes – unless:

- there is a legal or practical barrier in place preventing the family from leaving the UK, or
- the local authority has otherwise determined that support is necessary to prevent a breach of human rights or European Treaty rights.

Entitlement to public funds

Cannot access welfare benefits, homelessness assistance or social housing.

Entitlement to employment

Cannot undertake employment.

Right to rent from a private landlord (England)

No right to rent unless the Home Office grants permission to rent.

Suggested steps to resolve the case

If there is a barrier to return in place, ensure the status of the barrier is regularly reviewed.

Signpost to an immigration adviser for advice about options.

Chase up the progress of pending immigration applications with the Home Office using NRPf Connect.

Advise on voluntary return options.

If the parent is an in-country refused asylum seeker, find out whether asylum support may be available from the Home Office, but note that a family can only be referred for section 4 support when this support is available and is sufficient to meet the needs of the child.

For more information, see the following sections:

- **2.3 Exclusions from support**
- **9 EEA nationals and family members**
- **10 Asylum seekers**
- **11 Immigration information**
- **12 How to find an immigration or asylum legal adviser**

7 Refusing or withdrawing support

A decision to refuse or withdraw support under section 17 of the Children Act 1989 may be made following a child in need and/or human rights assessment. It is good practice for conversations with the family to have already taken place to prepare them for such an outcome and what their options will be, confirming the decision in writing. Any other organisations assisting the family should also be informed of the decision.

In this chapter we suggest good practice that may be followed when ending support for families who:

- Can be referred to mainstream benefits and housing
- May need some advice about steps that can be taking to avoid future re-presentations for support from social services
- Are excluded from support and can return to the parent's country of origin

7.1 Referring a family onto welfare benefits and housing

When section 17 support is being terminated because there has been a change of circumstances that means that a family can now claim welfare benefits and homelessness assistance, they will need to be given a notice period and support with making these claims.

From 1 October 2018, local authorities will be under a legal duty to refer a family to the housing authority of their choice for homelessness assistance, but it is likely that most NRPF services will be assisting families to approach a housing department already. In England the housing authority is required to establish whether homelessness can be prevented when a person is eligible and threatened with homelessness within 56 days. This means that, where families are being accommodated in private tenancies, the housing authority may explore the possibility of transferring the existing license agreement to a tenancy or if this is not possible, whether alternative accommodation can be secured for the family, which is most likely to be a private tenancy of at least six months.¹⁰⁴

Social services would therefore need to ensure a family approaches a housing authority as soon as they issue notice, and flexibility regarding the notice period may be required to allow for support to continue if there are delays in benefits being issued, or if it appears that the housing authority can prevent homelessness by enabling the family to remain in their current home or by securing a private tenancy for them, and a short extension of the notice period would enable this to take place. Social services and the housing department must cooperate in order to promote the welfare of any children concerned in compliance with section 11 of the Children Act 2004.

7.2 Preventing re-presentations

Local authorities often see families re-present asking for assistance when they had previously received support from social services under section 17 of the Children Act 1989. Re-presentations may occur when a family fails to make a valid application when they apply

¹⁰⁴ Homelessness Reduction Act 2017; DCLG Homelessness Code of Guidance (February 2018) <https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities>

for further leave, or if they extend their leave and have the NRPF condition imposed when they cannot in fact self-support with income from employment alone. Families on 10-year settlement routes need to renew their leave every 30 months.

When support is terminated on the basis that the parents have been granted leave to remain with recourse to public funds it is important that the family are given advice with a view to preventing such problems:

- The family should seek advice from an immigration adviser in good time before they need to apply to the Home Office to extend their leave.
- If the family received a fee waiver to make their previous application, their circumstances are likely to be different when they reapply for leave and the terms of the policy could be changed by the Home Office during this time; where possible, families should save up funds for the next application fee and also be aware that fees are usually increased at least once a year in April.
- Legal representatives should make appropriate representations within their application if a person has grounds to be granted leave to remain with recourse when they extend their leave, otherwise the Home Office is likely to impose the NRPF condition; if this happens, families that are reliant on benefits, whether wholly or partly due to low income from employment, will find that their benefits could stop and may risk losing their accommodation.
- If a family are receiving benefits and are granted further leave to remain with the NRPF condition, they should seek advice immediately from a benefits adviser and from a housing adviser if they are subject to eviction proceedings. They may seek immigration advice to find out if they can request a reconsideration of the NRPF condition or submit a change of conditions application.

For more information, see sections:

- **11.1 Making an immigration application**
- **11.3 Leave to remain with NRPF**
- **12.4 How to find an immigration or asylum legal adviser**

7.3 Families excluded from support

When the provision of accommodation and financial support is being refused following a human rights assessment, which has determined that the family can return to the parent's country of origin, then assistance with return must be offered to the family. This could be provided by the Home Office or local authority.

It will normally be appropriate for the local authority to provide accommodation and financial support to the family whilst return is being arranged. In the case of *R (O) v London Borough of Lambeth* (2016), the Judge found that the local authority had made 'sensible, humane and appropriate undertakings' in agreeing that if the parent signs a formal undertaking in which she accepts that she and her child can be returned to Nigeria, and takes steps to co-operate

with the local authority in arranging a facilitated return, her interim accommodation may be provided for a reasonable period pending the return.¹⁰⁵

Should a parent refuse the offer of assistance with return to their country of origin and remain in the UK when they have no current immigration permission and no legal barrier preventing them from leaving the UK, they would need to be advised of the risks and difficulties of living in the UK unlawfully:

- They will be liable to be removed from the UK by the Home Office.
- They will not have permission to work; working when a person has no immigration permission to do so is now a criminal offence.
- Private landlords will not be able to rent, sub-let to or set up a paying lodging arrangement with a person who has no immigration permission.

It is therefore likely that significant concerns will arise regarding the wellbeing and safety of a child left in this situation. As soon as the local authority is aware that support is likely to be refused or terminated on the basis that the family can return to the parent's country of origin, it will be important to liaise with the Home Office to ensure that the case is allocated to the family returns team, with a view to further engagement with the family being carried out with regards to voluntary return before enforcement action is progressed.

When the local authority has lawfully determined that the family are free to return to the parent's country of origin, but the family refuses to do so, the courts have found that any hardship or degradation suffered will be a result of their decision to stay in the country and not as a result of any breach of human rights by the local authority.¹⁰⁶

If the local authority learns that such a family has moved to another area following the termination of support, it will be necessary to make a referral to Children's Services in that area, share information about the decision that has been made and inform other agencies involved in supporting the family.

For more information, see section:

- **4 Assessments when the exclusion applies**

7.3.1 Home Office funded return

The Home Office can fund and arrange travel for families who wish to return to their country of origin, and some people can obtain additional assistance.

Any person who is living in the UK without immigration permission or has been refused permission to enter or stay in the UK can apply to undertake a voluntary return. This includes EEA nationals who are not exercising a right to reside. The Home Office will organise and fund the flight, but will expect the person to arrange their own documentation if they do not already have this. The Home Office can normally only provide additional support in obtaining documentation when a person has a vulnerability which means that it would be difficult for them to do this by themselves.

¹⁰⁵ R (O) v London Borough of Lambeth (2016), paragraph 52.

¹⁰⁶ AW, R (on the application of) v London Borough of Croydon [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

An assisted return involves the Home Office arranging and funding flights, a financial reintegration package and additional support on a case by case basis.

Families will be eligible for an assisted return unless the parent:

- is currently being investigated by the police or detained by the Home Office;
- has been convicted of an immigration offence and given a deportation order;
- has already been given humanitarian protection, indefinite leave to remain or refugee status;
- has been informed that they are a 'third country case'; or
- is a European Economic Area (EEA) or Swiss national (unless they have been confirmed to be a victim of trafficking).¹⁰⁷

A financial reintegration package of up to £2000 per eligible person in the family group may be available (for up to two adults and each child under 18; children over 18 returning with the family may be eligible for up to £1500 depending on their circumstances).

The method by which this is provided depends on whether the country of return is part of the European Reintegration Network (ERIN), which currently includes: Afghanistan, Argentina, Bangladesh, Brazil, Cote d'Ivoire, Guinea (Conakry), Honduras, Iran, Iraq (KRG), Morocco, Nepal, Nigeria, Pakistan, Paraguay, Russian Federation, Senegal, Somalia North, Sri Lanka, Sudan and Ukraine. A person returning to an ERIN country package may receive some funds on a card which can be withdrawn as cash in the country of return, and then will receive payments for a specific item/purpose directly from a partner agency administering the programme on return.

A person returning to a country which is not part of the ERIN will receive the full amount on a card which can be withdrawn as cash in the country of return.

A person will usually only have one opportunity to apply for assisted return.

The Home Office administers all voluntary returns and, although will be able to answer questions about the returns process, does not provide independent and confidential advice to people who are considering return.

Non-EEA nationals undertaking a voluntary return which is funded by the Home Office (with or without a reintegration package), will be subject to a re-entry ban of two or five years, depending on how long they were in the UK after being issued with a liability to removal notice or becoming appeal rights exhausted. Legal advice should be sought to establish how long the re-entry ban will apply.

