NRPF NETWORK | No Recourse to Public Funds

When and how to undertake a human rights assessment

Practice guidance for local authorities

October 2021

Contents

1. Introduction

This guidance sets out how to undertake a human rights assessment when Schedule 3 of the Nationality, Immigration and Asylum Act 2002 ('Schedule 3') applies to a person with no recourse to public funds who is requesting or receiving accommodation and financial support from social services.

1.1 Supporting people with no recourse to public funds

The provision of accommodation and financial support by social services for people with no recourse to public funds is recognised by the UK Government and courts as being an essential safety-net for children within families, care leavers, and adults with care needs, who are at risk of homelessness and cannot access benefits due to their immigration status.

Social services' assistance is not a 'public fund' for immigration purposes and therefore can be provided to a person with no recourse to public funds. However, Schedule 3 restricts a local authority's ability to provide accommodation and finical support to a person who is 'in breach of immigration rules', and some other groups, where the person can return to their country of origin to avoid destitution in the UK. When Schedule 3 applies, the local authority must carry out a human rights assessment in addition to the needs assessment in order to establish whether the person can be expected to return to their country of origin. If a barrier to return is identified, accommodation and financial support can be provided when a person meets the usual eligibility criteria for social services' support.

Providing support to people with no recourse to public funds can be a high-cost service for local authorities, which is not reimbursed by central government. At the end of March 2021, 68 local authorities in England and Scotland were collectively spending £57 million supporting 3,200 households with no recourse to public funds. The average length of time that a family received support for was 1.5 years, whereas for adults with care needs this increased to 2.5 years. 79% of family and 51% of adult households exited support following a grant of leave to remain, demonstrating that regularising immigration status is the most common route off support, rather than return to country of origin. For more information, see the NRPF Connect data report 2020-21 available on the NRPF Network website at: https://www.nrpfnetwork.org.uk/nrpf-connect/nrpf-connect-data.

Although the Home Office provides local authorities with funding to support Unaccompanied Asylum Seeking Children, the weekly amount significantly reduces once a child turns 18 and ends three months after a care leaver becomes 'Appeal Rights Exhausted'.

Local authorities must therefore ensure that legislation governing eligibility for this essential 'safety-net' is correctly applied and that appropriate steps are taken to assist people to achieve a sustainable outcome to their situation of destitution when support is provided. The human rights assessment provides an opportunity to identify and document what action may need to be taken to assist a person who is 'in breach of immigration laws' to achieve a sustainable outcome. In the majority of cases, a sustainable outcome will be achieved by obtaining leave to remain and transferring to mainstream benefits and/or employment. However, for those who have exhausted their immigration options and are unable to pursue further claims to remain in the UK, return to country of origin will need to be considered.

1.2 How to use this guidance

This guidance accompanies the NRPF Network's human rights assessment template, available at https://www.nrpfnetwork.org.uk/-/media/microsites/nrpf/documents/guidance/HRA-template.docx.

The guidance and template can be used by local authority practitioners across the UK who are working with children within families, care leavers, or adults with care needs.

For the purpose of this guidance, the following terms are used:

- Human rights = a person's 'Convention rights', as set out in the European Convention on Human Rights (ECHR) and incorporated into the Human Rights Act 1998.

- Person = An adult, care leaver (age 18+), or parent (in a family household). This will be the 'main applicant' for the purpose of completing the template.

- Social services' support = One of the following types of assistance provided by social services under legislation set out in section 3.1 of this guidance:
  - Care and support, including accommodation and financial support, provided to an adult with care needs.
  - Accommodation and financial support provided to a family with a child in need.
  - Leaving care support provided to a former looked after child (age 18 or older).

For more information about when social services' duties apply to provide accommodation and financial support to people with no recourse to public funds, local authorities in England can refer to the following NRPF Network practice guidance:

- Assessing and supporting adults with no recourse to public funds (England), available on the NRPF Network website at: http://guidance.nrpfnetwork.org.uk/reader/practice-guidance-adults/
- Assessing and supporting families with no recourse to public funds (England), available on the NRPF Network website at: http://guidance.nrpfnetwork.org.uk/reader/practice-guidance-families/

Local authorities in Scotland can refer to the COSLA migrants' rights and entitlements national guidance, available on the Migration Scotland website at: http://www.migrationscotland.org.uk/migrants-rights-entitlements/introduction/1-1-how-use-guidance.

2. Schedule 3 Nationality, Immigration & Asylum Act 2002

This chapter sets out the purpose of Schedule 3, how this applies in practice, and how a human rights assessment can be undertaken.

2.1 What is the purpose of Schedule 3?

Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002 place a bar on the provision of social services' support to a person who is 'in breach of immigration laws' (i.e. is without lawful status in the UK), unless such assistance is necessary to prevent a breach of human rights.

A decision that compels a person to sleep rough, or to be without food, shelter or funds, usually amounts to inhuman treatment and therefore engages Article 3 of the European Convention on Human Rights (the right not to be subject to torture, or inhuman or degrading treatment) (see: Limbuela v Secretary of State for the Home Department [2005] UKHL 66).

In the case of R (Kimani) v London Borough of Lambeth (2003) EWCA Civ 1150, the Court of Appeal 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'.

When the local authority establishes that a person's needs must be met by the provision of accommodation and financial support, the failure to provide such support is highly likely to lead to the person suffering a breach of Article 3. When the person is in an excluded group, the local authority is entitled to consider whether the person can reasonably be expected to return to their country of origin to avoid a human rights breach arising from their destitution in the UK (see: Birmingham City Council v Clue [2010] EWCA Civ 460).

Therefore, when a person who is 'in breach of immigration laws' qualifies for social services' support, Schedule 3 requires the local authority to determine whether the person can be reasonably expected to return to their country of origin to avoid a breach of human rights arising from their destitution in the UK.

When the local authority concludes that the person can freely return to their country of origin to avoid a breach of Article 3, it will not be required to provide support but may offer assistance with return and ongoing accommodation and financial support whilst travel arrangements are made. The local authority will not be responsible for a breach of human rights if a person is denied support when they could return to their country of origin to avoid destitution in the UK (see: R(AW) v London Borough of Croydon [2007] EWHC Civ 266).

2.2 How does Schedule 3 apply in practice?

The local authority will need to undertake a human rights assessment in order to establish whether there are any barriers preventing return. When a barrier to return is identified, the bar on providing support can be lifted.

A human rights assessment should only be undertaken when the following three tests are met:

- The person qualifies for social services' support by meeting the usual eligibility criteria.
- The failure to provide social services' support, when a person qualifies for this, would leave the person destitute in the UK and at risk of suffering an Article 3 breach.
- The person is 'in breach of immigration laws' or is in another excluded group.

For more information about these tests, see sections 3.1-3.3 of this guidance.

When a barrier to return is identified, the bar on providing accommodation and financial support will be lifted and social services' support can be provided, although this will need to be subject to regular review.

Schedule 3 does not prevent the local authority from completing a needs assessment or providing interim support to meet urgent needs whilst assessments are being carried out. Therefore, in practice, a human rights assessment is usually undertaken to establish whether support can continue to be provided, rather than to determine eligibility for assistance when a person initially requests support. For former looked after children, the human rights assessment will determine whether leaving care can continue to be provided should a young person become Appeal Rights Exhausted (ARE) after they have turned 18.

Schedule 3 does not in itself create a free-standing power to provide support. Therefore, a human rights assessment is not necessary if a person does not qualify for social services' support. For example, where the local authority has undertaken a needs assessment and concluded that a child is not in need or an adult does not have care and support needs.

Schedule 3 does not apply to all groups of people with no recourse to public funds who may need to access social services' support if they are destitute or at risk of homelessness. Schedule 3 does not apply to a person who is seeking asylum or who is lawfully resident in the UK, such as a person with leave to remain that is subject to the 'No Recourse to Public Funds' (NRPF) condition or pre-settled status granted under the EU Settlement Scheme. When a person is lawfully present, or is seeking asylum, a human rights assessment will not be required and the usual eligibility criteria for social services' support must be applied.

2.3 Who can undertake the assessment?

There are no statutory requirements that specify who in the local authority can carry out a human rights assessment, so this must be determined by an individual service. Any person responsible for undertaking human rights assessments would need to have a good knowledge of the facts of the case and a sound understanding of how to apply Schedule 3.

The local authority must ensure that assessments are carried out correctly, particularly when there is no specialist worker or team responsible for supporting people with no recourse to public funds, so managerial oversight will be necessary. An example of good practice would be to establish a protocol that sets out who is responsible for undertaking assessments, what support will be available to the officer, and how guidance and oversight is provided, such as by requiring the assessment to be checked and signed off by a team manager, local authority lawyer, or by a multi-disciplinary panel.

2.4 When and how should a human rights assessment be recorded?

When Schedule 3 applies to a person requesting or receiving social services' support, the local authority must clearly document that it has considered the person's ability to return to their country of origin and what conclusion has been reached. It is therefore advisable to record the human rights assessment separately to the social care needs assessment, child in need assessment, or care leaver's pathway plan. The human rights assessment template has been designed as a practical tool to help local authorities record the relevant information that they will need in order to determine whether social services' support can be withheld or withdrawn.

When it is clear that a person who is 'in breach of immigration laws' cannot be expected to leave the UK because a barrier to return has been quickly identified, the local authority may decide not to formally record a human rights assessment to document this. However, a barrier to return, such as an immigration application or appeal, may continue to be in place for several months, or even years. Documenting this in a human rights assessment enables the local authority to identify what action needs to be taken in order to expedite an outcome to an immigration claim, such as by assisting the person to access immigration advice or obtaining updates from the Home Office. This may be particularly important if staff turnover is an issue or a service does not have specialist workers.

Should an immigration claim ultimately not succeed, the local authority will need to progress the human rights assessment to consider return in more detail if no other barriers are identified. Completing a human rights assessment when a person still has a pending immigration claim can therefore provide an opportunity to open up conversations about the possibility of the immigration application or appeal failing, particularly once the person's claim reaches the appeal stages, and raise awareness of the alternative options the person may have should they become liable to enforced removal.

There is no statutory requirement to complete a human rights assessment within a specific time period. However, the process is usually started when it is identified that the person requesting or receiving social services' support is 'in breach of immigration laws' or is in another excluded group. As a person's eligibility for social services' support may take some time to be determined, the template will help to identify what information may need to be gathered in preparation for completing the human rights assessment.

The views of the person applying for or receiving support will need to be recorded within the assessment, as well as their response, should the local authority conclude that support can be withheld or withdrawn on the basis that the person can return to their country of origin to avoid destitution in the UK. When such a conclusion is reached, the person should be provided with a copy of the completed assessment.

It is possible that a person may re-present to the local authority after social services' support has been withheld or withdrawn following a human rights assessment. In such instances, the assessment would need to be reviewed and updated to take into account any changes to the person's immigration position and/or personal circumstances.

2.5 How is the template structured?

The human rights assessment template is structured in three parts to enable the local authority to easily identify whether a short assessment is required and when it will be necessary to undertake a more detailed consideration of return:

- Part A: Background information
- Part B: Barriers to return
- Part C: Considering return

Part A requires the local authority to answer the following questions:

- Which duty or discretionary power is engaged that requires accommodation and financial support to be provided (i.e. on what basis does the person qualify for support)?
- Would the person be destitute in the UK without the provision of social services' support?
- Is the person 'in breach of immigration laws' or in another excluded group (as determined by their immigration status)?

For more information about completing Part A, see Chapter 3 of this guidance.

Part A is intended to assist the local authority to identify whether a human rights assessment is required. For example, if the person is not in an excluded group, then there will be no need to undertake a human rights assessment.

