

NRPF network

No Recourse to Public Funds Network

Practice Guidance for Local Authorities Assessing and Supporting Children & Families and Former Looked-after Children who have No Recourse to Public Funds (NRPF) for Support from Local Authorities under the Children Act 1989

December 2011



ISLINGTON



Contents

1. Introduction	4
1.1 Who has NRPF?	4
1.2 What are 'public funds'?	4
1.3 Scope and aims of guidance	6
1.4 Relevant legislation	6
1.5 Key case law	7
1.6 Specific considerations for Scottish Local Authorities	8
1.7 Specific considerations for Northern Irish Health and Social Care Boards	8
2. Key points	8
3. Good practice	10
4. Summary of key steps	11
5. Establishing eligibility for assessment	11
5.1 Establishing territorial responsibility	11
5.2 Establishing destitution	11
5.2.1 Temporary accommodation pending outcome of assessment	12
5.3 Establishing immigration status	12
5.4 Families in the asylum process and support provided by the UKBA	12
5.4.1 All appeal rights exhausted refused asylum seekers who have a child after the ARE date	13
5.5 Establishing whether the family is excluded from support by Schedule 3 Nationality Immigration and Asylum Act 2002	14
5.5.1 Additional duties where Schedule 3 Nationality Immigration and Asylum Act 2002 apply	15
5.5.2 Those not excluded from social services support by Schedule 3 Nationality Immigration and Asylum Act 2002	16
6. Assessments of need where Schedule 3 Nationality Immigration and Asylum Act 2002 does not apply	16
6.1 Families with children – child in need assessments under Section 17 Children Act 1989	16
6.2 Community care/community mental health assessments of parents	18
6.3 Expectant and nursing mothers	18
7. Child in need and human rights assessments where Schedule 3 Nationality Immigration and Asylum Act 2002 applies	20
7.1 Practical and/or legal barriers to return	21
7.1.1 Legal barriers	22
7.1.2 Practical barriers	22
7.2 Article 3 Human Rights Act 1998	23
7.3 Article 8 Human Rights Act 1998	24
7.4 Article 6 Human Rights Act 1998	26
7.5 Community Treaty rights of EEA nationals	26
7.6 Conclusions on human rights assessments	27
8. Children with UK citizenship	27
9. European Economic Area (EEA) nationals	28
9.1 EEA nationals' eligibility for public funds	28

9.2 EEA national families who cannot access public funds	30
9.3 Accession 2 (A2) nationals	31
10. Families fleeing domestic violence	31
10.1 Domestic Violence Rule	33
10.2 The Sojourner Project	33
10.3 Future arrangements for victims of domestic violence on spouse visas	34
11. Leaving care provisions	35
12. Children with needs over and above destitution	37
12.1 Families with a child that has a disability	37
12.2 Safeguarding children	37
12.3 Children subject to Orders under Section 8 Children Act 1989	37
12.4 Children subject to Care Proceedings	38
13. Families that are ineligible for support after assessment	38
13.1 Family returns process	39
14. Parents who refuse to return to their country of origin	40
15. Families who are granted Indefinite Leave to Remain in the UK	41
16. NRPF Connect	41
17. Access to health care	42
17.1 Primary health care	42
17.2 Secondary health care	42
18. Access to education	43
19. Access to legal aid	44
20. Pathway for homeless people with NRPF	45
21. Glossary of terms	46
22. Abbreviations	48
23. Further information	48
24. Acknowledgements	49

1. Introduction

This paper provides guidance to local authorities in assessing whether they have a duty to support families with children and former looked-after children who have no recourse to public funds (NRPF).

This guidance is written by the No Recourse to Public Funds (NRPF) Network, which has been working with local authorities and partner organisations in this area since 2006. The guidance is endorsed by the [Local Government Association](#) and the [Welsh Local Government Association \(WLGA\)](#).¹ A broad range of stakeholders were consulted in drawing up this guidance paper, including local authorities from across the UK and key partners in the voluntary sector. The guidance has been checked for its legal content by senior legal advisors.

1.1 Who has NRPF?

NRPF applies to a person who is subject to immigration control in the UK and has no entitlement to welfare benefits or public housing. These restrictions are set out in Section 115 Immigration and Asylum Act 1999 (IAA).

