

# Assessing and supporting adults who have no recourse to public funds (NRPF) (England)

Practice guidance for local authorities

February 2018

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# 1 Introduction

This guidance is intended to provide a reference for local authorities in England to use in order to apply statutory duties and powers in relation to providing housing and financial support to vulnerable adults who have no recourse to public funds (NRPF).

This guidance provides information on the specific considerations that must be made when assessing and meeting needs of person with NRPF under the Care Act 2014, applying discretionary powers, and implementing exclusions to support that affect people with certain nationalities and immigration status types. Practitioners must in all cases adhere to the Department of Health's *Care and support statutory guidance*, referred to here as 'the Statutory Guidance'.<sup>1</sup>

Social care is a devolved power and the Care Act 2014 applies to England only. The immigration legislation referred to applies to the UK so local authorities in Wales, Scotland and Northern Ireland may find this guidance useful in helping establish how to implement the exclusions and manage NRPF cases, but will need to refer to the relevant devolved social care legislation to find out how to assess and meet need:

- Section 35 of the Social Services and Well-being (Wales) Act 2014
- Sections 12 and 13A of the Social Work (Scotland) Act 1968
- Articles 7 and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972

For information specific to Wales and Scotland, please refer to the respective briefings by the Welsh Refugee Council and COSLA:

- *Single adult migrants: Destitution, safeguarding and services under the Social Services and Well-being (Wales) Act 2014* (March 2017)<sup>2</sup>
- *Establishing Migrants' Access to Benefits and Local Authority Services in Scotland* (March 2012)<sup>3</sup>

## 1.1 Who has NRPF?

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

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

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<sup>1</sup> Department of Health, *Care and support statutory guidance* (17 August 2017) <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance>

<sup>2</sup> <http://welshrefugeecouncil.org.uk/migration-information/legal-briefings/single-adult-migrants-destitution-safeguarding-and-services>

<sup>3</sup> [http://migration-matters.spideronline.co.uk/uploads/files/documents/final\\_guidance\\_document\\_-\\_layout.pdf](http://migration-matters.spideronline.co.uk/uploads/files/documents/final_guidance_document_-_layout.pdf)

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

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

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

## Notes

**A.** People with leave to remain granted under the family and private life rules, or outside of the rules, who are on a 10- year settlement route will have the NRPF condition imposed unless they can demonstrate to the Home Office that they are destitute, in which case, recourse to public funds will be granted. They may also apply for their leave to be varied by applying to the Home Office for a change of conditions in order for the NRPF condition to be removed.<sup>4</sup>

**B.** An adult dependent relative of a British citizen or person with settled status will have indefinite leave to enter or remain in the UK with a prohibition on claiming public funds for a period of five years, although they may apply for non-means tested benefits during this period. Once five years has passed, or if the person who made the undertaking has died, they will have full recourse to public funds.<sup>5</sup>

<sup>4</sup> <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

<sup>5</sup> Regulation 2 & Schedule of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 <http://www.legislation.gov.uk/ukxi/2000/636/schedule>; Home Office *Modernised Guidance on Public Funds* <https://www.gov.uk/government/publications/public-funds>

When a person has leave to remain with NRPF, 'no public funds' will be written on their immigration documents, for example a Biometric Residence Permit or Home Office letter.

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

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

For more information, see sections:

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

## 1.2 What are 'public funds'?

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

- Attendance allowance
- Carer's allowance
- Child benefit
- Child tax credit
- Council tax benefit
- Council tax reduction
- Disability living allowance
- Discretionary support/ welfare payment made by a local authority<sup>6</sup>
- Domestic rate relief (Northern Ireland)
- Housing benefit
- Income-based jobseeker's allowance
- Income-related employment & support allowance
- Income support
- Personal independence payment
- Severe disablement allowance
- Social fund payment: budgeting loan, sure start maternity grant, funeral payment, cold weather payment and winter fuel payment <sup>7</sup>

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

<sup>7</sup> In Northern Ireland included crisis loans and community care grants until 1 November 2016.



- State pension credit
- Universal credit
- Working tax credit

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

There are several exceptions to the rules regarding public funds, which are set out in the Home Office *Modernised Guidance on Public Funds*.<sup>8</sup> This means that a person who has leave to remain with NRPF may be able to claim certain benefits without this affecting their immigration status when they:

- are a national of a country that has a reciprocal arrangement with the UK;
- have an EEA national family member, including a British citizen;
- make a joint claim for tax credits with a partner who has recourse to public funds; or
- have indefinite leave to enter/remain as an adult dependent relative during the first five years they are in the UK (during which time they can claim non-means tested benefits).

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

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

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For more information, see sections:

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

### 1.3 Good practice points

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

- A specialist and targeted response is required to administer services effectively; ensure there is an identified lead practitioner or team to deal with NRPF cases.
- Local authorities lacking a specialist NRPF worker should ensure that staff undertaking needs assessments for people with NRPF are adequately supported because any practitioner carrying out an assessment under the Care Act 2014 must have: *‘the skills, knowledge and competence to carry out the assessment in question*

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<sup>8</sup> <https://www.gov.uk/government/publications/public-funds>

*and is appropriately trained', and where knowledge is lacking, 'must consult a person who has expertise in relation to the condition or other circumstances of the individual whose needs are being assessed in any case where it considers that the needs of the individual concerned require it to do so'.<sup>9</sup>*

- Establishing internal protocols and having regard for the legislation and case law referenced in this guidance will help ensure that NRPF cases are identified at point of referral and dealt with consistently. This may include how discretionary powers are exercised towards particular groups, for example, pregnant women without children.
- Provide an interpreter if this is required.
- The requirement to undertake a Care Act needs assessment is based on an appearance of need and is not dependent on the person's immigration status. A person should not be refused assistance solely because they have NRPF (because this in itself does not exclude them from social services assistance), or because the local authority does not receive funding from central government to provide support to people with NRPF.
- When support is provided, this should be reviewed regularly and steps taken to resolve the case; this may involve working in partnership with the Home Office.
- Obtain immigration status information and monitor caseloads and expenditure using NRPF Connect, which will also inform the Home Office of local authority involvement in case. This information contributes to the only national data source on NRPF service provision.<sup>10</sup>
- Inform the person how and why information about them may be shared with other parties, including the Home Office, and confirm this by written agreements. Permission will be required in order to share or obtain information from legal representatives and voluntary sector agencies.

A local authority will usually establish whether it has a duty to provide support to an adult with NRPF by undertaking two steps:

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

For more information, see sections:

- **2 Pre-assessment screening**
- **3 Eligibility for care and support**
- **8 Assessments when the exclusion applies**

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<sup>9</sup> Section 5 of the Care and Support (Assessment) Regulations 2014

<sup>10</sup> <http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx>

## 2 Pre-assessment screening

This chapter sets out the initial considerations that will need to be made as part of the process to determine whether care and support can be provided to a person with NRPF:

- Whether the local authority will be responsible for meeting needs
- What the person's nationality and immigration status is, in order to:
  - ascertain potential eligibility for welfare benefits or asylum support, and
  - determine whether they can only be provided with care and support if this is necessary to prevent a breach of their human rights or EU treaty rights
- Whether care and support needs to be provided to meet urgent need whilst assessments are being carried out

### 2.1 Responsibility for meeting needs

The Care Act 2014 requires a local authority to undertake an assessment where it appears that a person may have needs for care and support, but stipulates that a local authority will only have a duty to meet a person's eligible needs for care and support where:

*'..the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence'.<sup>11</sup>*

Local authorities will usually try and clarify responsibility for meeting needs at the point of initial referral or presentation. In some cases, where a person is very clearly ordinarily resident in another authority's area, it may be possible to direct them to that authority for an assessment of need. However, there is no legal basis to refuse to assess a person whose place of ordinary residence is in another local authority area.

The Statutory Guidance is clear that when ordinary residence cannot immediately be established, or where a person is presenting with urgent needs, then the local authority to which the person has presented will need to consider exercising its power under section 19(3) of the Care Act to meet urgent needs:

*'The determination of ordinary residence must not delay the process of meeting needs. In cases where ordinary residence is not certain, the local authority should meet the individual's needs first, and then resolve the question of residence subsequently. This is particularly the case where there may be a dispute between two or more local authorities.'<sup>12</sup>*

If two or more local authorities dispute a person's place of ordinary residence, and cannot resolve this, section 40 of the Care Act allows the person to request a determination by the Secretary of State for Health. This must be made within three months of the original decision being made. Further information is set out in the Care and Support (Disputes between Local Authorities) Regulations 2014 and chapter 19 of the Statutory Guidance.

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<sup>11</sup> Sections 9(1) and 18(1) of the Care Act 2014

<sup>12</sup> Care and support statutory guidance, paragraph 19.11

Sections 37 and 38 of the Care Act set out responsibility regarding the continuity of care when a person moves between authorities of their own accord.

### 2.1.1 Establishing ordinary residence

The Care Act does not define 'ordinary residence'. Instead, the interpretation of this term has been clarified by the courts and the most relevant case law is summarised here.

The case of *Shah v London Borough of Barnet* (1983) established that a person is ordinarily resident in the area where they have voluntarily taken up residence for a settled purpose.<sup>13</sup> This is usually where they are currently living, regardless of how long they have resided there. This approach was confirmed by the House of Lords in the case of *Mohamed v Hammersmith and Fulham LBC* (2001). When considering 'normal residence' the court found that this would be the place where at the relevant time the person in fact resides and went onto state: '*So long as the place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence*'.<sup>14</sup>

In ordinary residence determination OR 9 2010 (20 January 2011), the Secretary of State for Health confirmed that a person's immigration status was not relevant to the consideration of ordinary residence for the purposes of accessing community care services.<sup>15</sup> Therefore someone who does not have any current immigration permission can be considered to be ordinarily resident in a particular area.

Where a person lacks capacity to decide on their place of residence, they cannot be considered to have adopted this voluntarily. Local authorities must consider the Supreme Court judgment of *R (on the application of Cornwall Council) v Secretary of State for Health and Somerset County Council* (2015) and the Statutory Guidance at paragraphs 19.23-36.<sup>16</sup>

The Cornwall case is also relevant in establishing responsibility for young people who are former looked after children and have transitioned from child to adult care services.

There are some situations expressly covered by the Care Act 2014 with regards to when a person will be deemed to be ordinarily resident in a particular area. Those that may apply to a person who has NRPF are set out here.

### 2.1.2 No settled residence or in urgent need

People with NRPF will often have an unsettled address history or have spent time rough sleeping and so may not therefore have a place of ordinary residence. They may also be in urgent need of accommodation if no other sources of support are available to them.

Sections 18 and 19 of the Care Act are clear that a local authority has a duty to meet the eligible needs, and the power to meet non-eligible needs, respectively, of a person who is

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<sup>13</sup> *Shah, R (on the application of) v Barnet London Borough Council* [1982] UKHL 14 <http://www.bailii.org/uk/cases/UKHL/1982/14.html>

<sup>14</sup> *Abdulrahman Mohamed v The London Borough of Hammersmith & Fulham* [2001] UKHL 57, paragraph 18. <http://www.bailii.org/uk/cases/UKHL/2001/57.html>

<sup>15</sup> [http://webarchive.nationalarchives.gov.uk/20130104172511/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_113627](http://webarchive.nationalarchives.gov.uk/20130104172511/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113627)

<sup>16</sup> *Cornwall Council, R (on the application of) v Secretary of State for Health and Somerset County Council* [2015] UKSC 46 <http://www.bailii.org/uk/cases/UKSC/2015/46.html>

physically present in its area and has no settled residence. Such people therefore should be treated in the same way as a person who is ordinarily resident in the local authority's area.

The Statutory Guidance states that local authorities must not delay the process of meeting needs where ordinary residence is not certain.<sup>17</sup>

### 2.1.3 Hospital in-patients

Section 39(5) of the Care Act 2014 requires local authorities to treat a person who is being provided with NHS accommodation as ordinarily resident —

*'(a) in the area in which the adult was ordinarily resident immediately before the [NHS] accommodation was provided, or*

*(b) if the adult was of no settled residence immediately before the [NHS] accommodation was provided, in the area in which the adult was present at that time'.*

Therefore, the hospital must establish in which area the person was ordinarily resident prior to their admission. If this cannot easily be established, then the local authority responsible for the area in which the hospital is located will be required to undertake a needs assessment.

For more information, see section:

- **6 Hospital cases**

### 2.1.4 Out of area placements

Section 39(1) of the Care Act 2014 stipulates that when a local authority places a person in accommodation located within another authority's area, the person will remain ordinarily resident in the area where they were ordinarily resident prior to that move, or where they were present prior to that move if they had no place of settled residence. In practice this means that the placing authority will retain responsibility for meeting a person's care and support needs when they are provided with accommodation out of area.

However, the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 specify that this rule only applies when the type of accommodation being provided to meet the person's care and support needs is one of the following:

- A care home.
- Shared lives scheme (accommodation provided by a shared lives carer).
- Supported living accommodation (premises specifically designed or adapted to enable a person to live as independently as possible or accommodation in which personal care is available).

People with NRPf who do not require such types of supported accommodation, but are provided with housing to enable the care they require to be administered, will often be housed in a private tenancy or bed and breakfast. Such accommodation does not appear to be covered section 39 and raises questions about responsibility for meeting care and

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<sup>17</sup> Care and support statutory guidance, paragraph 19.11

support needs when the person is placed out of area. However, local authorities need to bear in mind the following points:

- A person cannot be deemed to be ordinarily resident in an area where they have not taken up their residence voluntarily.
- Sections 6 and 7 of the Care Act require co-operation between relevant partners, including other local authorities in the area, in the exercise of their respective functions relating to people with needs for care and support. Local authorities may only refuse to cooperate with a request from another local authority when this would be incompatible with its own duties or would otherwise have an adverse effect on the exercise of its functions.

In practice this means that the placing authority will retain responsibility of providing care and support (including accommodation) until that placement is lawfully discharged.

Schedule 1 of the Care Act 2014 sets out the provisions for cross-border placements, i.e., meeting a person's needs for care and support by providing accommodation in Wales, Scotland or Northern Ireland. In each instance, the person will remain ordinarily resident in the placing local authority's area.

### **2.1.5 Section 117 aftercare placements**

A person may be provided with supported accommodation as part of their aftercare package under section 117 of the Mental Health Act 1983. If they also have care and support needs that need to be met under the Care Act 2014, then section 39(4) specifies that the person will be treated as ordinarily resident in the area of the local authority in England or Wales that is responsible for providing the aftercare.

For more information, see section:

- **6.3 Section 117 mental health aftercare**

### **2.1.6 People in detention and on release**

The Care Act clarifies responsibility for the provision of care and support to people in prison, approved premises or other bail accommodation. Section 76 of the Care Act 2014 requires the local authority to assess and meet the needs of a person who is in custody in a prison within its area and who appears to be in need of care and support, regardless of where the person came from prior to their detention or where they will be released to. When an individual is transferred to another custodial unit in a different local authority area, this responsibility will transfer to that local authority.

The Statutory Guidance recognises that on release from prison, it will not always be straightforward to determine where a person's place of ordinary residence is, with the starting presumption being that this will be their area of ordinary residence prior to their detention. However, if the person's place of ordinary residence is unclear and/ or they express an intention to settle in a new area, the local authority to which they plan to move should take responsibility for carrying out the needs assessment.<sup>18</sup>

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<sup>18</sup> Care and Support statutory guidance, paragraphs 17.49-51

There is no specific provision for responsibility when a person is detained in an Immigration Removal Centre (IRC), so responsibility is likely to fall to the authority in which the IRC is located.

### **2.1.7 Carers**

Section 20(1) of the Care Act 2014 states that the local authority responsible for meeting the needs of carers will be the authority where the person they are caring for is ordinarily resident, or is present if that person has no place of settled residence. This should mean that one authority should be responsible for meeting needs of both a carer and the person requiring care, where this is applicable.

For more information, see section:

- **7 Support for carers**

## **2.2 Checking immigration status**

When a person requests care and support the local authority will establish their nationality and immigration status for several purposes:

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

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

### **2.2.1 Immigration documentation – non-EEA nationals**

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

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

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

- EEA family permit/ residence card/ permanent residence card/ derivative residence card issued to the family member of an EU national
- Home Office letter

The Council of the European Union maintains a public register of documentation issued by European Union countries and others.<sup>19</sup> Note that the register it is not complete, so some UK immigration documents may not be included. The Home Office also publishes a guide for employers which provides an overview of different types of UK immigration documents that may be issued.<sup>20</sup>

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

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

For more information, see sections:

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

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

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

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

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

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<sup>19</sup> PRADO - Public Register of Authentic travel and identity Documents Online  
<http://www.consilium.europa.eu/prado/EN/prado-start-page.html>

<sup>20</sup> Home Office, An employer's guide to acceptable right to work documents  
<https://www.gov.uk/government/publications/acceptable-right-to-work-documents-an-employers-guide>



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

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

Appeal time limits vary depending on the stage that the case is at in the appeal process so it will be necessary to need to seek advice from the person's legal representative or the Home Office to establish whether they have 3C leave and remain lawfully present. When 3C leave ends and the person has not been granted another form of leave to remain then they will become an overstayer.