Part B requires the local authority to answer the following questions:

- Is there a legal barrier preventing return?
- Is there a practical obstacles preventing return and, if so, can this be overcome?

For more information about completing Part B, see Chapter 4 of this guidance.

When a barrier to return is identified in Part B, the human rights assessment can be concluded and it will not be necessary to complete Part C of the template.

It will only be necessary to complete Part C when no barriers to return have been identified and, therefore, the person can reasonably be expected to return to their country of origin.

Part C requires the local authority to answer the following questions:

- Has the person made an immigration or asylum claim and, if so, what was the outcome of the Home Office/ appeal decision?
- Are there relevant matters that have not yet been put before the Home Office?
- Does the person require legal advice before return can be considered?
- Would return give rise to a breach of Articles 2, 3 or 8 of the European Convention on Human Rights (ECHR), taking account of the facts of the case and available evidence, including decisions made by the Home Office or appeal courts?

For more information about completing Part C, see Chapter 5 of this guidance.

2.6 What are the possible outcomes?

The local authority will reach one of the following three conclusions when a human rights assessment has been completed:

- A legal barrier or practical obstacle to return is identified.
- No barrier to return is identified but the local authority identifies that the person requires immigration advice about their options before any conclusions about return can be drawn.
- No barrier preventing return is identified and the local authority concludes that return will not give rise to a breach of human rights.

When a legal barrier or practical obstacle to return is identified, social services' support can be provided to prevent a breach of human rights (Article 3) when the person qualifies for this. When support is provided, it will be necessary to regularly review the status of the barrier and to identify what steps may need to be taken when it is reviewed. For example, if the person has an outstanding immigration application or appeal, an update can be requested from the Home Office and/ or the person's legal representative.

When the local authority identifies that the person requires immigration advice about their options before any conclusions about return can be drawn, social services' support can be provided to prevent a breach of human rights (Article 3) when the person qualifies for this. The person will need to be signposted to an immigration adviser and the progress of this regularly reviewed. If a claim is submitted, then it will need to be treated as a barrier to return.

It will only be possible to conclude that return will not give rise to a breach of human rights when no barrier to return is identified and an evaluation of the facts of the case has been carried out. This would need to take into account any available evidence, including decisions by the Home Office/ appeal courts or a legal opinion. When a person can return to their country of origin to avoid a breach of human rights arising from their destitution in the UK, there will be no duty to provide social services' support. Instead, assistance with return can be offered, which may be funded by the Home Office or local authority. The local authority may need to provide time-bound accommodation and financial support if the person intends to return, and must give a reasonable notice period of when this support will end. If the person indicates that they are not intending to take up return, they will need to be provided with appropriate signposting information, such as about how to access Home Office asylum support, local charities, immigration advisers, and Home Office voluntary return.

3. Initial information

This chapter outlines what information will need to be confirmed when Part A of the human rights assessment template is completed. This includes: confirming the person's eligibility for social services' support, whether they would be destitute without the provision of support, and which excluded group applies based on their immigration status.

3.1 Eligibility for social services' support

Schedule 3 places a bar on the provision of support or assistance that is administered under legislation listed in the table in this section. This legislation enables accommodation and financial support to be provided by social services to people with no recourse to public funds, along with care and support for adults, and leaving care services for former looked after children. The sub-sections contain additional information specific to each household type.

3.1.1 Table: Applicable legislation by household type

Household type	England	Wales	Scotland	Northern Ireland
Family with a child in need	Section 17 Children Act 1989	Section 37 Social Services and Well-being (Wales) Act 2014	Section 22 Children (Scotland) Act 1995	Article 18 Children (Northern Ireland) Order 1995
Care leaver (age 18+)	Sections 23C, 23CA, 23CZA, 24A, 24B Children Act 1989	Sections 103-118 Social Services and Well-being (Wales) Act 2014	Sections 29 & 30 Children (Scotland) Act 1995	Articles 35 or 36 Children (Northern Ireland) Order 1995
Adult with care and support needs	Part 1 Care Act 2014	Section 35 Social Services and Well-being (Wales) Act 2014	Sections 12 and 13A Social Work (Scotland) Act 1968	Articles 7 & 15 Health and Personal Social Services (Northern Ireland) Order 1972

3.1.2 Families

For families with no recourse to public funds, eligibility for accommodation and financial support is determined by the outcome of the child in need assessment. When a child has been found to be in need due to the parent's lack of access to benefits, employment, or other resources, accommodation and financial support can be provided to the whole family household in order to meet the child's needs.

Schedule 3 applies to a family household when the parent is in 'in breach of immigration laws' or is otherwise in an excluded group. As it usually takes some time for a child in need assessment to be concluded, the local authority may decide to start the human rights assessment if it is likely that the family will qualify for support

If the local authority establishes, following a child in need assessment, that the family are not eligible for support, there will be no reason to carry out a human rights assessment and the family will need to be signposted to alternative services.

Schedule 3 does not apply to other assistance that may be provided by social services to a child, such as services to meet a child's needs arising from a disability. Therefore, assistance other than accommodation and financial support can be provided to a child or their family, regardless of the parent's immigration status.

For more information about when a family will be eligible for accommodation and financial support, see the NRPF Network practice guidance: Assessing and supporting families with no recourse to public funds (England).

3.1.3 Care leavers

Schedule 3 does not apply to children under 18 who are being looked after by the local authority, including Unaccompanied Asylum Seeking Children (UASC).

However, Schedule 3 will apply when a former looked after child turns 18 and is 'in breach of immigration laws', such as a UASC who becomes Appeal Rights Exhausted (ARE) following an unsuccessful asylum application (if they claimed 'in-country') or ARE following the expiry of UASC leave. In such cases, a human rights assessment will need to be undertaken to establish whether leaving care support can be provided or continue to be provided.

In England, leaving care support that is provided under the following sections of the Children Act 1989 is subject to Schedule 3:

- Section 23C: Provision of support and assistance, including accommodation & financial support until age 21.
- Section 23CA: Assistance to pursue further education and training until age 25.
- Section 23CZB: Personal adviser support from age 21 to 25.
- Sections 24A & 24B: Advice and assistance to qualifying care leavers.

The local authority will have a duty to provide accommodation and financial support to a care leaver until they are age 21 (section 23C) or 25 when they are on a course of education or training (section 23CA).

A care leaver will also be entitled to personal adviser support from age 21 to 25 if they request this (section 23CZB). The Department for Education guidance on extending personal adviser support to age 25, states, at paragraph 33, that section 23CZB does not introduce a duty to accommodate. For more information, see the full guidance at: https://www.gov.uk/government/publications/extending-personal-adviser-support-to-age-25.

The amount of funding that local authorities receive from the Home Office for supporting UASCs significantly reduces once the young person turns 18 and will end should a young person become ARE. The amounts are outlined in the Home Office funding instructions to local authorities. No funding is provided to local authorities for supporting care leavers who are on other immigration routes. However, when the relevant leaving care duties are engaged, the local authority will need to provide accommodation and financial support for a care leaver who cannot access benefits or mainstream housing assistance due to their immigration status. Home Office funding instructions are available at:

https://www.gov.uk/government/publications/unaccompanied-asylum-seeking-children-uasc-grant-instructions.

Although adult asylum seekers who are destitute can access support from the Home Office, for a former looked after child, the responsibility to provide accommodation and financial support remains with the local authority until leaving care duties are discharged, even though Home Office funding only continues for three months after a young person becomes ARE (see: SO v London Borough of Barking and Dagenham [2010] EWCA Civ 1101).

If a young person who is 'in breach of immigration laws' returns to the local authority to request support after they turn 21 years old and before they are 25, the local authority will need to determine whether it has a duty to provide any assistance under sections 23CA or 23CZB. The provision of such support will be subject to the outcome of a human rights assessment. If leaving care duties were previously discharged following a human rights assessment, the assessment would need to be reviewed and, where necessary, revised to take account of any changes to the young person's circumstances.

A human rights assessment will not be required if the local authority has no duty to provide a young person with leaving care support.

As duties to provide leaving care support are time-bound, a care leaver's support options must always be addressed in the pathway plan if it appears that they may have no entitlement to benefits or employment due to their lack of immigration status after leaving care duties are due to be discharged.

3.1.4 Adults with care needs

For adults with no recourse to public funds, eligibility for accommodation and financial support is determined by the outcome of the needs assessment. Care and support can only be provided when the adult has care and support needs, which have not arisen solely because of destitution, or the physical effects/ anticipated physical effects of destitution.

In England, the provision of support or assistance under Part 1 of the Care Act 2014 is subject to Schedule 3. In practice, this is limited to the following provisions of the Care Act:

- Duty to meet needs for care and support (section 18).
- Power to meet non-eligible needs (section 19(1)).
- Duty and power to meet a carer's needs for support (section 20).

A human rights assessment will therefore be necessary when an adult is in an excluded group and is assessed as having eligible care and support needs, engaging section 18 of the Care Act. As it usually takes some time for a needs assessment to be concluded, the local authority may decide to start the human rights assessment if it is likely that the adult will meet the Care Act eligibility criteria.

When an adult has a care and support need that is not considered to be an 'eligible need', the local authority must consider whether to exercise its discretion to provide care and support. Accommodation and financial support must be provided under section 19(1) if the local authority's failure to meet a non-eligible care and support need would result in a breach of human rights. In order to determine whether section 19(1) is engaged when an adult is 'in

breach of immigration laws', a human rights assessment must be undertaken to establish whether there are any other sources of support or assistance available, such as Home Office asylum support and, if not, whether the adult is able to return to their country of origin to avoid an Article 3 breach arising from their destitution in the UK. Therefore, the human rights assessment must contain an analysis of what support is available in the UK when supporting an adult under section 19(1) is being considered (see: R(Aburas) v London Borough of Southwark [2019] EWHC 2754).

If the local authority establishes, following a needs assessment, that the adult does not have any care and support needs, there will be no reason to carry out a human rights assessment and they will need to be signposted to alternative services.

Schedule 3 does not prevent a local authority from:

- Undertaking a needs assessment (section 9) or carers needs assessment (section 10).
- Meeting urgent needs for care and support whilst assessments are being undertaken (section 19(3)).
- Undertaking its general duties with regards to providing information and advice (section 4) or prevention (section 2).

For more information about eligibility for care and support, see the NRPF Network practice guidance: Assessing and supporting adults with no recourse to public funds (England).

3.1.5 People accommodated on public health grounds during the Covid-19 pandemic

This guidance and the human rights assessment template are not intended to be used for the purpose of determining eligibility for providing support to people on public health grounds when social services' duties are not engaged.

During the Covid-19 pandemic, local authorities have accommodated people with no recourse to public funds through the 'Everyone In' scheme in order to save lives and reduce public health risks. The High Court has confirmed that the following powers can be engaged to accommodate people with no recourse to public funds in England during a public health emergency: section 138 of the Local Government Act 1972 and section 2B of the National Health Service Act 2006 (see: Ncube v Brighton and Hove City Council [2021] EWHC 578).

Schedule 3 does not apply when support or assistance is provided under these powers, so a human rights assessment is not required to determine whether such assistance can be provided to a person who is 'in breach of immigration laws'.

Although Schedule 3 does apply when support or assistance is provided under section 1 of the Localism Act 2011 (the general power of competence), in Ncube and two other cases, the courts have found that this power cannot be relied upon by local authorities to provide accommodation to an adult with no recourse to public funds who is ineligible for assistance under Part VII of the Housing Act 1996 (see: AR v London Borough of Hammersmith and Fulham [2018] EWHC 3453 & Aburas v London Borough of Southwark).