‘No recourse to public funds’ may be stamped on the visa of a foreign national living in the UK. If ‘no recourse to public funds’ is not stamped on the visa, it should be assumed that the person does have access to public funds.

Other groups of migrants who have NRPF include:

- Asylum seekers
- Refused asylum seekers
- Visa overstayers

European Economic Area (EEA) nationals do not have NRPF as they are not defined as ‘persons subject to immigration control’ under Section 115 (9) IAA and so are not excluded from entitlement to welfare benefits. However, in order to be eligible for public funds, EEA nationals must have a ‘right to reside’ and satisfy the ‘habitual residence test’ (more in Part 9). In situations where EEA nationals fail to meet these requirements, it may fall to social services to undertake an assessment of eligibility for accommodation and financial support under the Children Act 1989.

1.2 What are ‘public funds’?

There is an exhaustive list of what counts as a ‘public fund’, to which people with NRPF are not entitled:

- income-based jobseeker's allowance;
- income support;
- child tax credit*;

- working tax credit*;
- child benefit*;
- a social fund payment;
- housing benefit;
- council tax benefit;
- state pension credit;
- attendance allowance;
- severe disablement allowance;
- carer's allowance;
- disability living allowance;
- an allocation of local authority housing;
- local authority homelessness assistance; and
- income-related employment and support allowance.

* May be eligible if with an eligible partner from a country that has an agreement with the European Union, or where support from overseas stops for a short while – (NB to be repaid in the latter).

Some benefits and state-provided services are not classified as 'public funds'. The NRPF condition will not directly impact on eligibility for these benefits and services, although separate eligibility criteria may apply. They include:

- contribution-based jobseeker's allowance;
- incapacity benefit;
- retirement pension;
- widow's benefit and bereavement benefit;
- guardian's allowance;
- statutory maternity pay;
- maternity allowance;
- contribution-related employment and support allowance;
- healthcare (more in Part 21);
- education (more in Part 22);
- legal aid (more in Part 23);
- assistance from the emergency services;
- access to legal protection from the family or criminal courts;
- travel passes for those who are disabled or over the age of 60; and
- support provided under social services legislation.

More information about 'public funds' can be found on the following website:

www.ukba.homeoffice.gov.uk/visas-immigration/while-in-uk/rightsandresponsibilities/publicfunds/

Support provided under social services legislation does not count as 'public funds'. Having NRPF as a condition of your lawful stay in the UK does not therefore exclude you from social services support.

¹ We are awaiting endorsement of the Association of Directors of Children's Services (ADCS)

There may however be restrictions on access to support based on nationality or immigration status; these are detailed in Parts 5 and 7 of this guidance.

1.3 Scope and aims of this guidance

This guidance is for use when working with adults who are responsible for children under the age of 18. This guidance does not cover unaccompanied children and young people from abroad, to which different considerations apply.

The guidance outlines how to establish a family's eligibility for services under social services legislation, how to assess the need for support and good practice considerations, including referral options for those ineligible for support.

The guidance focuses on the assessment process under English and Welsh legislation and framed by English and Welsh case law. For information about how this applies in Scotland and Northern Ireland, please see Parts 1.4 and 1.5 respectively.

This guidance uses the term "subject to immigration control" as defined by section 115(9) of the Immigration and Asylum Act 1999 in order to describe people who are excluded from various forms of welfare provision.

This document is intended only as background guidance to local authority duties and powers and how authorities might wish to respond to requests for service provision. It does not attempt to provide an exhaustive statement of the relevant law; nor is it a substitute for legal advice either generally or in relation to individual cases.

While every attempt will be made to keep this guidance up-to-date on the NRPF Network web pages,² local authorities should check the issue date on this document against any recent case law or changes in statute or Government guidance.