For more information, see:

- Home Office *Modernised Guidance 3C and 3D leave* <sup>21</sup>

### 2.2.3 EEA nationals and family members

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

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

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

For more information, see section:

- **10 EEA nationals and family members**

### 2.2.4 How to request a Home Office status check

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

Local authorities signed up to use the [NRPF Connect](#) database can obtain a status check by creating a new case on the system and a response will be provided in line with the service level agreement. Once a case has been created, the local authority can obtain further updates via NRPF Connect from the Home Office whilst the person remains in receipt of support, and can update the Home Office about a change of circumstances.<sup>22</sup>

<sup>21</sup> <https://www.gov.uk/government/publications/3c-and-3d-leave>

<sup>22</sup> <http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx>

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

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

## 2.3 Exclusions from support

The primary reason for establishing a person's nationality and immigration status is because local authorities need to find out whether the person can only receive 'support or assistance' under Part 1 of the Care Act 2014, if such support is necessary to prevent a breach of their human rights or EU treaty rights. This limitation is set out at section 54 and Schedule 3 of the Nationality Immigration Asylum Act 2002, and applies to specific groups:

- (1) A person who is not currently seeking asylum and is unlawfully present in the UK, for example:
  - Visa overstayer
  - Illegal entrant
  - Refused asylum seeker, where the person claimed asylum in-country (usually at the Asylum Screening Unit in Croydon), rather than at port of entry (for example, at an airport immediately on arrival to the UK before passing through immigration control)<sup>23</sup>
- (2) EEA nationals (not UK nationals)
- (3) A person granted refugee status by another EEA State
- (4) Refused asylum seekers who fail to comply with removal directions, i.e., they have been issued with removal directions that provide a set time and means of leaving the UK and have failed to take this up
- (5) Refused asylum seekers with dependent children who have been certified by the Secretary of State as having failed to take steps to leave the UK voluntarily

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

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

UK region	Excluded legislation
England	Part 1 of the Care Act 2014 & Section 1 of the Localism Act 2011
Wales	Section 35 of the Social Services and Well-being (Wales) Act 2014
Scotland	Sections 12 & 13A of the Social Work (Scotland) Act 1968
Northern Ireland	Articles 7 and 15 of the Health and Personal Social Services (Northern Ireland) Order 1972

Schedule 3 only applies to adults, so the exclusion would not apply to a child who is transitioning to adult social care until they turn 18.

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<sup>23</sup> This distinction is set out in the case: *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (QB). <http://www.bailii.org/ew/cases/EWHC/QB/2005/2950.html>

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**Schedule 3 does not mean that support can automatically be refused to a person who is in an excluded group, because care and support must be provided where this is necessary to avoid a breach of the person’s human rights or rights under EU treaties.**<sup>24</sup>

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

The exclusion is limited to the provision of ‘support or assistance’ and does not prevent local authorities from undertaking assessments. The following points were confirmed by the Home Office and Department of Health in an email to the NRPF Network dated 29 July 2015:

- Schedule 3 prevents excluded groups from receiving ‘support or assistance’ under the Care Act 2014.
- Local authorities may undertake needs assessments for people requiring care and support (under section 9) and carers (under section 10).
- Local authorities may meet urgent needs for care and support whilst undertaking the relevant assessments (section 19(3)).
- There is no prohibition on a local authority undertaking its general duties with regards to providing information and advice (section 4) or prevention (section 2).

Care and support under sections 18 (duty to meet eligible needs), 19(1) (power to meet non-eligible needs) and 20 (duties to support carers), may only be provided to prevent a breach of the person’s human rights or rights under the EU treaties.

For more information, see section:

- **8 Assessments when the exclusion applies**

### **2.3.1 Duty to inform the Home Office**

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

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

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<sup>24</sup> Paragraph 3 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

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

### 2.3.2 People who are not excluded from support

Local authorities must be aware that the Schedule 3 exclusion does not apply to everyone who has NRPF, including people with the following types of immigration status:

- Limited leave to enter or remain in the UK with the NRPF condition
- Asylum seeker
- Refused asylum seeker who claimed asylum at port of entry rather than in-country (providing the other categories specific to refused asylum seekers do not apply)
- EU derivative right to reside, e.g., as the primary carer of a British citizen (Zambrano carer)

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**When a person is not in an excluded group, eligibility for care and support will depend on the outcome of the Care Act needs assessment only. A human rights assessment will not be required.**

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For more information, see sections:

- **3 Eligibility for care and support**
- **11 Asylum seekers**

## 2.4 Meeting urgent needs for care and support

Section 19(3) of the Care Act 2014 provides local authorities with a power to meet urgent needs for care and support before assessments have been completed:

*‘(3) A local authority may meet an adult’s needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without having yet—*

- (a) carried out a needs assessment or a financial assessment, or*
- (b) made a determination under section 13(1).’*

Local authorities must also have regard to the case of *R (Limbuela) v Secretary of State* (2004), in which the High Court determined that a decision which compels a person to sleep rough, or be without shelter and without funds, usually amounts to inhuman treatment and therefore engages Article 3 of the European Convention on Human Rights (ECHR).<sup>25</sup>

When a person presents to the local authority without any accommodation, or funds to acquire housing, the authority can provide this pending the outcome of an assessment where this is needed to prevent a breach of the person’s human rights which might be the consequence of remaining destitute and homeless whilst the local authority is establishing whether it has a duty to provide assistance.

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<sup>25</sup> *Limbuela, R (on the application of) v Secretary of State for the Home Department* [2004] EWHC 219

In exercising the power to meet urgent needs the local authority cannot fetter its discretion by strictly applying a blanket policy, and must consider each person's individual circumstances in order to establish whether interim accommodation might need to be provided, along with any other elements of care and support.

Consideration of the person's financial and housing circumstances at this stage is only relevant to determining whether interim support needs to be provided. The local authority will still be under a duty to carry out a needs assessment regardless of the level of the person's financial resources. Any enquiries already made will be relevant to decisions made about meeting needs and financial assessments, where the person has been assessed as having eligible care and support needs.

Local authorities can also use section 19(3) of the Care Act to provide accommodation when a person presents to social services with urgent needs and their place of ordinary residence cannot be easily established, or where they are in an excluded group so need to carry out a human rights assessment as well as a needs assessment.

For more information, see sections:

- **2.1.2 No settled residence or in urgent need**
- **3.2 Duty to assess**
- **4 Meeting needs for care and support**

## 3 Eligibility for care and support

This chapter highlights the additional considerations that local authorities will need to make when assessing the needs of a person with NRPF under the Care Act 2014, associated regulations and the Statutory Guidance.

The NRPF condition does not prevent care and support being provided by social services and a person with NRPF should be assessed and provided with this in the same way as any other adult.

The Care Act requires social services to ensure that provision of care and support, prevention, or information and advice, focuses on the needs and goals of the person requiring assistance. This is clear in the opening statement of the Statutory Guidance:

*'The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life.'*<sup>26</sup>

### 3.1 Well-being duty

Underpinning all of the processes and duties that are set out in the Care Act 2014 is the well-being duty at section 1. When a local authority is carrying out a care and support function, or is making a decision in relation to a person requiring care, the local authority must explain how it has had regard for each of the aspects of well-being:

- (a) personal dignity (including treatment of the individual with respect);*
- (b) physical and mental health and emotional well-being;*
- (c) protection from abuse and neglect;*
- (d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);*
- (e) participation in work, education, training or recreation;*
- (f) social and economic well-being;*
- (g) domestic, family and personal relationships;*
- (h) suitability of living accommodation;*
- (i) the individual's contribution to society.'*<sup>27</sup>

A particular focus on how a person with NRPF's social and economic well-being, and suitability of living accommodation, impacts on their physical and mental health, and emotional well-being, will be necessary. Their immigration status will mean that they are unable to access welfare benefits, are likely to have insecure or no housing, and in some instances will not be able to work or access other services. Failure to have proper regard to

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<sup>26</sup> *Care and support statutory guidance*, paragraph 1.1

<sup>27</sup> Section 1(2) of the Care Act 2014

considering this within assessments or when identifying what advice and information should be provided to a person with NRPF who is not eligible for care and support, is likely to be unlawful.

## 3.2 Duty to assess

Section 9 of the Care Act 2014 sets out the local authority's duty to undertake a needs assessment for a person in need of care and support:

*'(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—*

*(a) whether the adult does have needs for care and support, and*

*(b) if the adult does, what those needs are*

...

*(3) The duty to carry out a needs assessment applies regardless of the authority's view of—*

*(a) the level of the adult's needs for care and support, or*

*(b) the level of the adult's financial resources.'*

The threshold for triggering an assessment is therefore very low. Where there is evidence of a possible health and/or social care need, it is likely that this test will be met and the local authority will be required to undertake an assessment, even if it is suspected that a person may not have eligible care and support needs. A person who does not have eligible needs will still be entitled under to receive some tailored help, which may be limited to the information and advice necessary to reduce, prevent and delay current and future needs. For a person with NRPF, who may not have accessed services previously, this is an opportunity to obtain essential information and advice, even if they are not eligible for the provision of services.

## 3.3 Needs assessment

Section 9 of the Care Act 2014 and the Care and Support (Assessment) Regulations 2014 set out further requirements for the needs assessment, and must be read in conjunction with chapter 6 of the Statutory Guidance.

Prior to determining eligibility for care and support, the needs assessment must identify the following:

- The person's care and support needs
- The impact of the person's needs for care and support on all aspects of well-being
- The outcomes that the person wants to achieve
- How, and to what extent, the provision of care and support could contribute to the achievement of those outcomes

The needs assessment must comprise of an analysis of the information which has been gathered in order to draw the necessary conclusions, and can be carried out in various ways, with the process being adapted to best fit with the person's needs, wishes and goals.

However, it must follow core statutory requirements, for example, the person requesting support, their carer, and any other person that they want to participate, must be involved in the needs assessment. When a person lacks capacity to ask the authority to involve another person, social services must ensure that any person who appears to be interested in the person's welfare participates in the assessment.

When a person requires an independent advocate under section 67 of the Care Act, the advocate must be appointed prior to the needs assessment so that they are involved in the process from start to finish, otherwise the assessment may be unlawful. In the case of *SG v London Borough of Haringey* (2015), the court found that the needs assessment undertaken for an Afghan asylum seeker was flawed because it was unclear whether the outcome of the assessment had been prejudiced due to the absence of an advocate, and because SG was in no position to influence matters. SG had severe mental health problems including complex PTSD, insomnia, depression and anxiety, was illiterate and spoke no English. An advocate was only appointed following the assessment and the local authority was ordered to undertake a new assessment.<sup>28</sup>

The Care and Support (Assessment) Regulations 2014 set out requirements regarding the staff who will be responsible for undertaking needs assessments:

*'5 (1) A local authority must ensure that any person (other than in the case of a supported self-assessment, the individual to whom it relates) carrying out an assessment—*

*(a) has the skills, knowledge and competence to carry out the assessment in question; and*

*(b) is appropriately trained.*

*(2) A local authority carrying out an assessment must consult a person who has expertise in relation to the condition or other circumstances of the individual whose needs are being assessed in any case where it considers that the needs of the individual concerned require it to do so.*

*(3) Such consultation may take place before, or during, the carrying out of the assessment.'*

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**Local authorities must ensure that people with NRPF are identified at the point of referral and that practitioners who are responsible for these assessments have sufficient knowledge of how immigration status may impact on a person's well-being, their support options and whether the exclusions to social services' support apply. This may be more difficult to comply with for authorities that do not have specialist NRPF workers.**

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### **3.4 Care and support eligibility criteria**

Once a person's needs have been identified, the local authority must determine whether these meet the eligibility criteria in accordance with section 13(1) of the Care Act 2014 and

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<sup>28</sup> *R(SG) v London Borough of Haringey* [2015] EWHC 2579 (Admin)



the Care and Support (Eligibility Criteria) Regulations 2015. The regulations contain a three stage test:

*(1) An adult's needs meet the eligibility criteria if—*

*(a) the adult's needs arise from or are related to a physical or mental impairment or illness;*

*(b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and*

*(c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being.*

*(2) The specified outcomes are—*

*(a) managing and maintaining nutrition;*

*(b) maintaining personal hygiene;*

*(c) managing toilet needs;*

*(d) being appropriately clothed;*

*(e) being able to make use of the adult's home safely;*

*(f) maintaining a habitable home environment;*

*(g) developing and maintaining family or other personal relationships;*

*(h) accessing and engaging in work, training, education or volunteering;*

*(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and*

*(j) carrying out any caring responsibilities the adult has for a child.*

*(3) For the purposes of this regulation an adult is to be regarded as being unable to achieve an outcome if the adult—*

*(a) is unable to achieve it without assistance;*

*(b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;*

*(c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or*

*(d) is able to achieve it without assistance but takes significantly longer than would normally be expected.*

*(4) Where the level of an adult's needs fluctuates, in determining whether the adult's needs meet the eligibility criteria, the local authority must take into account the adult's*

*circumstances over such period as it considers necessary to establish accurately the adult's level of need.'*

A 'physical or mental impairment or illness' can be interpreted quite broadly:

*'Local authorities must consider at this stage if the adult has a condition as a result of either physical, mental, sensory, learning or cognitive disabilities or illnesses, substance misuse or brain injury. The authority should base their judgment on the assessment of the adult and a formal diagnosis of the condition should not be required.'*<sup>29</sup>

When applying the eligibility regulations, the local authority must disregard the services the person is receiving, for example, care provided by a family member, in order to establish whether the person can achieve the specified outcomes.<sup>30</sup>

The eligibility criteria include specified outcomes that are not related to basic care activities, for example, the maintenance of personal relationships and use of facilities in the community. It may therefore be possible for a person to have eligible needs that are not related to their ability to perform personal care activities. However, any eligible needs must arise from or be related to a physical or mental impairment or illness, rather than being the consequence of a person's immigration status or lack of housing/funds. The assessment must therefore be very clear about how a person's needs have arisen. There is a specific provision that prevents a local authority from being required to meet the needs of some groups of people with NRPF where their needs have arisen solely due to destitution.

### **3.4.1 Exception: needs arising solely from destitution**

Section 21 of the Care Act 2014 prevents a local authority from meeting needs, or providing preventative assistance under section 2(1) to some people with NRPF:

*'(1) A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act") (exclusion from benefits) applies and whose needs for care and support have arisen solely—*

*(a) because the adult is destitute, or*

*(b) because of the physical effects, or anticipated physical effects, of being destitute.'*

This exception only applies to people who are 'subject to immigration control':

<b>A non-EEA national who...</b>	<b>Examples</b>
Requires leave to enter or remain in the UK but does not have it	<ul style="list-style-type: none"><li>• Visa overstayer</li><li>• Illegal entrant</li></ul>
Has leave to enter or remain in the UK which is subject to a condition that they have no recourse to public funds (NRPF)	<ul style="list-style-type: none"><li>• Spouse of a British citizen or settled person</li><li>• Tier 4 student and their dependants</li></ul>

<sup>29</sup> *Care and Support Statutory Guidance*, paragraph 6.104

<sup>30</sup> *GS, R (On the Application Of) v London Borough of Camden* [2016] EWHC 1762 (Admin), paragraphs 28-29 & 38.

Has leave to enter or remain in the UK that is subject to a maintenance undertaking	<ul style="list-style-type: none"> <li>• Leave to remain – family/private life</li> <li>• Adult dependent relative of a British citizen or person with settled status (for the first five years of residence in the UK)</li> </ul>
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This exception does not apply to EEA nationals or a person who has the right to reside as the family member of an EEA national.

The definition of destitution that is used when determining claims for asylum support is to be followed:

*‘A person is destitute if—*

*(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or*

*(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.’*<sup>31</sup>

The intention behind this provision is to clarify that local authorities are not required to provide support to an adult solely for the purpose of alleviating destitution when that person has no additional needs. For example, where a person cannot maintain a habitable home environment for no other reason than because they are homeless, that need has solely arisen due to their destitution, rather than because of a physical or mental impairment or illness. When no other care and support needs are identified in such a case, the local authority will not have a duty to meet their needs (including accommodation).

Proper consideration of the eligibility criteria will involve identifying what has given rise to a person’s particular need. Anyone who does not have any needs arising from or related to a physical or mental impairment, or illness, will not be eligible for care and support. For people who are ‘subject to immigration control’, it will also be necessary in the eligibility assessment to document whether the section 21 exception applies or not.

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<sup>31</sup> Section 95(3) of the Immigration and Asylum Act 1999

## 4 Meeting needs for care and support

This chapter sets out what must be considered when a person with NRPF is assessed as having eligible needs and the duty under section 18(1) of the Care Act 2014 to meet needs for care and support is engaged, unless the person is 'subject to immigration control' and their needs have arisen solely due to destitution.

Local authorities are given a broad scope when it comes to deciding how needs may be met, with section 8(1) of the Care Act setting out some examples of what may be provided:

- (a) accommodation in a care home or in premises of some other type;*
- (b) care and support at home or in the community;*
- (c) counselling and other types of social work;*
- (d) goods and facilities;*
- (e) information, advice and advocacy.'*

A care and support plan must set out how a person's needs will be met, taking into account the person's wishes, needs and aspirations.<sup>32</sup> The local authority will need to establish whether a preference forms part of a person's needs and can refer to the High Court judgment of *Davey v Oxfordshire County Council* [2017] for further explanation of the difference between needs and wishes.<sup>33</sup>

Needs may be met by services that a person is already receiving, but the local authority must keep these arrangements under review.