Any local authority that has relied on section 1 of the Localism Act 2011 to accommodate people during the pandemic, rather that the public health powers identified by the High

Court, would need to seek advice from their legal department about applying Schedule 3 when a person is 'in breach of immigration laws'.

3.2 Establishing destitution in the UK

Before the local authority can proceed to consider whether a person is freely able to return to their country of origin to avoid destitution in the UK, it must be satisfied that the failure to provide social services' support is highly likely to lead to the person suffering a breach of Article 3 of the European Convention on Human Rights (ECHR).

Article 3 is the right not to be subject to torture, or inhuman or degrading treatment. A decision that compels a person to sleep rough or to be without food, shelter or funds, as such a decision usually amounts to inhuman treatment, therefore engaging Article 3 (see: R (Limbuela) v SSHD).

When the local authority establishes that a person's needs must be met by the provision of accommodation and financial support, the failure to provide such support is highly likely to lead to the person suffering a breach of Article 3 (see: Birmingham City Council v Clue).

Therefore, when a person qualifies for social services' support, the outcome of the needs assessment can be referred to in the human rights assessment and the person's situation of destitution will not usually need to be investigated any further. For a care leaver, the pathway plan will usually record any assistance that may be available to the young person in the UK and so can be referred to in the human rights assessment.

When a local authority is considering whether to provide accommodation on a discretionary basis to an adult with care needs, investigations into the person's support options will need to be made and recorded in the human rights assessment. For more information, see section 3.1.4 of this guidance.

3.3 Excluded groups

When a person qualifies for social services' support, their immigration status will determine whether Schedule 3 applies and, therefore, whether a human rights assessment will need to be carried out.

Schedule 3 applies to a person when they are in one of the following groups:

- A person who is 'in breach of immigration laws' and is not seeking asylum (paragraph 7).
- An Appeal Rights Exhausted (ARE) asylum seeker who has failed to comply with removal directions, which could apply when a person has not followed return arrangements that have been set by the Home Office (paragraph 6).
- A person with refugee status granted by a European Economic Area (EEA) state (paragraph 4).

Schedule 3 also applies to an ARE asylum seeker with dependent children who has been certified by the Home Office as failing to take steps to leave the UK voluntarily (paragraph 7A). However, as such certifications are not currently issued by the Home Office, people in this position will not be encountered by local authorities and this group has not been referenced on the template.

In practice, the majority of people who are subject to Schedule 3 will fall under paragraph 7 due to being 'in breach of immigration laws'.

3.3.1 When is a person ‘in breach of immigration laws’?

A person will be ‘in breach of immigration laws’ if they have one of the following types of immigration status:

- Visa overstayer
- Illegal entrant
- Appeal Rights Exhausted (ARE) in-country asylum seeker (who claimed asylum after entering the UK rather than at a port of entry)
- ARE following the expiry of Unaccompanied Asylum Seeking Child (UASC) leave and any subsequent claims
- ARE following an unsuccessful immigration claim
- EEA national who was living in the UK by 31 December 2020 and missed the deadline to apply to the EU Settlement Scheme
- EEA national who has been refused settled and pre-settled status under the EU Settlement Scheme

Asylum seekers

Schedule 3 does not apply to a person who is seeking asylum or to a ‘port’ asylum claimant who becomes Appeal Rights Exhausted (ARE).

When a person with a pending asylum claim or appeal that has not been finally determined meets the eligibility criteria for social services’ support, a human rights assessment should not be carried out.

If a person’s asylum claim has been finally determined and they become ARE, confirmation of whether they are a ‘port’ or ‘in-country’ asylum claimant will need to be obtained from the Home Office. This information is necessary because Schedule 3 applies to a person who is ARE if they claimed asylum ‘in-country’ but does not apply if they are classed as a ‘port’ claimant (see R(AW) v London Borough of Croydon [2005] EWHC 2950).

According to Home Office immigration statistics for the year ending June 2021, in 2020, about 16% of people seeking asylum claimed at port and 85% claimed in-country. 15% of Unaccompanied Asylum Seeking Children (UASC) were classed as ‘port’ claimants. However, a local authority with a sea port or airport in its area may be supporting a greater proportion of care leavers who are deemed to be ‘port’ rather than ‘in-country’ asylum claimants. Home Office immigration statistics are available at: https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#asylum-applications-decisions-and-resettlement.

EEA nationals

Following the end of European free movement in the UK on 31 December 2020, Schedule 3 was amended to reflect the subsequent changes to the residence rights of EEA nationals and their family members. An EEA national is no longer subject to Schedule 3 on the basis of their nationality. Instead, Schedule 3 now only applies to an EEA national when they are ‘in breach of immigration laws’.

However, applying Schedule 3 when an EEA national is 'in breach of immigration laws' has become unworkable when the person has an entitlement to apply to the EU Settlement Scheme. For more information about how to proceed in such cases, see chapter 6 of this guidance.

3.3.2 When is a person not in an excluded group?

A human rights assessment is only required when a person is in an excluded group and therefore does not apply to anyone who has leave to remain or is otherwise lawfully present in the UK. This means that there are many people with no recourse to public funds who can be provided with social services' support without the local authority being required to undertake a human rights assessment. When such a person meets the eligibility criteria for social services' support, it would be unlawful to refuse assistance on the basis that they can return to their country of origin.

Schedule 3 does not apply to a person when they have one of the following types of immigration status:

- Leave to remain with NRPF
- Section 3C leave
- Settled or pre-settled status
- Pending 'in-time' EU Settlement Scheme application submitted before 30 June 2021) when they were exercising a European right to reside on 31 December 2020
- Asylum seeker (i.e. their asylum claim has yet to be finally determined by the Home Office decision or appeal courts)
- ARE asylum seeker who claimed asylum at port of entry (rather than in-country)

3.3.3 How to check immigration status with the Home Office

As a person's immigration status can change, it is important that up-to-date information about this is obtained to determine whether they are 'in breach of immigration laws' or in another excluded group, and whether they have any outstanding immigration claims.

In family households, information about the nationality and immigration status of each dependant will also need to be obtained, as this may have a bearing on the parent's immigration position. It should not be assumed that each member of the household will have the same nationality or immigration status as the parent/ main applicant.

Immigration status information can be obtained directly from the Home Office in one of the following ways:

- Requesting a status check or raising a query with the Home Office on the NRPF Connect database, if the local authority subscribes to this.
- Using the Home Office Status, Verification, Enquires and Checking email service at: IE-CAS@homeoffice.gov.uk.

Information obtained from the Home Office may need to be checked with the person directly and/or their legal representative in case a new application or appeal has been lodged or is being prepared.

4. Barriers to return

This chapter sets out what information will need to be confirmed when Part B of the template is completed. Part B involves identifying whether there is a legal barrier or practical obstacle that means the person cannot be reasonably expected to return to their country of origin. The person's circumstances in their country of origin do not need to be considered at this stage of the assessment.

4.1 Legal barriers

The human rights assessment must identify any legal barriers to return. The following legal action will usually need to be treated as a barrier to return until the matter is concluded:

- An outstanding human rights application.
- An outstanding human rights appeal or procedural right to pursue a human rights claim.
- Further submissions made by an ARE asylum seeker.
- Other legal action, such as court proceedings involving a child.

4.1.1 Outstanding human rights application

An application made to the Home Office that raises human rights grounds must be treated as a legal barrier to return, unless the application is 'obviously hopeless or abusive'.

Examples of human rights applications include:

- An application made under the Immigration Rules on the basis of the person's family life (Article 8 grounds).
- An application made under the Immigration Rules on the basis of the person's private life (Article 8 grounds).
- An application made on the basis that the person cannot return to their country of origin due to medical reasons (raising Article 3 and/or Article 8 grounds).
- An application for leave outside the rules.

In Birmingham City Council v Clue, the Court of Appeal held that where a family has a pending application for leave to remain on human rights grounds, the local authority could not refuse assistance under section 17 of the Children Act 1989 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.

The Court of Appeal was also clear that a local authority must not consider the merits of an immigration application, as it is for the Home Office to decide this. However, the Court found that the local authority is required to be satisfied that the application is not 'obviously hopeless or abusive', stating, at paragraph 66 of the judgment, that this would apply to an application 'which is not an application at all or which is merely a repetition of an application which has already been rejected'.

An outstanding application will usually need to be treated as a legal barrier as it will be rare for a person to be making an immigration application that is 'obviously hopeless or abusive' due to the complexities of the Immigration Rules, difficulties accessing legal advice, barriers

to the application process, and changing personal circumstances. However, even when the local authority suspects that an application is 'obviously hopeless or abusive', it can be very difficult to determine this and advice should be sought from the local authority's legal department before drawing such a conclusion. Where a person has a history of failed immigration applications, an assumption should not immediately be made that any subsequent application will be repetitive, obviously hopeless, or abusive, as the following factors would need to be considered:

- The type of application that has previously been made.
- Whether there have been any changes to the person's circumstances or country of origin situation since the last application was made.
- Whether the person made their applications with the assistance of an immigration adviser.
- Changes to the Immigration Rules, Home Office policy or immigration case law that did not previously apply and may affect the outcome of the application.

For family households, a pending human rights application that has been made by a child or other member of the household would also need to be treated as a legal barrier. As immigration application fees are very expensive, it can often be the case that a child may make an application separately from their parent(s), who may not be able to afford to apply for everyone in the household at the same time. There could also be instances where a legal representative advises that the parent may have a better chance of succeeding in their claim if their child obtains leave to remain first.

Where the outcome of an application made by a child may have a bearing on the parent's immigration status, it should be treated as a legal barrier if it gives rise to new and different Article 8 considerations, unless the child's application is hopeless or abusive (see: OA v London Borough of Camden & Anor [2019] EWHC 2537). This could apply, for example, if a child makes a registration application to confirm their entitlement to British citizenship and once granted, their parent is able to meet the family life requirements of the Immigration Rules in order to be granted leave to remain.

4.1.2 Outstanding human rights appeals and procedural rights

In KA v Essex County Council [2013] EWHC 43, the Court found that an ongoing procedural right to pursue a human rights claim from within the UK must be treated as a legal barrier to return.

A person with an outstanding appeal will be treated as having a legal barrier until their appeal is finally determined by the courts, which could take several months or even years to reach a conclusion. As the Home Office has the ability to certify a human rights claim that is clearly unfounded, it is unlikely that a pending appeal could ever be said to be 'obviously hopeless or abusive'. In the majority of cases the local authority would therefore need to wait for the courts to give judgement on an appeal before the human rights assessment can be progressed.

When a person has the right to lodge an in-country appeal following the refusal of a human rights application, they will need to be treated as having a legal barrier until the deadline to lodge the appeal has passed. An appeal to the First-Tier Tribunal (Immigration and Asylum

Chamber) must be lodged within 14 days. More information about the appeal process is available at: https://www.gov.uk/immigration-asylum-tribunal.

If an appeal is lodged 'out of time', after the given deadline has passed, then it may still be accepted by the courts. In such cases, the appeal should be treated as a legal barrier. If a person has missed the deadline to lodge an appeal then it will be necessary to find out from their legal representative whether they intend to lodge an out of time appeal.

When a person is making a human rights claim, the local authority can only proceed with the human rights assessment when a person becomes 'Appeal Rights Exhausted' (ARE) and no further procedural right to pursue their claim. A person will become ARE when one of the following applies:

- They do not lodge an appeal and the deadline by which they can do so has passed (either after their initial refusal or at a later stage in the appeal process).
- Their asylum or immigration claim is certified so they are only able to pursue an out-of-country right of appeal. This should be specified on the Home Office refusal letter.