In all cases, it is advisable that legal advice is sought. The NRPF Network and affiliated organisations do not accept responsibility for any reliance placed on the information given in this guidance. For detailed guidance on assessing and supporting former looked-after children with NRPF, please see: [LINK](#)

For detailed guidance on assessing and supporting adults with NRPF, please see: http://www.islington.gov.uk/DownloadableDocuments/CommunityandLiving/Pdf/adults_nrpf_guidance.pdf

1.4 Relevant legislation

The following legislation is relevant to this area of work:

² Please see: <http://www.islington.gov.uk/nrpfnetwork>

- [Children Act 1989](#)
- National Assistance Act 1948
- [Children \(Leaving Care\) Act 2000](#)
- [Immigration and Asylum Act 1999](#)
- [Nationality, Immigration and Asylum Act 2002](#)
- [Asylum and Immigration \(Treatment of Claimants, etc\) Act 2004](#)
- [Immigration, Asylum and Nationality Act 2006](#)
- [Local Government Act 2000](#)
- [Human Rights Act 1998](#)
- [NHS and Community Care Act 1990](#)
- Mental Health Act 1983

1.5 Key case law

For families and children leaving care with NRPF:

- [Ruiz Zambrano \(European citizenship\) \[2011\] EUECJ C-34/09](#)
- [ZH \(Tanzania\) v Secretary of State for the Home Department \[2011\] UKSC 4](#)
- [R \(SO\) v London Borough of Barking & Dagenham \[2010\] EWCA Civ](#)
- [1101Teixera v Lambeth London Borough Council \[2010\] EUECJ C-480/08](#)
- [Birmingham City Council v Clue \[2010\] EWCA Civ 460](#)
- Blackburn-Smith v Lambeth London Borough Council, Court of Appeal [2007] EWHC 767 (Admin) [Summary](#)
- PB v Haringey London Borough Council [2006] EWHC 2255 (Admin)
- The Queen (on the application of AW) v London Borough of Croydon The Queen (on the application of A, D, and Y) v London Borough of Hackney & Secretary State (interested party) [2005] EWHC 2950 QB [Summary](#)
- R (Limbuela) V Secretary of State for the Home Department [2004]
- [M v London Borough of Islington and another \[2004\] EWCA Civ 235](#)
- R (on the application of Kimani) v Lambeth London Borough Council [2003] EWCA Civ 1150

For single adults with NRPF:

- [SL v Westminster City Council & Another \[2011\] EWCA Civ 954](#)
- [Nassery, R \(on the application of\) v London Borough of Brent \[2011\] EWCA Civ 539](#)
- [R \(Mwanza\) v London Borough of Greenwich & London Borough of Bromley \[2010\] EWHC 1462 \(Admin\)](#)
- [R \(on the application of M\) v Slough Borough Council \[2008\] UKHL 52](#)
- [N v Coventry City Council \[2008\] EWHC 2786 \(Admin\)](#)
- [Gnezele, R \(on the application of\) v Leeds City Council & Anor \[2007\] EWHC 3275](#)
- R (N) v London Borough of Lambeth [2006] EWHC 3427 [Summary](#)
- [N v Secretary of State for the Home Department \[2005\] UKHL 31](#)
- R (Westminster City Council) v NASS [2002] 1 WLR 2956

1.6 Specific considerations for Scottish local authorities

Duties of Scottish local authorities differ to those in England, Wales and Northern Ireland.

Detailed guidance on assessing and supporting people with NRPF for support under Scottish social services legislation is forthcoming.

1.7 Specific considerations for Northern Irish Health and Social Care Boards

Duties of Northern Irish Health and Social Care boards differ to those of local authorities in England, Scotland and Wales.

Detailed guidance on assessing and supporting people with NRPF for support under Northern Irish social services legislation is forthcoming.

2. Key points

- Local authorities have a duty to safeguard and promote the welfare of children in need within their jurisdiction. Wherever possible, family support services should be provided to help families care for children in need. The [Children Act 1989](#) is the framework within which local authorities provide family and leaving care support services.
- It is unlikely that a local authority will be required to support an asylum seeking family that are eligible for Section 95 Immigration and Asylum Act 1999 support ('NASS support'). Local authorities cannot provide assistance in the form of support and accommodation under Section 17 Children Act 1989 (CA) to a child where support would otherwise be available to the child under Section 95 Immigration and Asylum Act 1999 (IAA). This is set out in Section 122 IAA. If a refused asylum seeker family has a child after the ARE date, they will not be eligible for Section 95 IAA support but may be eligible for Section 4 IAA. However, the case of R (VC and others) v Newcastle City Council has clarified that Section 4 IAA support cannot be considered as 'otherwise available' in a Children Act assessment and Section 17 CA support therefore takes precedence.
- In situations where asylum seeking families are accommodated by the UKBA, any child protection issues remain the responsibility of local authority Children's Services in the area in which they are being accommodated. If the family is moved by the UKBA, Children's Services must transfer responsibility to the new local authority.

