NRPF network

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

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ADCS Leading Children's Services

Local Government Association

Contents

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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/>

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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 and the local authority determines that it must use its power to provide accommodation and/or financial support.[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 European 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 essential safety net support to protect the most vulnerable people from destitution.[3] It is therefore necessary for thorough assessments to be undertaken so that support is provided to eligible families under section 17, and that proactive steps are taken to resolve supported cases.

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. Please see: Support for migrant families.[4]

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[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] *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49. http://www.bailii.org/ew/cases/EWCA/Civ/2015/49.html
[4] http://migrantfamilies.nrpfnetwork.org.uk

Social care is a devolved power and the Children Act 1989 applies to England only. Wales, Northern Ireland and Scotland have different legislation, although the responsibilities towards children are similar to those which apply in England. As immigration legislation applies to all administrations, this guidance provides all local authorities with a reference as to how to assist families with NRPF. 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 Legislative changes – expected in 2017

The Immigration Act 2016 contains important changes that will apply in England to local authority support (accommodation and financial assistance) provided to destitute families where parents:

- have no current immigration permission, or
- have a derivative right to reside under European law as the primary carer of a British (or other EEA national) child (Zambrano carer).

When these provisions of the Act are implemented, such families will not be able to receive support under section 17 of the Children Act 1989 but the local authority will be required to provide support to eligible families under new legislation: paragraph 10A of Schedule 3 of the Nationality, Immigration and Asylum Act 2002.

Additionally, Home Office support for asylum seeking families will be terminated when the parent's claim is finally determined and refused; Home Office support for refused asylum seekers will only be available in very limited circumstances. Refused asylum seeking families who remain in the UK after their asylum support has stopped may therefore request assistance from local authorities, and will need to be assessed for support under the new legislation.

When the Act is implemented there will be a significant proportion of families who will continue to be eligible for support under section 17, including those where the parents have leave to remain with no recourse to public funds (NRPF); are EEA nationals (subject to a human rights assessment); and all families receiving section 17 support prior to the implementation date.

The local authority and asylum support changes are expected to come into force in 2017. The asylum support measures will take effect across the UK but it is unclear at present whether the changes to local authority support will apply in the devolved administrations. This guidance will be updated to incorporate the changes when the full detail is known.

For more information see our factsheet:

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

[5] http://www.welshrefugeecouncil.org/migration-information/legal-briefings/children-and-families
[6] http://www.nrpfnetwork.org.uk/Documents/immigration-bill-families.pdf

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, social housing and homelessness assistance.

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 person that…	Examples
Requires leave to enter or remain in the UK but does not have it	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)	Spouse of a settled person Tier 4 student and their dependents Leave to remain under family or private life rules
Has leave to enter or remain in the UK that is subject to a maintenance undertaking	Adult dependant relative of a British Citizen or person with settled status

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

- Indefinite leave to remain or no time limit
- 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
    - Destitute 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)*
- UASC leave

*Some people who have certain types of leave to remain with NRPF may be able to gain recourse to public funds by applying to the Home Office for the condition to be removed.

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 should be assumed that they do have access to public funds, although they would need to satisfy the relevant benefit or housing eligibility requirements.

Section 115 of the Immigration and Asylum Act 1999 does not apply to European Economic Area (EEA) nationals but they not be able to access certain welfare benefits and housing assistance if they fail the right to reside and/or habitual residence tests, which are applied when determining eligibility for these services, so may also be referred to as having NRPF.

People who have a derivative right to reside under European law may be able to claim public funds depending on what basis they have acquired this right.

For further information see sections:

- **1.3 What are 'public funds'?**
- **2.2 Checking immigration status**
- **5 EEA nationals and family members**
- **9.3 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 specifies which welfare benefits a person who is subject to immigration control will be excluded from:

- 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 authority[7]
- 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 [8]
- 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 and local authority homelessness assistance.

There are several exceptions to the rules regarding public funds, which are set out in the Home Office *Modernised Guidance on Public Funds*.[9] This means that a person who has leave to remain with NRPF may be able to claim certain benefits without this affecting their immigration status:

[7] 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.
[8] In Northern Ireland included crisis loans and community care grants until 1 November 2016.
[9] https://www.gov.uk/government/publications/public-funds

- When they are a national of a country that has a reciprocal arrangement with the UK.
- When they have a British Citizen child they can claim Child Benefit.
- When they make a joint claim for Tax Credits with a partner who has recourse to public funds.

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

Assistance provided under social services legislation is not a public fund for immigration purposes but there are restrictions for some people based on nationality and immigration status who require certain types of support from social services.

For further 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.

- Monitor caseloads and expenditure on families with NRPF using NRPF Connect, which will also inform the Home Office of local authority involvement in case and contribute to the only national data source on NRPF service provision.[10]

- When provided, support should be kept under review and steps taken to resolve the case; this may involve monitoring the progress of the parent's immigration case over NRPF Connect and working in partnership with the Home Office.

- 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.

[10] http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx

- 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 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.

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

For further information see sections:

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

2 Pre-assessment screening

When a family presents to a local authority requesting accommodation and/or financial assistance, there will be some key considerations that will need to be made as part of the process to determine whether support can be provided:

- 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 European Treaty rights.
- Whether emergency support needs to be provided whilst assessments are being carried out.

At this first point of contact the family can be asked for information relating to their financial circumstances, which will be later 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 establish the needs of the child.

For further information see sections:

- **2.1 Duty to undertake a child in need assessment**
- **2.2 Checking immigration status**
- **2.3 Exclusions from support**
- **2.4 Emergency support**
- **3 Assessing need under section 17**

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.[11]

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 further information see section:

- **8 Resolving supported cases**

[11] 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/

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."*

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).[12] 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.

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.[13]

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[12] *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

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

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.[14] 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.

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.

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."* [15]

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.[16]

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.

[14] *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
[15] *R (Stewart) v LB Wandsworth & Ors* (2001), paragraph 28.
[16] *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

- 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; encourage agencies to share early concerns about safety and welfare of children and to ensure preventative action before a crisis develops."* [17]

2.2 Checking immigration status

It is important for local authorities to establish the nationality and immigration status of a family requesting accommodation and/or financial support to ascertain whether:

- the parents have any entitlement to public funds, employment or Home Office asylum support;
- exclusions to section 17 support apply; and
- the family have any immigration claims pending with the Home Office or appeal courts when they are in an excluded group.

Local authorities will check a family's immigration status directly with the Home Office but the family can also be asked to provide evidence of their nationality and immigration status in the UK.

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 Entry Clearance Posts. Various documents are issued depending on the type of immigration permission given and date it was granted. Some examples of documents are:

- Immigration status document
- Visa/ residence permit in passport
- Stamp in passport
- Biometric residence permit (BRP)
- Asylum registration card (ARC)
- Home Office issued convention travel document or certificate of travel
- EEA family permit/ residence card/ permanent residence card/ derivative residence card
- Home Office letter specifying what type of immigration permission has been granted

The Council of the European Union maintains a public register of documentation issued by European Union countries.[18] Note that the register it is not complete, so some UK immigration documents may not appear on the register.

There will be instances when a person may be unable to provide original documentation, for example, when they have submitted their passport and/or BRP to the Home Office with a

[17] Children Act 2004, Explanatory Notes, paragraph 67. http://www.legislation.gov.uk/ukpga/2004/31/notes

[18] http://prado.consilium.europa.eu/EN/categories/showAllCategories_GBR.html

pending application, or when the Home Office has retained documentation following a refusal of an application.

Sometimes Home Office systems do not show that an application has been made, for example, if it has only recently been submitted, so this may not be idenitified in a status check. In such instances, alternative evidence provided by the family or their legal representative can be accepted as sufficient and the Home Office should be notified that an application has been made. Such evidence could include an acknowledgement letter from the Home Office that confirms the date the application was made, or 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.