Methods of contacting the Home Office:

- People can apply online or contact the helpline: 0300 004 0202 ¹⁰⁸
- Email: voluntaryreturns@homeoffice.gsi.gov.uk
- Local Home Office Immigration Compliance and Enforcement Team may facilitate voluntary returns involving EEA nationals ¹⁰⁹

¹⁰⁷ <https://www.gov.uk/return-home-voluntarily>

¹⁰⁸ <https://visas-immigration.service.gov.uk/product/vrs>

7.3.2 Local authority funded return

Local authorities have a power to fund a family's return to country of origin, although this stems from different legislation depending on the parent's nationality or immigration status.

For EEA nationals and people with refugee status granted by another EEA state, the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 provide a power to:

- purchase travel tickets to enable the person to return to their country of origin, and
- provide time-bound interim accommodation pending the return to country of origin, but not cash payments.

Alternatively, national embassies may be able to assist with arranging return for EEA nationals.

For non-EEA nationals who do not have any current immigration permission, funding a return would be an appropriate use of the general power of competence set out in section 1 of the Localism Act 2011. Enabling a family to return to their country of origin would be an effective response to resolving their destitution in the UK when there is no duty to provide support.

¹⁰⁹ <https://www.gov.uk/government/publications/contact-details-for-immigration-compliance-and-enforcement-teams>

8 Adults with care and support needs

This chapter provides basic information about support that a parent or other adult in the family group may be entitled to if they have care needs.

When a parent or other adult in the household has needs arising from a physical or mental impairment or illness, they may be eligible for care and support under the Care Act 2014. They would need to be referred to adult social services or the mental health team, as appropriate, for an assessment of need. Equivalent legislation exists in Wales, Scotland and Northern Ireland.

It is likely that any care and support needs the adult may have would be identified when the child in need assessment is carried out. However, such needs may arise after the family has been provided with support.

Practitioners need to be aware of some key points when referring to Adult Social Services:

- Adult Social Services are required to undertake a needs assessment when an adult presents with an appearance of need.
- Eligibility for care and support is set out in the Care and Support (Eligibility Criteria) Regulations 2015 which require an adult to:
 - have needs arising from or related to a physical or mental impairment or illness;
 - be unable to achieve two or more outcomes that are specified in the regulations; and
 - as a consequence, there is or is likely to be a significant impact on the adult's well-being.
- When an adult has eligible needs, the local authority must then determine how to meet these.
- When the adult has eligible needs and requires care and support which can only be provided in a home environment, then the local authority may be required to provide accommodation in order to meet the adult's needs.
- The availability of asylum support accommodation from the Home Office must be disregarded as a form of alternative accommodation.
- When the adult does not have eligible needs, the local authority must decide whether to use its power to meet non-eligible needs, and if not, explain this decision to the adult.
- The provision of support and assistance under the Care Act 2014 is excluded under schedule 3 of the Nationality, Immigration and Asylum Act 2002 for certain people. Therefore the provision of assistance to meet eligible needs will be subject to a human rights assessment when the exclusions apply.

- The local authority can only meet the needs of an adult who is ordinarily resident in the local authority area (i.e. has voluntarily taken up residence in the area for a settled purpose), or has no place of settled residence and is present in the area. Responsibility is therefore subject to a different test to that which applies to assisting a child in need, so it is possible that a different local authority may be responsible for meeting any assessed care and support needs of the adult.

8.1 Pregnant women

There is no specific legislation that requires a local authority to accommodate a destitute pregnant woman with NRPF when she has no children in her care. However, the general power under section 19(1) of the Care Act 2014 permits local authorities to meet needs that do not satisfy the care and support eligibility criteria:

‘(1) A local authority, having carried out a needs assessment and (if required to do so) a financial assessment, may meet an adult’s needs for care and support if—

(a) the adult is ordinarily resident in the authority’s area or is present in its area but of no settled residence, and

(b) the authority is satisfied that it is not required to meet the adult’s needs under section 18.’

Expectant mothers with no children who present as destitute and have no care and support needs other than those that are pregnancy related, may therefore be provided with accommodation under section 19(1) of the Care Act. A power under section 19(3) allows urgent needs to be met before an assessment of need has been carried out.

When legislation prior to the Care Act 2014 was in force, the courts confirmed that local authorities could consider the availability of asylum support from the Home Office for expectant mothers because the local authority exercised a power rather than performed a duty in providing accommodation to them. It seems likely that the local authority can therefore take into account the availability of asylum support when exercising this power.

The provision of support and assistance under section 19(1) of the Care Act 2014 is excluded under Schedule 3 of the Nationality, Immigration and Asylum Act 2002 for certain people. Therefore, the provision of assistance to meet eligible needs will be subject to a human rights assessment when the exclusions apply.

Although the power that may be used to support a pregnant woman is set out in adult social care legislation, it is often the case that a pregnant woman will be supported by Children’s Services as an assessment of the mother’s parenting capacity may also be required, and, once the child is born, the duty to undertake a section 17 child in need assessment will be engaged.

For more information, see our practice guidance:

- *Assessing and supporting adults with NRPF (England)*¹¹⁰

¹¹⁰ <http://www.nrpfnetwork.org.uk/Documents/Practice-Guidance-Adults-England.pdf>

9 EEA nationals and family members

This chapter provides some basic information to help guide local authorities in assisting European Economic Area (EEA) nationals and their family members. It is not to serve as a comprehensive guide to rights under European law and benefit eligibility, so further information may need to be referred to or specialist advice obtained.

When a parent, who is an EEA national or the family member of an EEA national, requests accommodation and/or financial support from social services for their family, the local authority will need to establish whether:

- the parent may be eligible for welfare benefits and homelessness assistance, and
- the provision support is necessary to prevent a breach of the family's human rights or rights under the EU treaties.

The local authority will therefore need to establish whether the parent has a right to reside in the UK under European law and how this may affect their entitlement to benefits.

The process of the UK leaving the European Union (EU) has not been completed. The rights that people have under European law that are referenced here continue to apply and will only change after the UK finally withdraws from the EU and any transition period has ended. The UK is due to leave the EU on 29 March 2019 and the transition period that has been agreed with the EU will end on 31 December 2020.

9.1 European Economic Area (EEA) countries

The European Economic Area (EEA) is comprised of all European Union (EU) countries and some non-EU members.

EEA member states

EU countries

Austria	Estonia	Italy	Portugal
Belgium	Finland	Latvia	Romania
Bulgaria	France	Lithuania	Slovenia
Croatia	Germany	Luxembourg	Spain
Cyprus	Greece	Malta	Slovakia
Czech Republic	Hungary	Netherlands	Sweden
Denmark	Ireland	Poland	UK*

Non-EU member states

Iceland	Norway	Lichtenstein
---------	--------	--------------

* For the purpose of this guidance the term 'EEA national' does not include UK nationals but does include Swiss nationals, who also enjoy similar free movement rights as a result of bilateral treaties.

9.2 The right to reside

EEA nationals and their family members do not require leave to enter or to remain in the UK; their rights to enter and reside in the UK are governed by European law, and are commonly

referred to as 'EU treaty rights' or 'free movement rights'. These rights are transposed into UK law through the Immigration (European Economic Area) Regulations 2016.

An EEA national's right to reside is acquired on the basis of their circumstances and there is no requirement for an EEA national to obtain confirmation of this, although they may apply for documentation from the Home Office if they choose to do so. Due to uncertainty over the future of the rights of EEA nationals living in the UK, it is advisable for people to ensure they keep documents that may help evidence their residence and activities in the UK, and relationship with EEA family members, in case this is required at a later date.

All EEA nationals have an initial right of residence for up to three months. To stay in the UK beyond this period, they would need to be 'exercising a treaty right', which means being a 'qualified person.'

An EEA national must be undertaking one of the following specified activities that are set out in the 2016 Regulations in order to be a qualified person:

- Jobseeker
- Worker (including a worker who recently stopped working)
- Self-employed person (including a former self-employed person)
- Self-sufficient person
- Student

To be recognised as a qualified person, an EEA national must satisfy specific requirements that are set out in 2016 regulations. Some of the key requirements are set out below.

- **Jobseeker** status may only be retained for longer than three months if there is 'compelling evidence' that the EEA national is continuing to seek work and has a 'genuine chance' of being engaged in employment.¹¹¹
- An EEA national may retain their status as a **worker** even if they are not currently in employment when they are:
 - temporarily unable to work as a result of illness or accident;
 - involuntarily unemployed and registered as a jobseeker with the relevant employment office and can provide evidence that they are seeking employment and have a genuine chance of being engaged (worker status is only retained for longer than six months if they have worked for at least one year and there is 'compelling evidence' that they are continuing to seek work and has a 'genuine chance' of being engaged in employment);
 - involuntarily unemployed and has embarked on vocational training; or
 - voluntarily ceased working and embarked on vocational training that is related to their previous employment.¹¹²
- An EEA national may retain their status as a **self-employed person** if they are temporarily unable to undertake their self-employment activities as the result of an illness or accident.¹¹³

¹¹¹ Regulation 6(7), Immigration (EEA) Regulations 2016

¹¹² Regulation 6(2), Immigration (EEA) Regulations 2016

¹¹³ Regulation 6(4), Immigration (EEA) Regulations 2016

- A **student** or **self-sufficient person** needs to have ‘comprehensive sickness insurance’ and ‘sufficient resources not to become a burden on the social assistance system of the UK’ during their period of residence.¹¹⁴

When new countries accede to the EU, the UK government can limit access to the labour market for nationals of these countries for a set period of time. In the past, restrictions were placed on nationals of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, between 1 May 2004 and 30 April 2011, and on nationals of Bulgaria and Romania between 1 January 2007 and 31 December 2013.