- There are substantial restrictions on the support that can be provided under Section 17 CA to families that are unlawfully in the UK³ and to European Economic Area (EEA) national families. Support under the Children Act to such families can only be provided if it is assessed, in a Human Rights Assessment, that withholding or withdrawing this support would breach their human rights under the ECHR or their Community Treaty rights (in the cases of EEA nationals).
- A local authority may be requested to assess a parent under Section 47 NHS and Community Care Act 1990 for eligibility for support under 21 National Assistance Act 1948 (NAA) where there is an appearance of need. If support is provided under Section 21 NAA to an asylum seeking parent, local authorities will be required to accommodate the entire family but may be able to reclaim the costs of supporting the children from the UKBA. Authorities may also be requested to assess a destitute family under Section 17 CA if no other support is available.
- Financial and accommodation support under the leaving care provisions is excluded for former unaccompanied asylum seeking children who are all appeal rights-exhausted and unlawfully present, and will be subject to a Human Rights Assessment.
- Where a destitute family has submitted an Article 8 ECHR application and they are not eligible for UKBA support, case law has established that a local authority will have a duty to support that family under Section 17 CA until a decision is made on the application and unless that application is “obviously hopeless or abusive” (*Clue v Birmingham City Council* (2010)).
- A child in need assessment may be required irrespective of a lack of presenting needs. Being destitute with NRPF is reason enough to intervene.
- Support provided by local authorities to people with NRPF should be temporary, that is, kept under review and provided until the immigration status of the individual or family is resolved. It may also be necessary to provide interim support while assessments are completed.
- There are no guidelines on how much subsistence should be given to people with NRPF supported by local authorities, but a local authority must be able to demonstrate that its subsistence payments meet the essential living needs of clients. Subsistence payments within a local authority should be standardised across services and departments.
- A child dependent is defined as: a member of an applicant’s family or their spouse’s family who is under the age of 18; or a person under 18 who has been living in the applicant’s household since birth or for at least six of the previous 12 months.⁴

³ This includes families where the parent has overstayed a visa, never presented to the UK authorities or is a failed in-country asylum seeker.

⁴ This definition is taken from regulation 2(4)(i) of the Asylum Support Regulations 2000. For more information, see: <http://www.opsi.gov.uk/si/si2000/20000704.htm>

3. Good practice

All families who present to an authority requesting support with accommodation and subsistence should receive a humane and customer-focused response. Local authorities should ensure a consistent response to people who request a service, irrespective of the local authority department to which they present. It is good practice for there to be an identified lead person dealing with individual cases. An interpreter should be provided if the lack of these services would place a person/family at a disadvantage.

Local authorities should explain the assessment process to a presenting family and the potential outcomes of their case at the outset, including the possibility that returning to their country of origin may become the only practical option left for them.

Local authorities must seek a solution to the destitution faced by the family presenting whilst not acting outside its legal powers. In cases where there is no duty on the authority to provide support, the reasons for this must be set out in writing and reasonable time given for the individual or family to seek legal advice. Where it is assessed that there is no duty to financially support the family, local authorities will be required to provide advice and assistance to families in pursuing other options such as voluntary return via Refugee Action or accommodation/financial support provided by the UKBA. However, authorities should not propose other options when it is clear these will not work or when there is a duty to support the presenting family.

Where a duty to provide financial support is established, social services departments should work with the family and the UKBA/partner organisations to find a resolution to the case. This is to minimise the distress that can be caused by uncertainty around insecure immigration status as well as providing cost-effective services.