Changes since KA v Essex

In KA v Essex County Council, the Court considered the local authority's obligation to provide support under section 17 of the Children Act 1989 to a family that had been refused leave to remain but had not yet issued with a decision to make removal directions. In this case, the Court found that the local authority was required to provide support whilst the family waited for the Home Office to issue a removal decision. However, KA v Essex cannot be followed to the letter because the Home Office has since made significant changes to appeals and removals processes. Instead, the principles established in Clue v Birmingham City Council and KA v Essex must be followed in line with the removal and appeal processes that are currently implemented by the Home Office.

Currently, a refused human rights claim (rather than a removal decision) will have an in-country right of appeal, unless it is certified as clearly unfounded.

Certification of a human rights claim and out-of-country appeals

The Home Office may certify any asylum or human rights claim on a case-by-case basis. Certified claims will only attract an out-of-country right of appeal, which can only be brought after the person has left the UK following their enforced removal or a voluntary return.

Asylum claims made by people from certain countries will almost certainly be certified, although it cannot be assumed that this will always be the case. It will be rare for a non-asylum human rights claim to be certified. The Home Office guidance on Rights of appeal: Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims) sets out the current country list as well as giving examples of when asylum and non-protection human rights claims may be certified. The guidance is available at: https://www.gov.uk/government/publications/appeals.

When a person's claim is certified with an out-of-country right of appeal, they would need to obtain legal advice about whether there are grounds to judicially review the decision. A judicial review must be lodged within three months of the date of the decision. If judicial

review action is pending then this would normally need to be treated as a legal barrier to return.

4.1.3 Asylum claims and further submissions

When further submissions are made by an appeal rights exhausted (ARE) asylum seeker, these would need to be treated as a legal barrier to return, unless the submissions are obviously hopeless or abusive (see: AM v Secretary of State for the Home Department: AS/14/11/32141).

If a person claims asylum, or makes further submissions that are accepted as a fresh asylum application, the human rights assessment should be stopped as the person will no longer be in an excluded group. In such cases, the local authority would need to explore whether Home Office asylum support is available to meet the accommodation needs of a family or adult with care needs who does not require residential care.

4.1.4 Other legal action

A person may be treated as having a legal barrier to return if one of the following circumstances applies to them:

- They are involved in criminal or civil proceedings.
- They are involved in court proceedings involving a child.
- There are difficulties obtaining consent for a child to leave the UK where this needs to be provided by another person with parental responsibility.
- They are making an immigration application that does not involve human rights considerations.

When a person is a defendant in criminal proceedings or a party to civil proceedings it is likely that they will be required to remain in the UK whist the trial or legal action is ongoing.

In family cases, ongoing court proceedings regarding a child in the household, such as legal action regarding contact or a care order, would need to be considered as a legal barrier to return. If a parent is not able to participate in family law proceedings, then this is likely to give rise to a breach of Article 8 (the right to a family or private life).

When another person outside of the family household has parental responsibility for a child within the household, then it will be necessary to establish whether requiring the family to return to their country of origin could lead to a breach of child abduction legislation. This can be a complex area of law and guidance will need to be sought from the local authority's legal department when it is unclear what consent would need to be obtained in order to enable a child to return to their parent's country of origin.

When it appears that a person is unable to leave the UK because of ongoing legal action, or to remain compliant with child abduction laws, they may need signposting to an immigration adviser to find out whether they are able to apply for leave to remain on that basis.

The majority of people requesting social services' support who are making immigration applications will be raising human rights grounds. Other types of immigration applications can usually be made from outside of the UK and therefore may not fall under the scope of Birmingham City Council v Clue and KA v Essex. However, for European Economic Area (EEA) nationals who are without lawful status but have an entitlement to apply to the EU

Settlement Scheme, it is recommended that their EU Settlement Scheme application is treated as a legal barrier if a human rights assessment is completed. For more information about how Schedule 3 applies to EEA nationals, see chapter 6 of this guidance.

4.2 Practical obstacles

The human rights assessment must identify any practical obstacles that appear to prevent the person from being able to travel to their country of origin and, where possible, set out how these can be overcome.

The following practical obstacles will usually need to be treated as a potential barrier to return and considered within the assessment:

- Medical or health needs affecting the person's ability to travel.
- Lack of travel documents where these cannot be obtained.
- Lack of funds to arrange a return.
- Other practical obstacles, such as Covid-19 related restrictions on international travel.

4.2.1 Medical/ health needs

If a person has a medical condition, disability, or mental health condition, then their ability to travel must be considered and documented in the human rights assessment.

A ‘fit to fly’ opinion from the person’s GP or specialist doctor may be required to confirm whether the person is able to travel and if so, what appropriate arrangements would need to be made to facilitate this. If the person is unable to travel or travel would be very difficult for them to undertake with assistance, then this should be treated as a practical obstacle to return.

The current government guidance (which may be different in England, Wales, Scotland and Northern Ireland) will need to be followed with regards to self-isolation requirements following a close contact or positive test. As the situation regarding Covid-19 remains fluid, the position would need to be regularly reviewed if no barriers are identified and return is being considered.

4.2.2 Travel documents

It is common for a person who is without immigration permission in the UK not to have a current passport or the identity documents they may need to obtain a new passport. In such cases, it will be necessary to establish how these can be obtained and record this in the human rights assessment.

Information about the process for obtaining an identity document or passport can be gathered by making general enquiries to an embassy, consulate, or the Home Office, without disclosing the person’s identity. Details of a person who has previously claimed asylum and is intending to lodge, or has made, further submissions should not be disclosed to their national authorities, unless their legal representative has confirmed that this would not adversely affect their claim.

When a person lacks identity or travel documents, this does not necessarily constitute a practical barrier to return as it will usually be reasonable to expect the person to follow the

processes set out by their national authority in order to obtain a travel document. If a person is unable to obtain their own document, the Home Office should also be able to advise if a temporary travel document can be issued to enable return to a particular country.

However, there may be some cases where a person's lack of travel documentation will need to be treated as an obstacle to return, such as where there is no functioning government in the country of origin, no presence of a national embassy/ consulate in the UK/Europe, or when the person's nationality is disputed by their national authority. When a person has no means of acquiring a travel document, they would need to be signposted to a legal adviser to find out what their immigration options are.

4.2.3 Funding a return

As a person who qualifies for social services' support is unlikely to have funds available to arrange their own return, the human rights assessment must document what assistance is available from the Home Office and/or local authority to cover the costs of a return.

Home Office Voluntary Returns Service

The Home Office can assist a person to return voluntarily if one of the following applies to them:

- They are living in the UK without immigration permission, such as a person who has overstayed their visa.
- They have withdrawn or want to withdraw a pending immigration application.
- They have claimed asylum.
- They are a confirmed victim of modern slavery.

A person will not be eligible for a voluntary return if one of the following applies to them:

- They are currently being investigated by the police or detained by the Home Office.
- They have been given a prison sentence which is 12 months or longer.
- They have been convicted of an immigration offence and given a deportation order.
- They have been granted humanitarian protection, indefinite leave to remain or refugee status.
- They have a Service Providers from Switzerland visa, a Frontier Worker permit, or an S2 Healthcare Visitor visa.
- They have been granted settled or pre-settled status under the EU Settlement Scheme or have applied to the EU Settlement Scheme.

When a person qualifies for a voluntary return, the Home Office can organise and fund the flight but will usually expect the person to arrange their own travel documentation if they do not have this. The Home Office may provide additional support in obtaining documentation when a person has a vulnerability and cannot get this by themselves without difficulty.

In some cases, the Home Office can provide up to £3,000 in financial support to help a person on their return. This is provided as a single payment on a card, which can only be used in the country of return. A person may qualify for financial support when one of the following applies:

- They are returning to a 'developing country', as defined by the Organisation for Economic Co-operation and Development (OECD) on its website at: https://www.gov.uk/government/publications/countries-defined-as-developing-by-the-oecd
- They have been refused asylum.
- They are a confirmed victim of modern slavery.
- They are returning as a family household that includes a child under 18.
- They are under 18 and travelling alone.
- They are under 21 and a care leaver.
- They are sleeping rough.
- They need more help with return due to a medical condition or other reason.

For more details, see the Home Office information about voluntary returns and how to apply at: https://www.gov.uk/return-home-voluntarily.

Local authority return

When the Home Office is unable to arrange a return, this may be funded and organised by a local authority in England using its general power of competence (section 1 Localism Act 2011).

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

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

Covid-19 entry requirements

Any national restrictions relating to Covid-19 that apply in the country of return will need to be identified and documented in the human rights assessment. The person may need to meet testing, vaccination, and/or quarantine requirements in order to be able to enter their country of return. Any costs arising from these requirements will need to be covered by the Home Office or local authority, depending on how return is facilitated. As the situation regarding Covid-19 remains fluid, the position would need to be regularly reviewed if a return is arranged.

Return and future residence rights

Undertaking a voluntary return is likely to affect the person's ability to return to the UK at a future date. Therefore, any person who indicates a desire to return would need to be given an opportunity to get legal advice so that they are fully aware of the consequences of taking up a return before committing to this. Although the Home Office can answer questions about the voluntary returns process, it does not provide independent advice to people who are considering return.

The following examples demonstrate how a voluntary return or absences from the UK can affect a person's immigration position:

- A person who undertakes a voluntary return that is funded by the Home Office (with or without a reintegration package), will be subject to a re-entry ban of two or five years, depending on how long they were in the UK after being issued with a liability to removal notice or becoming appeal rights exhausted.

- EEA nationals will lose their pre-settled status if they remain outside of the UK for a period of two years or longer. If they intend to apply for settled status, they must not be absent for longer than six months in any 12 month period, although may be permitted to have a single absence of up to 12 months in certain limited circumstances.

4.2.4 Other practical obstacles

Any other practical obstacles must be identified and documented in the human rights assessments, with details of how these can be overcome, where this is possible.

For example, a person could not be expected to return whilst government restrictions were imposed on international travel during the Covid-19 pandemic. Currently, it is possible for people in the UK to undertake international travel but if restrictions are imposed at a future date then these may affect a person's ability to return. Any government guidance would need to be followed and different rules may apply in England, Wales, Scotland and Northern Ireland.

4.3 Conclusion and next steps

At this stage of the human rights assessment the local authority will need to conclude whether the person can reasonably be expected to return. This decision will depend on whether a legal barrier, or practical obstacle that cannot be overcome, has been identified.

4.3.1 Possible outcomes

If a legal barrier, or practical obstacle that cannot be overcome, is identified, then the bar on providing support will be lifted because the person cannot be expected to avoid a breach of human rights by returning to their country of origin. In such cases, the human rights assessment can be concluded. Part C of the template will not need to be completed.

If no barrier to return is identified, the local authority can conclude at this stage that the person can be reasonably expected to return to their country of origin to avoid a human rights breach arising from their destitution in the UK. In order to consider the impact of return on the individual or family in more detail, Part C of the template will need to be completed.

4.3.2 Next steps when a barrier to return is identified

When a barrier to return is identified, social services' support can be provided if the person qualifies for this. The person will need to be advised on what basis social services' support is being provided and when this could be reviewed.

As immigration claims can be ongoing for several months, or even years, social services' support may need to be provided for a long time and any barriers to return must be regularly reviewed. It is therefore important to record when regular reviews will need to be undertaken and what will need to be checked during the review.

For example, when a person has a pending immigration application or appeal it will be necessary to regularly request updates from the Home Office about the status of the claim and, in some cases, additional action may be necessary. A person with an outstanding appeal who is unrepresented could be assisted to get legal advice to find out whether in fact they have an alternative option with better prospects of success, such as making a new immigration claim based on their current circumstances. Local authorities using the NRPF Connect database can use the system to request that the Home Office expedites a decision on a longstanding application.