Currently, restrictions to the labour market only apply to Croatian nationals, following the accession of Croatia to the EU on 1 July 2013. Croatian nationals who wish to work in the UK are required to apply for worker registration, unless they are exempt from doing so. These restrictions will end on 30 June 2018, after which Croatian nationals will be able to undertake any employment in the UK without prior registration.

EEA nationals will acquire the right of permanent residence after five years’ continuous residence in the UK as a qualified person under the 2016 Regulations, or if they meet the criteria as a worker or self-employed person who has ceased activity because of a permanent incapacity to work.¹¹⁵

For more information, see the Home Office Modernised Guidance:

- *EEA and Swiss nationals: free movement rights*¹¹⁶

9.3 Family members

Certain family members of EEA nationals, whether they are EEA nationals themselves or non-EEA nationals, will have the right to reside in the UK where the EEA national is a ‘qualified person’. Family members may also acquire permanent residence.

The Immigration (EEA) Regulations 2016 define who is considered to be a family member:

- Spouse or civil partner*
- Child under 21 of the EEA national or their spouse/civil partner
- Dependent child age 21 and older of the EEA national or their spouse/civil partner
- Dependant relatives in the ascending line i.e. a parent or grandparent of the EEA national or their spouse/civil partner¹¹⁷

* Following a separation, a person will continue to be considered as a spouse or civil partner until the marriage or civil partnership is legally terminated. After that point, they may retain their right of residence if they meet certain conditions set out in the Regulations.¹¹⁸

¹¹⁴ Regulation 4(1), Immigration (EEA) Regulations 2016

¹¹⁵ Regulation 6(7), Immigration (EEA) Regulations 2016

¹¹⁶ <https://www.gov.uk/government/publications/eea-and-swiss-nationals-free-movement-rights>

¹¹⁷ Regulation 7, Immigration (EEA) Regulations 2016

¹¹⁸ Regulation 10, Immigration (EEA) Regulations 2016

Extended family members of EEA nationals also have the right to reside, including a partner who is in a durable relationship with the EEA national, and other relatives who may be dependent on the EEA national or the EEA national's spouse or civil partner.¹¹⁹

Different rules apply to family members of EEA national students.¹²⁰

It is also possible for a non-EEA national to acquire a derivative right to reside under European law on the basis being the primary carer of a British (or EEA) national adult or child, where failing to permit the carer to stay and work in the UK would lead to the British (or EEA) national leaving the EEA. This is often referred to as the Zambrano right to reside.¹²¹

A family member's right to reside is acquired on the basis of their circumstances. There is no requirement for them to obtain confirmation of this, although they may apply for documentation from the Home Office if they choose to do so, and non-EEA national family members will need evidence of their lawful residence for the purpose of obtaining employment, accessing services and ease of travelling in and out of the UK. The only exception to this requirement is that under the Regulations, extended family members are required to obtain documentation from the Home Office before they can be recognised as having a right to reside on that basis.

For more information, see the Home Office Modernised Guidance:

- *Free movement rights: direct family members of EEA nationals*¹²²

9.4 Benefit eligibility

EEA nationals and their family members may access welfare benefits, homelessness assistance or an allocation of social housing through the council register. However, each benefit has regulations which specify on what basis an EEA national or family member would be eligible, and usually require the person to have a right to reside in a particular capacity. This means that EEA nationals may not be able to receive benefits or housing assistance when the eligibility requirements are not satisfied, or their right to reside is difficult to evidence. As the rules are different for each benefit, it may be the case that a person can claim some but not all of the benefits they require.

An EEA national who has worked and becomes unemployed may be able to obtain benefits based on their national insurance contributions, such as contributory-based Jobseeker's Allowance (JSA), however their ability to access income-based benefits such as income-based JSA and housing benefit will usually depend on whether they continue to be exercising the right to reside as a 'worker'.

It is therefore important to establish a person's length of residence and full work/activity history in the UK to determine whether an EEA national or their family member may have the right to reside in the UK and therefore access to benefits.

¹¹⁹ Regulation 8, Immigration (EEA) Regulations 2016

¹²⁰ Regulation 7(2), Immigration (EEA) Regulations 2016

¹²¹ Regulation 16, Immigration (EEA) Regulations 2016

¹²² <https://www.gov.uk/government/publications/direct-family-members-of-european-economic-area-eea-nationals>

The rules surrounding benefit eligibility for EEA nationals are complex and the government's interpretation of European directives can sometimes be more restrictive than the provisions are intended to be, so benefit decisions are often subject to challenge. It is therefore recommended that all EEA nationals presenting to a local authority for assistance are referred for advice in order to establish their entitlement to benefits and/or to check that any refusals of benefits are correct.

9.4.1 Benefit eligibility table

This table serves to act as an indicator as to whether a person may be able to access welfare benefits and housing assistance on the basis of their right to reside under European law. It does not provide confirmation that a person can access those benefits as further enquiries would need to be made by the benefits assessor.

Right to reside	Eligible for welfare benefits and housing? (See note A)
Initial right of residence for three months following entry to the UK by EEA national or their family member	May only be eligible for: child benefit and child tax credit
EEA jobseeker or their family member	May only be eligible for: JSA (IB), universal credit, child benefit and child tax credit
EEA worker (including a person who has retained worker status) or their family member	Yes
EEA self-employed person (including a person who has retained self-employed status) or their family member	Yes
EEA self-sufficient person or their family member	Yes (see note B)
EEA student or their family member	Yes (see note B)
EEA permanent right of residence	Yes
Derivative right to reside: Teixeira and Ibrahim The primary carer of a child of an EEA national worker or former worker where that child is in education in the UK, and where requiring the primary carer to leave the UK would prevent the child from continuing their education in the UK.	Yes
Derivative right to reside: Zambrano The primary carer of a British or other EEA national child when requiring the primary carer to leave the UK would also require the British or EEA child to leave the EEA.	No
Derivative right to reside: Chen The primary carer of an EEA national child who is exercising free movement rights in the UK as a self-sufficient person, where requiring the primary carer to leave the UK would prevent the EEA national child exercising those free movement rights.	Yes (see note B)

Notes

- A.** The welfare benefits referred to for these purposes are those with a right to reside requirement: Child benefit (claimed on or after 1 May 2004); Child tax credit (claimed on or after 1 May 2004); Council tax reduction; Housing benefit; Income- based Jobseeker's Allowance; Income related Employment and Support Allowance (from 31 October 2011); Income support; State pension credit and Universal credit.

Eligibility for an allocation of social housing through the council register and homelessness assistance referenced here applies to England only, as the housing regulations differ in Wales, Scotland and Northern Ireland.

To claim most benefits and housing assistance the person must have been living in the Common Travel Area (UK, Republic of Ireland, Channel Islands and Isle of Man) for a period of three months prior to the claim.

- B.** For students or self-sufficient EEA nationals, a benefits assessor will consider whether the claim does not amount to an unreasonable burden on the social assistance system of the UK in order to determine whether they are fulfilling the requirements to be exercising the right to reside in either capacity. Claiming benefits does not mean a person will fail this test.

The following organisations provide information on EEA rights and access to benefits:

- Citizen's Advice¹²³
- Housing Rights Information¹²⁴
- AIRE Centre¹²⁵

9.5 Irish nationals

The Republic of Ireland forms part of the Common Travel Area (CTA), along with the UK, Channel Islands and Isle of Man. Nationals of these countries are allowed to travel and live freely within the CTA.

Irish nationals automatically have a right to reside in the UK for the purpose of claiming benefits, although any non-Irish family members do not.

However, to claim most benefits and housing assistance a person must have been living in the CTA for a period of three months prior to the claim. An Irish national will pass this if they move to the UK directly from Ireland, but not if they have moved to the UK from a country outside of the CTA.

Although Irish nationals are not required to exercise a right to reside under the EU treaties in order to be able claim benefits themselves, any family members who are not Irish or British may need to rely on the Irish national exercising a right to reside in order be eligible for benefits.