Section 22 of the Care Act does not permit the local authority to meet needs by providing or arranging any health service or facility which is required to be provided by the NHS under the National Health Services Act 2006. This demarcation between health and social care services is likely to become more significant for this client group following the introduction in 2017 of upfront charging for some people who are seeking certain types of non-urgent NHS treatment. People affected who are receiving care and support from a local authority may be refused non-urgent NHS hospital treatment and some community services. This leaves the local authority in a situation where the health needs of a person receiving care may remain untreated, but there appears to be a prohibition on funding this under the Care Act.

For more information, see section:

- **15.4 NHS treatment**

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<sup>32</sup> *Care and support statutory guidance*, paragraph 10.31

<sup>33</sup> *Davey, R (On the Application Of) v Oxfordshire County Council* [2017] EWHC 354 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2017/354.html> (This case has since been determined by the Court of Appeal but the findings regarding needs and wishes were not considered further.)

## 4.1 Care provided by friends and family

The local authority is not required to meet needs for care and support where it has determined that these are already being met by an unpaid carer and such an arrangement can continue. The Statutory Guidance states:

*'The local authority should record in the care and support plan which needs are being met by a carer, and should consider putting in place plans to respond to any breakdown in the caring relationship.'*<sup>34</sup>

When a friend or family member is providing care, then the immigration status of the carer will need to be taken into account to help inform the local authority's decision about whether to continue to rely on the carer's help to meet the person's needs. In many cases, relying on care provided by friends or family will be consistent with the person's preferences and well-being, as well as being cost-effective for the local authority. However, where a carer has no current immigration permission, the local authority would need to ensure that the situation is regularly reviewed, as such an arrangement could break down at short notice, for example, if the carer is detained or removed from the UK by the Home Office. The immigration status of a carer who has limited leave to remain may also change if a future application is unsuccessful, so this should be noted in the care plan.

The person receiving care should be advised to contact social services as soon as they are aware of a change of circumstance that may impact on their carer's ability to continue to provide them with care.

Friends and family members providing care may also require a carer's assessment, but for some carers, the provision of care and support (including a direct payment/ individual budget), will be subject to a human rights assessment if they are in an excluded group.

For more information, see section:

- **7 Support for carers**

## 4.2 Direct payments

Any person requiring care may request that they are given a direct payment to arrange their own care and support. In such instances they would either use an agency or employ a carer directly. If they chose the latter option then they will need to register as an employer and must adhere to several requirements, including checking that the carer they employ has the right to work in the UK.

The Care and Support (Direct Payments) Regulations 2014 do not prohibit a local authority from providing a person with NRPF with a direct payment. Where a person with NRPF requires a care package only, for example, because they are living with family, it may be appropriate to provide a direct payment in order for them to employ a carer or use an agency to obtain home care. However, when accommodation is being provided under the Care Act, the care package will usually be arranged by social services.

If a person with NRPF requests a direct payment, then the local authority must decide whether to provide this based on the regulations and chapter 12 of the Statutory Guidance.

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<sup>34</sup> Care and Support Statutory Guidance, paragraph 10.26

Additional considerations may include the impact of any language barrier on the person being able to arrange their own care, and whether the person can open a bank account or obtain a National Insurance number, which may be needed to register as an employer.

### 4.3 Providing accommodation to meet needs

The local authority will need to consider whether a person, who is assessed as having eligible needs, can be provided with accommodation in order to meet their needs. It may be the case that residential care or supported accommodation is appropriate due to their identified needs. For people who do not require such types of accommodation, social services would normally need to make a referral to the local housing authority because section 23 of the Care Act 2014 prohibits housing to be provided when a person would be entitled to receive this under the Housing Act 1996.

As a person with NRPF would not be eligible for assistance under the Housing Act, and may have insecure or non-existent alternative housing options, social services will need to consider whether housing should be provided in order to meet the person's needs for care and support, even though this could result in the local authority incurring significant costs. With homelessness increasing across the UK and destitute adults with NRPF facing significant service gaps, it remains essential that local authorities correctly consider whether accommodation can be provided in order to meet the care and support needs of this vulnerable group.

There is no specific test in the Care Act for determining when accommodation should be provided to meet needs; eligibility for support must be established by following the Care and Support (Eligibility Criteria) Regulations 2015. In practice this means that a person must require a certain level of care in order to be provided with accommodation to meet their needs.

In the absence of a specific test, and due to the serious consequences of not being able to access housing, it was not a surprise that the two of the initial legal challenges against local authority decisions made under the Care Act addressed the question of when accommodation can be provided: *R(SG) v Haringey* (2015) and *R(GS) v Camden* (2016).<sup>35</sup>

The High Court found that a two-step approach is required to firstly identify accommodation-related needs and then secondly decide whether accommodation is required to meet those needs.

#### Step 1: Identify accommodation-related needs

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<sup>35</sup> *R(SG) v London Borough of Haringey* [2015] EWHC 2579 (Admin); *GS, R (On the Application Of) v London Borough of Camden* [2016] EWHC 1762 (Admin) <http://www.bailii.org/>. In each case the reasoning behind the court's interpretation of the Care Act effectively transposes the principles established in the case law that applied to section 21 of the National Assistance Act 1948, which pre-dates the Care Act, and contained a specific test that must have been met to provide accommodation, the wording of which is not reflected in the Care Act. Although SG appealed her case (*SG, R (on the application of) v London Borough of Haringey & Ors* [2017] EWCA Civ 322), the Court of Appeal judgment did not make findings on the High Court's approach to the question of when accommodation may be provided, so this can still be followed.

In both *R(SG) v Haringey* (2015) and *R(GS) v Camden* (2016) the court confirmed that a need will be accommodation-related when the services required by the person can only be provided in a home or would be effectively useless if the person has no home.<sup>36</sup>

Examples of accommodation-related needs:

- When the person requires a carer to help them get dressed and washed.
- Where a person, who cannot develop and maintain family relationships because they live far away and their illness or impairment makes travel very difficult for them, might need to move closer to their family if those difficulties cannot be overcome in any other way.

The local authority will need to clearly document whether a person's needs can or cannot be effectively met without the provision of accommodation if the person does not have any housing available to them. For people with NRPF who have housing available, for example, they are staying with friends, or are living in Home Office asylum support accommodation, then the well-being duty requires consideration to be given to the suitability of their living accommodation.<sup>37</sup>

## **Step 2: Decide whether accommodation is to be provided**

The Court of Appeal in *R(SG) v Haringey* (2017) did not rule either way on the question of when accommodation-related needs are identified, whether this creates a duty or discretion to provide accommodation but local authorities must consider the Care Act and adhere to public law principles.

The Care Act is clear that it is for the local authority to decide what support or services are provided to each person who has eligible care and support needs, and that needs may be met by the provision of accommodation of any type.<sup>38</sup>

Local authorities must not make a decision which is unlawful, unreasonable, irrational, or which is likely to lead to a breach of a person's human rights. It is therefore difficult to envisage how a local authority would be able to lawfully refuse to provide accommodation when accommodation-related needs have been identified and the person has no housing available to them or does not have access to appropriate housing in which their needs can be suitably met.

### **4.3.1 Home Office asylum accommodation**

In the case of *R(SG) v Haringey* (2015), the High Court was very clear that when a person is provided with asylum support accommodation by the Home Office then the local authority is still required to consider whether the person has accommodation-related needs. However, the court did not address the question of whether the local authority can take into account the availability of Home Office asylum accommodation when determining how to meet a person's needs.

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<sup>36</sup> *R(SG) v LB Haringey* [2015] EWHC 2579, paragraph 47; *R(GS) v LB Camden* [2016] EWHC 1762 paragraphs 27-29.

<sup>37</sup> Section 1(2)(h) of the Care Act 2014

<sup>38</sup> Section 8(1) of the Care Act 2014

Prior to the Care Act 2014 coming into force, the case of *R(Westminster City Council) v National Asylum Support Service* (2002) clarified that, where the duty to provide accommodation was engaged under section 21(1A) of the National Assistance Act 1948, it would fall to social services to provide housing rather than the Home Office, because section 95 asylum support is a residual power that cannot be engaged when other support is available.<sup>39</sup>

Section 21(1A) of the National Assistance Act 1948 contained a specific eligibility test giving rise to a duty to provide accommodation. As described above, the Care Act does not contain an equivalent provision, and the courts have not found that identifying accommodation-related needs creates a duty to provide accommodation. The application of *R(Westminster City Council) v National Asylum Support Service* (2002) therefore does not appear to directly translate to the decision of how a local authority should meet needs under the Care Act.

When an asylum seeker or refused asylum seeker has accommodation-related needs and is currently being housed by the Home Office, the local authority may wish to consider a number of factors when deciding whether accommodation should be provided to meet the asylum seeker's needs:

- The person's wishes
- The person's well-being in relation to the suitability of their asylum accommodation.
- Whether the care and support required can be provided within that particular accommodation, e.g., some asylum accommodation providers reportedly will not permit registered carers to administer care in their properties
- The local authority may not have any control over whether the person is moved to different accommodation, which could be in another area, risking a disruption of care and questions over continued responsibility to meet needs
- The Home Office will terminate accommodation providing a notice period of 28 or 21 days, respectively when the person is no longer eligible for asylum support because they have been granted leave to remain or their claim has been refused

These matters must be considered and fully documented to explain why asylum accommodation is or is not being relied on to meet a person's needs for care and support. Where it is determined that the asylum seeker's needs can be met by remaining in Home Office accommodation, this decision must be Care Act compliant, for example, by promoting the person's well-being.

### **4.3.2 Right to rent scheme**

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

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<sup>39</sup> *Westminster City Council v National Asylum Support Service* [2002] UKHL 38, paragraphs 17, 39-40 considering reg.6 of the Asylum Support Regulations 2000  
<http://www.bailii.org/uk/cases/UKHL/2002/38.html>



People without any current immigration permission will not have the right to rent unless the Home Office issues permission to rent when exceptional circumstances apply.<sup>40</sup>

The right to rent scheme does not prevent local authorities from providing a person, who does not have the right to rent, with housing in the private rented sector to meet their care and support needs due to an exemption set out in the Immigration Act 2014, which is explained in the Home Office Code of Practice for landlords:

*'Residential tenancy agreements which grant a right of occupation in any circumstances where the accommodation is arranged by a local authority which is acting in response to a statutory duty owed to an individual, or which is exercising a relevant power with the intention of providing accommodation to a person who is homeless, or who is threatened with homelessness, is exempt from the scheme. This includes instances where the occupier is to be placed into private rented property by the local authority.*

*'In such circumstances, landlords should ask for written confirmation from the local authority that the authority is acting in response to a statutory duty and keep this on file.'*<sup>41</sup>

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

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**The right to rent scheme does not prevent local authorities from providing housing in the private sector to people who do not have a right to rent where this is necessary to discharge duties under the Care Act 2014.**

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## 4.4 Providing subsistence to meet needs

When a person with NRPF does not have access to any financial support, the local authority may have to provide subsistence payments as part of the care plan to meet care and support needs. The type of accommodation that is provided to meet needs will impact on how much subsistence is also provided.

When deciding how much to provide to a person with NRPF who is living in residential care, the local authority may wish to refer to the weekly personal expenses allowance of £24.90, which a person who is required to pay for their care in a care home must be left with.<sup>42</sup>

For people who are living in other types of accommodation, the local authority would need to be mindful of the broad scope it has to meet needs under the Care Act 2014 and should take a flexible approach to determine how much a person requires based on their individual needs. For example, a person may want to watch television and therefore need subsistence

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<sup>40</sup> The Home Office, *A short guide on right to rent*, lists these at page 10.

<https://www.gov.uk/government/publications/landlords-right-to-rent-checks-guide>

<sup>41</sup> Schedule 3 of the Immigration Act 2014, paragraph 7; Home Office, *Code of practice on illegal immigrants and private rented accommodation*, paragraph 3.7

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

<sup>42</sup> The Care and Support (Charging and Assessment of Resources) Regulations 2014, regulation 6.

payments to cover a TV licence. If watching television is linked to meeting an identified need, rather than because the person desires this, then it may be appropriate to ensure this is funded on top of subsistence paid to meet their basic living needs.

Local authorities may have regard to the principles established regarding subsistence payments to meet a child's needs when families with NRPF are supported under section 17 of the Children Act 1989. In such cases the courts have found that payments must meet an individual child's assessed needs, so must have a flexible approach if administering standard subsistence rates.<sup>43</sup>

## 4.5 Financial assessments

When the local authority has determined that a person requires care and support, it will normally undertake a financial assessment to establish how much the person has to pay towards the cost of their care. The financial assessment must be compliant with section 17 of the Care Act 2014, the Care and Support (Charging and Assessment of Resources) Regulations 2014 and the Statutory Guidance.

The rules and regulations governing financial assessments are the same for all people regardless of their nationality or immigration status, so people with NRPF should be subject to the same assessment process as everyone else.

It is likely that a person with NRPF's financial circumstances will have already been investigated to some extent in order to establish whether they require accommodation to be provided whilst the needs assessment is being carried out.

The local authority will need to determine whether to conduct a full financial assessment or a light touch assessment. The Statutory Guidance suggests that a light touch financial assessment may be undertaken where a person is in receipt of benefits which demonstrate that they would not be able to contribute towards their care and support costs. This would also be a sensible approach when a person's sole income is subsistence support provided by social services.<sup>44</sup>

A full financial assessment is likely to be required when a person with NRPF is living with family members, has recently been working, or has recently entered the UK with a type of leave to enter that is only issued when financial requirements are met, for example, as a visitor or student.

A determination of a complaint made to the Local Government & Social Care Ombudsman in September 2016 provides some useful points to be mindful of in cases when care and support is provided to a person who has leave to remain or a European right to reside on the basis of being dependent on a family member.<sup>45</sup>

When people who obtain leave to enter the UK in order to work or study bring their family members with them, they will have to satisfy maintenance requirements, usually by showing

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<sup>43</sup> For more information, see the NRPF Network factsheet: Subsistence for families supported under section 17 of the Children Act 1989. <http://www.nrpfnetwork.org.uk/Documents/Subsistence-support-families.pdf>

<sup>44</sup> Care and Support Statutory Guidance, paragraph 8.22.

<sup>45</sup> Local Government and Social Care Ombudsman decision 16 002 534 (28 September 2016). <http://www.lgo.org.uk/decisions/adult-care-services/charging/16-002-534>

they have specified funds available to them. No maintenance undertaking is signed that binds the main applicant to providing support for their family members, unlike where a British Citizen applies for a parent, or other dependent adult relative, to settle permanently with them in the UK, and as part of the application must sign a maintenance undertaking. In such cases, the maintenance undertaking relates to the sponsor providing what would otherwise be covered by benefits and social housing, but does not include them being required to fund social services' support should the relative require care. Therefore, it is incorrect to assume that people with leave as a dependant should have their care funded by their sponsoring family member.

The Ombudsman complaint was made against the London Borough of Richmond upon Thames by the father of an autistic adult, who had leave to remain with NRPF as the dependant of his father. His father had come to the UK to work for a multi-national company and the son was provided with a placement in a children's home when his parents could not cope with his increasingly challenging behaviour. One year after becoming an adult, he was placed in a care home. After turning 18, whilst he was still in the children's home, the council charged the son £32.95 per week towards his placement, which is what he would have been charged were he claiming Employment and Support Allowance (ESA). His father paid this as his son was unable to claim ESA or other benefits due to having the NRPF condition. The council later wrote to the father stating that he or his employer should pay the total cost of the placements since the son had become an adult, and that the father was responsible for this due to his son having leave to remain as a dependant. The Council also wrote to the Home Office informing them that they had concerns that the family had misrepresented their ability to support the son when they extended their leave to remain.

The LGO upheld the father's complaint, making the following findings:

- The Care and Support (Charging and Assessment of Resources) Regulations 2014 and Statutory Guidance are clear that the financial assessment must take account of the resources of the person receiving care services. There is no legal basis for charging anyone other than the person requiring care, so the council was at fault for charging the father for his son's care. The government has not made separate charging provisions for people who are subject to different types of immigration status.
- The Care Act Statutory Guidance allows local authorities to take account of 'notional income' in their assessments, including income that would be available which has not yet been applied for, but in this case the council was at fault for charging the son based on income that he could not receive due to his immigration status.

When determining responsibility for funding a person with NRPF's care, this case highlights that a good understanding of entitlements is necessary and that a decision based on assumptions relating to a person's immigration status should not be made, as there must be a legal basis for any course of action followed.

## 5 Discretionary powers to provide housing

This chapter sets out the legislation and case law that local authorities must consider when deciding whether it is appropriate to use discretionary powers to provide housing and financial support to a person with NRPF who is not eligible for care and support, including accommodation, under the Care Act 2014. The powers set out in section 19(1) of the Care Act and section 1 of the Localism Act 2011 may be used to prevent a breach of human rights or to manage a situation where the impact of failing to meet a person's needs could have serious long term consequences for the individual and local authority.