Where a practical obstacle to return is identified that makes return unviable for the foreseeable future, steps will need to be taken to ensure that this insurmountable barrier is formally recognised by the Home Office, otherwise the long-term costs of meeting the person's accommodation and subsistence needs will unjustifiably fall to the local authority. An example of when such as situation may arise would be where a consultant advises that an adult receiving care will be unable to travel indefinitely due to a serious long-term health condition, but the adult has not been granted leave to remain by the Home Office because they do not meet the high threshold to be granted leave on medical grounds. When social services' support cannot be withheld or withdrawn on the basis that a person can return, the local authority should assist the person to access immigration advice and raise the case with the Home Office in order to explore the possibility of a grant of leave to remain outside the rules. A grant of leave to remain in such circumstances would be appropriate to avoid the local authority incurring ongoing support costs when a person cannot be expected to leave the UK, is eligible for care and support, but remains ineligible for benefits and mainstream housing assistance.

5. Considering return

This chapter outlines what information will need to be confirmed when Part C of the template is completed.

Part C should only be undertaken when no barriers to return have been identified and, therefore, the person can reasonably be expected to return. In such cases, the local authority must proceed to consider whether return would result in a breach of human rights, having regard to the outcome of any decisions made by the Home Office or appeal courts.

5.1 Home Office decisions

The Courts have been clear that expertise for determining whether a human rights breach w return lies with the Home Office, rather than the local authority (see: O v London Borough Of Wandsworth [2000] EWCA Civ 201 & Birmingham City Council v Clue).

When a decision has been made by the Home Office or appeal courts, the local authority must have regard for the findings that have been made, which will inform the conclusions drawn in the human rights assessment. Therefore, it will be very difficult for a person to demonstrate that the bar on providing social services' support can be lifted when the Home Office or appeal courts have already concluded that return would not result in a human rights breach.

However, whilst undertaking the human rights assessment, the local authority may identify that no relevant immigration decisions have been made or that there are new matters that need to be put before the Home Office. In the absence of a relevant Home Office decision, it would be very difficult for the local authority to determine whether return would give rise to a breach of human rights. In such cases, the person would need to be provided with an opportunity to seek immigration advice before any conclusions about return are drawn. The human rights assessment can either be paused whilst the person is seeking advice or can be concluded on this basis. In both cases, it will be necessary to regularly review the person's progress in accessing legal advice.

5.1.1 Obtaining Home Office decisions

The outcome of relevant Home Office decisions will need to be recorded in the human rights assessment. This information can be obtained if the person provides a copy of their decision letter or appeal determination, or by finding out what the outcome of an application or appeal was from the Home Office and/or the person's legal representative. For details about how to obtain immigration information from the Home Office, see section 3.3.3 of this guidance.

5.1.2 Immigration advice

Signposting to an immigration adviser may be necessary when one of the following circumstances apply:

- The person has never made an application to the Home Office.
- New circumstances, such as the birth of a child, or diagnosis of a medical condition, have arisen since the person made their most recent application to the Home Office.

- It appears that the person may be able to make a claim under the Immigration Rules, or that a child may be entitled to register as a British citizen, which may then enable their parent to pursue an application under the Immigration Rules.
- The person made their previous application without legal advice or did not appear to have good quality legal advice, made the wrong application, or did not lodge an appeal against a Home Office refusal when they had the opportunity to do so.

The template prompts the local authority to consider whether the person requires immigration advice at several stages of the assessment, as this may not be immediately apparent. In some instances the need for immigration advice may only be identified when a more detailed consideration of a human rights breach has begun. The information provided in section 5.2 of this guidance is intended to help establish whether immigration advice may be required.

If an application is submitted as a result of receiving legal advice, then this would need to be treated as a barrier to return until the claim is finally determined by the Home Office and/or appeal courts. For more information about barriers to return, see chapter 4 of this guidance.

If the person is advised by their legal representative that no further applications can be made, the outcome of such advice would need to be recorded in the human rights assessment and would need to be referred to when return is considered.

For information about what types of cases are covered by legal aid and how to find an immigration adviser, see the NRPF Network's information on rights and entitlements at: https://www.nrpfnetwork.org.uk/information-and-resources/rights-and-entitlements.

5.2 Identifying a human rights breach

This section of the guidance is intended to help a local authority to identify any potential human rights breaches that will need to be considered in the human rights assessment, and whether there are matters that will need to be put before the Home Office before a conclusion about return can be drawn.

For the purpose of the guidance, the term 'human rights' refers to a person's 'Convention rights', as set out in the European Convention on Human Rights (ECHR) and incorporated into the Human Rights Act 1998.

Schedule 3 requires the local authority to undertake its own assessment of return by evaluating the views of the person (and those of any dependants in a family household) against the available factual information, including relevant Home Office decisions.

Where the Home Office has already found that return would not give rise to a human rights breach, it is highly unlikely that the local authority would reach a different conclusion with regards to the person's ability to return. Any additional investigations undertaken into the person's situation in their country of origin for the purpose of the human rights assessment would not need to be excessive as these will have already been carried out by the Home Office.

The template is structured to prompt the local authority to consider whether the following Articles of the ECHR may be breached on return to country of origin:

- Article 2: the right to life
- Article 3: the right to be free from torture, inhuman or degrading treatment
- Article 8: the right to respect for family and private life

The factors that must be considered for each person will be different, so this section of the template can be replicated if it is identified that return could breach any other Convention rights. For more information about these Articles and other Convention rights, see the Equality and Human Rights Commission website at: https://www.equalityhumanrights.com/en/human-rights/human-rights-act.

This guidance sets out what will need to be considered in the human rights assessment when the person asserts, or the local authority identifies, that the following reasons could result in a human rights beach on return:

- Protection (asylum) grounds
- Medical grounds
- Family and private life grounds

5.2.1 Protection (asylum) grounds

Return would result in a breach of Article 2 and/ or Article 3 when a person is at risk of being unlawfully killed, and/or is at risk of torture or inhuman or degrading treatment in their country of origin. When a person asserts that they would be at risk of such mistreatment, they would usually need to apply for asylum in order to have their claim for international protection considered by the Home Office.

A person will be granted refugee status if they can demonstrate that they have a well-founded fear of persecution due to their race, religion, nationality, political opinion or membership of a particular social group (see: the 1951 Refugee Convention).

A person may be granted Humanitarian Protection if they do not qualify for refugee status but there is a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. For more information, see the Home Office asylum policy guidance on humanitarian protection at: https://www.gov.uk/government/publications/humanitarian-protection-instruction.

When a person is refused asylum, then the Home Office will consider whether leave to remain can be granted for other reasons, such as on human rights grounds under the Immigration Rules or on medical grounds, where the person's removal would result in a breach of Article 3 or Article 8. Some care leavers who were Unaccompanied Asylum Seeking Children (UASC) may have been granted limited leave to remain, often referred to as 'UASC leave', until they were 17.5 years old if there were no reception arrangements in their country of origin.

When a person's asylum claim, and any subsequent appeal, has not succeeded, they will be described as 'Appeal Rights Exhausted' (ARE) but in certain circumstances may be able make a fresh asylum claim. This is usually done by making 'further submissions' to the Home Office. The following scenarios are examples of when further submissions may be made by a person who is ARE:

- They are raising grounds that were not considered by the Home Office in their original asylum claim.
- They have new evidence, their personal circumstances have changed, or the situation in their country of origin has changed since their original asylum claim was determined.
- They did not have a legal representative assisting them with their asylum claim or they did not appeal against the refusal of their claim when they had the opportunity to do so.

If the person has not previously claimed asylum or may have grounds to make further submissions, the local authority will be unable to conclude whether return would result in a breach of Article 2 or Article 3. Instead, the person would need to be provided with an opportunity to access legal advice to find out what their options are.

If, following legal advice, they claim asylum, the person will no longer be in an excluded group and a human rights assessment will not be required.

Further submissions lodged with the Home Office after the person has sought legal advice would usually need to be treated as a barrier to return. For more information about when further submissions can be treated as a legal barrier, see section 4.1.3 of this guidance.

When a person's asylum claim has been finally determined by the Home Office and/or appeal courts, or they do not have grounds to make further submissions, the outcome of such decisions, and/or any legal opinion they have subsequently obtained, can be relied upon as evidence that return would not give rise to a breach of Article 2 and/or Article 3.

5.2.2 Medical cases

When a person is receiving medical treatment in the UK, it will be necessary to consider whether the deprivation of such treatment on return to their country of origin would result in a breach of Article 3 and/or Article 8.

In immigration cases that have involved the person's removal to their country of origin, the Courts have determined that a high threshold will need to be met in order for the deprivation of medical treatment to amount to a breach of Article 3 (see: Paposhvili v. Belgium, Application no. 41738/10, Council of Europe: European Court of Human Rights (13 December 2016) & AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17).

The case of Paposhvili concerned a person living in Belgium who had multiple health issues, including TB and Leukaemia. The European Court of Human Rights found that Article 3 would be engaged when:

> …[the person] although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.

AM (Zimbabwe) is a deportation case involving a person who was HIV positive and receiving a type of anti-retroviral medication that was unavailable in their country of origin. The

Supreme Court held that Paposhvili should be followed by the UK courts and found that a 'significant reduction in life expectancy' meant a substantial reduction, rather than the imminence of death. Article 3 can therefore be engaged in situations other than 'deathbed' cases, although the threshold still remains high.

A person's medical condition and any treatment they require will be relevant factors when undertaking an Article 8 proportionality assessment, and should be considered in line with other family or private life matters that are identified in the human rights assessment. For more information about Article 8 proportionality assessments, see section 5.2.4 of this guidance.

There is little case law that considers human rights breaches arising for medical reasons in the context of applying Schedule 3 when a person is eligible for social services' support. In the case of De Almeida v Royal Borough of Kensington and Chelsea [2012] EWHC 1082, the court considered whether refusing accommodation under section 21 of the National Assistance Act 1948 would give rise to a breach of human rights on medical grounds. Mr De Almeida was a Portuguese national who was terminally ill with AIDS and also suffered from depression and skin cancer. The High Court found that there would be a breach of Article 3 if Mr De Almeida was refused accommodation and returned to Portugal because he was a very exceptional case: 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, as he would have faced delay and difficulty in obtaining accommodation and benefits whilst being away from his existing support network of friends and healthcare professionals. The Court also found that return to Portugal would be a breach of Mr De Almeida's private life under Article 8.

(Since the case of De Almeida was heard, the Care Act 2014 has replaced the National Assistance Act 1948 and Schedule 3 no longer applies to European Economic Area nationals, unless they are 'in breach of immigration laws'.)

When a person is receiving medical treatment in the UK, the local authority will need to identify whether the Article 3 threshold is met and/or whether Article 8 may be engaged. In order to determine this, the following information will usually need to be documented in the human rights assessment:

- Confirmation of the health condition from medical professionals, including a treatment plan and a prognosis with and without treatment.
- An explanation of how the person's medical needs could be managed in their country of origin, for example, whether similar or alternative treatment is available and if so, how they would be able to access this.
- What support networks the person would have on return to help access treatment and manage their condition.
- What access to services, housing, and income they would have in their country or origin when their medical condition deteriorates, if this is the expected consequence of the withdrawal of the medical care being received in the UK.
- If the person is unable to access any treatment in their country of origin, an explanation of how this would impact on their prognosis, specifically whether this would expose the person to a serious, rapid and irreversible health decline resulting in intense suffering, or a substantial reduction in life expectancy.

- The outcome of relevant decisions made by the Home Office and/ or appeal courts.

If it is clear from the facts of the case that the Article 3 threshold is not met, this can be explained in the human rights assessment with reference to the person's circumstances and any medical evidence that has been obtained.