For further information see sections:

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

2.2.1 Continuing leave (3C leave)

A person will continue to be lawfully present after their leave to remain has expired when they have applied to extend their leave to remain when certain conditions are satisfied that are set out in 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 when a 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 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 ends the person will become an overstayer.

2.2.2 EEA nationals and their family

European Economic Area (EEA) nationals and most family members of EEA nationals 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 fact. 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.

Even if an EEA national or family member has a Home Office document, if their circumstances have changed since this was issued, the document may not be sufficient to establish whether they have access to welfare benefits and further enquiries will need to be made to find out whether they have a right to reside.

For further information see sections:

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

2.2.3 How to request a Home Office status check

The Intervention and Sanctions Directorate (ISD) at the Home Office is responsible for providing information to local authorities, and a status check for a person requesting support can be requested by:

- creating a new case on NRPF Connect,[19] or
- sending an email to: EvidenceandEnquiry@homeoffice.gsi.gov.uk.

Local authorities signed up to use the NRPF Connect database will need to create a new case which will alert the Home Office to provide an immigration status check within the timescales set out in the Service Level Agreement.[20] 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 must use the database to update the Home Office of any change of circumstances, for example, when a person has submitted a new immigration application.

Other local authorities will need to contact the Home Office by email and will be required complete a form detailing why the information is needed.

2.3 Exclusions from support

The primary reason for checking nationality and immigration status is because local authorities are required to establish whether a parent is in one of the groups of people who are excluded from receiving 'support and assistance' under section 17 of the Children Act 1989.

Schedule 3 of the Nationality Immigration Asylum Act 2002, sets out five groups of people who are ineligible for support:

(1) A person granted refugee status by another EEA State and their dependants.
(2) EEA nationals and their dependants (excluding UK nationals).
(3) A person who is not seeking asylum and is unlawfully present in the UK and their dependants:

[19] http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx
[20] http://www.nrpfnetwork.org.uk/Documents/NRPF-connect-SLA.pdf

- Visa overstayer
- Illegal entrant
- Refused asylum seeker when 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)[21]

(4) Refused asylum seekers who fail to comply with removal directions, and their dependents, 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.

Paragraph 1 of Schedule 3 sets out the legislation under which such migrants are excluded from receiving assistance. The legislation relevant to families 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 authority to provide for the child's needs depends on whether the parent is ineligible under Schedule 3.[22]

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.

When parents are in an excluded group, the exclusion does not mean that support can automatically be refused to the family because there is an important exception to the exclusion: where parents are caught by the restrictions to support, paragraph 3 of Schedule 3 requires the local authority to provide support and assistance where this is necessary for the purpose of avoiding a breach of the family's human rights or rights under the European Treaties.

[21] 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

[22] *M v London Borough of Islington & Anor* [2004] EWCA Civ 235. http://www.bailii.org/ew/cases/EWCA/Civ/2004/235.html

The purpose of Schedule 3 is to restrict access to support to a person in an excluded group when they can no longer self-support themselves and their family in the UK and when they can return to their country of origin. This means that along with establishing eligibility for services by undertaking a child in need assessment, local authorities must consider whether the family can freely return to their country of origin, where the parents may be able to access employment and receive services, therefore avoiding homelessness and destitution.

In order to determine whether a family can freely return to the parent's country of origin, the local authority must undertake a human rights assessment. This will include establishing whether the family are practically able to leave the UK, as any barriers preventing return will need to be identified and cleared before return can be fully considered.

For further 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 requires a local authority to inform the Home Office when a person requests assistance if the person is:

- 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 them to social services. Local authorities using the NRPF Connect database will meet this requirement when they create a new case.

For further information see section:

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

2.3.2 Families not excluded from support

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 limited leave to enter or remain in the UK with the NRPF condition;
- a derivative right to reside under European law, for example, as:
    - 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;
- is an asylum seeker; or
- is a 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.

Households, where the parent is lawfully present, for example, has limited leave to remain with NRPF, or a derivative right to reside under European law, make up about a quarter of the local authority NRPF caseload.[23] When a parent has limited leave to remain with NRPF, they can work but will be unable to claim benefits to top up a low income, such as housing benefit and tax credits. They are also unable to access social housing. As this status is commonly awarded to sole carers of a British Citizen child, or child who has lived in the UK for seven years, the parent will often face difficulties finding employment and funding childcare to enable them to afford accommodation and provide for the 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. Where the parent is a Zambrano carer and their child is in need because they cannot afford housing or to meet their family's living needs, the local authority will be under a positive duty to provide accommodation and/or financial support to the family under section 17 of the Children Act 1989. In the case of *Sanneh & Ors v SSWP* (2015), the Court of Appeal found that the government's policy of restricting access to mainstream benefits and housing for this group of people was lawful because section 17 provides a safety net to protect destitute children. For more information see our Factsheet:

- *Zambrano carers: local authority duties and access to public funds*[24]

For further information see sections:

- **3 Assessing need under section 17**
- **5.4.1 Benefit eligibility table**
- **9.3 Leave to remain with NRPF**

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.

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.[25] 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.

[23] Data taken from NRPF Connect for 38 authorities at year end 2015/6. http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx
[24] http://www.nrpfnetwork.org.uk/Documents/Zambrano-Factsheet.pdf
[25] *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

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."* [26]

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 scare resources and other

[26] 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

support options available to the family into account and must decide what intervention is required on the facts and evidence of an individual case.[27]

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.[28]

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.[29]

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.[30]

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.[31]

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, 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

[27] *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
[28] *R (C, T, M and U) v LB Southwark* (2016), paragraphs 16 & 18.
[29] Department for Education, *Working together to safeguard children,* paragraphs 26 & 29.
[30] Department for Education, *Working together to safeguard children,* paragraphs 36-7.
[31] Department for Education, *Working together to safeguard children,* paragraphs 58 & 60.

accommodation.[32] 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.

Where such a situation is identified, and the child does not appear to have needs other than those related to a lack of housing or provision for their basic living requirements, it may be possible to lawfully conclude that support will not be provided without undertaking a full child in need assessment, but only when the local authority has made detailed enquiries that properly consider the needs of the child. This practice has been accepted by the courts in the interim relief case of *Giwa v LB Lewisham* (2015), when it appeared that a family, who were Nigerian overstayers, had other support options available including returning to Nigeria.[33] It is notable that the enquiries that were carried out by the local authority appeared to be no less rigorous than they would have been had a child in need assessment been conducted.

Giwa v LB Lewisham (2015) confirms that when determining whether the local authority has acted lawfully and rationally, what matters is how the local authority has collected and documented the information and evidence needed to support its decision making process. In *R (C, T, M and U) v LB Southwark* (2016), the Court of Appeal has since 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, so local authorities may find it more efficient to undertake a child in need assessment when deciding all applications for support.

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 because they are unable to work, claim benefits or access social housing due to their immigration status.

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).[34]

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.[35] Such risks to the child must also be considered.

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

[32] Price & Spencer, *Safeguarding children from destitution*, p.28.
[33] *R(Giwa) v London Borough of Lewisham* [2015] EWHC 1934 (Admin)
[34] *R v Northavon District Council, Ex p Smith* [1994] 2 AC 402
[35] Price & Spencer, *Safeguarding children from destitution*, p.29.

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 other support options will be limited:

- 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 top-up benefits usually provided to families with a low income.[36]

For further information see sections:

- **2.3 Exclusions from support**
- **2.3.2 Families not excluded from support**
- **4.2.1 Legal barriers to return**

3.4 Considerations when undertaking an assessment

In *R (C, T, M and U) v LB Southwark* (2016), the Court of Appeal is 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.[37] 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.

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

[36] *Birmingham City Council v Clue* [2010] EWCA Civ 460 (Admin) & *Sanneh & Ors v Secretary of State for Work and Pensions* [2015] EWCA Civ 49
[37] *R (C, T, M and U) v LB Southwark* (2016), paragraph 12.