¹²³ <http://www.adviceguide.org.uk/>

¹²⁴ <http://www.housing-rights.info/index.php>

¹²⁵ <http://www.airecentre.org/>

Where an Irish national also holds British citizenship, then their family members cannot rely on having a right to reside under European law in order to claim benefits because the Immigration (EEA) Regulations 2016 do not apply to EEA nationals who also hold British citizenship. Although a recent European Court of Justice decision may mean that in some cases this position is no longer compatible with EU law, the UK government has not yet amended the Regulations. Advice from a specialist benefits adviser should be sought if a person is the family member of a dual Irish/ British national.¹²⁶

9.6 Returning British citizens

The UK forms part of the Common Travel Area (CTA), along with the Republic of Ireland, Channel Islands and Isle of Man. Nationals of the CTA will automatically have a right to reside and will be habitually resident in the UK for the purpose of claiming certain benefits.

However, to claim most benefits and housing assistance a person must have been living in the Common Travel Area for a period of three months prior to the claim. A British citizen will pass this if they have been living in the Republic of Ireland for at least three months before arriving in the UK, but will not if they have been living in a country outside of the CTA.

Therefore, British citizens returning to live in the UK may face at least a three-month delay before being able to access benefits and housing services, so social services may need to undertake a child in need assessment if such a family has no access to accommodation and/or financial support with a view to providing these on a temporary basis. British citizen parents should not be recorded on the NRPF Connect database.

9.7 Difficulties asserting the right to reside

Due to the challenges and complexities of establishing whether a person has a right to reside, and difficulties with regards to evidencing this, there may often be differences in opinion between social services and the local housing authority or the DWP. The points made here are to help practitioners identify when an EEA national or their family member may be able to challenge a refusal of assistance.

- When a housing authority in England finds that an EEA national is ineligible to receive homelessness assistance, they would need to issue a section 184 decision letter setting out the reasons why the EEA national is not eligible, which has a right to review. A direct referral to children's services should be made when a family are found to be ineligible.
- In order to determine whether an EEA national is a worker, is self-employed, or has retained worker or self-employed status, the DWP and local authority housing benefit department will apply the 'minimum earnings threshold'. This is a two-part test which is not set out in legislation and requires a person to have regularly earned a specified amount of money over a three-month period, set at what someone working 24hrs/week at minimum wage would earn. When a person does not satisfy the minimum earnings threshold, the benefits assessor must consider whether the

¹²⁶*Lounes v Secretary of State for the Home Department*, European Court of Justice, C-165/16 (14 November 2017) <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-165/16>

employment is 'genuine and effective'. Note that it is not a legal requirement for a person to demonstrate that they meet the minimum earnings threshold.¹²⁷

- There is no requirement for work to have been legal so a person receiving cash in hand payments can be a worker, but this may be difficult to evidence. This principle also applies to an EEA national who is a victim of modern slavery or trafficking as work undertaken, despite it being exploitative, may mean they have a right to reside as a worker or have retained worker status.
- When a person has separated from an EEA national spouse or partner due to domestic violence, and they are unable to provide evidence of their former partner's employment to support an application to the Home Office to confirm that they have a right to reside as a family member of an EEA national, or have a retained their right of residence, then the Home Office has the power under section 40 of the UK Borders Act 2007 to obtain evidence directly from HMRC, and has a policy setting out details of this.¹²⁸
- When an EEA national has resided in the UK for five years or more then they may have a permanent right of residence; an immigration adviser can help to establish this and apply for documentation from the Home Office.
- Families who are unable to claim welfare benefits or homelessness assistance on the basis that the parent has no right to reside and/or are not habitually resident in the UK will need to be assessed for assistance under section 17 of the Children Act 1989, subject to a human rights assessment.
- Families, where the parent has a derivative right to reside in the UK, for example, as the primary carer of a British Citizen child, are not subject to the Schedule 3 exclusions to social services support, so must be provided with assistance when the child is assessed as being in need.

If a person is having difficulty establishing their right to reside, they have the following options:

- Obtain advice from a benefits adviser with a good understanding of European law - legal aid is available for appeals
- Apply for Home Office documentation to confirm their right to reside - an immigration adviser with experience of European law should be able to advise and assist with such an application but legal aid is only available for domestic violence cases
- Send a written query to the AIRE Centre - advice will be provided based on the information given, which may then assist a welfare rights adviser to prepare a benefits claim or appeal, but it may take several weeks to receive a response

¹²⁷ Department for Work and Pensions, *HB Circular A3/2014: Minimum Earnings Threshold*. <https://www.gov.uk/government/publications/hb-circular-a32014-minimum-earnings-threshold>

¹²⁸ Home Office, *European operational policy notice 10/2011 for caseworkers to process EEA nationals' applications*. <https://www.gov.uk/government/publications/european-operational-policy-notice-102011-for-caseworkers-to-process-eea-nationals-applications>

10 Asylum seekers

This chapter sets out what to consider when parents who are seeking asylum, or have been refused asylum, approach the local authority for assistance, and whether the local authority or Home Office will be responsible for providing support to their families.

10.1 Responsibility for providing support

Whether the Home Office or local authority will be responsible for providing accommodation and financial support, depends on the type of Home Office support that a family will be eligible for under the Immigration and Asylum Act 1999: section 4 or section 95.

The local authority would need to check with the Home Office to establish the status of the parent's asylum claim in order to determine which type of support is available to them. It will be important to obtain confirmation that the parent has claimed asylum, whether the claim is still pending and if it has been refused, the dates of the initial refusal and date the parent became appeal rights exhausted if they have received a final determination by the courts.

Responsibility for providing support is governed by legislation and case law:

- If the family are eligible for or are receiving support from the Home Office under section 95, then section 122 of the Immigration and Asylum Act 1999 prevents the local authority from providing financial support and/or accommodation to a child under section 17 Children Act 1989. Such families who approach the local authority need to be assisted to apply for section 95 support.
- If the family are eligible for section 4 support, then a referral to the Home Office for this can only be made if such support is 'available and adequate'. The local authority must have confirmation from the Home Office that section 4 support will be provided and must be able to demonstrate that the support will meet the child's assessed needs, although the courts have suggested that it is unlikely that section 4 support would be sufficient to meet a child's needs.¹²⁹

Even when a family can be referred to the Home Office for support, either because they are eligible for section 95 support, or section 4 support has been assessed as being sufficient to meet a child's needs, it may fall to the local authority to provide accommodation and financial support under section 17 of the Children Act 1989 if there are delays in accessing Home Office support and the child in need assessment establishes that the family have no alternative funds or housing available.

The provision of support under section 17 is not limited by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, for families where the parent has a pending asylum claim which has not been finally determined, or where the parent claimed asylum at port of entry, even if they have been refused and are appeal rights exhausted.

¹²⁹ *VC & Ors, R (on the application of) v Newcastle City Council* [2011] EWHC 2673 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2011/2673.html> & *R (C, T, M and U) v LB Southwark* (2016)

However, the Schedule 3 exclusion will apply where the parent:

- claimed asylum after they entered the UK (rather than at the port of entry), or
- failed to comply with removal directions, or
- has been certified by the Home Office as failing to take steps to leave the UK voluntarily.

In such cases, section 17 support may only be provided where this is necessary to prevent a breach of the family's human rights, i.e., there is a legal or practical barrier preventing them from returning to the parent's country of origin. The local authority will need to undertake a human rights assessment as well as a child in need assessment to establish this.

10.2 Section 95 Home Office support

A person with a pending asylum or Article 3 human rights application (or appeal) may apply for support from the Home Office under section 95 of the Immigration and Asylum Act 1999 when they are destitute (have no accommodation or cannot afford to meet their essential living needs).

They can also apply for emergency support from the Home Office under section 98 of the Immigration and Asylum Act 1999 and may receive this support whilst the Home Office make a final decision on their application for section 95 asylum support.

The Home Office can provide housing and financial support (subsistence) through a card, which can be used in shops and to withdraw cash. A person who already has accommodation may request subsistence support only.

The asylum seeker's dependants will also be provided with support. If the person's asylum claim is unsuccessful and they become appeal rights exhausted, then support will end following a short notice period unless there is a child who was part of the household before the claim was finally determined. In such instances, support will continue until the youngest child turns 18 or they no longer meet the requirements, for example, the Home Office has evidence that they are not destitute. Due to this, most refused asylum seeking families remain supported by the Home Office and do not require local authority support.

A refused asylum seeking family will not be eligible to receive support from the Home Office under section 95 when the first child was born after the asylum claim was finally determined by the Home Office or courts, but instead may be able to apply for section 4 support. However, if a child under 18 was part of the household prior to the asylum claim being finally determined, the family should be able to access section 95 support when they have not previously claimed this.¹³⁰

10.3 Section 4 Home Office support

In certain circumstances, destitute refused asylum seekers may be provided with support from the Home Office under section 4 of the Immigration and Asylum Act 1999. They need to show that they:

- are taking all reasonable steps to leave the UK;

¹³⁰ Section 94(5) of the Immigration and Asylum Act 1999

- are unable to leave the UK due to physical impediment;
- have no safe route of return;
- have been granted leave to appeal in an application for judicial review in relation to their asylum claim; or
- require support to avoid a breach of their human rights, for example they have made further submissions for a fresh asylum claim.