However, if it appears that the Article 3 threshold may be engaged, and the Home Office has not considered the person's medical grounds in an immigration or asylum application, the local authority will be unable to conclude whether return would result in a breach of Article 3 and/or Article 8. Instead, the person would need to be provided with an opportunity to access legal advice to find out what their options are.

The following scenarios are examples of when a person may require legal advice:

- They have not previously made an application on medical grounds and whether they meet the Article 3 threshold or may experience an Article 8 breach needs to be considered by the Home Office.
- Their health situation has changed since any previous Home Office decisions were made.
- Their last Home Office decision was made before the Supreme Court judgment of AM (Zimbabwe), which expands the Article 3 threshold, was given on 29 April 2020.

Any immigration application or further submissions made to the Home Office after the person has sought legal advice would usually need to be treated as a barrier to return. For more information about legal barriers, see section 4.1 of this guidance.

When a person's medical claim has been finally determined by the Home Office and/or appeal courts, or they do not have grounds for a further application, the outcome of such decisions, and/or any legal opinion they have subsequently obtained, can be relied upon as evidence that return would not give rise to a breach of Article 3.

5.2.3 Family and private life

In all cases, it will be necessary to establish if return would result in a breach of Article 8 of the ECHR and, if so, whether such interference with the person's family or private life would be proportionate. This will involve identifying whether return would interfere with the person's ability to maintain family relationships (family life) or their social and economic ties (private life). This section of the guidance contains information about undertaking a proportionality assessment, grounds for making an Article 8 immigration application, best interests of a child, family life considerations, and private life considerations.

Where the Home Office has already made findings that return would not result in an Article 8 breach, or would not disproportionately interfere with Article 8 rights, it will still be necessary for the local authority to undertake additional investigations to establish whether the full facts of the case in relation to the person's family and private life have been considered, as these can often change. If new or different information is identified then the person may need to be provided with an opportunity to access legal advice to find out what their options are before a conclusion can be reached about whether return would result in an Article 8 breach.

The following scenarios are examples of when a person may require legal advice:

- The local authority reaches a different conclusion to the Home Office and identifies that return would give rise to an Article 8 breach and that such interference with the person's family or private life would not be proportionate.
- The person appears to be able to make an application under the Immigration Rules.
- The person's (or member of the household's) personal circumstances have changed since any previous Home Office decisions were made.
- The person did not have a legal representative assisting them with their previous Article 8 application or they did not appeal against the refusal of their claim when they had the opportunity to do so.

Any immigration application or further submissions made to the Home Office after the person has sought legal advice would usually need to be treated as a barrier to return. For more information about legal barriers, see section 4.1 of this guidance.

When a person's family or private life claim has been finally determined by the Home Office and/or appeal courts, or they do not have grounds for a further Article 8 application, the outcome of such decisions, and/or any legal opinion they have subsequently obtained, can be relied upon as evidence that return would not give rise to a breach of Article 8.

Proportionality assessment

The full text of Article 8 is as follows:

> (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 is 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.

In order to identify whether Article 8 is engaged, the local authority would need to consider the following questions:

1. Does the person have an established family and/ or private life in the UK?
2. Will return to country of origin interfere with this?
3. Will the interference be significant enough to breach the person's right to family and private life?
4. Is such interference justified and proportionate in light of the fact that there will be other demands on the social services' budget which the local authority is responsible for spending properly?

See: Razgar v Secretary of State for the Home Department [2004] UKHL 27 & Birmingham City Council v Clue.

Article 8 is a qualified right, which means that a certain level of infringement of a person's right to a family and private life can be permitted so long as this is justifiable and proportionate to achieving a legitimate public end. A legitimate public end could be

maintaining immigration control or protecting the economic wellbeing of the country, such as by withholding scarce local authority resources.

When the person is identified has having an established family life or private life, the local authority will need to consider whether it is justified and proportionate to interfere with those rights by withholding social services' support on the basis that the person can return to their country of origin. This 'proportionality assessment' requires an evaluative exercise that considers all the relevant factors. For family households, the best interests of the child must be given primary consideration.

Two cases illustrate how different conclusions on proportionality may be reached when the relevant facts of each case are taken into account.

The case of AR v Hammersmith and Fulham concerned a Lithuanian national who had lived in the UK for seven years and applied to the local authority for accommodation under the Care Act 2014. AR did not have eligible care and support needs and the local authority concluded that he could avoid destitution in the UK by returning to Lithuania, where his family were living. He had no close connections with family or friends in the UK and had worked in the past. He would be entitled to social assistance and free healthcare if he returned to Lithuania. The Judge found that any interference with his private life under Article 8 as a result of having to leave the UK would be justified due to the local authority's scarce resources, the claimant's slight connections with the UK, and the fact that some support would be available in Lithuania.

The case of De Almeida v Kensington and Chelsea concerned a Portuguese national who was terminally ill with AIDS and also suffered from depression and skin cancer. The Court found that return to Portugal would be a breach of his private life, in terms of Mr De Almeida's physical and psychological integrity. He would not be able to access the immediate support which he needed on return due to his weakened physical condition, his vulnerable mental state, the absence of any friends or family in Portugal to assist him, and the 'cumbersome' and slow welfare assessment procedures in Portugal. Such a breach was not justified due to the relatively small cost saving to be gained by the local authority by returning him.

(NB: Schedule 3 no longer applies to European Economic Area nationals, unless they are 'in breach of immigration laws'.)

Grounds for making an Article 8 immigration application

The Immigration Rules (at paragraph 276ADE and Appendix FM) contain provisions that reflect that when certain requirements are met, it would usually not be proportionate to expect a person to return to their country of origin when Article 8 is engaged.

A person may be able to make an application under the Immigration Rules when one of the following circumstances applies to them:

- They are the sole parent of a British child.
- They are the sole parent of a child who has lived in the UK for seven years.
- They are the partner of a British citizen or person who has a form of settled status, such as indefinite leave to remain in the UK.

- A child in the household has lived in the UK for seven years.
- They are age 18-25 and have lived in the UK for over half their life.
- They are age 18 or older and have lived in the UK for 20 years.
- They are age 18 or older and have lived continuously in the UK for less than 20 years when there would be very significant obstacles to their integration into their country of origin.

Even where a person does not appear to meet the requirements of the Immigration Rules, they may still be able to make an immigration claim raising Article 8 grounds.

Additionally, a child or adult who was born in the UK on or after 1 January 1983 and who has lived here for 10 years or longer will be entitled to register as a British citizen. For more information about British citizenship rights for children, see the Project for the Registration of Children as British Citizens website at: https://prcbc.org/.

Best interests of a child (family households)

When undertaking an Article 8 proportionality assessment for a family household, the local authority must have regard to Article 3(1) of the United Nations Convention on the Rights of the Child 1989:

> 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.

Additionally, section 11 of the Children Act 2004 requires local authorities in England to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. For more information, see the Department for Education statutory guidance, Working together to safeguard children at: https://www.gov.uk/government/publications/working-together-to-safeguard-children--2.

Where a child's right to a family and/or private life is engaged, the best interests of the child need to be a primary consideration when establishing whether it would be proportionate to withhold support on the basis that the family can return to their country of origin. The term 'best interests' broadly describes the wellbeing of a child and the child's views must be sought in order to discover their best interests. The child's nationality is of particular importance, although is not a 'trump card', when assessing their best interests (see: ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, which concerned the removal of a family with British children).

The legal principles in cases concerning the best interests of children are clearly set out in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74:

> (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
>
> (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

Many statutory decisions undertaken by Children's Services will involve consideration of the best interests of a child, so this will not be an unfamiliar concept. Most of the information necessary to inform the human rights assessment, such as a child's needs relating to education and healthcare, will have been already been documented in the child in need assessment undertaken to establish the family's eligibility for support.

In a child in need assessment, the local authority will also consider the parent's ability to meet their child's needs in the UK in light of any restrictions to services that are imposed on the parent as a result of their lack of lawful status. Where a parent is without lawful status in the UK, the child's needs in their country of origin will also be considered in the child in need assessment, in order to identify any potential risks on return or safeguarding factors. There will be a presumption that on return to country of origin, the parent will no longer be barred from accessing employment and/or public services, so, in the majority of cases, the material deprivation that has resulted in the child being in need in the UK due to the parent's immigration status will no longer be experienced on return.

UNICEF and UNHCR's Safe and Sound guidance sets out what states can do to ensure respect for the best interests of unaccompanied and separated children in Europe, which may be a useful reference when considering a child's best interests. The guidance is available on the UNICEF website at: http://www.unicef.org/protection/files/5423da264.pdf.

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Home Office to have regard to the need to safeguard and promote the welfare of children in its decision making, which includes making timely decisions on immigration and asylum claims involving children. For more information, see the Home Office statutory guidance, Every Child Matters at: https://www.gov.uk/government/publications/every-child-matters-statutory-guidance.

Family life considerations

A person can establish a family life in the UK through their relationships with a spouse or partner, or any children under 18. 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 the person's circumstances.

In family cases, children will be expected to return with their parent(s). In such cases, there would be no breach of Article 8 due to household separation. However, there may be a significant interference in family life where there are insurmountable obstacles that prevent a child from returning. For example, where a parent who is living in the UK is not part of the family unit, it would be necessary to establish details of their relationship and contact with the child, and to consider how return may change this and affect the child.

Where members of a household have different nationalities, current entry requirements or residence restrictions in the country of return would need to be checked in case any family members are prevented from being able to permanently reside there.

Private life considerations

A person's private life will include their social, cultural and economic ties, which could be established through work, education, social networks, or community involvement. The length of a person's residence in the UK will be a highly relevant factor in considering whether they have an established private life. Any medical and health issues would also need to be considered. For example, if the person will no longer have access to treatment that they are receiving in the UK, the impact of this on their physical and psychological integrity would need to be considered, taking into account the availability of family or other support in the country of return.

For family households, it will be necessary to determine whether each child in the household has an established private life, taking into account their age and how return may impact on the social and cultural ties that the child enjoys in the UK. A child of school age is likely to have established a private life in the UK, so this must be properly considered in the human rights assessment (see: MN & Anor v London Borough of Hackney [2013] EWHC 1205).

In all cases it will be necessary to consider whether the person can reasonably be expected to establish a meaningful level of existence in their country of origin. This may include establishing whether they can work or study, access welfare services, or be assisted by friends or family members. The human rights assessment would need to reference any funds or reintegration support that would be made available by the Home Office or local authority to prevent the person experiencing destitution on return.

The presumption will be that the person will not usually be barred from accessing employment and/ or public services on return to their country of origin, and therefore will not experience the material deprivation that a person who is living in the UK without lawful immigration permission would. A person who is without lawful status in the UK cannot legally work, access free secondary healthcare, rent a property (in England), open a bank account or hold a driving licence.

Although experiencing economic hardship in their country of origin will not usually give rise to a breach of Article 3, this threshold may be met in exceptional circumstances, where conditions of material deprivation give rise to a real risk that the person may be exposed to intense suffering or a significant reduction in their life expectancy (see: Ainte (material deprivation, Art 3, AM) (Zimbabwe) [2021] UKUT 203 (IAC)).

5.2.4 Country of origin information

A detailed analysis of country-specific circumstances will be undertaken by the Home Office, when a person makes an immigration or asylum claim, or by an immigration adviser, when advice is being sought by a person about their immigration options. Any research undertaken by the local authority for the purpose of completing the human rights assessment will not therefore need to be in-depth.