### 5.1 Considerations for using a discretionary power

It is essential that local authorities properly consider and document whether a discretionary power will or will not be used in order to adhere to public law principles. Where a power is engaged to provide housing to a person with NRPF, it is important that practitioners and the person receiving accommodation understand if this may be limited, for example, where a change of circumstances may lead to the accommodation being withdrawn. If the staff involved do not know the legal basis under which accommodation has been provided, then the case will not be effectively managed and the local authority will be faced with a challenging situation when it comes to review the provision of support.

The Public Law Project provides guidance about how a public body, including a local authority, must use a discretionary power:

*'Where the law gives a public body a discretion to do something, that discretion must be exercised in line with public law principles which require the public body to:*

- *Take into account relevant information and disregard irrelevant information;*
- *Ask the right questions, for example by addressing the right issue and taking reasonable steps to obtain information on which a proper decision can be based;*
- *Not delegate a decision for which the law gives it responsibility. Only the public body can make the decision; if they allow another person to take a decision for them they are giving their power away and failing to be properly accountable;*
- *Make sure they have not limited, or fettered, their discretion by applying a very rigid policy as if it were the law.'*<sup>46</sup>

The Care Act 2014 requires local authorities to consider using the section 19(1) power when a person does not have eligible care and support needs, so failure to consider this and document any reasoning why the power is not engaged will be unlawful. Following the case of *R(GS) v Camden (2016)*, which is described below, where the Care Act power is not engaged, the local authority will be required to consider whether section 1 of the Localism Act 2011 can be used to provide housing.

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<sup>46</sup> Public Law Project, Short Guide 03: An introduction to Judicial Review.  
[http://www.publiclawproject.org.uk/data/resources/6/PLP\\_Short\\_Guide\\_3\\_1305.pdf](http://www.publiclawproject.org.uk/data/resources/6/PLP_Short_Guide_3_1305.pdf)

There may also be instances where a person is not assessed for care and support under the Care Act but the local authority must consider using section 1 of the Localism Act to provide support, for example, for a confirmed victim of trafficking who does not present with an appearance of need that triggers the duty to undertake a needs assessment.

Local authorities are encouraged to evidence any support provided on a discretionary basis by recording cases on NRPF Connect, from which they can also get updates from the Home Office about the progress of any immigration applications that have been made.

## 5.2 Section 19 of the Care Act 2014

Where a local authority determines it has no duty under the Care Act 2014 to meet a person's needs for care and support, it must then consider whether to use the general power under section 19(1) to meet needs that do not satisfy the eligibility criteria:

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

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

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

If this power is used, the local authority must comply with the Care Act in the same way as they would for a person to whom they have a duty to meet needs for care and support, and so must provide a care and support plan and conduct reviews.

Support under section 19(1) of the Care Act may only be provided to a person who is in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, where the local authority has assessed that this is necessary to prevent a breach of their human rights or rights under the EU treaties, for example, when there is a legal or practical barrier preventing the person from returning to their country of origin. For such people the local authority must undertake a human rights assessment as well as a needs assessment to establish whether a person in an excluded group can return to their country of origin.

When return is not possible, or where a person requesting assistance is not in an excluded group, then the local authority must determine whether their circumstances are such that refusing to provide accommodation under section 19(1) would result in a breach of their human rights.

The Statutory Guidance sets out what the local authority must do if it decides not to use this power:

*'If the local authority decides not to use its powers to meet other needs, it must give the person written explanation for taking this decision, and should give a copy to their advocate if the person requests. If the person cannot request this, then a copy should be given to the person's advocate or appropriate individual if this in the best interests of the person. This explanation must also include information and advice on how the person can reduce or delay their needs in future. This should be personal and specific advice based on the person's needs assessment and not a generalised*

*reference to prevention services or signpost to a general web-site. For example, this should involve consideration of alternative ways in which a person could reduce or delay their care and support needs, including signposting to support within the local community. Authorities may choose to provide this information after the eligibility determination, in which case this need not be repeated again. At whatever stage this is done, in all cases the person must be given a written explanation of why their needs are not being met. The explanation provided to the person must be personal to and should be accessible for the person.’<sup>47</sup>*

Where this power is not used, local authorities should ensure that the information and advice given is appropriate to the person’s needs, so is likely to need to include: where to access immigration advice, local destitution charities, Home Office asylum support, Home Office voluntary returns service and signposting to the NRPF Network website.

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### **Case example**

*Mr Y is a French national who has been in the UK for 18 years and is suffering from end stage kidney disease for which he receives dialysis three times a week. Mr Y does not have a right to reside under European law and cannot claim most benefits or access homelessness assistance. Mr Y’s consultant advises that even one missed session of dialysis represents a risk to his life. Given the complexities of transferring his care to health services in France and the fact that even one missed session of dialysis carries significant risk of causing serious illness or sudden death, return would breach Article 3 of the ECHR. Social services have assessed that Mr Y does not have eligible care and support needs but making Mr Y homeless in light of his medical needs would constitute a breach of human rights. In the absence of any NHS provision to provide accommodation, the local authority provides housing under section 19(1) of the Care Act 2014 to prevent a breach of human rights. To prevent support being ‘open ended’ the local authority begins discussions with the Home Office about whether leave to remain with recourse to public funds on an exceptional basis might be granted.*

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### **5.2.1 Pregnant women**

The National Assistance Act 1948, which preceded the Care Act 2014, contained an explicit power allowing local authorities to provide care and support to expectant and nursing mothers who do not have care needs in addition to those associated with pregnancy. There was no requirement for the pregnancy to be at a particular stage in order for this support to be provided. When the government consulted on the Care Act eligibility regulations, responders, including local authorities, confirmed that no one who would have been provided with accommodation under the previous legislation would fall out of scope of the Care Act.<sup>48</sup>

When an expectant mother with NRPF, who has no children in her care, requests assistance with housing, then the local authority should therefore consider using the general power under section 19(1) of the Care Act to provide support, and may also provide interim accommodation under section 19(3) to prevent homelessness before a needs assessment has been concluded. Additionally, the UK is a signatory to the UN Convention on the

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<sup>47</sup> *Care and support statutory guidance*, paragraph 10.29

<sup>48</sup> Department of Health, *Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014*, page 23.  
<https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

Elimination of All Forms of Discrimination against Women (CEDAW), which requires that pregnant women are given access to appropriate services, including access to nutrition.<sup>49</sup>

If the expectant mother is in a group excluded from support by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, then the human rights assessment must consider how the pregnancy impacts on her ability to travel and return to her country of origin.

Children's services departments may support pregnant women and, where appropriate, undertake a pre-birth assessment, so housing may be provided by a different council department even though the power to do this exists under the Care Act.

### **5.3 Section 1 of the Localism Act 2011**

Where a person does not have eligible care and support needs and the local authority has decided not to use section 19(1) of the Care Act 2014 to meet non-eligible needs, it will need to consider whether to use its general power of competence under section 1 of the Localism Act 2011. This gives the local authority a power to do anything that an individual generally may do, and may exercise this power in any way, including for the benefit of residents.

Support under section 1 of the Localism Act may only be provided to a person who is in a group excluded by Schedule 3 when the local authority has assessed that this is necessary to prevent a breach of their human rights or rights under the EU treaties, for example, where there is a legal or practical barrier preventing the person from returning to their country of origin.

Where it has been established that a person cannot return to their country of origin (or Schedule 3 does not apply to them) and they have no other housing options open to them in the UK, then the local authority would need to consider whether the person has particular vulnerabilities that mean refusing support may give rise to a breach of human rights. If the local authority finds that a breach of human rights will occur, then a duty to provide housing under section 1 of the Localism Act may arise.

The principle of using the Localism Act power to provide housing in such an instance was established in the case of *R(GS) v LB Camden* (2016), which concerned a Swiss national who had physical and mental health problems and was wheelchair dependent. The local authority accepted that GS could not return to Switzerland because she did not have the mental capacity to be able to either decide this or to consent for treatment for her mental health condition, and so provided her with accommodation. In October 2015 the local authority undertook a needs assessment under the Care Act 2014, concluding that GS did not have eligible care and support needs, her only need being accommodation, and that the section 19(1) power was not engaged. The only benefit GS was entitled to was a personal independence payment (PIP), which was not sufficient to enable her to afford accommodation and to meet her living costs.

The court found that the local authority's power under section 1 of the Localism Act 2011 could potentially be exercised to provide GS with accommodation, and also considered whether this was converted into a duty to prevent a breach of her human rights. The court determined that the failure to provide GS with accommodation would be a breach of Article 3

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<sup>49</sup> Article 12 of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

(the right not to be subject to inhuman or degrading treatment) of the European Convention on Human Rights when the entirety of her circumstances were taken into account, including: her inability to afford accommodation; her potential social isolation; and previous effects of homelessness on her mental health (including suicidal ideation). The local authority therefore had a duty to provide accommodation under section 1 of the Localism Act.<sup>50</sup>

Given that similar considerations would need to be made for using either discretionary power, it is unclear why section 19(1) of the Care Act was not engaged if GS's circumstances and vulnerabilities were such that failure to provide accommodation would result in a breach of her human rights. *R(GS) v Camden* (2016) makes it clear that local authorities must ensure they also consider using the Localism Act if section 19(1) of the Care Act is not engaged.

Another example of when section 1 of the Localism Act may be used to provide accommodation is where victims of trafficking or modern day slavery require this due to gaps in the support available to them.

Local authorities may have regard to a consent order agreed by Bristol City Council, in which the council accepted that it had to provide accommodation and financial support to an EEA national, who had received a positive conclusive grounds decision that she was a victim of trafficking and was waiting for a decision on an application for leave to remain. She was not eligible for benefits, having failed the right to reside test, and could only provide for her most basic needs by engaging in prostitution. She brought a judicial review claim against the local authority after support was initially refused and withdrew the claim when a consent order was agreed that she would receive accommodation and subsistence until she transitioned to mainstream benefits.<sup>51</sup>

The local authority accepted that section 1 of the Localism Act can be used to provide support and assistance to victims of trafficking where this is necessary to avoid a breach Articles 3 and 4 (prohibition of slavery and forced labour) of the ECHR and/or to comply with Article 11 of the EU Anti-Trafficking Directive. Schedule 3 would not apply in this case due to AK having a pending application for discretionary leave to remain that had yet to be determined by the Home Office.

In all cases when considering whether to use section 1 of the Localism Act to provide housing, the local authority will need to consider whether the person has any realistic alternative housing options.

## 5.4 Establishing alternative housing options

In order to establish whether a discretionary power is to be used, the local authority would need to consider what alternative support options may or may not be available to the person, depending on what is appropriate to the individual's circumstances.

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<sup>50</sup> *GS, R (On the Application Of) v London Borough of Camden* [2016] EWHC 1762 (Admin), para.75

<sup>51</sup> *R (AK) v Bristol City Council* (CO/1574/2015). Article by the solicitors acting for AK:

[http://dpglaw.co.uk/ground-breaking-case-local-authority-responsibilities-supporting-victims-trafficking/Consent order: <http://dpglaw.co.uk/wp-content/uploads/2016/04/1092383-Consent-order-sealed-18.11.2015.pdf>](http://dpglaw.co.uk/ground-breaking-case-local-authority-responsibilities-supporting-victims-trafficking/Consent%20order%3A%20http%3A%2F%2Fdpglaw.co.uk%2Fwp-content%2Fuploads%2F2016%2F04%2F1092383-Consent-order-sealed-18.11.2015.pdf)



Home Office accommodation may be available to someone who is seeking asylum and can claim section 95 support, or has been refused asylum and meets the requirements for section 4 support.

People who have been referred to the National Referral Mechanism to have their trafficking case considered will be provided with accommodation and support by the Salvation Army.

When a person has lived in the UK for a significant time prior to requesting support from the local authority, then it will be necessary to establish whether these arrangements remain available, and if so, whether any information and advice can be provided to the person to prevent them from becoming homeless, for example, signposting to an immigration adviser and/or the Home Office voluntary returns service.

If a person with NRPF has a source of income, it would be reasonable to consider whether they can access accommodation in the private rented sector. However, this will be limited by affordability and, for some, the right to rent scheme in England.

People with no current immigration permission do not have the right to rent or sub-let from a private landlord, or be a paying lodger, unless the Home Office grants permission to rent on an exceptional basis, and so cannot be expected to secure housing in the private rented sector. EEA nationals, people with settled status and limited leave to remain will have the right to rent. Immigration status checks provided by the Home Office through NRPF Connect will confirm whether a person has a right to rent or has been granted permission to rent on an exceptional basis.

When a person does have the right to rent, then the local authority would need to consider how realistic securing private rented accommodation will be for a person who has a low income and cannot claim housing benefit. For example, GS was a Swiss national and was able to claim a PIP but not housing benefit. Her insufficient income to secure private rented accommodation was a relevant factor, but not the sole factor, that led to the court determining that section 1 of the Localism Act 2011 should be used to provide housing.

For more information, see sections:

- **8 Assessments when the exclusion applies**
- **11 Asylum seekers**
- **12 Victims of trafficking and modern day slavery**

## 6 Hospital cases

This chapter sets out the considerations that must be made when a hospital in-patient with NRPF has no accommodation to be discharged to when their treatment ends. Such cases present the hospital with a challenging, and possibly expensive, situation to manage when bed spaces are in high demand. Local authorities can be required to reimburse the NHS where a delay in assessing and/or meeting care and support needs leads to ‘bed-blocking’, and may face considerable costs if accommodation needs to be provided to meet care and support needs under the Care Act 2014. It is essential that patients with NRPF are identified as soon as possible after admission, and that health professionals and social services practitioners work closely to establish how this will impact on the treatment plan and discharge options.

### 6.1 Discharge procedure

Section 74 and Schedule 3 of the Care Act 2014, the Care and Support (Discharge of Hospital Patients) Regulations 2014, and Annex G of the Statutory Guidance, set out the process that must be followed to transfer care from a hospital to local authority where the hospital believes that there is a reasonable prospect that a person may have care and support needs.

The Care Act requires a hospital to give notice to the local authority when it is not likely to be safe to discharge the patient unless arrangements for meeting the patient’s needs for care and support are in place. The Statutory Guidance states:

*‘The NHS is required to issue a notice to the local authority where they consider that an NHS hospital patient in receipt of acute care may need care and support as part of supporting a transfer from an acute setting regardless of whether they intend to claim reimbursement. The relevant local authority who the NHS must notify is the one in which the patient is ordinarily resident or, if it is not possible to determine ordinary residence, the local authority area in which the hospital is situated.’<sup>52</sup>*

Once the assessment and discharge notices have been issued by the hospital in accordance with the regulations, the local authority must undertake a needs assessment and make arrangements for meeting eligible needs before the discharge date or two days after the assessment notice was received, whichever date is later.

Where the local authority determines that a patient has eligible care and support needs, or considers using a discretionary power to provide accommodation, then for patients who are in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, it will also need to undertake a human rights assessment to determine whether support is required to prevent a breach of the person’s human rights or EU treaty rights.

For further information about responsibility for meeting needs, see section:

- **2.1.3 Hospital in-patients**

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<sup>52</sup> Section 1(1) of Schedule 3 of the Care Act 2014; Care and support statutory guidance, Annex 6 (5)

## 6.2 TB treatment

Local authorities have no duty under the Care Act 2014 to provide accommodation when this is needed solely to manage a public health risk. When a patient requires a course of tuberculosis (TB) treatment and is contagious, but has NRPF so cannot access mainstream housing services, an agreement regarding sourcing and funding accommodation may need to be made with the local Clinical Commissioning Group (CCG). Failure to have an agreement in place may give rise to costs to the NHS due to bed-blocking or people being lost to follow up treatment, as well as a drain on resources where a business case has to be made each time such a situation arises to access funding for accommodation.

Examples of such arrangements and practical information can be found in Public Health England's guidance, *Tackling tuberculosis in under-served populations*, including:

- Checklist to help accommodate TB patients with no recourse to public funds developed by the London TB Control Board, NRPF Network and others
- Service level agreement between a hospital and London Borough of Hackney's housing department to accommodate homeless TB patients with NRPF
- CCG risk share arrangement in London to fund housing for TB patients with NRPF <sup>53</sup>

## 6.3 Section 117 mental health aftercare

Section 117 of the Mental Health Act 1983 imposes a duty on the local NHS Clinical Commissioning Group (CCG) and local authority social services department, to provide or arrange for aftercare services to patients who have been compulsorily detained under the Mental Health Act when they cease to be detained and leave hospital following admission under:

- Section 3 (detained in hospital for treatment)
- A hospital order made under sections 37 or 45A (ordered to go to hospital by a court)
- Sections 47 or 48 (transferred from prison to hospital)

Aftercare services are provided once the patient has left hospital, whether this is immediately or sometime after they have been discharged under the above provisions of the Mental Health Act. Aftercare can include the provision of accommodation in certain circumstances, so it is very important that the CCG and local authority properly consider whether this can be provided when a person with NRPF's detention is due to end.