The support provided comprises of accommodation and subsistence, which is intended to cover the costs of food, clothing and toiletries, through a card which can be used in shops but not to withdraw cash. Subsistence support cannot be provided independently of accommodation.

The following organisations provide more information about asylum support:

- Home Office¹³¹
- Asylum Help (assistance with applications)¹³²
- Asylum Support Appeals Project (assistance when support is refused)¹³³

¹³¹ <https://www.gov.uk/asylum-support>

¹³² <http://asylumhelpuk.org/>

¹³³ <http://www.asaproject.org/>

11 Immigration information

This chapter provides immigration information to help practitioners establish an appropriate pathway out of destitution for families where the parent is a non-EEA national who is not seeking asylum. A sustainable solution to a person's destitution will often be achieved by obtaining a form of immigration status which will allow recourse to mainstream welfare benefits and housing services.

It is unlawful to provide immigration advice that relates to a person's specific circumstances unless the adviser is registered with the Office of the Immigration Services Commissioner (OISC), or is exempt from registration, for example, a solicitor registered with the Solicitors Regulation Authority. However, it is important for local authority practitioners to be aware of relevant immigration rules and policies so that they can identify when a person will need to be signposted to an immigration adviser.

Local authority practitioners should advise a person who has applied for, or is receiving, support from social services to inform their legal representative of this, and also that their information will be shared with the Home Office. This will enable the legal representative to advise their client appropriately and update any pending applications where this is necessary.

For more information, see section:

- **12 Legal aid and accessing legal advice**

11.1 Making an immigration application

The Immigration Rules set out the categories under which people can apply for leave to enter or remain in the UK, the requirements which need to be met, the length of leave which will be granted and conditions attached to the leave.¹³⁴

The majority of NRPF families making immigration applications to regularise their status or extend their current leave to remain will be doing so on human rights grounds. This means that they will be making applications:

- under the family life rules set out in Appendix FM,
- under the private life rules set out in Part 7, or
- outside of the Immigration Rules.

In order for such an immigration application to be considered by the Home Office, it needs to be valid in compliance with requirements set out in the Immigration Rules:

- The correct and current version of the application form must be used when this is specified
- The correct fee is paid (when no exemption applies)

¹³⁴ <https://www.gov.uk/guidance/immigration-rules>

- The Immigration Health Charge is paid (when no exemption applies)
- Evidence of identity and photographs are submitted that meet specified requirements

Applications that do not meet these requirements will not be valid, and will be returned to the applicant without their substantive claim being considered by the Home Office.

Additionally, applications can be refused when the applicant has a debt for NHS treatment of £500 or more.

More information about these requirements is provided in the following sections because it is important for local authorities to be aware of any potential barriers to making an application, which may give rise to more presentations to social services for support (when a person fails to successfully make a valid application to extend their stay and loses access to employment or benefits), and delays in case resolution for families where the parents have no current immigration permission and are attempting to regularise their stay.

11.1.1 Application fees and exemptions

Immigration fees are revised (and usually increased) in April each year. The current fees and exemptions are set out under the Immigration and Nationality (Fees) Regulations 2018. The majority of immigration applications incur a fee although those which are exempt include the following types of applications:

- Asylum or Article 3
- Leave to remain under the Destitution Domestic Violence Concession
- Leave to remain as a victim of domestic violence under paragraph 289A, Appendix FM or Appendix Armed Forces, where the person is destitute
- Most applications made by children who are looked after by a local authority (but not children supported under section 17 of the Children Act 1989)
- Leave to remain as a stateless person, or as the family member of a stateless person, under Part 14
- Discretionary leave when the person has a positive grounds decision as a victim of trafficking or modern day slavery
- Leave as a domestic worker who is the victim of slavery or human trafficking
- Change of conditions application to vary leave to allow recourse to public funds

Application fee for leave to remain under the family/private life rules (2018/19)	
Application fee	£1033
Immigration Health Charge	£500
Total	£1533

A separate fee must be paid for each family member that is included in the application.

When a person is not exempt from paying an application fee, but they cannot afford the fee, then they will need to find out whether the fee waiver policy applies to them; most families supported by local authorities will be able to apply for a fee waiver.

11.1.2 Fee waiver policy

When a person cannot afford the application fee then they may be able to apply for a fee waiver if they are making one of the following applications for leave to remain:

- 5-year partner route (only where a person is not required to meet the minimum income threshold because their sponsor is in receipt of a particular benefit and so instead must demonstrate that their sponsor can provide adequate maintenance)
- 5-year parent route
- 10-year partner, parent or private life route - where a person claims that refusal of that application for leave to remain would breach their rights under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR)
- Where other rights under the ECHR are asserted and this forms the substantive basis of an application
- Extension of discretionary leave that was granted following refusal of asylum or humanitarian protection claim - where a person claims that refusal to grant further leave to remain would breach their ECHR rights
- Extension of discretionary leave for a victim of trafficking or slavery who has already accrued 30 months' discretionary leave and is applying to extend it for reasons relating to trafficking or slavery¹³⁵

The policy suggests that a fee waiver will be accepted if the person can demonstrate they would be destitute were it not for social services' support, and that evidence from the local authority will be given significant weight in determining this. However, if this is not clear, it appears that the person must demonstrate that they do not have any disposable income, cannot borrow from friends or family, and that their circumstances are unlikely to change in the immediate future. Caseworkers may contact the local authority when insufficient detail of support has been provided, although this is not a requirement.

It will be essential that the local authority provides evidence of any support they are providing and a legal representative may request this in the form of a letter detailing the support, length of time it has been provided and why. The financial information on NRPF Connect should be kept up to date as this may be referred to by the Home Office.

The Home Office has confirmed that the Immigration Health Charge will also be waived when a fee waiver is accepted, although there is no reference to this in published guidance.

The fee waiver application will need to be made in conjunction with an application for leave to remain, so a person will need to be referred for immigration advice. It is important that a person receiving local authority support seeks advice about applying for a fee waiver because if they pay for their application, they will also need to pay the Immigration Health Charge and they are more likely to have the NRPF condition imposed if their leave to remain application is successful.

¹³⁵ Home Office, *Fee waiver: Human Rights-Based and other specified applications*
<https://www.gov.uk/government/publications/chapter-1a-applications-for-fee-waiver-and-refunds>

11.1.3 Evidence of identity

Paragraph 34(5)(b) of the Immigration Rules requires a person applying for limited or indefinite leave to provide:

'(i) a valid passport or, if an applicant (except a PBS applicant) does not have a valid passport, a valid national identity card; or

(ii) if the applicant does not have a valid passport or national identity card, their most recent passport or (except a PBS applicant) their most recent national identity card; or

(iii) if the applicant does not have any of the above, a valid travel document.'

Paragraph 34(5)(c) confirms that proof of identity need not be provided when:

'(i) the applicant's passport, national identity card or travel document is held by the Home Office at the date of application; or

(ii) the applicant's passport, nationality identity card or travel document has been permanently lost or stolen and there is no functioning national government to issue a replacement; or

(iii) the applicant's passport, nationality identity card or travel document has been retained by an employer or other person in circumstances which have led to the applicant being the subject of a positive conclusive grounds decision made by a competent authority under the National Referral Mechanism; or

(iv) the application is for limited leave to enable access to public funds pending an application under paragraph 289A of, or under Part 6 of Appendix Armed Forces or section DVILR of Appendix FM to these Rules; or

(v) the application is made under Part 14 of these Rules for leave as a stateless person or as the family member of a stateless person; or

(vi) the application was made by a person in the UK with refugee leave or humanitarian protection; or

(vii) the applicant provides a good reason beyond their control why they cannot provide proof of their identity.'

Where 34(5)(c)(ii)-(vii) applies, the Home Office may ask the applicant to provide alternative satisfactory evidence of their identity and nationality.

When a person does not have a required document and none of the exceptions apply, this may lead to delays in being able to make an application. The local authority may wish to make the following checks to prevent such delay:

- Find out what documents the person has in their possession and whether they would comply with this requirement
- Raise a query on the NRPF Connect database to find out whether the Home Office is holding any documents and the validity period of these

- Advise the person to take immediate action to apply for replacement documents if they are missing and are not with the Home Office

This information applies to people making immigration applications only. If a person has made, or intends to make, a protection (asylum) claim, then they should seek legal advice from an immigration adviser before making any contact with their national authorities.

11.2 Refusal of leave due to NHS debt

Where a person has been charged for NHS treatment and has a debt of at least £500 or £1000, the Immigration Rules state that such applications ‘will normally’ be refused. This means that the Home Office has the discretion to refuse on this basis and in some instances may not do so. The minimum amounts that could trigger a refusal are set out in the table below.¹³⁶

NHS debt that may lead to a refusal

Applications under family migration (FM) rules made on/after 24 November 2016	£500
Applications under FM rules made before 24 November 2016	£1000
Other immigration application - debt accrued on/after 6 April 2016	£500
Other immigration application - debt accrued between 1 November 2011 and 5 April 2016	£1000

People who have no current immigration permission and people on short-term visit visas will need to pay up front for most NHS hospital treatment and some community services. Treatment that is urgent or immediately necessary, for example, maternity care, must be provided without requiring upfront payment, but will still be charged to the patient.