When the local authority needs refer to country information or identify what services may be available in the country of return, the following sources may provide some basic information:

- Home Office country policy and information notes, available at: https://www.gov.uk/government/collections/country-information-and-guidance.
- United States Department of State country reports on human rights practices, available at: https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/.
- Amnesty International country information and reports, available at: https://www.amnesty.org/en/countries/.
- World Health Organisation website (http://www.who.int/).
- International Labour Organisation website (http://www.ilo.org/global/lang--en/index.htm#).
- European Commission social security information (EEA countries and Switzerland) available at: https://ec.europa.eu/social/main.jsp?langId=en&catId=858.
- Routes Home (EEA countries) website (http://www.routeshome.org.uk/).

5.3 Conclusion and next steps

Where the local authority has identified that relevant matters need to be put before the Home Office, and that the person will need to be provided with an opportunity to access immigration advice before a conclusion about return to country of origin can be reached, the bar on providing support will be lifted. The human rights assessment can either be paused or concluded whilst the person seeks advice, with regular reviews undertaken to check their progress.

Where no barriers to return are identified, and, with reference to decisions have been made by the Home Office and/or appeal courts, the local authority concludes that return would not give rise to a human rights breach, social services' support can be withheld or withdrawn on the basis that the person can avoid a breach of human rights arising from their destitution in the UK by return to country of origin. In such cases, assistance with return can be offered to the person.

5.3.1 Next steps: immigration advice is required

When the person needs to access legal advice to find out what their options are before the local authority can draw conclusions about return, accommodation and financial support will need to be provided when they qualify for social services' support.

Services providing legal aid-funded advice or free advice are usually in short supply and high demand, so a reasonable timeframe would need to be provided for a person to instruct a legal representative. It will be necessary to undertake regular reviews and to maintain ongoing discussions with the person about their progress in seeking advice, providing any

practical assistance where necessary. The human rights assessment can be used to record what assistance will be provided to the person to access immigration advice and how regularly their progress will need to be reviewed. This should be communicated to the individual.

Once a legal representative has been instructed, it can take several weeks, or even months, to prepare an application, particularly for complex matters such as further submissions relating to a fresh asylum claim. The legal representative may require the local authority to provide evidence to support an application, such as a letter detailing its intervention, and the person may require practical help with obtaining documents from other agencies.

5.3.2 Next steps: return to country of origin

When a person qualifies for social services support but is able to avoid destitution in the UK by returning to their country of origin, the local authority will be barred from providing support and can instead offer assistance with return. If the person agrees to undertake a voluntary return, accommodation and financial support may be provided whilst return arrangements are made. For more information about arranging and funding a return, see section 4.2.3 of this guidance.

When support is being withheld or withdrawn on the basis that the person can return, recommendations for the individual and any action the local authority will be taking would need to be documented in the human rights assessment. Where a person refuses the offer of assistance with return, they must be advised of the risks of remaining in the UK without leave to remain and provided with information about any local support services. Where a person has been provided with accommodation, a reasonable notice period would need to be given before support is withdrawn.

6. EEA nationals

This chapter provides advice about conducting a human rights assessment when a European Economic Area (EEA) national who is 'in breach of immigration laws' qualifies for social services' support.

6.1 When does Schedule 3 apply to an EEA national?

When an EEA national qualifies for social services support, Schedule 3 applies when the person is 'in breach of immigration laws' i.e. is living in the UK without lawful status.

People who have an entitlement to apply to the EU Settlement Scheme will be 'in breach of immigration laws' when one of the following situations applies to them:

- They have a pending 'in-time' application (submitted before 30 June 2021) but were not exercising a European right to reside on 31 December 2020.
- They were resident in the UK by 31 December 2020 but missed the deadline to apply to the EU Settlement Scheme and have not yet made an application.
- They failed to apply to the EU Settlement Scheme within 3 months of their EUSS family permit expiring (non-EEA family members).
- Their late application is not accepted by the Home Office.
- Their application for settled or pre-settled status is refused and any subsequent administrative review or appeal is unsuccessful.

However, when a person is entitled to apply to the EU Settlement Scheme, a local authority will face challenges implementing Schedule 3.

The Independent Monitoring Authority for the Citizens' Rights Agreement (IMA) has emphasised that local authorities will play a key role in upholding the rights of EEA nationals that are set out in the Withdrawal Agreement and agreements with EFTA states. On 30 June 2021, the IMA reminded public bodies 'of the need for care in considering the status of citizens who have applied to the EUSS but have not yet received the results of their application', and on 27 August warned that 'better understanding of the rights of late applicants to the EU Settlement Scheme (EUSS) is required to avoid potential hardship for individuals'. For more information, see the full articles on the IMA website at: https://ima-citizensrights.org.uk/.

In order to meet commitments to protect the rights of EEA citizens that are set out in the EU-UK Withdrawal Agreement and other agreements, the UK Government has enabled late EU Settlement Scheme applications to be made when a person has a reasonable excuse for missing the deadline and has introduced various policy protections to protect a person's entitlements whilst their EU Settlement Scheme application is pending, whether the application was made before or after the deadline. The UK Government also does not distinguish in the EU Settlement Scheme between those that have protected rights and those that do not, with the qualifying criteria based on residence in the UK rather than the need to have been exercising a European right to reside.

It will therefore be extremely difficult to implement Schedule 3 when a person is identified as needing to make a late application to the EU Settlement Scheme. In order to protect the

rights of EEA nationals and their family members, when a person qualifies for social services' support a local authority may need to continue to provide or to start providing accommodation and financial support whilst the Home Office determines whether settled or pre-settled status will be granted. Implementing Schedule 3 by withholding or withdrawing social support on the basis that the person can return to their country of origin could risk breaching the person's rights and cause reputational damage to the local authority. As providing support in such circumstances will likely result in additional financial pressures for local authorities, the NRPF Network will monitor any changes in demand for support through NRPF Connect and will continue to raise the impacts on local authorities with the Government.

Local authorities may also encounter EEA nationals who will be 'in breach of immigration laws' and do not have an entitlement to apply to the EU Settlement Scheme. In such cases, Schedule 3 can be applied without needing to have regard to the protections set out in the Withdrawal Agreement. This would apply to a person who becomes visa overstayer following the expiry of visitor leave or another type of leave granted on or after 1 January 2021.

For more information about benefit and other entitlements for EEA nationals, see the NRPF Network factsheet: supporting EEA nationals who are destitute or at risk of homelessness, available at: https://www.nrpfnetwork.org.uk/-/media/microsites/nrpf/documents/guidance/factsheet-eu-settlement-scheme.pdf.

6.2 When can a human rights assessment be undertaken?

The guidance set out in this section is based on the information available at the time of writing and is informed by the duty of local authorities to uphold the rights of EEA nationals living in the UK, as emphasised by the IMA.

When an EEA national who is without lawful status in the UK qualifies for social services' support, the local authority will need to identify whether the person has an entitlement to apply to the EU Settlement Scheme in order to establish whether to proceed to complete a human rights assessment. Further detail of the legal position and the Government's policy protections are outlined in this section according to the person's immigration situation.

It will not be advisable to proceed with a human rights assessment to consider return when a person is 'in breach of immigration laws' and one of the following circumstances applies:

- They have a pending 'in-time' application (submitted before 30 June 2021) but were not exercising a European right to reside on 31 December 2020.
- They were resident in the UK by 31 December 2020 but missed the deadline to apply to the EU Settlement Scheme and have not yet made an application.
- They have a pending late application (submitted after 30 June 2021).
- They failed to apply to the EU Settlement Scheme within 3 months of their EUSS family permit expiring (non-EEA family members).

Instead, the local authority may need to assist the person to access legal advice when this is required, such as to make a late application or challenge a refusal. When the person qualifies for social services' support, this can be provided and may need to be ongoing until the application is concluded.

Where support is provided, the local authority may still find it useful to complete Part B of the template in order to document details of the outstanding application and any action needed to regularly review its progress, or what assistance may need to be given to help the person to access legal advice in order to make an application. Recording this information may be beneficial if multiple staff will be dealing with the person's case and will also be necessary if the person's EU Settlement Scheme application is unsuccessful and the local authority proceeds to consider the person's ability to return to their country of origin.

If an EEA national does not have an entitlement to apply to the EU Settlement Scheme, or has made an unsuccessful application, then it will be appropriate for the local authority to progress a human rights assessment in order to consider the person's ability to return. A human rights assessment can therefore be carried out when a person is 'in breach of immigration laws' and one of the following circumstances applies:

- The Home Office refuses to accept a late application.
- The Home Office refused to grant settled or pre-settled status and any subsequent administrative review or appeal has been unsuccessful.
- They became a visa overstayer following the expiry of six months visitor leave or another type of leave (when the person is not entitled to apply to the EU Settlement Scheme).

In such circumstances, the human rights assessment template can be completed in the usual way and an assessment of the person's ability to return to their country of origin will need to be made. As part of this process, it will be necessary to ensure that the person has received recent immigration advice about their immigration options, particularly if they have made their previous applications without any legal representation.

Schedule 3 does not apply when an EEA national is lawfully present in the UK, such as when a person has pre-settled status or has a pending 'in-time' application and was exercising a European right to reside on 31 December 2020. In such cases, a human rights assessment will not be required and the usual eligibility criteria for social services' support must be applied.

6.2.1 Pending 'in-time' application (made before 30 June 2021)

The lawful status of a person who submitted their EU Settlement Scheme application before the deadline of 30 June 2021 depends on whether or not they are protected by the Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020 (the 'Grace Period Regulations').

The Grace Period Regulations only preserve the lawful status and entitlements of a person with a pending EU Settlement Scheme application if the person was exercising a European right to reside on 31 December 2020 or had acquired a permanent right of residence by that date. Anyone who was not exercising a right to reside on 31 December 2020 is not protected by the Grace Period Regulations and is therefore technically without lawful status in the UK. However, the Government has effectively disregarded a person's lack of lawful status for the purpose of enabling access to some entitlements, so a person's status under the Grace Period Regulations will be irrelevant in practice.

Instead, entitlements are retained on the basis that a person has made an 'in-time' application. The Home Office does not make a distinction in the Confirmation of Acceptance notice between an applicant who was exercising a right to reside on 31 December 2020 and a person who was not. A person can rely on the Confirmation of Acceptance notice as evidence of their immigration position in order to access employment and other services whilst their application is pending. For example, in England they can use their Confirmation of Acceptance notice to demonstrate that they have the right to rent or to access free secondary healthcare. In June 2021, the DWP confirmed that pre-existing benefits received prior to 30 June 2021 will continue whilst the person's application is pending.

However, whether a person is protected or not by the Grace Period Regulations is relevant when it comes to their entitlement for benefits and homelessness assistance, so local authorities will still encounter people with pending applications who are in need of social services' support if they are destitute or at risk of homelessness and cannot meet right to reside requirements to qualify for benefits.

6.2.2 No pending application

Anyone who missed the deadline to apply to the EU Settlement Scheme will be unlawfully present in the UK. However, in line with the commitment in Article 18(1) of the Withdrawal Agreement, the Home Office will accept a late application if a person can show that they have a reasonable excuse for missing the deadline. Examples of 'reasonable grounds' are given in the Home Office caseworker guidance, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members, available at: https://www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance. It appears that late applications are likely to be accepted from children, people who lack mental capacity, and adults with care and support needs.

Anyone encountered by Immigration Enforcement who has not yet applied will be issued with a notice and will have 28 days to make a late application. No enforcement action will be undertaken by the Home Office during the 28 day period. This policy is set out in the Home Office caseworker guidance, EU Settlement Scheme: EU, other EEA and Swiss citizens and their family members.