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**Aftercare services must be provided free of charge and are not subject to any immigration exclusions, so nationality and immigration status are not factors that affect whether a person can receive aftercare under section 117.**

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The Department of Health's *Mental Health Act 1983: Code of Practice* must be followed for people with NRPF. <sup>54</sup>

The duty to provide aftercare services exists until both the CCG and the local authority are satisfied that the patient is no longer in need of such services, so a joint decision must be

<sup>53</sup> <https://www.gov.uk/government/publications/tackling-tuberculosis-in-under-served-populations>

<sup>54</sup> <https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983>

made. When preparing to discharge a person from section 117 support, regard should be given to their immigration status and entitlement to public funds, as a referral to social services may be appropriate for a needs assessment under the Care Act 2014, and in some cases, a human rights assessment.

### 6.3.1 Responsibility for providing aftercare

Responsibility for the provision of section 117 aftercare mirrors the position regarding responsibility for providing care and support under the Care Act 2014.

Section 75(3) of the Care Act stipulates that the local authority responsible for providing aftercare will be that in which the patient was ordinarily resident (if in England or Wales) immediately before they were detained/hospitalised or where they are discharged to if they have no previous or current place of ordinary residence. This is summarised in the Statutory Guidance:

*'The duty on local authorities to commission or provide mental health aftercare rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were detained under the 1983 Act, even if the person becomes resident in another area where they are detained, or on leaving hospital. The responsible local authority may change, if the person is ordinarily resident in another area immediately before a subsequent period of detention.'*

....

*'If, however, a patient is not ordinarily resident in England or Wales immediately before being detained, the local authority responsible for commissioning the patient's after-care will be the one for the area in which the patient is resident. Only if that cannot be established, either, will the responsible local authority be the one for the area to which the patient is sent on discharge. However, local authorities should only determine that a person is not resident anywhere as a last resort.'*<sup>55</sup>

### 6.3.2 Providing accommodation under section 117

Section 117(6) of the Mental Health Act 1983 defines aftercare:

*'In this section, "after-care services", in relation to a person, means services which have both of the following purposes—*

*(a) meeting a need arising from or related to the person's mental disorder;*  
*and*

*(b) reducing the risk of a deterioration of the person's mental condition (and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder).'*

This clarifies that aftercare services must meet a need **arising from or related to** the person's mental disorder with the purpose of reducing the risk of deterioration in the

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<sup>55</sup> *Care and support statutory guidance*, paragraphs 19.64-66

condition and therefore reduce the risk of readmission to hospital for treatment for the disorder.

CCGs and local authorities are given broad discretion as to what services they provide, and the *Code of Practice* provides examples of what services aftercare can encompass:

*‘CCGs and local authorities should interpret the definition of after-care services broadly. For example, after-care can encompass healthcare, social care and employment services, **supported accommodation** and services to meet the person’s wider social, cultural and spiritual needs, if these services meet a need that arises directly from or is related to the particular patient’s mental disorder, and help to reduce the risk of a deterioration in the patient’s mental condition.’<sup>56</sup>*

Aftercare can include the provision of accommodation, if that is required for the purpose of meeting a need arising directly from or related to the patient’s mental disorder and will help to reduce the risk of their mental condition deteriorating. This therefore suggests that ordinary accommodation (e.g. a private tenancy) cannot be provided. Aftercare may also include subsistence payments when a person with NRPF is accommodated under section 117 and has no alternative means of obtaining financial support.

### 6.3.3 Referring for a Care Act assessment

It may be appropriate to refer a person, who is eligible for or receiving aftercare, for a needs assessment under the Care Act 2014 in the following circumstances:

- When they require additional care and support outside of what can be provided under section 117
- When the CCG and local authority have determined that accommodation cannot be provided under section 117
- Where supported accommodation under section 117 has been provided but their progress means that their need for such a type of housing no longer exists and the CCG and local authority have jointly discharged the person from such aftercare support

A needs assessment must be carried out under section 9 of the Care Act in accordance with standard practice, but if the person is in a group excluded by Schedule 3 of the Nationality Immigration and Asylum Act 2002, then a human rights assessment will also be required to establish whether care and support should be provided to prevent a breach of the person’s human rights or rights under the EU treaties. The local authority can exercise its power under section 19(3) of the Care Act to meet urgent needs whilst these assessments are undertaken.

For more information, see section:

- **3 Eligibility for care and support**

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<sup>56</sup>Department of Health, *Mental Health Act 1983: Code of Practice*, paragraph 33.4

## 7 Support for carers

This chapter highlights some considerations that must be made relating to the nationality and immigration status of a carer who requests assistance under the Care Act 2014.

The Care Act contains a duty to provide care and support to a person providing care to an adult. Sections 10(1) and (4) state that a carer's assessment must be undertaken when there is an appearance of need, whether currently or in the future, and regardless of the level of need or the carer's financial resources. A person requiring care and support and their carer may have a combined needs assessment.<sup>57</sup>

Eligibility must be considered under the Care and Support (Eligibility Criteria) Regulations 2015 and the well-being duty also applies. Under section 20(1) of the Care Act the local authority must meet a carer's eligible needs for support, as set out in a care and support plan, and section 20(6) sets out a power to meet non-eligible needs. Ordinary residence requirements apply. Section 20(7) allows for a carer's needs to be met by providing care and support to the person they are caring for, even if that person does not have eligible needs themselves.

Section 21(4) prevents local authorities from providing care and support to a person who is subject to immigration control in order to meet a carer's needs for support where the person's needs for care and support have arisen solely due to destitution or the physical effects of destitution. Therefore, the immigration status of the person requiring care and support must be established to determine whether this may apply.

The immigration status of the carer must also be established at the point of referral because the provision of any support and or assistance to carers is in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002. This means that the local authority will only have a duty, or be able to use its discretionary power, to meet a carer's care and support needs if this is necessary to prevent a breach of the carer's human rights or rights under EU treaties. A human rights assessment would need to be carried out to establish whether a carer's needs for support can be met when the exclusion applies.

Carers have a right to request that the local authority meets some or all of such needs by giving them a direct payment, which will give them control over how their support is provided. There is nothing prohibiting the local authority from providing a direct payment to a carer who does not have any current immigration permission, where the local authority has undertaken a human rights assessment that concludes that carer's support must be provided to prevent a breach of their human rights or EU treaty rights, for example, because they have a pending immigration application. However, in such instances the local authority will need to consider whether it is appropriate to rely on such a person to provide unpaid care given that their long term future in the UK is uncertain.

For more information, see sections:

- **4.1 Care provided by friends and family**
- **8 Assessments when the exclusion applies**

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<sup>57</sup> *Care and support statutory guidance*, para. 6.74

## 8 Assessments when the exclusion applies

When a person with NRPF requests care and support under the Care Act 2014, the local authority must establish whether they are in an excluded group, which means that they can only be provided with the support or assistance that is necessary to prevent a breach of their human rights or EU treaty rights. This chapter provides guidance on how a local authority will need to make this decision, and will also be relevant when the local authority considers whether to use its discretionary powers to provide housing under section 19(1) of the Care Act or section 1 of the Localism Act 2011.

This chapter applies to the groups set out at Schedule 3 of the Nationality Immigration Asylum Act 2002:

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

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

When a person is not in one of the above groups, then a human rights assessment is not required because eligibility for care and support depends only on the outcome of the Care Act needs assessment.

### 8.1 Human rights assessment

A person who is in an excluded group can only be provided with support or assistance under the Care Act 2014 where this is necessary for the purpose of avoiding a breach of a person's rights under the European Convention on Human Rights (ECHR) or European Union (EU) treaty rights.<sup>58</sup>

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

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<sup>58</sup> Paragraph 5 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

*'A State owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home.'*<sup>59</sup>

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

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

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

In order to assist local authorities in documenting the decision making process, we have developed a human rights assessment template, although questions will need to be tailored to each person's specific circumstances. It is recommended that the human rights assessment is recorded separately from the Care Act needs assessment as the conclusions and reasoning for each must be clearly set out.

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

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

## **8.2 Determining whether a person can freely return**

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

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<sup>59</sup> *R (K) v London Borough of Lambeth* [2003] EWCA Civ 1150, paragraph 49.  
<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1150.html>



Where a person is eligible for care and support (including accommodation) under the Care Act and this is not provided when a legal or practical barrier is preventing the person from leaving the UK, then this is likely to result the local authority breaching the person's right to be free of inhuman and degrading treatment under Article 3 of the ECHR. In the case of *Secretary of State v Limbuela* (2004), the court found that a decision which compels a person to sleep rough or without shelter and without funds usually amounts to inhuman treatment and therefore engages Article 3 of the ECHR.<sup>60</sup>

When there is clearly no legal or practical barrier to return, then the local authority does not have a duty to support a person when they are freely able to return to their country of origin, in accordance with *R (Kimani) v LB Lambeth* (2003). The courts have determined that the denial of support in such instances does not constitute a breach of human rights: see *R(AW) v Croydon LBC* (2005).<sup>61</sup>

### 8.2.1 Legal barriers to return

An outstanding application or appeal made to the Home Office raising human rights grounds (for example, Article 3 and/or Article 8) would constitute a legal barrier to return. This principle has been established in two cases involving NRPF families who were subject to Schedule 3 and required support under section 17 of the Children Act 1989:

- The Court of Appeal case of *Birmingham City Council v Clue* (2010), held that when a family has a pending application for leave to remain on human rights grounds, the local authority cannot refuse assistance under section 17 if this would require the family to leave the UK and therefore forfeit their immigration application, which was of a type that could not be pursued from outside of the UK.<sup>62</sup>
- The High Court case of *KA v Essex County Council* (2013) took this principle further, finding that a family who had been refused leave to remain, but not yet issued with a decision to make removal directions (which gave rise to an in-country right of appeal), would be compelled to leave the UK if support under section 17 is refused.<sup>63</sup>

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

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<sup>60</sup> *Secretary of State for the Home Department v Limbuela & Ors* [2004] EWCA Civ 540.

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

<sup>61</sup> *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

<sup>62</sup> *Birmingham City Council v Clue* [2010] EWCA Civ 460

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

<sup>63</sup> *KA, R (on the application of) v Essex County Council* [2013] EWHC 43 (Admin)

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

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

## Notes

- A.** Under section 94 of the Nationality, Immigration and Asylum Act 2002 a human rights application can be certified as being 'clearly unfounded'. There is a high threshold for imposing certification on this basis and it is not often used in non-asylum human rights claims.<sup>64</sup>
- B.** Under section 94B of the Nationality, Immigration and Asylum Act 2002 any human rights claim can be certified unless there is a real risk of serious irreversible harm if the person is removed from the UK before any appeal is concluded. This provision is set out in the Immigration Act 2016, and means that most non-asylum human rights claims are unlikely to be issued with an in-country right of appeal on refusal. These 'remove first, appeal later' provisions were found to be unlawful by the Supreme Court and on 3 August 2017 the Home Office withdraw its guidance. It is therefore unclear whether human rights claims are being refused with no in-country right of appeal on this basis and if they are, which types of claim will be affected.<sup>65</sup>

Although Home Office processes have changed since *R(KA) v Essex* was heard, the principles established in that case, and *Birmingham City Council v Clue*, must still be followed, i.e., support will need to be provided to prevent a breach of the person's human rights whilst there is an ongoing procedural right to pursue a human rights claim from within the UK, for example, an in-country right of appeal. When a claim is certified (under section 94 or 94B), the person will only be able to bring an appeal from outside of the UK, for example, following their enforced removal or voluntary return, and so this will not be a barrier against removal. The local authority would only be able to give further consideration to the question of return once the person has had their claim finally determined, and is either

<sup>64</sup> Home Office, *Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*.

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

<sup>65</sup> Home Office guidance: <https://www.gov.uk/government/publications/section-94b-of-the-nationality-immigration-and-asylum-act-2002>; *R (Kiarie) v Secretary of State for the Home Department* [2017] UKSC 17 <https://www.supremecourt.uk/cases/docs/uksc-2016-0009-judgment.pdf>

‘appeal rights exhausted’ or has had their claim certified with no in-country right of appeal. Local authorities using the NRPF Connect database can clarify this with the Home Office by raising a query.

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

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

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

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

For many people without any current immigration permission, their lack of housing is likely to be resolved by regularisation of immigration status. However, the absence of legal aid for immigration cases and difficulties in making a valid application mean that local authorities will need to proactively support people in obtaining advice by making referrals and building links with local voluntary sector agencies that provide such services. A good awareness of immigration options will enable local authority practitioners to properly support and signpost people to obtain appropriate legal advice.

For more information, see sections:

- **13 Immigration information**
- **14 Legal aid and accessing legal advice**

### **8.2.2 Practical barriers to return**

There may be a clear practical issue that presents a barrier to a person being able to return. Examples would include, the person’s inability to:

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

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

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

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

### **8.3 Determining a breach of human rights**

Where the local authority is clear that return is reasonably practicable because there are no barriers that will prevent a person from leaving the UK, then it will need to determine whether the provision of support will be necessary to prevent a breach of the person's human rights, and, therefore, whether return to country of origin would result in a breach of human rights.

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

For local authorities, when determining whether the exclusions to social care support apply, it is likely that only certain articles of the ECHR will need to be considered, but this will depend on a person's circumstances. The articles of the ECHR listed below are the most relevant and this section sets out how they may be considered within a human rights assessment.

#### **Article 3**

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

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

#### **Article 8**

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

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

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

The tribunals of the Immigration and Asylum Chamber must follow the steps set out in the House of Lords case of *R(Razgar) v SSHD* (2004) in order to establish whether refusal of an immigration application would breach a person's rights under Article 8. If a local authority refuses or withdraws support then it is generally accepted that this would be necessary in

order to protect the economic well-being of the country, which is a legitimate public end. However, in order to reach such a conclusion, the local authority must consider the questions set out in *Razgar*:

- Would the refusal/withdrawal of support amount to interference by the local authority with the exercise of the person's right to respect for their private or family life?
- If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
- Is such interference proportionate to the legitimate public end sought to be achieved?<sup>66</sup>

## Article 6

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

### 8.3.1 Protection cases

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

The local authority must have regard to determinations by the Home Office and courts. It is therefore unlikely that the local authority would make a different conclusion regarding risk on return when the Home Office or courts have made a recent finding on this.

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

- The person's immigration history, i.e. on what basis did they come to the UK, and what applications have been made since arrival
- Previous decisions made by the Home Office and courts
- Whether the person is from a country on the designated list of states; if they were to make an asylum or human rights protection claim this would normally be certified as clearly unfounded and therefore not awarded an in-country right of appeal<sup>67</sup>
- When advice from an immigration adviser was last sought and whether further advice is required, for example, about claiming asylum or making a fresh asylum claim

### 8.3.2 Medical cases

When a person is receiving treatment in the UK for a medical condition, they may claim that they cannot return to their country of origin because they will be deprived of the type or level of medical treatment that they are receiving in the UK. This issue has been considered by

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<sup>66</sup> *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27, paragraph 17. <http://www.bailii.org/uk/cases/UKHL/2004/27.html>

<sup>67</sup> For the current list of designated states see the Home Office guidance, *Certification of Protection and Human Rights claims under section 94 of the Nationality, Immigration and Asylum Act 2002 (clearly unfounded claims)*. <https://www.gov.uk/government/publications/appeals>

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

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

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

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

*There may, of course, be other exceptional cases, with other extreme facts, where the humanitarian considerations are equally compelling.'*<sup>68</sup>

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

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

*'... that the "other very exceptional cases" within the meaning of the judgment in N v the United Kingdom (§43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.'*<sup>69</sup>

In an adult social care case, *De Almeida v Royal Borough of Kensington and Chelsea* (2012), the High Court found that there would be a breach of Article 3 if the Portuguese national in question, who was terminally ill with AIDS and also suffered from depression and skin cancer, was refused accommodation under section 21 National Assistance Act 1948 (pre-dating the Care Act 2014) and returned to Portugal. It was found that Mr De Almeida was a very exceptional case, as referenced in *N*: he was at the end of his life, and, despite

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<sup>68</sup> *N v Secretary of State for the Home Department* [2005] UKHL 31, paragraphs 69-70.

<http://www.bailii.org/uk/cases/UKHL/2005/31.html>

<sup>69</sup> *Paposhvili v Belgium* Applcn No. 41738/10, para. 183

Portugal having a health and welfare system, returning him to Portugal would have led to an undignified and distressing death, with him facing delay and difficulty in obtaining accommodation and benefits, whilst being away from his existing support network of friends and healthcare professionals.<sup>70</sup>

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

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

*'The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish 'private life' under Article 8. That conclusion would not involve a comparison between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the United Kingdom is under no Convention obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported.'*<sup>71</sup>

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

- Previous decisions made by the Home Office and courts on a medical claim
- Medical confirmation of the person's condition, prognosis, and the healthcare they are currently receiving and require
- What treatment would be available in the country of origin - note that there does not need to be parity, and it may not even need to be accessible. To help establish this the local authority may refer to:
  - World Health Organisation (for medical services)<sup>72</sup>
  - The relevant national embassy
- What support the person currently receives from family or other people in the UK and whether this or other support would be available on return

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<sup>70</sup> *De Almeida, R (on the application of) v Royal Borough of Kensington and Chelsea* [2012] EWHC 1082 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2012/1082.html>

<sup>71</sup> *MM (Zimbabwe) v Secretary of State for the Home Department* [2012] EWCA Civ 279, paragraph 23. <http://www.bailii.org/ew/cases/EWCA/Civ/2012/279.html>

<sup>72</sup> <http://www.who.int/en/>

- What access to services, housing and income the person would have in their country of origin when their medical condition deteriorates, if this is the expected consequence of the withdrawal of the medical care they are receiving in the UK

### 8.3.3 Family and private life

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

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

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

- Previous Home Office and court decisions that consider Article 8
- Family life that exists in the UK
- Whether each family member will preserve their family life with the person that is returning
- Where there is identified family life with family members that will remain in the UK, and how this would be maintained on the person's return
- Where there is identified family life with family members residing in the country of origin, how this is currently maintained
- Length of residence in the UK: note that there are specific Immigration Rules under which an application for leave to remain can be made by an adult age 18-25 who has lived in the UK for over half their life or an adult who has lived in the UK for 20 years, but people who don't meet these residence requirements may still be able to successfully assert that return would breach their private life
- Whether the person can reasonably be expected to establish a meaningful level of existence in their country of origin, i.e. whether they can work or study; what services exist and their ability to access these; any support that is available from family members to do these things etc.