When a person has received NHS treatment which is subject to charging, they should be advised to inform their legal representative so that this can be properly addressed in any leave to remain application.

For more information, see section:

- **13.4 NHS treatment**

11.3 Leave to remain with NRPF

The ‘no recourse to public funds’ (NRPF) condition is imposed on most categories of leave to enter or remain. However, in exceptional circumstances, recourse to public funds may be granted, when:

¹³⁶ Home Office Modernised Guidance, *General grounds for refusal: considering leave to remain* <https://www.gov.uk/government/publications/general-grounds-for-refusal-considering-leave-to-remain>

- the person can demonstrate to the Home Office that they are destitute or will become destitute within 14 days (cannot afford accommodation or to meet their family's essential living needs);
- there are compelling reasons relating to the welfare of a child of a parent in receipt of a very low income; or
- when other exceptional reasons apply.¹³⁷

This exception only applies to people granted leave to remain in the UK under one of the following categories:

- Partner or parent under Appendix FM (10-year route to settlement)
- Private life under paragraph 276BE or paragraph 276DG of the Immigration Rules
- Outside the rules on the grounds of family or private life.

When a person is granted leave to remain with NRPF but information was submitted with their application to the effect that they should have been granted recourse to public funds, then their legal representative may be able to seek a reconsideration of this decision.¹³⁸

If they were destitute, or otherwise met the policy, at the time that the decision was made, but no evidence was submitted to the Home Office to confirm this, they will need to seek legal advice about submitting a change of conditions application to the Home Office to request that their leave to remain is varied so that the NRPF condition is removed.¹³⁹

The change of conditions application may also be applied for when a person's circumstances change following their grant of leave to remain with NRPF, which means they would now satisfy the policy to be granted recourse.

Local authority practitioners are not permitted to advise or assist with this type of application because it is unlawful to do so without being registered with the OISC or exempt from registration, so will need to signpost a presenting family, or supported family where leave to remain with NRPF has been granted, for legal advice from an immigration adviser.

To minimise the risk of the NRPF condition being imposed when leave to remain is granted to a family in receipt of section 17 support, local authorities should ensure that:

- the parent has sought advice about applying for a fee waiver when they are making their application for leave to remain;
- the parent informs their legal representative that they are receiving local authority support, including if they start to receive this after their application has been made;
- any evidence required by their legal representative to support their immigration or change of condition application is provided, for example a letter outlining details of the local authority's support; and

¹³⁷ Home Office, *Chapter 8 Immigration and Nationality Directorate Instructions, Annex FM 1.0(b): Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*

<https://www.gov.uk/government/publications/appendix-fm-10b-family-life-as-a-partner-or-parent-and-private-life-10-year-routes>

¹³⁸ Home Office Modernised Guidance, *Reconsiderations*

<https://www.gov.uk/government/publications/reconsiderations>

¹³⁹ <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

- the finance page of NRPF Connect is fully updated, including details of any application fees paid for by the local authority.

11.3.1 Next steps after recourse is obtained

Once a person obtains limited leave to remain that confers recourse to public funds, there is no guarantee that they will retain access to benefits when they make further applications. A person can end up becoming NRPF again if they fail to make a valid application when they apply for further leave and as a consequence, become an overstayer, or if they extend their leave and have the NRPF condition imposed when they cannot support themselves solely by working. People who are on a 10-year settlement route will need to renew their leave every 2.5 years. When a person is reliant on benefits, whether wholly or partly due to low income from employment, then the imposition of the NRPF condition could result in their benefits immediately stopping and they may risk losing their accommodation.

In order to reduce the risk of this happening, the person should be made aware of the following points:

- It will be necessary to seek advice from an immigration adviser in good time before they are due to apply to the Home Office to extend their leave.
- If the person received a fee waiver to make their previous application, their circumstances are likely to be different when they reapply for leave and the terms of the policy could be changed by the Home Office during this time; where possible, a person should save up funds for the next application fee and also be aware that fees are usually increased at least once a year in April.

If a person is granted leave to remain with NRPF they should seek advice immediately from a benefits adviser and from a housing adviser if they are subject to eviction proceedings. They would also need to seek urgent immigration advice to find out if they can request a reconsideration of the NRPF condition or submit a change of conditions application.

11.4 Destitution domestic violence concession

In some instances, a person who has obtained their immigration permission on the basis of having a spouse or partner in the UK may experience a relationship breakdown due to domestic violence, and separate from their partner. They may be able to apply for indefinite leave to remain (ILR) under the domestic violence rule if they have limited leave to enter or remain as the spouse, civil partner, unmarried partner or same-sex partner of a:

- British citizen;
- person with settled status, for example ILR or right of abode; or
- member of HM Forces (must be serving or discharged, and must be a British citizen or a person who has served for at least four years).

Legal aid is available for assistance with this type of application.

As leave to remain under the partner routes is usually subject to the NRPF condition, if the person is destitute and intends to apply for ILR under the domestic violence rule, they may apply to have their leave varied under the Destitution Domestic Violence Concession. If successful, they will be granted three months leave with recourse to public funds. Within this timeframe they must submit their ILR application, and their leave will continue to be valid

under section 3C of the Immigration Act 1971, until a decision is made on the ILR application.¹⁴⁰

Even if a person's spouse or partner leave has already expired, it may still be possible to apply for ILR under the domestic violence rule.

People who have leave to enter or remain as the spouse or partner of a student, points based system worker, refugee or EEA national will not be able to apply for ILR on this basis and will therefore not be able to apply for the concession.

A person who has separated from a partner who has leave to enter or remain as their partner's dependant will always need to be signposted for immigration advice as a matter of urgency to find out what their options are. If the Home Office is informed or otherwise finds out about the relationship breakdown, the person's leave to remain could be curtailed to expire within a short time period. Local authorities need to be aware that this is a possible consequence of conducting an immigration status check with the Home Office.

For more information, see section:

- **2.2.2 Continuing leave (3C leave)**

11.5 When is a child British?

It is important for local authority practitioners to be able to identify when a child is a British Citizen or may be able to register as a British Citizen by applying to the Home Office in order to correctly exercise duties under section 17 of the Children Act 1989:

- When a parent has a derivative right to reside in the UK under European law as the primary carer of a British child, they will be lawfully present in the UK and are not subject to exclusions from support, so social services will be required to provide assistance if the child is in need.
- In order to comply with the section 17 duty to safeguard and promote the welfare of a child in need, practitioners would need to identify when a parent may need to take steps to regularise their child's status, which could include seeking legal advice about registering the child as a British Citizen if this appears to be an option.

The British Nationality Act 1981 sets out how a person may acquire British Citizenship at birth and how a child may register as a British Citizen if they have not acquired this nationality at birth. There are two types of registration applications:

- Registration by entitlement, which means that an application should succeed if all the requirements are satisfied.
- Registration by discretion, which means that the Home Office will exercise its discretion on a case by case basis, in accordance with published guidance.

Children age 10 or older will need to satisfy a 'good character requirement'. The table below sets out when a child will be British and when they may be able to register as British.

¹⁴⁰ <https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence>

For registration applications that are subject to a fee, there is no fee waiver or legal aid available but it may be possible to apply for legal aid exceptional case funding.

The Migrants Resource Centre hosts the Project for the Registration of Children as British Citizens, which holds a monthly surgery and may be able to provide some assistance to destitute children and young people who want to apply to register as a British Citizen but are prevented to by the prohibitive cost of this.¹⁴¹

How British Citizenship is acquired	Criteria	How to evidence citizenship or apply for registration
Automatically acquired at birth	<p>Born in UK to a parent who is British or has settled status, e.g. ILR/ EEA permanent right of residence.</p> <p>Exception – this does not apply to a child born prior to 1 July 2006 to a British/settled father who was not married to the mother (see below).</p>	<p>No application necessary to confirm citizenship.</p> <p>Birth certificate and evidence of British/ settled parent’s nationality usually adequate evidence of citizenship.</p> <p>May apply for a British passport or confirmation from the Home Office using application form NS.¹⁴²</p>
Registration by entitlement	Born in UK and a parent subsequently becomes British or acquires settled status before child turns 18.	Must apply for registration to the Home Office. Fee: £1012
Registration by entitlement	Born in UK and resident here until age 10.	Must apply for registration to the Home Office. Fee: £1012
Registration by entitlement	Born in UK prior to 1 July 2006 to a British/settled father who was not married to the mother.	Must apply for registration to the Home Office. No fee
Registration by discretion	Home Office has discretion to register any child as British – see Nationality Instruction Chapter 9.	Must apply for registration to the Home Office. Fee: £1012

¹⁴¹ <https://prcbc.wordpress.com/>

¹⁴² <https://www.gov.uk/government/publications/application-for-confirmation-of-british-nationality-status-form-ns>

12 Legal aid and accessing legal advice

This chapter sets out when a person may be able to receive legal aid and how to find a legal adviser.