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.

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 not been permitted to allow a person who does not have any immigration status to open a new current account. (There is a provision in the Immigration Act 2016, not currently in force, which will require banks to undertake periodic checks and close or freeze an account when the holder is identified as having no current immigration permission.)

- Since 1 February 2016 private landlords in England cannot legally rent a property, sub-let a property or have a paying lodger who does not have any current immigration status and when the Home Office does not grant that person permission to rent. When establishing whether a family can afford to fund their own accommodation, the local authority must have regard to whether the right to rent scheme would prevent the family from obtaining housing in the private sector – *R(N) v Greenwich LB Council* (2016).[38]

- On 1 December 2016, landlords will be 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; the Home Office will be actively informing landlords about such people, and in such cases the landlords 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 the above measures and take these into account 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.

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 respond.

[38] *R (on the application of N) v Greenwich London Borough Council* (2016) QBD (Admin) - extempore judgment

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.[39]

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 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.*

[39] *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

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".”* [40]

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

Local authorities need to ensure that full investigations into a family's circumstances are undertaken in all circumstances. In the case of *R (BC) v Birmingham City Council* (2016), the local authority initially refused to undertake a child in need assessment when a Jamaican overstayer and her 6 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.[42] When Birmingham City Council did undertake an assessment the child was found not to be in need, concluding that the family could apply to the other local authority for support or rely on the help of the mother's cousin in Birmingham.

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[40] *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

[41] *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

[42] *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

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 infected the Council's reasoning and caused it to fail 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.

The child in need assessment must properly consider any reasons for asserting that a child is not in need because alternative support is available to the family. 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 local authority had not identified and specified which friends or family members would be able to provide accommodation; the assessment has failed to consider the cost of staying in a B&B compared with the mother's resources and there was no reasonable prospect of her renting in the private sector due to the right to rent scheme.

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.

This is again emphasised by the court in *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 Court found that 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. [43]

3.5 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 the European 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 further information see sections:

- **2.3 Exclusions from support**
- **4.3 Determining whether there would be a breach of human rights**

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

4 Assessments when the exclusion applies

4.1 Human rights assessment

Paragraph 5 of Schedule 3 of the Nationality, Immigration Asylum Act 2002 prevents local authorities from providing support or assistance under section 17 Children Act 1989 to families where the parent's nationality or immigration status means that they are in an excluded group, unless such support:

> *"..is necessary for the purpose of avoiding a breach of a person's Convention rights or rights under the European Union Treaties."*

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

> *"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."* [44]

For such cases, in addition to a child in need assessment, the local authority must undertake a human rights assessment to establish whether, or to what extent, the family's circumstances are such that the restriction on providing support or assistance under section 17 Children Act 1989 should be lifted in order to avoid a breach of human rights or European treaty rights. The key issue that must be established is whether the family can return to the parent's country of origin when the parent is unable to support their family and/or has no immigration permission to remain in the UK.

The human rights assessment must determine whether:

- the family can freely return to the parent's country of origin;
- return to country of origin would cause a breach of the family's human rights under the European Convention on Human Rights (ECHR); and
- return to country of origin would cause a breach of the family's rights under European treaties (applicable to 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 parents are 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.

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

- 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.

4.2 Determining whether the family can freely return

The first stage of the assessment is to identify whether there are any legal or practical barriers that prevent the family's return to country of origin in order to establish whether return is reasonably practical. If there is a barrier preventing return then it would be perverse for the local authority to make further considerations about the family's return when this cannot realistically happen.

If support is refused or withdrawn when there is a barrier to return then this may result in the family experiencing enforced destitution, which would be a breach of Article 3 of the European Convention on Human Rights (ECHR). As a result, the family may experience inhuman and degrading treatment. In the case of *Limbuela v Secretary of State* (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.[45]

When there is no legal or practical barrier to return, then the local authority does not have a duty to support a family when they are freely able to return to their country of origin, see: *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: see *AW v Croydon LBC* (2005).[46]

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.[47]

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

[45] *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
[46] *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
[47] *Birmingham City Council v Clue* [2010] EWCA Civ 460 http://www.bailii.org/ew/cases/EWCA/Civ/2010/460.html

make removal directions, would be compelled to leave the UK if support under section 17 is refused.[48]

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.

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").*	No longer issued.
1 December 2016 onwards	Right of appeal depends on basis of claim - some will be certified under "remove first, appeal later" provisions.**	No longer issued.

* 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 on non-asylum human rights claims. 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)*.[49]

** 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 is referred to "remove first, appeal later", meaning that most non-asylum human rights claims are unlikely to be issued with an in-country right of appeal on refusal. However, this provision is currently subject to a phased implementation and does not apply to: people applying for further leave to remain on family or private life grounds when they already have leave to remain; overstayers who are making a claim based on their relationship to a British partner or child; or people making an Article 3 medical claim. However these applications can still be subject to certification under section 94 if they are the claim is "clearly unfounded". See the Home Office guidance, *Section 94B of the Nationality, Immigration and Asylum Act 2002*.[50]

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.,

[48] *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

[49] 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

[50] Home Office, *Section 94B of the Nationality, Immigration and Asylum Act 2002* (updated 1 December 2016). https://www.gov.uk/government/publications/section-94b-of-the-nationality-immigration-and-asylum-act-2002

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.

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.

The majority of NRPF cases are likely to be resolved by regularisation of immigration status. 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 further information see sections:

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

4.2.2 Practical barriers to return

Practical barriers could include the person's inability to:

- obtain identity or travel documentation,
- travel due to ill health or a medical condition, or
- travel due to being at late stages of pregnancy or caring for a new born baby.

When such barriers apply they may only be temporary, and it might be appropriate to provide support to the family on a short term basis and assist them to overcome this barrier, for example, by helping to obtain travel documentation.

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 their human rights being breached.

For further information see section:

- **4.3.3 Medical cases**

4.3 Determining whether there would be a breach of human rights

When the local authority is clear that return is reasonably practical because there are no legal or practical barriers that will prevent a family from leaving the UK, then it will need to determine whether the provision of support will be necessary to prevent a breach of the family's human rights. This means that the local authority would need to consider whether return to country of origin would result in a breach of the family's human rights.

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 *Razgar v SSHD* (2004) in order to establish whether refusal of an immigration application would breach a person's rights under Article 8.[51] 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?

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 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.[52]

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.

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

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

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 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.[53]

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.[54]

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, when a person has previously been refused asylum.

The principle underpinning the *Clue* and *KA* cases is that the local authority must defer to the expertise of the Home Office in making human rights decisions, and therefore 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.

If the family does not make a protection application, then there are several factors a local authority will need to consider within the human rights assessment:

- The family'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 parent 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 appeal.[55]

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

[53] https://www.gov.uk/government/publications/every-child-matters-statutory-guidance
[54] http://www.unicef.org/protection/files/5423da264.pdf
[55] 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

deprived of the type or level of medical treatment that they are receiving in the UK. This 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."* [56]

This test has been followed by the Court of Appeal in the case of *GS (India) v Secretary of State for the Home Department* (2015) in considering whether return to country of origin would be a breach of Article 3 for six appellants, five of whom (from India, Ghana and Jamaica) suffered from terminal renal failure or end stage chronic kidney disease and received essential life preserving kidney dialysis in the UK. Without dialysis, their life expectancy would be reduced to two to three weeks. The sixth appellant, from the Democratic Republic of Congo, was at an advanced stage of HIV infection, received antiretroviral therapy and other medication, which if withdrawn would lead to his life expectancy reduced to months or a year or two at most. Despite the appellants with kidney disease having no transplant, and no, or no real prospect of continued dialysis in their home country, the Court of Appeal found that removing them to their respective countries would not result in a breach of Article 3. The Court determined that Article 3 would only be engaged in the most exceptional circumstances, i.e., deathbed cases, interpreting the exception outlined in *N v SSHD* very narrowly.[57] The Supreme Court refused the appellants' application for permission to appeal this decision in July 2015 because there appeared no reasonable prospect of the Court departing from the position of *N v SSHD*.[58]

However, 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 ECHR 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

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[56] *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

[57] *GS (India), & Ors v The Secretary of State for the Home Department* [2015] EWCA Civ 40 http://www.bailii.org/ew/cases/EWCA/Civ/2015/40.html

[58] https://www.supremecourt.uk/docs/permission-to-appeal-2015-0607.pdf

Assistance Act 1948 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.[59] Note that this case pre-dates the Court of Appeal's determination of *GS (India)* which limits the exception in *N* to deathbed cases.

