

Local Authority support for migrant families

This fact sheet provides information about local authority support for migrant families including section 17 support, eligibility, child in need assessments and human rights assessments. This fact sheet also covers the proposed changes to the support system under the Immigration Act 2016 (please note these provisions are not yet in force).

This fact sheet does not deal with unaccompanied asylum seeking children as those children will be looked after and accommodated by the local authority under section 20– please see our fact sheets on this type of support here:

www.childrenslegalcentre.com/resources

One of the leading charities in relation to section 17 support for migrant families is Project 17. For further information on their services, please see their website: <http://www.project17.org.uk/>

You can also find detailed information on section 17 support and local authority duties from the NRPF Network's website: <http://www.nrpfnetwork.org.uk/Pages/Home.aspx>

Section 17 support

Section 17(1) of the Children Act 1989 [1] places a general duty on local authorities to safeguard and promote the welfare of children 'in need' and to promote the upbringing of such children by their families. In meeting this duty, social services are empowered to provide a wide range of services for those children's needs.

Section 17(3) of the Act states that:

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

Most families seeking help from children's social services with accommodation and/or meeting essential living expenses are doing so because they

have no recourse to public funds, are not eligible to claim asylum support, and are destitute. The family will be destitute if 'they do not have and cannot obtain both (a) adequate accommodation and (b) food and other essential items'. [2]

It is important to note that a child in need assessment, which is carried out by social services to determine entitlement to s17 support, is not a destitution assessment. However, where a family is destitute, a child will always be in need, and the local authority will have a duty to address that need.

The local authority must assess the needs of the child on an individual basis, including the child's right to respect for family life. Typically, it will not be in the child's best interests and/or would be a breach of their family rights for a child to be separated from their parent/s. [3] The local authority *is* under a duty to assess what a child needs for its welfare to be safeguarded.

Eligibility

Families with refugee status, humanitarian protection, indefinite leave to remain, limited leave to remain or discretionary leave will be eligible for assistance under section 17, subject to assessment. Individuals with derivative rights of residence under EU law are also not excluded from section 17 support – for further information on derivative rights of residence, please see our fact sheet: www.childrenslegalcentre.com/resources

However, certain categories of adults are ineligible to access support under section 17 by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, [4] including (not a full list):

- those granted refugee status by another EEA state,
- EEA nationals,

- Most refused asylum seekers
- people who are unlawfully present in the UK

Schedule 3 does not prevent children directly being supported under section 17. In practice, as the local authority is under a duty to promote the upbringing of the child within the family, this will lead to a family, with excluded parents, not being supported. **However, the local authority will still need to support an ineligible family if it is necessary to avoid a breach of the family's human rights.**

It is important to note that Schedule 3 places a requirement on the local authority to advise the Home Office when someone who is excluded from support approaches the local authority. Many local authorities now have 'embedded' Home Office staff who can check immigration status and identify those who have no pending application to regularise their status. Consequently, the unlawful presence in the UK of such families is brought to the attention of the Home Office, who may make efforts to remove them back to their country of origin.

Child in need assessment

Main assessment

A 'child in need' assessment, under the Children Act 1989, must be carried out when working with migrant families who cannot support themselves and become destitute. A local authority can provide temporary accommodation to a destitute family under section 17 while these assessments are carried out.

The threshold for carrying out an assessment is relatively low – essentially it will be required where any family presents on the basis they do not have adequate accommodation/sufficient income to meet their living needs because of their inability to access benefits or employment, or where the child's circumstances suggest this may be the case. **[5]**

However, in practice it can be difficult to get the local authority to assess within a reasonable timeframe if it appears that the family are in a difficult, but not impossible, situation – for example, they are overcrowded, in severe rent arrears, or being threatened with homelessness, but are not yet roofless.