### 8.3.4 Legal proceedings

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

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



Article 8 if support under section 21 of the National Assistance Act 1948 was refused on the basis that she could return to Jamaica and the local authority had failed to consider these aspects of the case adequately.<sup>73</sup>

### 8.3.5 Country information

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

- Home Office, Country information and guidance reports<sup>74</sup>
- US State Department, human rights reports<sup>75</sup>
- Amnesty International, annual human rights reports<sup>76</sup>
- IOM, information about return for migrants<sup>77</sup>
- Routes Home (support services in EU countries)<sup>78</sup>

## 8.4 Determining a breach of EU treaty rights

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

- (1) Whether person has the right to reside in the UK under European law, through their own activities or as the family member of an EEA national, considering:
  - the person's length of residence and activities in the UK, e.g. have they studied, worked etc.; and
  - whether there are other EEA national family members in the UK, (or who were previously living in the UK), what their activities during this time were, and whether the person is living with them or otherwise dependent on them.
- (2) When a person does have a right to reside, consider whether support is necessary to prevent a breach of the person's rights under the EU treaties, i.e., would the person be able to exercise their right to reside if care and support is not provided?

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

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<sup>73</sup> *R(PB) v LB Haringey* [2006] EWCH 2255 (Admin)

<sup>74</sup> <https://www.gov.uk/government/collections/country-information-and-guidance>

<sup>75</sup> <http://www.state.gov/j/drl/rls/hrrpt/>

<sup>76</sup> <http://www.amnesty.org/en>

<sup>77</sup> <http://irrico.belgium.iom.int/>

<sup>78</sup> <http://www.routeshome.org.uk/>

Additionally, EEA workers and their family members must not be discriminated against and must be provided with same level of assistance as a British citizen, due to the equal treatment clause of the free movement directive, so support should never be refused when an EEA worker or family member of an EEA worker has eligible care and support needs.<sup>79</sup>

When a person does have the right to reside, then it will be necessary to check whether this means that they would be eligible for welfare benefits and housing. For example, the family member of an EEA worker will usually be eligible for welfare benefits, or may be able to receive a pension from abroad. This can then be taken into account in the financial assessment to establish whether they must contribute anything towards their care.

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

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### Case example

*Mr X is a German national working in the UK. His elderly mother, who is also German, comes to the UK to live with him following the death of her husband. She requires assistance to get dressed, wash herself and prepare meals but Mr X works full time and cannot always help with this. She is assessed by the local authority as having eligible care and support needs, but a care package can only be provided if this is necessary to prevent a breach of her EU treaty rights or human rights. Mr X's mother has the right to reside in the UK under European law as she is the family member of a worker. The local authority must therefore meet her care and support needs as failing to do so would mean that either she would be unable to stay in the UK or Mr X may be prevented from working if he has to give this up to care for his mother, resulting in a breach of their free movement rights under EU law. As the family member of an EEA worker, Mr X's mother may be entitled to benefits so the local authority would need to refer her to a welfare rights adviser to find out what she can claim. She will also need to be financially assessed to establish whether she must contribute towards the cost of her care.*

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For more information, see section:

- **10 EEA nationals**

## 8.5 Concluding the human rights assessment

The human rights assessment must balance the views expressed by the person requesting support and the information that is known to the local authority about the country of origin, in order to draw clear conclusions.

The courts have been clear that it is the role of the Home Office, rather than the local authority in determining whether a person should be granted leave to remain in the UK on human rights grounds.<sup>80</sup>

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<sup>79</sup> Article 24 of the European Parliament and Council Directive 2004/38/EC (29 April 2004) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l33152>

<sup>80</sup> *O v London Borough Of Wandsworth* [2000] EWCA Civ 201 <http://www.bailii.org/ew/cases/EWCA/Civ/2000/201.html> ; *Birmingham City Council v Clue* [2010] EWCA Civ 460

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

When concluding that the provision of care and support under the Care Act 2014 is not required because a person can return to their country of origin to avoid a breach of their human rights which may be incurred if they remain destitute in the UK, then this must be clearly documented in the human rights assessment. Potential barriers to return must be addressed and a detailed assessment of return must be documented.

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

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

When the local authority determines that the provision of care and support under the Care Act is necessary to prevent a breach of the person's human rights or EU treaty rights, then support must be provided when the Care Act duty under section 18(1) is engaged, and the case regularly reviewed.

## 9 Refusing or withdrawing support

This chapter sets out some good practice points to follow when care and support is to be refused or withdrawn following a change of circumstances.

The Care Act 2014 requires a local authority to record the assessment decision in writing and clearly communicate the outcome to the person requesting support. It may be necessary to use an interpreter. This would apply when a person:

- is assessed as having no eligible needs under the Care Act, or following a review, no longer has eligible care and support needs, and the local authority has also decided not to use its discretionary powers under section 19(1) or section 1 of the Localism Act 2011 to provide housing; or
- is in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, and is to be refused support following a human rights assessment that concludes they can return to their country of origin to prevent a breach of human rights.

The assessment outcome should clearly state why the person is not eligible, or no longer eligible for support. Any adverse findings must be put to them so that they may have a chance to respond. Any new information that comes to light after the decision, or any alternative explanations must be considered by the local authority. It is good practice for conversations with the person to have already taken place to prepare them for such an outcome and what their options will be.

When a person with NRPf has been provided with accommodation pending the outcome of an assessment and this is to be withdrawn, reasonable notice must be given to allow them to make alternative arrangements. What constitutes reasonable notice will depend on the person's circumstances, with 21 days being a reasonable minimum period.

When a person has another support option available to them, for example, Home Office asylum support, then it would be good practice for the local authority to support their application for this and liaise with the Home Office to chase up progress of the application through NRPf Connect to ensure this transfer happens as quickly as possible. Flexibility regarding the notice period may be required if there is a delay accessing such support.

### 9.1 Complying with the Care Act following a grant of leave to remain

Where social services are funding non-supported housing as part of a person with NRPf's care and support plan, and a change in immigration status means that the person now has recourse to public funds, then assistance with approaching a housing authority and claiming benefits will need to be provided.

Section 23 of the Care Act 2014 does not allow the local authority to provide accommodation under the Care Act when it could otherwise be provided under the Housing Act 1996, so this transfer of responsibility must occur as soon possible after the person becomes eligible for housing assistance. It is also important that any care package being provided is not

interrupted if the person moves into different accommodation. Delays in accessing mainstream benefits and housing often result in the local authority continuing to fund accommodation and subsistence support under social care legislation for several weeks after the person's immigration matter has been resolved. Therefore, some flexibility may be required regarding the notice period that is given.

Additionally, section 6(4) of the Care Act requires local authorities to ensure that the departments exercising functions relating to people with needs for care and support and the housing department co-operate, in order to promote the well-being of people with needs for care and support. This means that the staff responsible for a person NRPF, who is being provided with non-supported accommodation under the Care Act, will need to work collaboratively with the housing department to ensure that this transition is undertaken without adversely affecting the person's well-being.

## 9.2 People excluded from support

This section applies to people who are in a group excluded from support by Schedule 3 of the Nationality, Immigration and Asylum Act 2002. When the provision of care and support is being refused following a human rights assessment, which has determined that a person can return to their country of origin, then assistance with return must be offered. This could be provided by the Home Office or local authority.

It will normally be appropriate for the local authority to provide accommodation and financial support whilst return is being arranged. In an NRPF family case of *R (O) v London Borough of Lambeth* (2016), the Judge found that the local authority had made 'sensible, humane and appropriate undertakings' by providing assurances that if the parent signs a formal undertaking in which she accepts that she and her child can be returned to Nigeria, and takes steps to co-operate with the local authority in arranging a facilitated return, interim accommodation for a reasonable period pending the return would be provided.<sup>81</sup>

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

- The Home Office may undertake enforcement action to remove them from the UK.
- They will not have permission to work; working when a person has no immigration permission to do so is now a criminal offence.
- Private landlords will not be able to rent to, sub-let to or set up a paying lodging arrangement with a person who has no immigration permission.
- They will not be able to obtain many types of non-urgent NHS treatment unless they can provide full payment up front, including hospital treatment, some mental health and possibly even drug and alcohol services.
- They will not be able to open a bank account, may have any accounts held closed or frozen, and will be breaking the law if they drive, whether they hold a licence or not.

Where the local authority has lawfully determined that a person can freely return to their country of origin, but the person refuses to do so, the courts have found that any hardship or

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<sup>81</sup> *R (O) v London Borough of Lambeth* (2016), paragraph 52.

degradation suffered will be a result of their decision to stay in the country and not as a result of any breach of human rights by the local authority.<sup>82</sup>

However, people who are excluded from the services listed above are likely to be at risk of exploitation and safeguarding concerns may arise if they remain in the UK without support. As soon as the local authority is aware that its support is likely to be refused or terminated on the basis that a person can return to their country of origin, it will be important to liaise with the Home Office to establish if any plans have been made regarding return.

For more information, see section:

- **8 Assessments when the exclusion applies**

### **9.2.1 Home Office funded return**

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

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

An assisted return involves the Home Office arranging and funding flights, a financial reintegration package and additional support on a case by case basis. A single adult will be eligible for an assisted return if they:

- have claimed asylum and have a pending claim or appeal, or have been refused and have no further right to appeal, providing they have never previously withdrawn an asylum application;
- have a letter from UK Visas and Immigration (UKVI) at the Home Office confirming they are a victim of trafficking;
- require more help with their return, for example, because they have a medical condition; or
- were previously granted temporary ('discretionary') leave to remain in the UK outside the Immigration Rules, which has expired.<sup>83</sup>

However, the person will not be eligible for an assisted return if they:

- are currently being investigated by the police or detained by the Home Office;
- have been convicted of an immigration offence and given a deportation order;
- have already been given humanitarian protection, indefinite leave to remain or refugee status;
- have been informed that they are a 'third country case'; or

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<sup>82</sup> *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

<sup>83</sup> <https://www.gov.uk/return-home-voluntarily>

- are a European Economic Area (EEA) or Swiss national (unless they have been confirmed to be a victim of trafficking).

A financial reintegration package may be available of up to £1500 for people who have been through the asylum system or up to £1000 for a vulnerable person.

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

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

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

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

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

Methods of contacting the Home Office:

- People can apply online or contact the helpline: 0300 004 0202 <sup>84</sup>
- Email: [voluntaryreturns@homeoffice.gsi.gov.uk](mailto:voluntaryreturns@homeoffice.gsi.gov.uk)
- Local Home Office Immigration Compliance and Enforcement Team may facilitate voluntary returns involving EEA nationals <sup>85</sup>

### 9.2.2 Local authority funded return

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

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

- purchase travel tickets to enable the person to return to their country of origin, and

<sup>84</sup> <https://visas-immigration.service.gov.uk/product/vrs>

<sup>85</sup> <https://www.gov.uk/government/publications/contact-details-for-immigration-compliance-and-enforcement-teams>

- provide time-bound interim accommodation pending the return to country of origin, but not cash payments.

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

For Non-EEA nationals and people with no current immigration permission, funding a return would be an appropriate use of the general power of competence set out in section 1 of the Localism Act 2011. Enabling a person to return to their country of origin would be an effective response to resolving their destitution in the UK when there is no duty to provide support.



## 10 EEA nationals and family members

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

When an EEA national or the family member of an EEA national, requests care and support, the local authority will need to establish whether:

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

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

**The process of the UK leaving the European Union (EU) has not been completed. The rights that people have under European law that are referenced here continue to apply and may only change after the UK finally withdraws from the EU. This process may take up to two years from the date that the UK formally notified the EU of its intention to leave (29 March 2017), and there is likely to be a transition period.**

### 10.1 European Economic Area (EEA) countries

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

EEA member states			
EU countries			
Austria	Estonia	Italy	Portugal
Belgium	Finland	Latvia	Romania
Bulgaria	France	Lithuania	Slovenia
Croatia	Germany	Luxembourg	Spain
Cyprus	Greece	Malta	Slovakia
Czech Republic	Hungary	Netherlands	Sweden
Denmark	Ireland	Poland	UK*
Non-EU member states			
Iceland	Norway	Lichtenstein	

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

### 10.2 The right to reside

EEA nationals and their family members do not require leave to enter or to remain in the UK; their rights to enter and reside in the UK are governed by European law, and are commonly referred to as 'EU treaty rights' or 'free movement rights'. These rights are transposed into UK law through the Immigration (European Economic Area) Regulations 2016.

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

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

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

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

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

- **Jobseeker** status may only be retained for longer than three months if there is 'compelling evidence' that the EEA national is continuing to seek work and has a 'genuine chance' of being engaged in employment.<sup>86</sup>
- An EEA national may retain their status as a **worker** even if they are not currently in employment when they are:
  - temporarily unable to work as a result of illness or accident;
  - involuntarily unemployed and registered as a jobseeker with the relevant employment office and can provide evidence that they are seeking employment and have a genuine chance of being engaged (worker status is only retained for longer than six months if they have worked for at least one year and there is 'compelling evidence' that they are continuing to seek work and has a 'genuine chance' of being engaged in employment);
  - involuntarily unemployed and has embarked on vocational training; or
  - voluntarily ceased working and embarked on vocational training that is related to their previous employment.<sup>87</sup>
- An EEA national may retain their status as a **self-employed person** if they are temporarily unable to undertake their self-employment activities as the result of an illness or accident.<sup>88</sup>

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<sup>86</sup> Regulation 6(7), Immigration (EEA) Regulations 2016

<sup>87</sup> Regulation 6(2), Immigration (EEA) Regulations 2016

<sup>88</sup> Regulation 6(4), Immigration (EEA) Regulations 2016

- A **student** or **self-sufficient person** needs to have ‘comprehensive sickness insurance’ and ‘sufficient resources not to become a burden on the social assistance system of the UK’ during their period of residence.<sup>89</sup>

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

Currently, restrictions to the labour market only apply to Croatian nationals, following the accession of Croatia to the EU on 1 July 2013. Croatian nationals who wish to work in the UK are required to apply for worker registration, unless they are exempt from doing so.