A person without lawful status in the UK will normally be unable to work, will not have the right to rent (in England), and cannot access free secondary healthcare. They will be subject to immigration control and will have no recourse to public funds, so will be ineligible for benefits and homelessness assistance. However, some policy protections have been introduced, which mean that a person who missed the deadline may not immediately lose their entitlements if they were already working or claiming benefits. Employers and landlords are not required by the Home Office to make retrospective status checks, although when a person is identified as not having applied to the EU Settlement Scheme, they will need to take action to make a late application or risk losing their employment or right to rent. The DWP is also giving people with pre-existing benefit claims a period of time to make a late application before their claim is stopped.

The Government has therefore adopted the position of encouraging people to make a late application and enabling some entitlements to continue despite a person's lack of lawful status. Once a late application is submitted then the person may be able to access other entitlements, such as free secondary healthcare and new employment.

Although EU Settlement Scheme applications can, in certain circumstances, be made from outside of the UK, the local authority may risk impeding the person's right to make a late application by withholding or withdrawing support on the basis that the person can leave the UK in order to apply. For example, complications with regards to meeting the continuous residence requirement may arise, and obtaining evidence of past residence or accessing legal advice or practical assistance with making the application will be much more difficult.

6.2.3 Pending late application (made after 30 June 2021)

On 6 August 2021, the Government announced that people who make a late application will be granted temporary protection whilst their application is pending, in order to comply with Article 18 (3) of the Withdrawal Agreement. For more information, see the news story at: https://www.gov.uk/government/news/temporary-protection-for-more-applicants-to-the-settlement-scheme.

Guidance for employers and landlords makes it clear that they can rely on a person's Confirmation of Acceptance notice as evidence that they can work or have the right to rent. Additionally, secondary healthcare will be free for people who have made a late application.

In Housing Benefit adjudication circular A10/2021, the DWP states, at paragraph 12:

> Where a claimant has received a certificate of application from the Home Office, local authority (LA) Decision Makers should accept that the claimant has submitted a late application which has been verified and validated by the Home Office and treat it the same way as those who submitted an EUSS application before 30 June 2021. These individuals can access HB and other income related benefits until the outcome of their application has been decided or they have exhausted their appeal rights.

The circular can be accessed at: https://www.gov.uk/government/publications/housing-benefit-adjudication-circulars-2021/a102021-claimants-without-a-status-under-the-european-union-settlement-scheme-at-the-end-of-the-grace-period.

The Homelessness Code of Guidance for local authorities (applicable in England) states, at paragraph 7.34(a):

> In line with the Withdrawal Agreements, late applications to the EU Settlement Scheme will be accepted where there are reasonable grounds for missing the 30 June 2021 deadline. An applicant who has made a valid application for the EU Settlement Scheme and is awaiting a decision, who was resident and exercising a qualifying right to reside in the UK by 31 December 2020 should be treated as eligible if they have a permanent right to reside (normally acquired after 5 years), or are working, self employed or a Baumbast Carer at the time of their application for homelessness assistance.

The full guidance is available at: https://www.gov.uk/guidance/homelessness-code-of-guidance-for-local-authorities.

Once a person has evidence that they have made a late application, this guidance suggests that they will be able to apply for benefits and homelessness assistance, subject to meeting right to reside tests. It is likely that some people making late applications may continue to be ineligible for benefits or homelessness assistance if they cannot satisfy the right to reside

requirements, and, therefore, could be in need of social services' support if they are destitute or at risk of homelessness.

6.2.4 Application refused or late application not accepted

The majority of EU Settlement Scheme applications will succeed, with the Home Office reporting that by the end of August, 3% (145,200) had been refused. However, this is not an insignificant number. For up to date statistics, see the Home Office data at https://www.gov.uk/government/collections/eu-settlement-scheme-statistics.

A person who does not meet the continuous residence requirement in order to be granted settled status will instead be granted pre-settled status, therefore outright refusals will most likely be due to a person not meeting suitability requirements. Full details of the suitability requirements are set out in the Home Office caseworker guidance, EU Settlement Scheme: suitability requirements.

It is also possible that the Home Office could refuse to accept a late application if a person is unable to demonstrate that they have reasonable grounds for missing the deadline. However, this should only be in the rarest of instances. In its information for local authorities, the Home Office states: 'The Home Office will take a flexible and pragmatic approach to accepting late applications and will continue to look for reasons to grant applications, not to refuse them'.

If a person's EU Settlement Scheme has been unsuccessful and they have exhausted all means of challenging this, then they will be unlawfully present in the UK and the local authority may proceed to complete a human rights assessment to determine whether to withhold or withdraw social services' support. However, before proceeding to consider their ability to return, the person would need to be given an opportunity to access legal advice to find out what their immigration options are, particularly if they made their original application without any legal representation or did not challenge a refusal by submitting an administrative review or appeal.

6.2.5 Visa overstayer (entered on or after 1 January 2021)

EEA nationals who entered the UK since 1 January 2021 are required to obtain leave to enter for a specific purpose, such as to visit, work, or study. Should they remain in the UK after their leave has expired without applying for further leave then they will become a visa overstayer and unlawfully present in the UK. In such cases, the local authority can proceed to undertake a human rights assessment in the usual way.

EEA nationals can enter the UK through e-gates using a national ID card (up until 30 September 2021) or a passport. Those entering as visitors will be deemed to have six months' visitor leave and those who have obtained a visa in advance to work or study will only have access to electronic evidence of their status. Therefore, it will be important to obtain confirmation of the person's status from the Home Office to determine whether their leave is still valid before a human rights assessment is carried out.

Appendix A: summary table

The table in this appendix is intended to be used as an indication of what a person's entitlement may be for benefits or Home Office asylum support. It also sets out how a local authority would need to determine eligibility for social services' support (accommodation and financial support), including when a human rights assessment will be required.

For more details about the qualifying criteria for Home Office asylum support, see the NRPF Network information at: https://www.nrpfnetwork.org.uk/information-and-resources/rights-and-entitlements/support-options-for-people-with-nrpf/home-office-support.

A.1 Table: benefit entitlement and establishing eligibility for social services' support

Immigration status	Eligible for means-tested benefits/ homelessness assistance?	Eligible for Home Office asylum support?	How to establish eligibility for social services' support?	Is a human rights assessment required?
Leave to remain with NRPF	Ineligible	No	Child in need/ needs assessment	No
Visa overstayer (no asylum claim)	Ineligible	No	Child in need/ needs assessment	Yes
Asylum seeker (pending claim or appeal)	Ineligible	Yes	Child in need/ needs assessment	No
Appeal Rights Exhausted asylum seeker (in-country claimant)	Ineligible	Yes	Child in need/ needs assessment	Yes
Appeal Rights Exhausted asylum seeker (port claimant)	Ineligible	Yes	Child in need/ needs assessment	No
Pre-settled status	Must meet right to reside requirements	No	Child in need/ needs assessment	No
Pending EU Settlement Scheme application	Must meet right to reside requirements	No	Child in need/ needs assessment	No - see chapter 6 of this guidance.
No lawful status but entitled to apply late to the EU Settlement Scheme	Ineligible	No	Child in need/ needs assessment	No - see chapter 6 of this guidance.

References

Case law

- O v London Borough Of Wandsworth [2000] EWCA Civ 201.
- R (Kimani) v London Borough of Lambeth [2003] EWCA Civ 1150.
- Razgar v Secretary of State for the Home Department [2004] UKHL 27.
- R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66.
- R (AW) v London Borough of Croydon [2005] EWHC 2950.
- R (AW) v London Borough of Croydon [2007] EWCA Civ 266.
- SO v London Borough of Barking and Dagenham [2010] EWCA Civ 1101.
- Birmingham City Council v Clue [2010] EWCA Civ 460.
- ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.
- R (De Almeida) v Royal Borough of Kensington and Chelsea [2012] EWHC 1082.
- KA v Essex County Council [2013] EWHC 43.
- MN & Anor v London Borough of Hackney [2013] EWHC 1205.
- Zoumbas v Secretary of State for the Home Department [2013] UKSC 74.
- AM v Secretary of State for the Home Department [2015] AS/14/11/32141, available at: https://www.gov.uk/asylum-support-tribunal-decisions/am-v-secretary-of-state-for-the-home-department-as-14-11-32141.
- Paposhvili v. Belgium, Application no. 41738/10, Council of Europe: European Court of Human Rights (13 December 2016), available on the EU Agency for Fundamental Rights website at: https://fra.europa.eu/en/caselaw-reference/ecthr-application-no-4173810-judgment.
- AR v London Borough of Hammersmith and Fulham [2018] EWHC 3453.
- OA v London Borough of Camden & Anor [2019] EWHC 2537.
- R(Aburas) v London Borough of Southwark [2019] EWHC 2754.
- AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17.
- Ncube v Brighton and Hove City Council [2021] EWHC 578.
- Ainte (material deprivation, Art 3, AM) (Zimbabwe) [2021] UKUT 203 (IAC).

Unless specified otherwise, all case law can be accessed at: bailii.org. Useful summaries of Supreme Court cases are available at: https://www.supremecourt.uk/cases/.

Legislation

International law

- European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950, available at: https://www.echr.coe.int/documents/convention_eng.pdf.
- United Nations Convention on the Rights of the Child 1989, Article 3, available at: https://www.ohchr.org/en/professionalinterest/pages/crc.aspx.
- The 1951 Refugee Convention, available at: https://www.unhcr.org/uk/1951-refugee-convention.html.

- The EU-UK Withdrawal Agreement 2019, Article 18, available at: https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-withdrawal-agreement_en

Primary legislation

- The Local Government Act 1972, s138.
- The Children Act 1989, s17.
- The Housing Act 1996, Part VII.
- The Human Rights Act 1998.
- The Nationality, Immigration and Asylum Act 2002, s54 and Schedule 3.
- The Children Act 2004, s11.
- The National Health Services Act 2006, s2B.
- The Borders, Citizenship and Immigration Act 2009, s55.
- The Localism Act 2011, s1.
- The Care Act 2014, Part 1.

Secondary legislation

- The Immigration Rules HC395, available at: https://www.gov.uk/guidance/immigration-rules.
- The Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002.
- The Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020.

Unless specified otherwise, all legislation is available at: https://www.legislation.gov.uk/.

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. If this is unclear or unknown then the local authority 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. EEA countries: 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 and Sweden.
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	Immigration legislation that 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 to be granted leave; • the length of leave that is granted; and • any conditions attached to the leave, such as 'no recourse to public funds'.
Indefinite leave to enter (ILE) Indefinite leave to remain (ILR)	Immigration permission with no time limit on the length of stay in the UK. 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 an application 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.
Non-EEA national	A person who is a national of a country that is outside of the European Economic Area (EEA) and Switzerland.
No recourse to public funds	An immigration condition that prevents a person from being able to claim most benefits, homelessness assistance and a local authority allocation of social housing.
Pre-settled status	Five years limited leave to remain granted under the EU Settlement Scheme to an EEA national or a non-EEA family member.
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.
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.
Section 3C leave	3C leave preserves a person's lawful status and entitlements whilst their application for leave to remain is pending. A person will have section 3C leave when their leave to enter or remain has expired and they have a pending application for leave to remain that was submitted prior to their previous leave expiring. 3C leave continues whilst any subsequent appeal or administrative review is pending.
Settled status	Indefinite leave to remain granted under the EU Settlement Scheme to an EEA national or a non-EEA family member.
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.

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Disclaimer

This practice guidance is for information purposes only and provides general guidance about the issues a local authority practitioner may need to consider when undertaking a human rights assessment for the purpose of determining whether social services' support may be withdrawn or withheld when a family, adult, or care leaver is 'in breach of immigration laws' or falls under another excluded group. The guidance is not intended to constitute advice in relation to any specific case. Every attempt has been made to present up to date and accurate information and this guidance will be updated periodically. However, practitioners are advised to check the current legal position and seek advice from their local authority legal teams on individual cases.

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