It is important to keep in mind the purpose of the child in need assessment, particularly when migrant families are being assessed. The purpose is stated within the statutory guidance:

- to gather important information about a child and family,
- to analyse their needs and/or the nature and level of any risk and harm being suffered by the child,
- to decide whether the child is a child in need (section 17) and/or is suffering, or likely to suffer, significant harm (section 47), and
- to provide support to address those needs to improve the child's outcomes to make them safe. **[6]**

For children in need of safeguarding protection, action may need to be taken urgently, and should happen without any delay. In any case, the local authority should make a decision about the type of response that is required within 1 day of being approached, and conclude the assessment within 45 working days from the point of referral. **[7]**

The local authority should also establish the ordinary residence, destitution and immigration status of the child, as these may differ from those of their parent or carer. It may be difficult for families to provide identity documentation such as biometric residence permits and passports if they have been sent to the Home Office in support of an application. EEA nationals may not have documentation, as EEA rights of residence do not require documentation.

The local authority must also consider whether other financial support can be accessed by the family, such as mainstream benefits (public funds) for EEA

nationals; asylum support for those in the asylum process; or voluntary return for visa overstayers (in cases where the child would cease to be a child in need on returning to their country of origin and where no human rights breach would result from return).

For a comprehensive guide to considerations that need to be made by the local authority when carrying out an assessment, please see the NRPF Networks practice guidance on assessing families at section 3.4 here:

<http://guidance.nrpfnetwork.org.uk/reader/practice-guidance-families/assessing-need-under-section-17/#34-considerations-when-undertaking-an-assessment>

Human Rights Assessment

A key part of the child in need assessment for those with uncertain immigration status is determining whether there is an obstacle to the family leaving the UK and whether this could be practically overcome (for instance, by paying for travel) whilst avoiding a breach of a person's human rights upon removal. This is often referred to as a human rights assessment – some local authorities incorporate the human rights assessment within their child in need assessment, other authorities do the assessments in conjunction with each other and provide separate assessments.

As noted above in the eligibility section, certain categories of adults or families are excluded from accessing support under section 17. The Human Rights Act 1998 incorporates the European Convention on Human Rights ('ECHR') into domestic law. It is unlawful for public authorities to act in a way that is incompatible with Convention rights. **[8]**

The two main parts of the ECHR which are involved when considering a human rights assessment are Article 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment) and Article 8 (the right to respect for family and private life). Article 3 is an absolute right – the UK cannot breach this right, whereas Article 8 is a qualified right – meaning it can be interfered with (breached) if it can be shown that there is a lawful and legitimate ('proportionate', or fair) basis for doing so. The assessment of the proportionality/fairness of any

proposed breach has to encompass a weighing of the person's interests against those of the state. In immigration cases, usually this will involve weighing a person's/family's establishment of life in UK – including, as a primary consideration, what is in a child's best interests – against the UK's right to maintain immigration control.

If the family has made an application for leave to remain in the UK on human rights grounds, they should not be removed from the UK until this has been dealt with, and the local authority should support the family until that application is decided. **[9]** If there is no outstanding application, the local authority can itself consider and make an assessment of the Article 8 issues.

When carrying out an assessment, the local authority will be considering the following questions:

- Can this breach of human rights (e.g. degrading treatment due to homelessness) be avoided by the person leaving the UK?
- Are there any obstacles to their leaving the UK, whether practical (e.g. unfit to travel) or legal (e.g. an outstanding application with the Home Office)?
- If there is no outstanding application, are there any possible breaches of human rights if the family was expected to return to their country of origin (e.g. gross interference in family life due to insurmountable obstacles to the parents being removed together with their children to one country)?

As noted above, one of the most common barriers to removal is an outstanding application but there are other reasons – such as being unable to obtain travel documentation despite complying with all procedures to obtain such documents.