EEA nationals will acquire the right of permanent residence after five years’ continuous residence in the UK as a qualified person under the 2016 Regulations, or if they meet the criteria as a worker or self-employed person who has ceased activity because of a permanent incapacity to work.<sup>90</sup>

For more information, see:

- The Home Office Modernised Guidance, *EEA and Swiss nationals: free movement rights*<sup>91</sup>

### 10.3 Family members

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

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

- Spouse or civil partner\*
- Child under 21 of the EEA national or their spouse/civil partner
- Dependent child age 21 and older of the EEA national or their spouse/civil partner
- Dependent relatives in the ascending line, i.e. a parent or grandparent of the EEA national or their spouse/civil partner<sup>92</sup>

\* Following a separation, a person will continue to be considered as a spouse or civil partner until the marriage or civil partnership is legally terminated. After that point, they may retain their right of residence if they meet certain conditions set out in the Regulations.<sup>93</sup>

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<sup>89</sup> Regulation 4(1), Immigration (EEA) Regulations 2016

<sup>90</sup> Regulation 6(7), Immigration (EEA) Regulations 2016

<sup>91</sup> <https://www.gov.uk/government/publications/eea-and-swiss-nationals-free-movement-rights>

<sup>92</sup> Regulation 7, Immigration (EEA) Regulations 2016

<sup>93</sup> Regulation 10, Immigration (EEA) Regulations 2016

Extended family members of EEA nationals also have the right to reside, including a partner who is in a durable relationship with the EEA national, and other relatives who may be dependent on the EEA national or the EEA national's spouse or civil partner.<sup>94</sup>

Different rules apply to family members of EEA national students.<sup>95</sup>

It is also possible for a non-EEA national to acquire a derivative right to reside under European law on the basis being the primary carer of a British (or EEA) national adult or child, where failing to permit the carer to stay and work in the UK would lead to the British (or EEA) national leaving the EEA. This is often referred to as the Zambrano right to reside.<sup>96</sup>

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

For more information, see:

- The Home Office Modernised Guidance, *Free movement rights: direct family members of EEA nationals*<sup>97</sup>

## 10.4 Benefit eligibility

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

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

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

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<sup>94</sup> Regulation 8, Immigration (EEA) Regulations 2016

<sup>95</sup> Regulation 7(2), Immigration (EEA) Regulations 2016

<sup>96</sup> Regulation 16, Immigration (EEA) Regulations 2016

<sup>97</sup> <https://www.gov.uk/government/publications/direct-family-members-of-european-economic-area-eea-nationals>

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

### 10.4.1 Benefit eligibility table

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

Right to reside	Eligible for welfare benefits and housing? (see note A)
<b>Initial right of residence</b> for three months following entry to the UK by EEA national or their family member	May only be eligible for: child benefit and child tax credit
<b>EEA jobseeker</b> or their family member	May only be eligible for: JSA (IB), universal credit, child benefit and child tax credit
<b>EEA worker</b> (including a person who has retained worker status) or their family member	Yes
<b>EEA self-employed person</b> (including a person who has retained self-employed status) or their family member	Yes
<b>EEA self-sufficient person</b> or their family member	Yes (see note B)
<b>EEA student</b> or their family member	Yes (see note B)
<b>EEA permanent right of residence</b>	Yes
<b>Derivative right to reside: Zambrano</b> The primary carer of a British (or EEA) national when requiring the primary carer to leave the UK would also require the British/EEA national to leave the UK	No

#### NOTES

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

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

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

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

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

- Citizen's Advice<sup>98</sup>
- Housing Rights Information<sup>99</sup>
- AIRE Centre<sup>100</sup>

## 10.5 Irish nationals

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

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

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

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

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

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<sup>98</sup> <http://www.adviceguide.org.uk/>

<sup>99</sup> <http://www.housing-rights.info/index.php>

<sup>100</sup> <http://www.airecentre.org/>

amended the Regulations. Advice from a specialist benefits adviser should be sought if a person is the family member of a dual Irish/ British national.<sup>101</sup>

## 10.6 Returning British citizens

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

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

Therefore, British citizens returning to live in the UK may face at least a three-month delay before being able to access benefits and housing services, so where they have eligible care and support needs, the local authority will need to consider whether housing may also need to be provided. British citizens can therefore make up part of a local authority's NRPF caseload and should be recorded independently of the NRPF Connect database, as there are no immigration considerations to be made that require information from the Home Office.

## 10.7 Difficulties asserting the right to reside

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

- When a local housing authority in England finds that an EEA national cannot be provided with homelessness assistance, they would need to issue a section 184 decision letter setting out the reasons why the EEA national is not eligible, which has a right to review.
- When an EEA national makes a homelessness application in England the local authority has a power under section 188 of the Housing Act 1996 to provide temporary accommodation pending decision if it appears that they are eligible and in priority need (which a single adult may be if they have a disability or health needs).
- In order to determine whether an EEA national is a worker, is self-employed, or has retained worker or self-employed status, the DWP and local authority housing benefit department will apply the 'minimum earnings threshold'. This is a two-part test which is not set out in legislation and requires a person to have regularly earned a specified amount of money over a three-month period, set at what someone working 24hrs/week at minimum wage would earn. Where a person does not satisfy the minimum earnings threshold, the benefits assessor must consider whether the

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<sup>101</sup>*Lounes v Secretary of State for the Home Department*, European Court of Justice, C-165/16 (14 November 2017) <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-165/16>

employment is 'genuine and effective'. Note that it is not a legal requirement for a person to demonstrate that they meet the minimum earnings threshold.<sup>102</sup>

- There is no requirement for work to have been legal so a person receiving cash in hand payments can be a worker, but this may be difficult to evidence. This principle also applies to an EEA national who is a victim of modern slavery or trafficking as work undertaken, despite it being exploitative, may mean they have a right to reside as a worker or have retained worker status.
- When a person has separated from an EEA national spouse or partner due to domestic violence, and they are unable to provide evidence of their former partner's employment to support an application to the Home Office to confirm that they have a right to reside as a family member of an EEA national, or have a retained their right of residence, then the Home Office has the power under section 40 of the UK Borders Act 2007 to obtain evidence directly from HMRC, and has a policy setting out details of this.<sup>103</sup>
- When an EEA national has resided in the UK for five years or more then they may have a permanent right of residence; an immigration adviser can help to establish this and apply for documentation from the Home Office.

If a person is having difficulty establishing their right to reside, they may consider:

- seeking advice from a benefits adviser with a good understanding of European law. Legal aid is available for appeals;
- applying for Home Office documentation to confirm their right to reside. An immigration adviser with experience of European law should be able to advise and assist with such an application. However legal aid is only available for domestic violence cases; or
- sending a written query to the AIRE Centre, who may be able to provide advice that could assist a welfare rights adviser to prepare a benefits claim or appeal. Note that it may take several weeks to receive a response.

For help finding a local adviser, see:

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

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<sup>102</sup> Department for Work and Pensions, *HB Circular A3/2014: Minimum Earnings Threshold*. <https://www.gov.uk/government/publications/hb-circular-a32014-minimum-earnings-threshold>

<sup>103</sup> Home Office, *European operational policy notice 10/2011 for caseworkers to process EEA nationals' applications*. <https://www.gov.uk/government/publications/european-operational-policy-notice-102011-for-caseworkers-to-process-eea-nationals-applications>



# 11 Asylum seekers

This chapter sets out what must be considered when an asylum seeker or refused asylum seeker requests care and support from social services and when a local authority will be able to refer such a person to the Home Office for asylum support.

## 11.1 Local authority assessments

When an asylum seeker presents with an appearance of need, they must be assessed in the usual way under the Care Act 2014 and provided with care and support if they have eligible needs. Whilst an asylum seeker is waiting for their decision from the Home Office or final determination following any appeals against a refusal they are not subject to any exclusion from social services' support, so eligibility for care and support will be established solely on the outcome of the needs assessment.

When a refused asylum seeker (who has received the final determination of their asylum claim) presents with an appearance of need, they must be assessed in the usual way under the Care Act, but the provision of care and support may be subject to a human rights assessment depending on their immigration status and whether they are in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002:

- Port of entry refused asylum seekers are not excluded (unless they have been refused and have failed to comply with removal directions), so the provision of care and support will be established solely on the outcome of the needs assessment; a human rights assessment is not required.
- In-country refused asylum seekers and refused asylum seekers who have failed to comply with removal directions (whether port or in-country claimants) are in an excluded group, so the local authority can only provide care and support if this is necessary to prevent a breach of their human rights, and will determine this by carrying out a human rights assessment as well as a needs assessment.

## 11.2 Referring to the Home Office for accommodation

Local authorities can only refer an asylum seeker or refused asylum seeker to the Home Office for accommodation without undertaking a needs assessment when the person has presented without an appearance of need.

An asylum seeker or refused asylum seeker who has presented with an appearance of need, and therefore requires a Care Act needs assessment, can only be referred to the Home Office for support when the relevant assessments have been completed and the local authority has determined that there is no duty to provide assistance. If interim care and support, including housing, has been provided under section 19(3) pending the outcome of the assessment, then it would be good practice for the local authority to assist the person to apply for asylum support and can use NRPF Connect to communicate with the Home Office to ensure the application is processed as quickly as possible.

When an asylum seeker or refused asylum seeker is already accommodated by the Home Office at the time of presentation to the local authority, then the suitability of this

accommodation, in terms of the person's well-being and enabling the person's care and support needs to be met, will need to be considered if the person has eligible needs.

### **11.2.1 Section 95 Home Office support**

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

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

For single people, housing is usually provided in shared accommodation and financial support (subsistence) will be provided through a card which can be used in shops and to withdraw cash. A person who has accommodation may request subsistence support only.

Support will continue to be provided until the asylum claim is finally determined following any appeals the person has lodged. When the person is granted leave to remain or becomes 'appeal rights exhausted' following an unsuccessful claim, they will be issued with 21 days' notice to leave their accommodation.

### **11.2.2 Section 4 Home Office support**

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

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

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

The following organisations provide information and asylum support:

- Home Office<sup>104</sup>
- Asylum Help (assistance with applications)<sup>105</sup>
- Asylum Support Appeals Project (assistance when support is refused)<sup>106</sup>

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<sup>104</sup> <https://www.gov.uk/asylum-support>

<sup>105</sup> <http://asylumhelpuk.org/>

<sup>106</sup> <http://www.asaproject.org/>

## 12 Victims of trafficking and modern slavery

This chapter sets out what local authorities must consider when they suspect a person may be a victim of trafficking and modern slavery, or when a confirmed victim who has NRPF requests care and support or requires housing. Local authorities should also refer to the government information on modern slavery and new guidance from the Local Government Association.<sup>107</sup>

### 12.1 Safeguarding duty

The Care Act 2014 requires a local authority to undertake an enquiry in order to establish whether any action needs to be taken to prevent or stop abuse or neglect, where the council has reasonable cause to suspect that an adult in its area who has needs for care and support (whether these are being met or not), is experiencing or is at risk of this, and is unable to protect themselves from the abuse or neglect due to their needs.<sup>108</sup>

The Statutory Guidance specifies that abuse or neglect includes modern slavery, which encompasses: slavery; human trafficking; forced labour; domestic servitude; and where traffickers and slave masters use whatever means they have at their disposal to coerce, deceive and force individuals into a life of abuse, servitude and inhumane treatment.<sup>109</sup>

A person's nationality or immigration status should not prevent a local authority from following its safeguarding procedures when this duty is engaged. Schedule 3 of the Nationality, Immigration and Asylum Act 2002 does not prevent the local authority from undertaking an enquiry and taking any necessary action to stop abuse or neglect.

When a person is identified as being a potential victim of trafficking or modern slavery, the local authority must notify the National Referral Mechanism (NRM). Where the person has NRPF, the safeguarding plan will need to explore what housing options are available. This could include:

- housing available through the NRM;
- consideration within the needs assessment to establish whether accommodation can be provided under the Care Act 2014; and/or
- consideration as to whether section 1 of the Localism Act 2011 will require the local authority to provide housing in order to prevent a breach of human rights or to comply with the EU Anti-Trafficking Directive.<sup>110</sup>

Even if no further action is taken following the safeguarding enquiry, the person should be provided with information about housing options if they have NRPF. Information about statutory support options is set out here.

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<sup>107</sup> <https://www.gov.uk/government/collections/modern-slavery>; <https://www.local.gov.uk/modern-slavery-council-guide>

<sup>108</sup> Section 42 of the Care Act 2014

<sup>109</sup> *Care and support statutory guidance*, paragraph 14.17

<sup>110</sup> Article 11 of EU Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en)

## 12.2 National Referral Mechanism support

Local authorities are under a duty under section 52 of the Modern Slavery Act 2015 to notify the Home Office about a potential victim of trafficking or modern slavery. This is done by making a referral to the National Referral Mechanism (NRM) if the person's consent is obtained. If the person does not consent to a referral, then the local authority is still required to complete the MS1 notification form.<sup>111</sup>

When a referral is made to the NRM, housing and subsistence support is provided by the Salvation Army and partner organisations during the recovery and reflection period for 45 days, during which time the person can consider their options. They should receive a conclusive grounds decision about whether they are a victim of trafficking or not as soon as possible after 45 days. When they receive a positive grounds decision they are entitled to further 14 days' support, but extensions are considered on a discretionary basis by the Home Office. During this period, victims are expected to decide whether to return to their country of origin or apply for discretionary leave to remain, which if successful will allow the person to have recourse to public funds. If the person receives a negative conclusive grounds decision, then their support will only continue for two days.

In November 2017, the government announced that the period of support provided following a positive conclusive grounds decision would be extended to 45 days, so 90 days' support will be available in total.<sup>112</sup>

There are often gaps between the Salvation Army support stopping and the person being able to access benefits following a grant of discretionary leave to remain, leaving victims homeless and destitute.

In the case of *R (Galdikas & Ors) v Secretary of State for the Home Department & Ors* (2016), a group of EEA nationals who received positive conclusive grounds decisions brought a legal challenge against the Home Office claiming that the support provision following a conclusive grounds decision was not adequate. In this case the judge found that, in order to comply with Article 11 of the EU Anti-Trafficking Directive, which requires the UK to provide support and assistance including 'appropriate and safe accommodation', consideration of an application for discretionary leave to remain includes a duty to provide support pending the determination of this application.<sup>113</sup>

This case makes it clear that support should continue following a positive grounds decision whilst the person's discretionary leave application is pending, but does not explicitly state where responsibility lies for providing this. With extensions of NRM support currently being time limited and dependent on the discretion of the Home Office, there will be instances when it falls to the local authority to provide support.

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<sup>111</sup> <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms> ; <https://www.gov.uk/government/publications/duty-to-notify-the-home-office-of-potential-victims-of-modern-slavery>

<sup>112</sup> <https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support>

<sup>113</sup> *Galdikas & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* (Rev 1) [2016] EWHC 942. <http://www.bailii.org/ew/cases/EWHC/Admin/2016/942.html>

## 12.3 Local authority support

A victim of trafficking or modern slavery may be eligible for accommodation under the Care Act 2014. Where this does not apply, the local authority would need to consider using section 1 of the Localism Act 2011 to provide support.

### 12.3.1 Care Act 2014

A potential or confirmed victim of trafficking may request a needs assessment with a view to establishing whether they require care and support, including accommodation. Many people who have been subject to trafficking or modern slavery are reported as experiencing high levels of depression, anxiety and PTSD.<sup>114</sup>

Therefore, it is highly likely that such a person will present with an appearance of need, and so would need to be assessed as usual under the Care Act 2014.

Where a potential victim of trafficking has eligible care and support needs, the local authority will need to consider whether to provide accommodation in order to meet their needs. When a person is receiving housing through the NRM, then the local authority would need to take into account the person's wishes and suitability of the accommodation to determine whether their care and support needs can be met whilst they are living there. For example, the local authority would need to establish whether carers would be permitted to enter a safe house or whether any necessary adaptations can be made in the accommodation. There may therefore be instances when, even though NRM support is available, it falls to the local authority to provide accommodation.

When a person is in a group excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, the local authority will also undertake a human rights assessment because care and support can only be provided where this is necessary to prevent a breach of a person's human rights or EU treaty rights. When a person is waiting for their determination through the NRM or a decision on an application for leave to remain following a positive conclusive grounds decision, then it is likely that the outcome of a human rights assessment would be that any eligible care and support needs will need to be met, at least until these decisions are made. However, when there are no longer any legal or practical barriers preventing the person from leaving the UK, the local authority may not have a duty to provide support if the person can return to their country of origin.

### 12.3.2 Localism Act 2011

In many cases, victims of trafficking or modern slavery will not qualify for care and support under the Care Act, so cannot be housed under the Care Act. When a person is not receiving support through the NRM and does not have any alternative means of accessing housing then the local authority must consider whether to use its power under section 1 of the Localism Act 2011 to provide accommodation.<sup>115</sup>

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<sup>114</sup> Oram, S et al (2016) *Human Trafficking and Health: A Survey of Male and Female Survivors in England* American Journal of Public Health (AJPH) doi: 10.2105/AJPH.2016.303095 <https://www.kcl.ac.uk/ioppn/depts/hspr/research/CEPH/wmh/News/PROTECT-Final-Report-for-the-Department-of-Health-Policy-Research-Programme-published.aspx>

<sup>115</sup> *R (AK) v Bristol City Council* (CO/1574/2015). See section 5.3 of this guidance.

Local authorities will need to decide which department will be responsible for funding and arranging such accommodation. Any multi-agency protocols developed in relation to police operations (planned and unplanned) will need to consider responsibility for providing housing when potential victims have NRPF, and develop a pathway for obtaining this. Access to immigration and other specialist advice will be essential to help establish whether the person has entitlement to benefits, for example, whether an EEA national has a right to reside or what options a non-EEA national without any immigration permission may have.

As public awareness of modern slavery increases, it is likely that more potential victims will be identified and the question of responsibility for funding support when people have NRPF will be of increasing importance. Although NRM support is due to be extended for people who have a positive conclusive grounds decision to ensure continuation of provision before leave to remain is granted, local authorities are reporting that there can be delays before NRM support is provided. Local authorities are advised to record and document all cases where support is provided, using NRPF Connect or other means, in order to help identify where there are gaps in support and evidence the resulting costs.

For more information, see sections:

- **1.1 Who has NRPF?**
- **3 Eligibility for care and support**
- **4 Meeting needs for care and support**
- **5 Discretionary powers to provide housing**
- **8 Assessments when the exclusion applies**
- **10 EEA nationals and family members**

## 13. Immigration information

This chapter provides immigration information to help practitioners establish an appropriate pathway out of destitution for non-EEA nationals who are not seeking asylum.

When a person is provided with care and support under the Care Act 2014, or is accommodated under the Localism Act 2011, the local authority will need to ensure that staff are equipped to assist the person to establish financial independence. This will be consistent with its duty to promote well-being as well as reducing costs incurred from funding accommodation and financial support. A sustainable solution to a person's destitution will often be achieved by obtaining a form of immigration status which will allow recourse to mainstream welfare benefits and housing services.