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) & Anor v Upper Tribunal IAC & Anor* (2013), the Court of Appeal considered the case of a child with beta thalassemia, 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 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.[60]

It may be also argued that there is a breach of Article 8 in medical cases, and immigration applications raising medical grounds may succeed on this basis when they fail to meet the test to engage Article 3.

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 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."* [61]

The case of *Akhalu (health claim: ECHR Article 8) Nigeria* (2013) involved a student, who, despite falling ill with kidney failure after entering the UK finished her degree. She received dialysis and later a kidney transplant. The Home Office accepted that she would die within

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[59] *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

[60] *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

[61] *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

weeks on return to Nigeria as she would not be able to access treatment there. The Tribunal held that when considering Article 8, the countervailing public interest in removal will outweigh the consequences for the health of the claimant due to a disparity of health care in all but a very few rare cases. A decision maker must have regard for all aspects of private life, even if they do not have any bearing on the claimants' prognosis.[62]

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 as a manifestation of health tourism and in light of all the evidence of the case, whether it would be disproportionate to remove the child.

The High Court found in *De Almeida* that return to Portugal would be a breach of the claimant's private life under Article 8, but such interference was not justified by the state due to the relatively small cost saving to be gained from returning him. In this instance the issue in question was the preservation of the economic wellbeing of the UK, rather than the maintenance of immigration control.

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

- Previous decisions made by the Home Office and courts.
- Medical confirmation of the family member's health, prognosis, and the healthcare they are currently receiving.
- 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 the family member. To help establish this the local authority may refer to:
    - World Health Organisation (for medical services)[63]
    - National embassies
- What support the person currently receives from family or other people in the UK and what such support would be available on return.
- What access to services, housing and income the person would have to ensure they would not experience degrading treatment if they have a prognosis that condition may deteriorate should similar treatment be unavailable.

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:

[62] *Akhalu (health claim: ECHR Article 8) Nigeria* [2013] UKUT 400 (IAC) http://www.bailii.org/uk/cases/UKUT/IAC/2013/[2013]_UKUT_400_iac.html
[63] http://www.who.int/en/

- 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.

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."* [64]

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.

[64] *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

- 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.

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.

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 whist 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 *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 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.

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, there are a number of sources:

- Home Office Country information and guidance reports[65]
- US State Department Human rights reports[66]
- Amnesty International Annual human rights reports[67]
- International Labour Organisation[68]
- IOM Information about return for migrants[69]
- Routes Home (support services in EU countries)[70]

4.4 Determining whether there would be a breach of European Treaty rights

Schedule 3 of the Nationality, Immigration Asylum Act 2002 prevents local authorities from providing support or assistance under section 17 of the Children Act 1989 to European Economic Area (EEA) nationals and their dependants, unless this is necessary to prevent a breach of human rights or rights under the European Treaties.

Having established that there are no legal or practical barriers preventing the family's return, the first step in determining whether support or assistance is necessary to prevent a breach of the family's rights under European Treaties is to establish whether the EEA national has the right to reside in the UK under European law, or as the family member of such a person.

The local authority would need to gather information to help establish this:

[65] https://www.gov.uk/government/collections/country-information-and-guidance
[66] http://www.state.gov/j/drl/rls/hrrpt/
[67] http://www.amnesty.org/en
[68] http://www.ilo.org/global/lang--en/index.htm#
[69] http://irrico.belgium.iom.int/
[70] http://www.routeshome.org.uk/

- Each family member's length of residence and activities in the UK, e.g. have they studied, worked etc.
- Whether there are other EEA national family members in the UK (or who were previously living in the UK), and what their activities during this time were.

When the local authority establishes that a family member does have the right to reside under European law, it must then consider whether provision of assistance under section 17 is necessary to prevent a breach of that right. In almost all cases where the person has a right to reside, a refusal to provide assistance when the family have no other support options is likely to prevent the person from exercising their right to reside, causing a breach of their European Treaty rights. 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, so support should never be refused to them when there is a child in need in the household. However the situation may be less clear for a family where the parent is an EEA jobseeker, which is a right to reside that can usually only be maintained for three months, and consideration must be given as to whether they must be provided with assistance to enjoy their right to seek work in the UK.

When a parent does have the right to reside, then it will be necessary to check whether this means that they would be eligible for welfare benefits and housing.

If the parent does not have the right to reside, or the local authority determines that the provision of support is not necessary to prevent a breach of European 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.

Local authorities will commonly consider whether return is possible for a newly arrived EEA national family when the parent has not obtained work in the UK or established a right to reside. However, when a family has been in the UK for a period of time and/ or one of the child's parents has undertaken some employment in the UK, it is likely that the parent may have a right to reside and so detailed consideration of the family's history will be required to establish this.

For further information see sections:

- **4.2 Determining whether the family can freely return**
- **5.2 The right to reside**
- **5.3 Family members**
- **5.4 Benefit eligibility**

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.

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.[71] 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.

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 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 and the information that is known to the local authority about the country of origin, so that conclusions can clearly be drawn. What is stated by the family should be taken into account in relation to the established facts.

The local authority must have regard for the findings made by the Home Office or courts, particularly if such a decision is recent. However, if the family asserts that since that decision their circumstances have changed, then they would need to be referred to an immigration adviser for advice about their options. The local authority may therefore decide it is necessary to wait for the family to obtain advice before proceeding to refuse or withdraw support, should that otherwise be the outcome of the human rights assessment.

When concluding that accommodation and financial assistance under section 17 of the Children Act 1989 is not required to prevent a breach of human rights, because the family can return to their country of origin, the local authority must be clear in its determination that:

- there are no legal or practical barriers preventing the family from returning/leaving the UK; and
- the provision of support is not necessary to prevent a breach of the family's human rights or rights under European Treaties because the family can return to the parent's country of origin.

The assessment must also outline what options the family may be offered in order to prevent a breach of human rights/European Treaty rights, for example:

[71] *London Borough of Lambeth v Grant* [2004] EWCA Civ 1711 http://www.bailii.org/ew/cases/EWCA/Civ/2004/1711.html

- Providing accommodation and financial support pending return.
- Method of return and what additional support will be provided.

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

For further information see sections:

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

5 EEA nationals and family members

When a parent who is a European Economic Area (EEA) national, or family member of an EEA national, presents to social services, the local authority will need to establish whether the family may be eligible for welfare benefits and homelessness assistance, and if not, whether support is necessary to prevent a breach of the family's human rights or rights under the European Treaties.

This chapter provides basic information to help local authorities establish whether a person has a right to reside in the UK under the European law and how this may affect their entitlement to benefits. It is not to serve as a comprehensive guide to European rights and benefit eligibility so further information may need to be referred to or advice obtained. Since January 2014, the government has imposed several restrictions on benefit eligibility for EEA nationals, and so therefore social services are likely to receive more referrals for assistance from such families.

5.1 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.