There are a number of issues that can make human rights assessments seem daunting and problematic. To different extents, local authorities are being asked to become human rights experts, step into the role of the Home Office (in relation to deciding whether an application is hopeless) and take on the role of a

country expert – considering whether there would be human rights breaches in the country of origin. When placed in the context of the current immigration and welfare systems – poor immigration decision making at the Home Office, lack of sufficient best interests assessments, increasing immigration fees, cuts to legal aid and support generally – it is easy to see why there are difficulties with these assessments. There have been changes proposed under the Immigration Act 2016, although there is no commencement date and it is very unclear how these proposed changes will make any improvements on the current system (see section below).

Challenging a refusal or withdrawal of support

When the local authority refuses, or withdraws, support under section 17, there is no right of appeal. The only way to challenge the decision is through the local authority formal complaints process, and judicial review if necessary.

The local authority should normally have a complaints process that is publicised. If the complaints process is exhausted, then judicial review will be the only remedy. Judicial review is essentially seeking to review the lawfulness of a public body's decision (in this case the local authority). A judicial review will need to be made within 3 months of the decision which is sought to be reviewed. There is an established procedure that needs to be followed before the judicial review is made and legal aid is available. For information on legal representatives, legal aid and finding a solicitor please see our fact sheets on these issues, available here:

www.childrenslegalcentre.com/resources

Changes proposed under the Immigration Act 2016

The proposals under the Immigration Act 2016 seek to 'simplify' the way in which local authorities assess and provide accommodation to families without immigration status. Proposed changes for refused asylum seekers are dealt with in our fact sheets on asylum support and section 4/section 95A support,

available here:

www.childrenslegalcentre.com/resources.

In summary, those families who have no immigration status will no longer be eligible for support under section 17. The proposals under the Immigration Act 2016 seek to remove the need for a human rights assessment in most cases, instead setting out a new type of support – Paragraph 10A support. A family with dependant children will likely qualify if they are destitute and meet one of the following criteria:

- They have a pending non-asylum application that has not been determined,
- They are not yet appeal rights exhausted ('ARE') and are within the time limit for making a non-asylum in-country appeal,
- They have a non-asylum appeal yet to be determined,
- They are ARE but have cooperated with all arrangements to support them leaving the UK, or
- Support is needed to safeguard and promote the welfare of the child.

Section 17 may still apply in cases where a child is in need on more than destitution grounds, for example where social work support is needed to help address a mental health issue. [10]

Zambrano carers (where the parent has a derivative right to reside in the UK as a primary carer of a British citizen child) will also be excluded from section 17 support but may be eligible for Paragraph 10A support under the 5th bullet point. For further information on Zambrano carers, please see our fact sheet on derivative rights of residence:

www.childrenslegalcentre.com/resources.

Those not affected by the changes include those with limited leave to remain but no recourse to public funds, and EEA nationals. There will still need to be a human rights assessment when considering section 17 support for EEA national families, although this may change once we have left the EU.

These provisions are not in force and there is currently no indication of a commencement date for these provisions. Regulations will need to be written, and probably consulted on, suggesting that the changes are not imminent. Local authorities must still follow the current law – as set out in the sections above – and should not be pre-empting any proposed changes to the law.

NOTES

[1] <http://www.legislation.gov.uk/ukpga/1989/41/section/17>

[2]

<https://www.legislation.gov.uk/ukpga/1999/33/section/95>

[3] For further information on Article 8 of the European Convention on Human Rights, please see our fact sheet on this issue here: www.childrenslegalcentre.com/resources

[4] <http://www.legislation.gov.uk/ukpga/2002/41/schedule/3>

[5] NRPF Network, Practice guidance, April 2017

<http://guidance.nrpfnetwork.org.uk/reader/practice-guidance-families/pre-assessment-screening/>

[6] Pages 19-20, Department for Education, Working together to safeguard children, March 2015

<https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

[7] Page 26, *ibid*

[8] Under Section 6 of the Human Rights Act 1998

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

[10] Paragraph 56, Home Office, Reforming support for migrants without immigration status, January 2016

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance please contact our advice line by email at mcpadvice@coramclc.org.uk.