12.1 Eligibility for legal aid

People with NRPF can apply for legal aid funding to help with legal costs. However, legal aid is only available for certain areas of legal advice. Eligibility for legal aid funding depends on a person's financial circumstances and, for some matters, the merits of their case.

In England and Wales legal aid is available for the following types of asylum and immigration cases:

- Asylum applications
- Detention
- Applying for indefinite leave to remain after relationship breakdown due to domestic violence or an EU citizen applying to stay after domestic violence
- Applying for leave to remain as a victim of trafficking
- Proceedings before the Special Immigration Appeals Commission (SIAC)
- Applications for asylum support (when housing and financial support is applied for)

Advice and assistance with all other immigration matters, including applications made under the family life rules, or outside the rules on human rights grounds will not be covered by legal aid, unless a person can successfully apply for exceptional funding.

Legal aid is also available for other types of cases:

- Social services cases where children are involved
- Help or services from the local authority and/or the NHS because of illness, disability or mental capacity
- Representation at a mental health tribunal for people detained in hospital
- Welfare benefit appeals to the Upper Tribunal, High Court, Court of Appeal or Supreme Court
- Homelessness including asylum accommodation
- Judicial review challenges against decisions by public bodies, including local authorities

When legal aid is available for a person's case, they will be subject to a means assessment and will only qualify if they have a low or no income. A person in receipt of local authority support would need to provide a letter outlining the financial assistance they are receiving.

Depending on the stage that the case is at, eligibility for legal aid funding may also be dependent on the case passing a merits test. The legal adviser will be required to make an assessment of the likelihood of the case succeeding and legal aid funding may be refused if the case has little prospect of success.

For more information, see:

- The Law Society¹⁴³

12.2 Exceptional case funding

If the case is not covered by legal aid, then a person may apply for exceptional case funding. Exceptional funding is available to people whose human rights or European rights would be breached if they did not have legal aid.

A person must demonstrate that:

- legal aid is not ordinarily available for their case,
- their case is strong,
- they are financially eligible for legal aid,
- legal aid is necessary to prevent their human rights or European rights from being breached, and
- without legal aid it would be practically impossible to bring their case or the proceedings would be unfair.

To apply for exceptional funding, form CIV ECF1 must be completed and submitted with a merits and means form to the Legal Aid Agency's Exceptional Funding Case Team. Legal advisers generally will not help people to complete this form. However, the Public Law Project may be able to help people to complete the exceptional funding form if they cannot get assistance from elsewhere.

For more information, see:

- The Public Law Project¹⁴⁴
- Government guidance and application forms¹⁴⁵

12.3 How to find a legal aid adviser

To find a local legal aid provider see:

- England and Wales: UK Government website¹⁴⁶
- Scotland: Scottish Legal Aid Board¹⁴⁷
- Northern Ireland: Legal Services Agency Northern Ireland¹⁴⁸

12.4 How to find an immigration or asylum adviser

It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory bodies for solicitors and barristers or an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC).¹⁴⁹

¹⁴³ <http://www.lawsociety.org.uk/for-the-public/paying-for-legal-services/legal-aid/>

¹⁴⁴ <http://www.publiclawproject.org.uk/exceptional-funding-project>

¹⁴⁵ <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>

¹⁴⁶ <http://find-legal-advice.justice.gov.uk/>

¹⁴⁷ <http://www.slab.org.uk/public/solicitor-finder/>

¹⁴⁸ <https://www.dojni.gov.uk/topics/legal-aid>

¹⁴⁹ <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner>

Therefore, it is not appropriate for local authority practitioners to advise a person about the specifics of a person's case, or to make a judgement on whether they have grounds for a specific type of application and the merits of such an application. Instead, they will need to signpost the person to a legal adviser. Due to the lack of legal aid funding for many immigration matters, and general availability of free advice, practitioners will need to make links with voluntary sector agencies providing such services in their area.

To find a local immigration adviser or solicitor who is properly regulated see:

- The OISC - for a regulated immigration or asylum adviser¹⁵⁰
- The Law Society - for a solicitor in England and Wales¹⁵¹
- The Law Society of Scotland¹⁵²
- The Law Society of Northern Ireland¹⁵³
- UK government website – for immigration and asylum advisers in England and Wales with a legal aid contract¹⁵⁴

A person providing immigration and asylum advice under a legal aid contract will need to be accredited under the Law Society's Immigration and Asylum Accreditation Scheme. Although solicitors and advisers providing fee paying services are not required to obtain this accreditation, it is advisable to select a person who has obtained this accreditation where possible.¹⁵⁵

12.5 Law centres and other free advice providers

Some areas will have a local law centre, which may receive funding from various sources, including the local authority, in order to provide advice on a range of matters to the local community. They therefore may have funding to provide free legal advice to families with NRPF, although demand is likely to be high for services. Often they will have immigration and asylum specialists.

Locally, there may be charities and voluntary sector organisations which provide legal advice. Also some private practices may offer drop-in surgeries to provide free one-off advice, so it is a good idea to establish what is available in the local authority area in order to signpost families.

To find a local law centre, see:

- The Law Centres Network¹⁵⁶

¹⁵⁰ http://home.oisc.gov.uk/how_to_find_a_regulated_immigration_adviser/adviser_finder/finder.aspx

¹⁵¹ <http://solicitors.lawsociety.org.uk/#formtop>

¹⁵² <http://www.lawscot.org.uk/find-a-solicitor>

¹⁵³ <http://www.lawsoc-ni.org/solicitors-directory/>

¹⁵⁴ <http://solicitors.lawsociety.org.uk/#formtop>

¹⁵⁵ <http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/>

¹⁵⁶ <http://www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically>

13 Eligibility for other services

This chapter sets out the eligibility requirements for key public services that people with NRPF may need to access. People with NRPF are only prohibited from accessing specified welfare benefits, homelessness assistance and an allocation of social housing through the council register. A person who has NRPF will not be excluded from accessing other publicly funded services because of the NRPF condition. However, there are often eligibility criteria attached to these services which relate to a person's nationality or immigration status, or are linked to being in receipt of certain welfare benefits. It is therefore important to be aware of what services a person with NRPF may be entitled to. Legal aid is covered in chapter 12.

13.1 Work related welfare benefits

A person who is lawfully present and has NRPF may be able to claim the following welfare benefits if they have been in work or have paid National Insurance contributions:

- Bereavement benefit
- Contributory-based employment and support allowance
- Contributory- based jobseeker's allowance
- Guardian's allowance
- Incapacity benefit
- Maternity allowance
- Retirement pension
- Statutory maternity pay
- Statutory sickness pay
- Widows benefit

13.2 Housing association tenancy

Some housing associations maintain their own allocations list as well as letting properties through the local housing authority's allocations list. A person with NRPF can rent a property from a housing association if they apply directly to the housing association for this. They cannot rent a housing association property if this was applied for through the local authority's housing allocations list, because this is a public fund for immigration purposes.

13.3 Education and student finance

All children, regardless of their immigration status, can receive state school education whilst they are of compulsory school age.¹⁵⁷

The only children who cannot receive a state school education are those who have leave to enter or remain with a condition that does not permit study, or study at a state school. This will apply to children who have been issued with leave to enter or remain as a visitor, Tier 4 (Child) or short-term student (Child).

¹⁵⁷ <https://www.gov.uk/know-when-you-can-leave-school>

When applying to undertake further education (age 16+), a person with NRPF will only be able to undertake a course for free if they meet the funding criteria; immigration status and length of residence in the UK will be relevant factors.

The same applies to higher education, as the criteria for lower 'home' fee rates and student finance to help with course and living costs are based on immigration status and length of residence in the UK.

Slightly different rules apply to further and higher education funding in England, Wales, Scotland and Northern Ireland. For more information about eligibility requirements in each region of the UK for further and higher education course funding, student finance and bursaries see:

- UK Council of International Student Affairs (UKCISA) ¹⁵⁸

13.4 NHS treatment

Services delivered by a GP, treatment for certain contagious diseases, and accident and emergency treatment at a hospital, are free of charge to everyone regardless of their immigration status.

In England, some people will need to pay for hospital treatment and certain community healthcare services, for example, community mental health services, district nursing and drug and alcohol treatment. These services must be paid for up front, unless the treatment is deemed to be 'urgent' or 'immediately necessary' by a clinician. Maternity care, including antenatal appointments, will always be treated as 'immediately necessary'. Anyone who is required to pay but is provided with treatment on this basis will still accrue an NHS debt. Failure to pay an NHS debt of £500 or more could lead to an immigration application being refused.

The main groups of people who will be charged for NHS treatment are:

- Visa overstayers
- Illegal entrants
- Refused asylum seekers (who are not receiving Home Office asylum support or accommodation under the Care Act 2014)

Prescriptions may be obtained free of charge if a person is on a low income. They must complete an HC2 form in order to obtain an HC1 certificate. A person receiving accommodation and/or financial support from social services should be able to receive free prescriptions on this basis.

The rules regarding who will be charged for healthcare and what must be paid for are different in England, Wales, Scotland and Northern Ireland.