5.2 The right to reside

EEA nationals do not require leave to enter or to remain in the UK; their right to enter and reside in the UK is governed by European law, commonly referred to as the 'European Treaties'. The European Treaties set out rights of economic free movement between EEA member states. These rights are transposed into UK law by the Immigration (European Economic Area) Regulations 2006.

An EEA national's right to reside is acquired on the basis of fact; therefore there is no requirement for an EEA national to obtain confirmation of their status, although they may apply for documentation from the Home Office if they choose to do so.

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.'

To be a qualified person, an EEA national must be undertaking a specified activity as a:

- jobseeker,
- worker (including a worker who recently stopped working),
- self-employed person (including a formerly self-employed person),
- self-sufficient person, or
- student.

To be recognised as a qualified person, an EEA national must satisfy specific requirements that are set out in the Immigration (EEA) Regulations 2006:

- 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 – regulation 6(7).

- An EEA national may retain their status as a worker even if they are not currently in employment and will continue to be a worker if 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 is seeking employment and have a genuine chance of being engaged. An EEA national will only retain worker status on this basis 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 his previous employment - regulation 6(2).

- A student and self-sufficient person needs to have "sufficient resources not to become a burden on the social assistance system of the UK" during their period of residence – regulation 4(1).

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.

EEA nationals will acquire the right of permanent residence after five years continuous residence in the UK as a qualified person under the Immigration (EEA) Regulations 2006, or

if they meet the criteria as a worker or self-employed person who has ceased activity because of a permanent incapacity to work.

5.3 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.

Regulation 7 of the Immigration (EEA) Regulations 2006 defines family members as:

- 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 partner

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

Regulation 8 provides for extended family members of EEA nationals to have the right to reside, such as 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.

Different rules apply to family members when the EEA national has the right to reside as a student.

It is also possible for a parent to acquire a derivative right to reside under European law on the basis of their child's rights. The Court of Justice of the European Union has made several determinations to this effect and these are set out in the table summarising benefit eligibility in section 5.4.1.

A family member's right to reside is acquired on the basis of fact; there is no requirement for them to obtain confirmation of their status, 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 extended family members, who under the Immigration (EEA) Regulations 2006 must obtain documentation from the Home Office before they can be recognised as having a right to reside on this basis.

5.4 Benefit eligibility

EEA nationals and their family members may access welfare benefits, homelessness assistance or an allocation of social housing. However, they may not always be able to receive benefits or housing assistance where eligibility requirements relate to having a right to reside in a particular capacity.

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 depend on whether they continue to be exercising the right to reside as a 'worker'.

It will therefore be important to establish a person's length of residence and full work 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.

The rules surrounding benefit eligibility for EEA nationals are complex and the government's interpretation of European directives can 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 to their local Citizens Advice Bureau (CAB) or other welfare rights advice agency in order to establish their entitlement to benefits and/or to check that any refusals of benefits are correct.

For further information see sections:

- **5.2 The right to reside**
- **5.3 Family members**

5.4.1 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 assessor.

Right to reside	Eligible for welfare benefits and housing?*
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**
EEA student or their family member.	Yes**
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	Yes

prevent the child from continuing their education in the UK.	
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 for the 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**

*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 social housing and homelessness assistance referenced here applies to England only, as the housing regulations differ in the devolved administrations.

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.

**In order to demonstrate an EEA national is a student or self-sufficient, a benefits assessor will consider whether any benefit claim does not amount to an unreasonable burden on the social assistance system of the UK. It is therefore possible that the person may be considered not to fulfil the requirements to be exercising the right to reside in either capacity.

5.5 Irish nationals

Irish citizens are EEA nationals but are not required to exercise a right to reside under the European Treaties in order to be able to live in the UK. The Republic of Ireland forms part of the Common Travel Area, along with the UK, Channel Islands and Isle of Man. The Common Travel Area Agreement allows for nationals of the Common Travel Area to travel and live freely within that area.

Additionally, Irish nationals automatically have a right to reside in the UK for the purpose of claiming benefits, although their non-Irish family members do not. Such a family member may therefore need to rely on the Irish national exercising a right to reside under European law in order to gain access to benefits. However, the rights of EEA nationals and their family members, as set out in the Immigration (EEA) Regulations 2006, do not apply to EEA nationals who also hold British citizenship. Therefore the family member of an Irish national with dual British Citizenship will not be able to rely on having a right to reside under European law on that basis and should seek advice from a benefits adviser.

5.6 UK nationals returning from abroad

UK nationals who are resident in the Common Travel Area (the UK, Republic of Ireland, Channel Islands and Isle of Man) 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 UK national, who has been living in the Republic of Ireland for at least three months before arriving in the UK, will pass the three month test and should be able to claim benefits and housing assistance.

However, a UK national, who has been living outside of the Common Travel Area and is returning to live in the UK, will be prohibited from accessing most benefits for at least three months following their arrival in the UK. This could also apply to other nationals of Common Travel Area coming to live in the UK. If a family is affected by this they may request assistance under section 17 of the Children Act 1989 for a short period until they become eligible for benefits. UK nationals should not be recorded on the NRPF Connect database.

5.7 Good practice points

Due to the complexity in 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 local authority housing departments 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 local authority housing department in England states that an EEA national cannot be provided with 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 referral to children's services should be made.

- When an EEA national family makes a homelessness application in England the local authority has a power under section 188 of the Housing Act 1996 to provide temporary accommodation pending decision if it appears that the parents are eligible and in priority need (which families with children under 18 will be).

- 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 employment is 'genuine and effective'. [72] Note that it is not a legal requirement for a person to demonstrate that they meet the minimum earnings threshold.

- 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

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

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.[73]

- 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:

- Seek 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. However legal aid is only available for domestic violence cases.

- For complex matters, send a written query to the AIRE Centre – they can provide advice based on the information given, although this could take several weeks. This may then assist a welfare rights adviser to prepare a benefits claim or appeal.[74]

Further information can also be obtained from:

- DWP, *Decision Makers Guides*[75] and *Local authority housing benefit circulars*[76]
- Home Office, *Modernised Guidance for EEA and Swiss nationals*[77]
- Citizens Advice Bureau (CAB) *Advice Guide*[78]
- Housing Rights Information[79]

[73] 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
[74] http://www.airecentre.org/
[75] https://www.gov.uk/government/publications/decision-makers-guide-memos-staff-guide
[76] https://www.gov.uk/government/collections/housing-benefit-for-local-authorities-circulars
[77] https://www.gov.uk/government/collections/eea-swiss-nationals-and-ec-association-agreements-modernised-guidance
[78] http://www.adviceguide.org.uk/

6 Asylum seekers

6.1 Section 95 Home Office support

A family 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).

The Home Office can provide accommodation and subsistence support in the form of cash payments. Families who have accommodation may request cash support only.

Support will continue to be provided to the family if their asylum claim is unsuccessful and there is a child in the family group who is under 18 years old at time the asylum claim is finally determined.

If the family are in urgent need they can 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 the person's application for section 95 asylum 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, or the family were not receiving section 95 support when their asylum claim was finally determined.

6.2 Section 4 Home Office support

Support from the Home Office may be provided to destitute refused asylum seekers, including families, under section 4 of the Immigration and Asylum Act 1999 if they:

- are taking all reasonable steps to leave the UK;
- 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.

Support provided comprises of accommodation and subsistence in the form of vouchers. A person who has accommodation cannot receive subsistence support only.

The following organisations provide more information about asylum support:

- Home Office[80]
- Asylum Help (assistance with applications)[81]
- Asylum Support Appeals Project (assistance when support is refused)[82]

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[79] http://www.housing-rights.info/index.php
[80] https://www.gov.uk/asylum-support
[81] http://asylumhelpuk.org/

6.3 Local authority support for asylum seeking families

Local authorities are prohibited under section 122 of the Immigration and Asylum Act 1999 from providing financial support and/or accommodation to a child under section 17 Children Act 1989 where the family are eligible for or are receiving support from the Home Office under section 95 of the Immigration and Asylum Act 1999.