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

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

For more information, see section:

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

### 13.1 Making an immigration application

The Immigration Rules set out the categories under which people can apply for leave to enter or remain in the UK, the requirements which need to be met, the length of leave which will be granted and conditions attached to each type of leave.<sup>116</sup>

The majority of people with NRPf who make immigration applications to regularise their status, or extend their current leave to remain, will be doing so on human rights grounds:

- Under the family life rules set out in Appendix FM
- Under the private life rules set out in Part 7
- Outside of the Immigration Rules

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

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<sup>116</sup> <https://www.gov.uk/guidance/immigration-rules>

- The correct and current version of the application form must be used when this is specified
- The correct fee is paid (unless an exemption or fee waiver applies)
- The Immigration Health Charge is paid (when no exemption applies)
- Evidence of identity and photographs are submitted that meet specified requirements

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

It is important for local authorities to be aware of any potential barriers to making an application, as these can cause delays in case resolution for people who are receiving support and are attempting to regularise their stay. The requirements may also lead to presentations to social services for support, for example, when a person fails to successfully make a valid application to extend their leave, becomes an overstayer and subsequently loses access to employment or benefits.

### 13.1.1 Application fees and exemptions

Immigration fees are revised (and usually increased) in April each year. The current fees and exemptions are set out in the Immigration and Nationality (Fees) Regulations 2017.

Applications that are exempt include:

- Asylum or Article 3
- Leave to remain under the Destitution Domestic Violence Concession
- Leave to remain as a victim of domestic violence under paragraph 289A, Appendix FM or Appendix Armed Forces, when the person is destitute
- Most applications made by children who are looked after by a local authority.
- Initial period of limited leave to remain as a stateless person, or as the family member of a stateless person, under Part 14
- EC Association Agreement with Turkey
- Discretionary leave when the person has a positive grounds decision as a victim of trafficking or modern day slavery
- Leave as a domestic worker who is the victim of slavery or human trafficking

Most immigration applications therefore incur a fee, including those made under the family or private life rules.

#### Application fee for leave to remain under the family/private life rules 2017/18 (per applicant)

Application fee	£993
Immigration Health Charge	£500
<b>Total</b>	<b>£1493</b>

When a person is not exempt from paying an application fee, but they cannot afford the fee, then they will need to find out whether the fee waiver policy applies to them; most people provided with social services' support are likely to be able to apply for a fee waiver.

### 13.1.2 Fee waiver policy

When a person cannot afford the application fee then they may be able to apply for a fee waiver in line with the Home Office policy, *Fee waiver: Human Rights-based and other*



*specified applications*, if they are making one of the following applications for leave to remain:

- 5-year partner route (only where a person is not required to meet the minimum income threshold because their sponsor is in receipt of a particular benefit and so instead must demonstrate that their sponsor can provide adequate maintenance)
- 5-year parent route
- 10-year partner, parent or private life route - where a person claims that refusal of that application for leave to remain would breach their rights under Article 8 (the right to respect for private and family life) of the European Convention on Human Rights (ECHR)
- Where other rights under the ECHR are asserted and this forms the substantive basis of an application
- Extension of discretionary leave that was granted following refusal of asylum or humanitarian protection claim - where a person claims that refusal to grant further leave to remain would breach their ECHR rights
- Extension of discretionary leave for a victim of trafficking or slavery who has already accrued 30 months' discretionary leave and is applying to extend it for reasons relating to trafficking or slavery<sup>117</sup>

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

A legal representative may request that the local authority supplies a letter detailing the support, length of time it has been provided and why. The financial information on NRPF Connect should be kept up to date as this may be referred to by the Home Office caseworker.

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

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

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<sup>117</sup> <https://www.gov.uk/government/publications/chapter-1a-applications-for-fee-waiver-and-refunds>

### 13.1.3 Evidence of identity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Find out what documents the person has in their possession and whether they would comply with this requirement

- Raise a query on the NRPF Connect database to find out whether the Home Office is holding any documents and the validity period of these
- Advise the person to take immediate action to apply for replacement documents if they are missing and are not with the Home Office

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

## 13.2 Refusal of leave due to NHS debt

Where a person has been charged for NHS treatment and has a debt of at least £500 or £1000, the Immigration Rules state that such applications 'will normally' be refused. This means that the Home Office has the discretion to refuse on this basis and in some instances may not do so. The minimum amounts that could trigger a refusal are set out in the table below.<sup>118</sup>

### NHS debt that may lead to a refusal

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

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

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

For more information, see section:

- **15.4 NHS treatment**

## 13.3 Leave to remain with NRPF

The 'no recourse to public funds' (NRPF) condition is imposed on most categories of leave to enter or remain. However, the Immigration Rules and a Home Office policy state that recourse to public funds may be granted when:

<sup>118</sup> Home Office Modernised Guidance, *General grounds for refusal: considering leave to remain* <https://www.gov.uk/government/publications/general-grounds-for-refusal-considering-leave-to-remain>

- the person can demonstrate to the Home Office that they are destitute or will become destitute within 14 days (cannot afford accommodation or to meet their family's essential living needs);
- there are compelling reasons relating to the welfare of a child whose parent is in receipt of a very low income; or
- other exceptional reasons apply.<sup>119</sup>

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

- Partner or parent under Appendix FM (10-year route to settlement)
- Private life under paragraph 276BE or paragraph 276DG of the Immigration Rules (including the 20-year residence rule)
- Outside the rules on the grounds of family or private life

When a person is granted leave to remain with NRPF but information was submitted with their application to the effect that they should have been granted recourse to public funds, then their legal representative may be able to seek a reconsideration of this decision.<sup>120</sup>

If they were destitute, or otherwise met the policy, at the time that the decision was made, but no evidence was submitted to the Home Office to confirm this, they will need to seek legal advice about submitting a change of conditions application to the Home Office to request that their leave to remain is varied so that the NRPF condition is removed.<sup>121</sup>

A change of conditions may also be applied for when a person's circumstances change at some point after they have been granted leave to remain with NRPF.

Local authority practitioners are not permitted to advise or assist with a change of conditions application because it is unlawful to do so without being registered with the OISC or exempt from registration, so will need to signpost a person for legal advice from an immigration adviser.

To minimise the risk of the NRPF condition being imposed when leave to remain is granted to a person receiving support from social services, local authorities should ensure that:

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

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<sup>119</sup> Home Office, *Chapter 8 Immigration and Nationality Directorate Instructions, Annex FM 1.0(b): Family Life (as a Partner or Parent) and Private Life: 10-Year Routes*.

<https://www.gov.uk/government/publications/chapter-8-appendix-fm-family-members>

<sup>120</sup> Home Office Modernised Guidance, *Reconsiderations*

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

<sup>121</sup> <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

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

### **13.3.1 Next steps after recourse is obtained**

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

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

- It will be necessary to seek advice from an immigration adviser in good time before they are due to apply to the Home Office to extend their leave.
- If the person received a fee waiver to make their previous application, their circumstances are likely to be different when they reapply for leave and the terms of the policy could be changed by the Home Office during this time; where possible, a person should save up funds for the next application fee and also be aware that fees are usually increased at least once a year in April.
- If a person is granted leave to remain with NRPF they should seek advice immediately from a benefits adviser and from a housing adviser if they are subject to eviction proceedings. They would also need to seek urgent immigration advice to find out if they can request a reconsideration of the NRPF condition or submit a change of conditions application.

### **13.4 Destitution Domestic Violence Concession**

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

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

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

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

under section 3C of the Immigration Act 1971, until a decision is made on the ILR application.<sup>122</sup>

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

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

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

For more information, see section:

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

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<sup>122</sup> <https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence>

## 14 Legal aid and accessing legal advice

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

### 14.1 Eligibility for legal aid

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

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

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

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

Legal aid is also available for other types of cases:

- Social services cases where children are involved
- Help or services from the local authority and/or the NHS because of illness, disability or mental capacity
- Representation at a mental health tribunal for people detained in hospital
- Welfare benefit appeals to the Upper Tribunal, High Court, Court of Appeal or Supreme Court
- Homelessness including asylum accommodation
- Judicial review challenges against decisions by public bodies, including local authorities<sup>123</sup>

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

Depending on the stage that the case is at, eligibility for legal aid funding may also be dependent on the case passing a merits test. The legal adviser will be required to make an

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<sup>123</sup> <http://www.lawsociety.org.uk/for-the-public/paying-for-legal-services/legal-aid/>

assessment of the likelihood of the case succeeding and legal aid funding may be refused if the case has little prospect of success.

## 14.2 Exceptional case funding

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

A person must demonstrate that:

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

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

For more information, see:

- The Public Law Project<sup>124</sup>
- Government guidance and application forms<sup>125</sup>

## 14.3 How to find a legal aid adviser

To find a local legal aid provider see:

- England and Wales: UK Government website<sup>126</sup>
- Scotland: Scottish Legal Aid Board<sup>127</sup>
- Northern Ireland: Legal Services Agency Northern Ireland<sup>128</sup>

## 14.4 How to find an immigration or asylum adviser

It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory body for solicitors or barristers, or is an immigration adviser regulated by the [Office of the Immigration Services Commissioner](#) (OISC).<sup>129</sup>

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<sup>124</sup> <http://www.publiclawproject.org.uk/exceptional-funding-project>

<sup>125</sup> <https://www.gov.uk/government/publications/legal-aid-exceptional-case-funding-form-and-guidance>

<sup>126</sup> <http://find-legal-advice.justice.gov.uk/>

<sup>127</sup> <http://www.slab.org.uk/public/solicitor-finder/>

<sup>128</sup> <https://www.dojni.gov.uk/topics/legal-aid>

<sup>129</sup> <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner>



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

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

- The OISC - for a regulated immigration or asylum adviser<sup>130</sup>
- The Law Society - for a solicitor in England and Wales<sup>131</sup>
- The Law Society of Scotland<sup>132</sup>
- The Law Society of Northern Ireland<sup>133</sup>
- UK government website – for immigration and asylum advisers in England and Wales with a legal aid contract<sup>134</sup>

A person providing immigration and asylum advice under a legal aid contract will need to be accredited under the Law Society's Immigration and Asylum Accreditation Scheme. Although solicitors and advisers providing fee paying services are not required to obtain this accreditation, it is advisable to select a person who has obtained this accreditation where possible.<sup>135</sup>

## 14.5 Law centres and other free advice providers

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

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

To find a local law centre see:

- The Law Centres Network<sup>136</sup>

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<sup>130</sup> [http://home.oisc.gov.uk/how\\_to\\_find\\_a\\_regulated\\_immigration\\_adviser/adviser\\_finder/finder.aspx](http://home.oisc.gov.uk/how_to_find_a_regulated_immigration_adviser/adviser_finder/finder.aspx)

<sup>131</sup> <http://solicitors.lawsociety.org.uk/#formtop>

<sup>132</sup> <http://www.lawscot.org.uk/find-a-solicitor>

<sup>133</sup> <http://www.lawsoc-ni.org/solicitors-directory/>

<sup>134</sup> <https://find-legal-advice.justice.gov.uk/>

<sup>135</sup> <http://www.lawsociety.org.uk/support-services/accreditation/immigration-asylum/>

<sup>136</sup> <http://www.lawcentres.org.uk/about-law-centres/law-centres-on-google-maps/alphabetically>

## 15 Eligibility for other services

This chapter sets out the eligibility requirements for key public services that people with NRPF may need to access. People with NRPF are only prohibited from accessing specified welfare benefits, homelessness assistance and an allocation of social housing through the council register. A person who has NRPF will not be excluded from accessing other publicly funded services because of the NRPF condition. However, there are often eligibility criteria attached to these services which relate to a person's nationality or immigration status, or are linked to being in receipt of certain welfare benefits. It is therefore important to be aware of what services a person with NRPF may be entitled to. Legal aid is covered in chapter 14.

### 15.1 Work related welfare benefits

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

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

### 15.2 Housing association tenancy

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

### 15.3 Education and student finance

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

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

Slightly different rules apply to further and higher education funding in England, Wales, Scotland and Northern Ireland.

For more information, see:

- UK Council of International Student Affairs (UKCISA)<sup>137</sup>

## 15.4 NHS treatment

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

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

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

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

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

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

For more information, see our factsheet:

- NHS healthcare for migrants with NRPf (England)<sup>138</sup>

## 15.5 Free and concessionary travel

Some local authorities operate concessionary travel passes for people who are elderly or have a disability. People with NRPf are not prohibited from applying for these, but will have to satisfy the relevant eligibility criteria to obtain one. A person would need to contact their local authority to find out whether they have such a scheme.<sup>139</sup>

Elderly or disabled people with NRPf who are resident in Greater London may be able to apply to London Councils for a Freedom Pass.<sup>140</sup>

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<sup>137</sup> <http://www.ukcisa.org.uk/>

<sup>138</sup> <http://www.nrpfnetwork.org.uk/Documents/NHS-healthcare.pdf>

<sup>139</sup> <https://www.gov.uk/find-your-local-council>

<sup>140</sup> <http://www.londoncouncils.gov.uk/services/freedom-pass>

# Glossary

<b>Appeal rights exhausted (ARE)</b>	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.
<b>Asylum seeker</b>	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.
<b>Country of origin</b>	Usually the person’s country of nationality but if this is unclear then local authorities would need to find out from the Home Office which country the person may be removed to or whether the person is stateless.
<b>EEA national</b>	<p>A person who is a national of a European Economic Area (EEA) country or Switzerland: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Slovakia, Sweden &amp; the UK.</p> <p>When the term EEA national is used in this guidance this does not include the UK.</p>
<b>Home Office</b>	<p>The government department that is responsible for maintaining immigration control, including:</p> <ul style="list-style-type: none"><li>• UK Visas and Immigration (application casework)</li><li>• Border Force (border control)</li><li>• Immigration Enforcement (enforcement within the UK including the Intervention and Sanctions Directorate which undertakes immigration status checking for local authorities)</li></ul>
<b>Humanitarian Protection</b>	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.
<b>Illegal entrant</b>	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.
<b>Immigration Rules</b>	The statutory instrument which sets out the categories under which people can apply for leave to enter or remain in the UK, the requirements which need to be met, the length of leave which will be granted and conditions attached to the leave.
<b>Indefinite leave to enter</b>	Immigration permission with no time limit on the length of stay in the UK. Also referred to as ‘settled status.’ There are no conditions attached to this type of leave so a person may undertake employment and can access public funds (unless they were granted as an adult dependent relative and have lived in the UK for less than five years).
<b>Indefinite leave to remain</b>	

<b>Leave to enter</b>	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.
<b>Leave to remain</b>	Immigration permission issued by the Home Office, which is applied from within the UK, usually by completing a form and submitting this online, by post or in person.
<b>Leave to remain outside of the rules</b>	Leave to remain granted outside of the Immigration Rules on the basis of a person's family or private life in the UK.
<b>Limited leave to enter</b>	Immigration permission issued for a time limited period; conditions may include restrictions on employment and access to public funds.
<b>Limited leave to remain</b>	
<b>Limited right to rent</b>	A person with limited leave to remain should be able to rent, sub-let or be the paying lodger of a private landlord in England for 12 months, if their leave to remain expires within one year, or until their leave expires if this is after 12 months.
<b>No recourse to public funds (NRPF)</b>	A condition that prevents a person from being able to claim most welfare benefits, homelessness assistance and social housing because of their immigration status.
<b>No right to rent</b>	A person who is seeking asylum or has no current immigration permission will not be able to rent, sub-let or be the paying lodger of a private landlord in England, unless the Home Office grants them permission to rent on an exceptional basis.
<b>Primary carer</b>	When a person, who is the parent, grandparent, or legal guardian, either has primary responsibility for the child's care or shares this responsibility equally with another person (who does not have British Citizenship, settled status or a European right to reside on any other basis).
<b>Refugee</b>	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.
<b>Refused asylum seeker</b>	A person who has made a claim for asylum which has been finally determined and refused.
<b>UASC leave</b>	Leave to remain granted to an unaccompanied asylum seeking child who is under 17.5 years old and has been refused asylum but there are no reception arrangements in their country of origin.
<b>Unlimited right to rent</b>	A person will be able to rent, sub-let or be a paying lodger of a private landlord in England if they are British Citizen, EEA national or if they have settled status (for example, indefinite leave to remain).
<b>Visa overstayer</b>	A person who had leave to enter or remain in the UK for a limited period and has no current immigration permission because they: <ul style="list-style-type: none"> <li>• did not make an application to extend their leave before their previous leave expired, or</li> <li>• made an application which was refused after their previous leave expired.</li> </ul>

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## Endorsements

This guidance has been endorsed by the Local Government Association (LGA).<sup>141</sup>

The LGA is the national voice of local government and works with councils to support, promote and improve local government. The LGA Asylum, Migration and Refugee Task Group consists of representatives of the NRPF Network, councillors and Regional Strategic Migration Partnerships.

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## Acknowledgements

This guidance has been written by Catherine Houlcroft, Project Officer at the NRPF Network, with input from the NRPF team at Islington Council and Phil Cryer, NRPF Manager at Bradford Metropolitan District Council.

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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 assessing and supporting adults with NRPF. 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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Email: [nrpf@islington.gov.uk](mailto:nrpf@islington.gov.uk)

Web link: <http://guidance.nrpfnetwork.org.uk/reader/practice-guidance-adults/>

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<sup>141</sup> <https://www.local.gov.uk>



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