It is a criminal offence to provide immigration advice where organisations are not registered with the Office for Immigration Services Commission (OISC). A list of legal aid immigration advice providers can be found at:

http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Pdf/legal_aid_immigration_providers.pdf

It is good practice that a Child in Need assessment is child-focused, that is based on the needs of the child and any potential risk there is to the child. Parents should be given the opportunity to comment on the findings of Children Act and Human Rights assessments and have their views considered and noted.

It is good practice for local authorities to establish protocols for their assessment processes to ensure consistency of practice. This should also include protocols for budgeting for families that are found to be eligible for local authority assistance. It is also good practice for expenditure on families with NRPF to be monitored. Local authorities receive no reimbursement for this expenditure (with the exception of those outlined in Part 5.3 and Part 10.1) but this in itself cannot be a reason to refuse support (Birmingham City Council v Clue 2010).

4. Summary of key steps

There are two fundamental steps that a local authority should undertake in assessing whether they have a duty to support a family:

1. Conducting an eligibility test; and
2. Carrying out assessment(s) of need.

Families with NRPF presenting as destitute will commonly seek provision of residential accommodation and subsistence under Section 17 CA. Much of this guidance relates particularly to support and assistance under this section.

5. Establishing eligibility for assessment

There are five key steps in assessing the eligibility of a family with NRPF for an assessment under the Children Act 1989 and Human Rights Act 1998 from a local authority:

5.1 Establishing territorial responsibility

The local authority area where the child/family was living when the need arose is responsible for assessing that family. Exceptions to this rule are when a child is:

- accommodated by another local authority; or
- subject to a Care Order in another local authority.

Children subject to a child protection plan are the responsibility of the authority in which they are living and these responsibilities should be transferred accordingly, even if accommodation and subsistence support is being provided by the placing borough.

In situations where there is a dispute between local authorities over the ordinary residence of a family, this should not delay the provision of emergency accommodation where a child presents in need.

5.2 Establishing destitution

The UKBA defines destitution as not having adequate accommodation or the inability to meet essential living needs. In order to establish destitution the family needs to demonstrate that they have no other means of support available. This would include establishing whether they are homeless or cannot meet essential living needs, and exploring whether support could be provided by friends or family, the voluntary or community sector, savings, a sponsor, eligibility for welfare benefits or selling anything of value.

If a parent is lawfully in the UK, they may have the right to work and the local authority should explore in such circumstances whether they can self-support.⁵ In some cases however, the person may encounter considerable barriers to accessing the labour market and this will impact on their ability to financially support themselves or their family and this will need to be taken into consideration in the assessment process.

5.2.1. Emergency accommodation pending outcome of assessment

A local authority has the power to provide temporary accommodation to a family that is destitute under Section 17 CA whilst assessments are being carried out. To leave a family destitute whilst carrying out assessments would normally breach Article 3 HRA.⁶

In the case of adults who are referred to adult social services for assessment under Section S47 NHS & CCA, the power to provide accommodation pending the outcome of assessment is under Section 47(5) National Health Service and Community Care Act 1990. For those already in receipt of financial support from social services, for example care leavers, services should continue until such time that eligibility is determined in an assessment.

5.3 Establishing immigration status

A parent's immigration status in the UK will determine whether the restrictions to social services support under Schedule 3 NIAA apply or whether UKBA support may be an alternative for the individuals or family if it is later established that no duty is owed by the local authority. Establishing immigration status is a prerequisite to determining which assessment should be carried out when a family with NRPF presents for a service from the local authority (more detail below). Local authorities can establish the immigration status of clients referred to them via their UK Border Agency Local Immigration Team (LIT).

For a list of Local Immigration Teams (LIT) contact persons, please see:

www.islington.gov.uk/Health/ServicesForAdults/nrpf_network/useful_resources.asp

The immigration status checking service is available to statutory bodies only. You may be required to 'register' with your LIT in order to use this service.

5.4 Families in the asylum process and support provided by the UKBA

The UKBA provides accommodation and subsistence support to asylum seeker individuals and families under Section 95 Immigration and Asylum Act 1999. For more information on Section 95 IAA

⁵ If they are on a visa and cannot self-support, they may be in breach of their conditions of entry.