The local authority would need to obtain confirmation from the Home Office that the parent has claimed asylum, and that the initial application or subsequent appeal is still pending to establish whether the family can apply for section 95 support.

Social services may be required to undertake a child in need assessment and provide assistance under section 17 Children Act 1989 to a destitute family whilst the application for asylum support is being processed. **Asylum seekers are not excluded from social services support.**

When a child is being accommodated by the Home Office and has additional needs, such as those relating to a disability, then the local authority in the area which the family are accommodated will be responsible for undertaking assessments and providing services. Should the family be moved to another area, then Children's Services must transfer responsibility to the new local authority.

6.4 Local authority support for refused asylum seeking families

A refused asylum seeking family can only be referred to the Home Office for section 4 support if such support is 'available and adequate' - *R (VC and others) v Newcastle City Council*. 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 asylum support would be sufficient to meet a child's needs. [83]

In practice this means that such families will often fall to be supported under section 17 Children Act 1989. However, the majority of refused asylum seekers will only be able to receive this support where this is necessary to prevent a breach of the family's human rights. This will apply where the parents:

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

For more information see section:

- **2.3 Exclusions from support**

[82] http://www.asaproject.org/

[83] *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)

7 Accommodation and subsistence support

When the local authority has established that the child is in need, it has the 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.[84]

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 would need to 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.

7.1 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.

There is case law that relates to the suitability of temporary accommodation provided to families who are owed a homelessness duty under the Housing Act 1996 and Homelessness Code of Guidance 2006 provides statutory guidance on the suitability of certain types of accommodation in the context of discharging homelessness duties under the Housing Act 1996.[85] However, the Court of Appeal recently ruled that when the local authority is providing

[84] 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

[85] https://www.gov.uk/government/publications/homelessness-code-of-guidance-for-councils-july-2006

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.[86]

There is one reported judgment that has considered the suitability of temporary accommodation provided to families under section 17, the 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 High Court determined that the local authority had acted lawfully in providing B&B accommodation for eight months and by providing accommodation in a different area of the UK without a specific assessment evaluating the impact of this. 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.

7.1.1 Bed and breakfast accommodation

In *C, T, M & U v LB Southwark* (2014), the family were placed in Bed and Breakfast (B&B) accommodation 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.[87]

7.1.2 Placing families in another local authority area

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.

The High Court had 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 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

[86] *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*
[87] *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

provided in Rochdale met the family's needs very well. This finding was not challenged by the family at the Court of Appeal.

It is useful to also examine the approach of the courts and guidance that local authorities are required to follow when exercising homelessness duties under Part 7 of the Housing Act 1996:

> *"Where it is not possible to secure accommodation within district and an authority has secured accommodation outside their district, the authority is required to take into account the distance of that accommodation from the district of the authority. Where accommodation which is otherwise suitable and affordable is available nearer to the authority's district than the accommodation which it has secured, the accommodation which it has secured is not likely to be suitable unless the authority has a justifiable reason or the applicant has specified a preference.*
>
> *"Generally, where possible, authorities should try to secure accommodation that is as close as possible to where an applicant was previously living. Securing accommodation for an applicant in a different location can cause difficulties for some applicants. Local authorities are required to take into account the significance of any disruption with specific regard to employment, caring responsibilities or education of the applicant or members of their household. Where possible the authority should seek to retain established links with schools, doctors, social workers and other key services and support."*[88]

Additionally, section 11 of the Children Act 2004 requires local authorities in England to ensure that they have regard 'to the need to safeguard and promote the welfare of children' when discharging a homelessness duty.

In *Nzolameso v City of Westminster* (2015), the Supreme Court examined the lawfulness of Westminster's decision to discharge its homelessness duty when the family refused to take up an offer of accommodation in a different area (Milton Keynes) on the grounds that it was too far from the children's schools, the mother did not know anyone there but had friends who provided childcare in Westminster, and she had lived in the Westminster for a long time. The Supreme Court allowed the appeal, stressing that local authorities have a duty to accommodate applicants within their own district so far as 'reasonably practicable' and where it is not reasonably practicable to accommodate in their own district authorities must, where possible, try to place the family as close to possible where they had previously been living. In determining suitability of accommodation, the local authority must have regard to the need to safeguard and promote the welfare of the children in the household and identify and have regard to the principal needs of the children, both individually and collectively.[89]

In comparing this to the Judge's findings in *C, T, M & U v LB Southwark* (2014), it is clear that the local authority must ensure that the needs of the child are clearly identified,

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[88] Department for Communities and Local Government, *Supplementary Guidance on the homelessness changes in the Localism Act 2011 and on the Homelessness (Suitability of Accommodation) (England) Order 2012*, paragraphs 48 to 49. https://www.gov.uk/government/publications/homelessness-changes-in-the-localism-act-2011-supplementary-guidance

[89] *Nzolameso v City of Westminster* [2015] UKSC 22. *http://www.bailii.org/uk/cases/UKSC/2015/22.html*

documented and considered when deciding whether to provide accommodation out of area. Local authorities will also need to consider the practicalities and resource implications of case managing a family placed in another region of the UK, for example, when undertaking reviews, responding to a change of circumstances and effectively progressing immigration matters or otherwise resolving the case.

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.

7.1.3 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 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."*[90]

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.

[90] https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice

7.2 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. [91]

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. [92] 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.[93]

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.

[91] *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*
[92] *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
[93] *Mensah v Salford City Council* [2014] EWHC 3537 (Admin). http://www.bailii.org/ew/cases/EWHC/Admin/2014/3537.html

- 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."*[94]

For more information see our factsheet:

- *Subsistence support for families under section 17 Children Act 1989*[95]

7.3 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.

[94] *R (C, T, M and U) v LB Southwark* (2016), paragraph 43.
[95] http://www.nrpfnetwork.org.uk/Documents/Subsistence-support-families.pdf

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 case, the statutory provision of support available to MK was section 4 of the Immigration and Asylum Act 1999, administered by the Home Office.[96]

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.[97]

[96] *R(MK) v LB Barking & Dagenham* [2013] EWHC 3486 (Admin)
[97] *R (on the application of KO) v London Borough of Lambeth* [2013] All ER (D) 171, extempore judgment.

8 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 European 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**
- **2.3.2 Families not excluded from support**
- **9 Immigration information**
- **12 How to find an immigration or asylum legal adviser**

9 Immigration information

It is unlawful to provide immigration advice to a person that relates to their specific circumstances unless the adviser is registered with the Office of the Immigration Services Commissioner (OISC), or is exempt from registration, for example, is a solicitor or barrister registered under the appropriate regulatory body. However it is important for local authority practitioners to be aware of relevant immigration rules and policies so that a family can be properly signposted to an immigration adviser and to ensure that the representative is made aware of any factors that may impact on the family's claim.

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 that such information will be shared with the Home Office.

9.1 Making an immigration application

The Immigration Rules[98] 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.

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).
- The Immigration Health Charge is paid (when no exemption applies).
- Evidence of identity is submitted that meets 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

[98] https://www.gov.uk/guidance/immigration-rules

or benefits), and delays in case resolution for families where the parents have no current immigration permission and are attempting to regularise their stay.

9.1.1 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 2016. 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)
- Initial period of limited leave to remain as a stateless person, or as the family member of a stateless person, under Part 14
- EC Association Agreement with Turkey
- 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

Application fee for leave to remain under the family/private life rules (2016/17)	
Application fee	£811
Immigration Health Charge	£500
Total	**£1311**

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.

9.1.2 Fee waiver policy

A family would need to be signposted to an immigration adviser for legal advice as a fee waiver application will need to be made in conjunction with an application for leave to remain.