For more information, see our factsheet:

- *NHS healthcare for migrants with NRPF (England)*¹⁵⁹

¹⁵⁸ <http://www.ukcisa.org.uk/>

¹⁵⁹ <http://www.nrpfnetwork.org.uk/Documents/NHS-healthcare.pdf>

13.5 Child maintenance

A person with NRPF can claim child maintenance from a former partner through the statutory Child Maintenance Service (formerly Child Support Agency).

The parent caring for the child, non-resident parent and qualifying children must all be habitually resident in the UK. It should not matter if they have NRPF. Applications can be progressed if the person does not have a National Insurance number, although the identity of all parties involved will need to be proved, preferably with birth certificates.

A person wanting to discuss their options regarding child maintenance must contact Child Maintenance Options before applying to the Child Maintenance Service. If they do not have a National Insurance number, they can ask Child Maintenance Options for their case to be managed via the Exceptional Case Handling Process.

For more information, see:

- Child Maintenance Service¹⁶⁰
- Child Maintenance Options¹⁶¹

13.6 Free school meals

All children in reception, year 1 and year 2 at state schools in England automatically get free school meals, regardless of their immigration status.

For older children at state schools, normally eligibility for free school meals is linked to the parent being in receipt of certain welfare benefits, all of which are public funds. A child may not be entitled to free school meals if their parents have NRPF and cannot claim these benefits.

Local authorities have their own policies regarding free school meals and some may provide these to all nursery and primary school children, regardless of whether their parents are receiving welfare benefits and the child's immigration status.

To find out about a local authority's policy in England on Wales on free school meals see:

- Government information ¹⁶²

Local authorities supporting a family under section 17 Children Act 1989 will need consider whether free school meals are available when determining how much financial support to provide to meet the child's needs, as additional support may be needed to cover this cost.

13.7 Government funded child care

There are now several different childcare schemes but parents with NRPF, even when they have leave to remain and are working, may not be able to access some of these.

For more information, see:

- NRPF Network website

¹⁶⁰ <https://www.gov.uk/child-maintenance/overview>

¹⁶¹ <http://www.cmoptions.org/>

¹⁶² <https://www.gov.uk/apply-free-school-meals>

13.8 Free and concessionary travel

Concessionary travel arrangements vary regionally, but usually young children will be eligible for free travel. Older children may be required to obtain a pass that allows for free or reduced rate travel, which varies regionally. Such schemes do not have immigration restrictions.

Some local authorities operate concessionary travel passes for people who are elderly or have a disability. People with NRPF are not prohibited from applying for these, but will have to satisfy the relevant eligibility criteria to obtain one. A person would need to contact their local authority to find out whether they have such a scheme.¹⁶³

Elderly or disabled people with NRPF who are resident in Greater London may be able to apply to London Councils for a Freedom Pass.¹⁶⁴

¹⁶³ <https://www.gov.uk/find-your-local-council>

¹⁶⁴ <http://www.londoncouncils.gov.uk/services/freedom-pass>

Glossary

Appeal rights exhausted (ARE)	A person will become 'appeal rights-exhausted' when their asylum or immigration claim and any subsequent appeals have been unsuccessful, the time to lodge an appeal has passed, or they have no further right to appeal.
Asylum seeker	A person who has made a claim to the UK government for protection (asylum) under the United Nations Refugee Convention 1951 and is waiting to receive a decision from the Home Office on their application or from the Court in relation to an appeal.
Country of origin	Usually the person's country of nationality but if this is unclear then local authorities would need to find out from the Home Office which country the person may be removed to or whether the person is stateless.
EEA national	<p>A person who is a national of a European Economic Area (EEA) country or Switzerland: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Slovakia, Sweden & the UK.</p> <p>When the term EEA national is used in this guidance this does not include the UK.</p>
Home Office	<p>The government department that is responsible for maintaining immigration control, including:</p> <ul style="list-style-type: none">• UK Visas and Immigration (application casework)• Border Force (border control)• Immigration Enforcement (enforcement within the UK including the Intervention and Sanctions Directorate which undertakes immigration status checking for local authorities)
Humanitarian Protection	A person who has been recognised as having a real risk of serious harm or well-founded fear of persecution in their country of origin, but not for any reason set out under the UN Refugee Convention 1951. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after five years.
Illegal entrant	A person who has entered the UK without the correct immigration permission, has used deception to gain entry, has not passed through immigration control, or who re-enters the UK before their deportation order is revoked.
Immigration Rules	The statutory instrument which sets out the categories under which people can apply for leave to enter or remain in the UK, the requirements which need to be met, the length of leave which will be granted and conditions attached to the leave.
Indefinite leave to enter	Immigration permission with no time limit on the length of stay in the UK. Also referred to as 'settled status.' There are no conditions attached to this type of leave so a person may undertake employment and can access public funds (unless they were granted as an adult dependant relative and have lived in the UK for less than five years).
Indefinite leave to remain	
Leave to enter	Immigration permission issued by an Immigration Officer when a non-EEA national enters the UK. Most people are required to apply for prior

	entry clearance at a visa application centre abroad, which will be provided as a vignette in the person's passport.
Leave to remain	Immigration permission issued by the Home Office, which is applied from within the UK, usually by completing a form and submitting this online, by post or in person.
Leave to remain outside of the rules	Leave to remain granted outside of the Immigration Rules on the basis of a person's family or private life in the UK.
Limited leave to enter	Immigration permission issued for a time limited period; conditions may include restrictions on employment and access to public funds.
Limited leave to remain	
Limited right to rent	A person with limited leave to remain should be able to rent, sub-let or be the paying lodger of a private landlord in England for 12 months, if their leave to remain expires within one year, or until their leave expires if this is after 12 months.
No recourse to public funds (NRPF)	A condition that prevents a person from being able to claim most welfare benefits, homelessness assistance and social housing because of their immigration status.
No right to rent	A person who is seeking asylum or has no current immigration permission will not be able to rent, sub-let or be the paying lodger of a private landlord in England, unless the Home Office grants them permission to rent on an exceptional basis.
Primary carer	When a person, who is the parent, grandparent, or legal guardian, either has primary responsibility for the child's care or shares this responsibility equally with another person (who does not have British Citizenship, settled status or a European right to reside on any other basis).
Refugee	A person who has been recognised as having a well-founded fear of persecution in their country of origin for reasons of race, religion, nationality, membership of a particular social group, or political opinion under the UN Refugee Convention 1951. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after five years.
Refused asylum seeker	A person who has made a claim for asylum which has been finally determined and refused.
Unlimited right to rent	A person will be able to rent, sub-let or be a paying lodger of a private landlord in England if they are British Citizen, EEA national or if they have settled status (for example, indefinite leave to remain).
Visa overstayer	A person who had leave to enter or remain in the UK for a limited period and has no current immigration permission because they: <ul style="list-style-type: none"> • did not make an application to extend their leave before their previous leave expired, or • made an application which was refused after their previous leave expired.

Endorsements

This guidance has been endorsed by the Local Government Association (LGA) and Association of Directors of Children's Services (ADCS).

The Local Government Association (LGA) is the national voice of local government and works with councils to support, promote and improve local government.

<<http://local.gov.uk/>>

ADCS recognises that the ways of working described in this document represent effective practice and is offered by way of assistance to local authorities and their partners in order to improve services and the support provided to children, young people and their families. The content is not, nor does it seek to be binding on Local Authorities, nor will the endorsers of this document monitor Local Authority compliance. <<http://adcs.org.uk/>>

Acknowledgements

This guidance has been written by Catherine Houlcroft, Project Officer at the NRPF Network with input from the NRPF team at Islington Council.

Disclaimer

This practice guidance is for information purposes only and provides general guidance about the issues a local authority practitioner may need to consider when assessing and supporting NRPF families. The guidance is not intended to constitute advice in relation to any specific case. Every attempt has been made to present up to date and accurate information and this guidance will be updated periodically. However, practitioners are advised to check the current legal position and seek advice from their local authority legal teams on individual cases.

We provide no warranty as to the accuracy of the information contained in this guidance and accepts no liability for any loss, damage or inconvenience caused as a result of reliance on such information. We are not responsible for the content of external websites which are linked from this guidance, and do not approve or endorse websites which are not controlled by Islington Council. Use of such links will not render us liable to you or any other person for loss or liability of any kind.

Terms of use

Any person or organisation wishing to reproduce any section of this guidance must contact the NRPF Network at Islington Council to request permission. You may link to the online version of this guidance from a textual reference on your website but you may not use our logo, and you must ensure that no false or misleading claims are made about the NRPF Network (Islington Council) or its relationship with the person or organisation on whose pages the links appear.

Email: nrpf@islington.gov.uk

Web link: <http://www.nrpfnetwork.org.uk/Documents/Practice-Guidance-Families.pdf>

For further information, please contact:

NRPF Network

Tel: 0207 527 7121

Email: nrpf@islington.gov.uk

Web: www.nrpfnetwork.org.uk

© Islington Council, April 2018.

This is version 3 of guidance originally published on 10 November 2016.