The policy states that a fee waiver can be applied for when a person is applying for leave to remain on one of the following grounds:

- 10-year partner or parent route under Appendix FM of the Immigration Rules (application form FLR(FP))
- Private life route under paragraph 276ADE(1) of the Immigration Rules (application form FLR(FP))
- Outside of the Immigration Rules on non-Article 8 human rights grounds (application form FLR(O))

The Home Office policy states that applicants in receipt of local authority support may be granted a fee waiver if they can demonstrate that:

- they have adequate accommodation and can meet their essential living needs, but would be rendered destitute by payment of the fee, or
- there are exceptional circumstances relating to their ability to pay the fee.

The fee waiver policy is written to the effect that when a family are provided with accommodation and financial assistance by a local authority, they are deemed to have adequate accommodation and to be able to meet their essential living needs, so the Home Office will scrutinise how this money is spent and request evidence of the financial circumstances, even though the local authority has already established that the family are destitute and, as a result, is providing financial support to meet basic living needs only.

Legal representatives usually require the local authority to supply a letter detailing the support provided and it is advisable that this references that the family's financial circumstances have already been fully investigated within the child in need assessment. For local authorities using NRPF Connect, any letters provided to a person or their legal representative should be uploaded to the database and details of the financial support accurately recorded.

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

It is important that families receiving local authority support apply for a fee waiver, where this is possible because if they do not and they pay for their application:

- they will also need to pay the Immigration Health Charge;
- they are likely to have the NRPF condition imposed if their leave to remain application is successful; and
- the local authority will query the source of funds used for application fees and legal advice as part of the child in need assessment under section 17 of the Children Act 1989, although in the absence of other regular and sustainable sources of support, money borrowed or acquired on a one-off basis to make an immigration application should not in itself be taken to draw an adverse conclusion on the family's eligibility for support.

For more information see the Home Office policy:

- *Fee waiver guidance for FLR(O) form*[99]

9.1.3 Evidence of identity

Rules that apply to applications made before 24 November 2016

Paragraph 34BB of the Immigration Rules requires a person applying for limited or indefinite leave to remain to submit a valid passport, travel document or national identity card with their application, unless one of the following applies:

- They are applying for indefinite leave to remain under the domestic violence rule.

[99] https://www.gov.uk/government/publications/chapter-1a-applications-for-fee-waiver-and-refunds

- Their document is held by the Home Office.
- The Home Office considers there is 'a good reason beyond the control of the applicant' why the document cannot be provided, for example, when it is held by a person in circumstances which have led the applicant to be accepted as a victim of trafficking under the National Referral Mechanism, or where it has been permanently lost and there is no functioning national government to issue a replacement.

Rules that apply to applications made on or after 24 November 2016

Paragraph 34BB of the Immigration Rules will be replaced by the requirements set out in paragraph 34(5)(b), which states that an applicant must 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 where:

(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.

It therefore appears that as of 24 November 2016, people will be able to submit an application for leave to remain using their most recently expired passport. When a person does not have a required document and none of the exceptions apply, this may lead to delays in the family being able to make an application. Local authority practitioners may wish to make checks to prevent such delay:

- Find out what documents the family have 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 family to take immediate action to apply for replacement documents if they are missing and are not with the Home Office.
- Find out what must be done to obtain national documentation for a non-British child born in the UK, for example, the family may need to register the birth at their national embassy.

9.2 Refusal of leave due to NHS debt

Paragraph 322(12) of the Immigration Rules allows for leave to remain to be refused on a discretionary basis when a person has an NHS debt of £1000 or more that was accrued on or after 1 November 2011. For people who were not applying under the family migration (FM) rules, this threshold was lowered to £500 for debts accrued on or after 6 April 2016. As of 24 November 2016, people applying under the family migration (FM) rules may face a discretionary refusal of leave to remain under the suitability requirements of the FM rules if they have an NHS debt of £500 or more.

People who have no current immigration permission will be subject to charges for NHS hospital treatment, including for maternity care. Such a person who has had NHS hospital treatment must be advised to inform their legal representative so that this can be properly addressed in any leave to remain application.

For more information see:

- NRPF Network factsheet: *NHS healthcare for migrants with NRPF (England)*[100]
- Home Office Modernised Guidance, *General grounds for refusal: considering leave to remain*[101]

9.3 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:

- the person can demonstrate to the Home Office that they are destitute are 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.

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

[100] http://www.nrpfnetwork.org.uk/Documents/NHS-healthcare.pdf
[101] https://www.gov.uk/government/publications/general-grounds-for-refusal-considering-leave-to-remain

- 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.

If 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.

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.

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

For more information please refer to the following Home Office documents:

- Home Office policy [102]
- Change of conditions application form[103]
- Modernised Guidance: reconsiderations[104]

[102] 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/chapter-8-appendix-fm-family-members
[103] https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change
[104] https://www.gov.uk/government/publications/reconsiderations

9.4 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.

Such a person will always need to be signposted for immigration advice as a matter of urgency, as they will need to find out what their options are, and if the Home Office is informed or otherwise find out about the relationship breakdown, the person's leave to remain could be curtailed to expire within a short time period.

A person 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 application.

As leave to remain under the partner routes is subject to the NRPF condition, if the person is destitute and is intending 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 time they must submit their ILR application, and their leave will continue to be valid until a decision is made on the ILR application.

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, so legal advice should be sought. If the person is not intending to apply for ILR under the domestic violence rule, they will need to seek legal advice to find out what their options are.

There are many people who have permission to stay in the UK based on their relationship to a partner but cannot apply for the Destitution Domestic Violence Concession should their relationship break down due to domestic violence, for example, the spouse or partner of a student, points based system worker, refugee or EEA national. Such a person must be signposted for advice from an immigration adviser about what other immigration options they might have following a relationship breakdown.

9.5 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.

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.

Asylum Aid host 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.[105]

How British Citizenship is acquired	Criteria	How to evidence citizenship or apply for registration
Automatically acquired at birth	Born in UK to a parent who is British or has settled status, e.g. ILR/ EEA permanent right of residence. 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).	No application necessary to confirm citizenship. Birth certificate and evidence of British/ settled parent's nationality usually adequate evidence of citizenship. May apply for a British passport or confirmation from the Home Office using application form NS.[106]
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: £936

[105] https://prcbc.wordpress.com/
[106] https://www.gov.uk/government/publications/application-for-confirmation-of-british-nationality-status-form-ns

Registration by entitlement	Born in UK and resident here until age 10.	Must apply for registration to the Home Office. Fee: £936
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: £936

10 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

10.1 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 making these claims. Flexibility regarding the notice period may be required to allow for support to continue if there are delays in benefits being issued.

In order to access housing support, families should be referred to local authority housing departments. Where families are being accommodated in private tenancies, the possibility of transferring the existing license agreement to a tenancy could be explored with landlords. This will often be dependent on the landlord's willingness to take tenants who receive housing benefit, and if the property is in England, the landlord will need to comply with the right to rent requirements.

Note that regulations 3 and 5 of the Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006 were amended on 30 October 2016 to allow for people who have been granted limited leave to remain under the family and private life routes when they have recourse to public funds to be eligible for homelessness assistance and an allocation of social housing in England. Such families can therefore be referred to local authority housing departments for assistance once such leave is granted, and any families previously refused assistance should be re-referred for new eligibility assessments for housing assistance.

10.2 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 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 further information see sections:

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

10.3 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.[107]

[107] R (O) v *London Borough of Lambeth* (2016), paragraph 52.

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.[108]

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 further information see section:

- **4 Assessments when the exclusion applies**

10.3.1 Home Office funded return

The Home Office offers two options to people who wish to return to their country of origin:

- Voluntary return
- Assisted return

Voluntary return

Any person who is living in the UK without immigration permission or has been refused permission to enter or stay in the UK can to undertake a voluntary return. This includes EEA nationals who are not exercising a right to reside. As non-EEA national families should normally qualify for an assisted return (where a financial integration package is provided), this scheme is likely to only be appropriate to use when the local authority is refusing or withdrawing support from an EEA family.

[108] *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

The Home Office will organise and fund the flight, but will expect the family 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.

Assisted return

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).

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, Democratic Republic of Congo, Guinea, Iran, Iraq, Morocco, Nigeria, Pakistan, Russian Federation, Somalia and Sri Lanka. More countries will join the ERIN in 2017. Families returning to an ERIN country will receive the first £500 on a card which can be withdrawn as cash in the country of return, and then will receive payments for a specific items/purpose directly from a partner agency administering the programme on return.

Families 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.

Important information

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

Families will usually only have one opportunity to apply for assisted return and the government website states:

> *"You can be forced to return to your home country if you withdraw your application or don't follow the application process."*[109]

Any non-EEA national adult in the family group who undertakes a return (assisted or voluntary) which is funded by the Home Office will be subject to a re-entry ban of two or five

[109] https://www.gov.uk/return-home-voluntarily/assisted-voluntary-return

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.

Contacting the Home Office

- Home Office returns helpline: 0300 004 0202.
- Email: voluntaryreturns@homeoffice.gsi.gov.uk
- EEA nationals should contact their local Immigration Compliance and Enforcement Team[110]

For further information see the government website:

- Who can get help[111]
- AVR application form[112]

10.3.2 Local authority funded return

Local authorities are provided with a power to fund a family's return to country of origin where the parents are:

- EEA nationals or have refugee status granted by another EEA state
- Non-EEA nationals and have no current immigration permission

EEA nationals or parents 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 family 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.

Non-EEA nationals and parents with no current immigration permission

Providing travel to enable a family to return to the parent's country of origin would be an effective response to resolving the family's destitution when there is no duty to provide support in the UK, and local authorities may use the general power of competence or wellbeing in order to do so.

In England, section 1 of the Localism Act 2011 provides a general power of competence that allows a local authority to do 'anything that individuals generally may do'. This replaced section 2 of the Local Government Act 2000, in February 2012, which provides a general power to undertake anything that is likely to achieve the promotion or improvement of the economic, social or environmental well-being of their area, unless the authority is prohibited from doing so by other legislation, and is still in force in Wales.

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[110] https://www.gov.uk/government/publications/contact-details-for-immigration-compliance-and-enforcement-teams
[111] https://www.gov.uk/return-home-voluntarily/who-can-get-help
[112] https://www.gov.uk/government/publications/assisted-voluntary-returns-application-form

11 Adults with care and support 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 2014 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 to may be responsible for meeting any assessed care and support needs of the adult.

11.1 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)*[113] and the following sections of this guidance:

- **2.3 Exclusions from support**
- **6 Asylum seekers**

[113] http://www.nrpfnetwork.org.uk/Documents/Practice-Guidance-Adults-England.pdf

12 Legal aid and accessing legal advice

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 Society[114]

[114] http://www.lawsociety.org.uk/for-the-public/paying-for-legal-services/legal-aid/

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 Project[115]
- Government guidance and application forms[116]

12.3 How to find a legal aid adviser

To find a local legal aid provider see:

- England and Wales: UK Government website[117]
- Scotland: Scottish Legal Aid Board[118]
- Northern Ireland: Legal Services Agency Northern Ireland[119]

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).[120]

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

[115] http://www.publiclawproject.org.uk/exceptional-funding-project
[116] https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance
[117] http://find-legal-advice.justice.gov.uk/
[118] http://www.slab.org.uk/public/solicitor-finder/
[119] https://www.dojni.gov.uk/topics/legal-aid
[120] https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner

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 adviser[121]
- The Law Society - for a solicitor in England and Wales[122]
- The Law Society of Scotland[123]
- The Law Society of Northern Ireland[124]
- UK government website – for immigration and asylum advisers in England and Wales with a legal aid contract[125]

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.[126] 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.

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 Network[127]

[121] http://home.oisc.gov.uk/how_to_find_a_regulated_immigration_adviser/adviser_finder/finder.aspx
[122] http://solicitors.lawsociety.org.uk/#formtop
[123] http://www.lawscot.org.uk/find-a-solicitor
[124] http://www.lawsoc-ni.org/solicitors-directory/
[125] http://solicitors.lawsociety.org.uk/#formtop
[126] http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/
[127] http://www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically

13 Eligibility for other services

People with no recourse to public funds (NRPF) are only prohibited under section 115 of the Immigration Asylum Act 1999 from accessing specified welfare benefits, homelessness assistance and social housing. A person who has NRPF will not be excluded from accessing other publically funded services because of the NRPF condition, however, there are often eligibility criteria attached to these services which related to a person's nationality or immigration status, or are linked to being in receipt of certain welfare benefits. Eligibility requirements for key services that families with NRPF may be able to access are set out in this chapter. 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

A person with NRPF can rent a property from a housing association if they apply directly to the Housing Association for this.

They cannot be provided with a housing association property if this was applied for through their local council's housing allocations list because this is considered to be a public fund.

For more information see:

- Home Office Modernised Guidance, *Public Funds*[128]

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.[129]

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

[128] https://www.gov.uk/government/publications/public-funds
[129] https://www.gov.uk/know-when-you-can-leave-school

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).

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).[130]

13.4 NHS treatment

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

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:

- Visa overstayers
- Illegal entrants
- Refused asylum seeking families (when they are not receiving Home Office asylum support)

Such people will be required to pay for hospital treatment before it can be provided, unless such treatment is immediately necessary or urgent. Maternity care, including antenatal appointments, will always be provided prior to payment, but the mother will still accrue an NHS debt if she is subject to charging.

People making immigration applications that apply for limited leave to remain in the UK are now required to pay the Immigration Health Charge to gain access to hospital treatment. Failure to pay an NHS debt of £500 or more could lead to an immigration application being refused.

For detailed information about NHS charges, prescription exemptions and the Immigration Health Charge please see our factsheet:

- NHS healthcare for migrants with NRPF (England)[131]

[130] http://www.ukcisa.org.uk/
[131] 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 Service[132]
- Child Maintenance Options[133]

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 [134]

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

All children ages three and four are entitled to 570 hours of free childcare or early education per year, and must be taken over at least 38 weeks, for example, 15 hours per week for 38 weeks of the year.

[132] https://www.gov.uk/child-maintenance/overview
[133] http://www.cmoptions.org/
[134] https://www.gov.uk/apply-free-school-meals

Two year old children are only entitled to free childcare when they meet one of the following criteria:

- They are eligible for free school meals (see section 11.6 Free school meals).
- Their families receive Working Tax Credits and have an annual gross income of no more than £16,190 per year.
- They have a current statement of Special Educational Needs or an Education, Health and Care plan.
- They are entitled to Disability Living Allowance.
- They are looked after by a local authority.
- They are no longer looked after by the local authority as a result of an adoption order, a special guardianship order or a child arrangements order which specifies with whom the child lives.

For more information see:

- The Department for Education, Early Education and Childcare[135]

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.[136]

Elderly or disabled people with NRPF who are resident in Greater London may be able to apply to London Councils for a Freedom Pass.[137]

[135] https://www.gov.uk/government/publications/early-education-and-childcare--2
[136] https://www.gov.uk/find-your-local-council
[137] 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	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. When the term EEA national is used in this guidance this does not include the UK.
Home Office	The government department that is responsible for maintaining immigration control, including: • 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 **Indefinite leave to remain**	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).
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 **Limited leave to remain**	Immigration permission issued for a time limited period; conditions may include restrictions on employment and access to public funds.
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: • 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.

For further information please contact:

NRPF Network
Tel: 0207 527 7121
Email: nrpf@islington.gov.uk
Web: www.nrpfnetwork.org.uk

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