⁶ R (Limbuela) V Secretary of State for the Home Department [2004]

support, please see the following briefing prepared by the Asylum Support Appeals Project:

http://www.asaproject.org/web/images/PDFs/Factsheets_2011/f1.pdf

UKBA support is also available to individuals and families who have submitted applications for leave to remain on Human Rights Article 3 grounds (*The right not to be subjected to torture or to inhuman or degrading treatment or punishment*). UKBA support is not available to those who have submitted applications for leave to remain on Human Rights Article 8 grounds only (*The right to respect for private and family life*).

Local authorities cannot provide assistance in the form of support and accommodation under Section 17 Children Act 1989 (CA) to a child where support would otherwise be available to the child under Section 95 Immigration and Asylum Act 1999 (IAA). This is set out in Section 122 (5) IAA. It is unlikely therefore that a local authority will be required to support an asylum seeking family.

In making a referral to the UKBA for support under Section 95 IAA where a local authority is providing temporary support under Section 17 Children Act, it is advisable that local authorities provide a discharge letter giving no more than 13 days notice of termination of support.

If an asylum seeker parent is assessed as having a need for care and attention that requires provision of residential accommodation under Section 21 NAA, the local authority must arrange for accommodation for the family. In such circumstances, the authority can seek reimbursement from the UKBA for the child's share of the accommodation and living expenses if eligibility for Section 95 IAA support is established and a NASS reference number obtained.

To claim back the costs of supporting children in these situations, you should contact la.finance.income@homeoffice.gsi.gov.uk or telephone 020 8196 0225/020 8196 0243.

For more information on Community Care/Community Mental Health Assessments for parents, please see Part 6.2 of this guidance.

In situations where asylum seeking families are accommodated by the UKBA, any child protection issues remain the responsibility of local authority Children's Services in the area in which they are being accommodated. If the family is moved by the UKBA, Children's Services must transfer responsibility to the new local authority.

5.4.1 All appeal rights exhausted refused asylum seekers who have a child after the ARE date

A refused asylum seeker whose first child is born 21 days after her asylum claim is rejected and whose appeal rights are exhausted will not be entitled to ongoing Section 95 IAA support but may be eligible for Section 4 IAA support if they meet certain eligibility criteria.⁷

However, the case of *R (VC and others) v Newcastle City Council* has clarified that powers under Section 4 IAA are residual where a child of a refused asylum seeker is found to be a 'child in need' in a Child in Need assessment and there is no prohibition on the provision of Section 17 CA financial

⁷ More information at: <http://www.ukba.homeoffice.gov.uk/asylum/support/apply/section4/>

support to the family. In other words, Section 4 IAA support cannot be considered 'otherwise available' in a Child in Need assessment *unless* the UKBA is providing Section 4 IAA support or has stated its intent to provide section 4 IAA support to a refused asylum seeker family and it is shown that Section 4 IAA support will meet the child's assessed needs.

Refused asylum seeker parents however may be caught by Schedule 3 NIAA, depending on their immigration status, and any claim for support under s17 CA or s21 NAA must be subject to a human rights assessment. More information on Schedule 3 NIAA and human rights assessments can be found in Part 7 of this guidance.

5.5 Establishing whether the family is excluded from support by Schedule 3 Nationality, Immigration and Asylum Act 2002

The following groups are excluded by Schedule 3 Section 54 of the Nationality Immigration and Asylum Act 2002 from certain social services provisions (with some notable caveats):

1. A person granted refugee status by another EEA state and any dependents
2. An EEA national and any dependents
3. A refused asylum seeker who has failed to comply with removal directions
4. A person unlawfully present in the UK

A person unlawfully present in the UK includes someone who has overstayed their visa, someone who has never presented to the authorities and all appeal rights-exhausted (ARE) failed asylum seekers who originally applied for asylum 'in-country'. Persons who are awarded a form of leave to remain (such as Discretionary Leave to Remain) which then expires will be unlawfully present regardless of the circumstances of when or how they applied.

The in-country/port-of-entry distinction was established in the Hackney/Croydon [2005] case.⁸ All appeal rights-exhausted refused asylum seekers who originally applied at 'port of entry' are not excluded from social services support by Schedule 3 NIAA, whereas those who originally applied 'in-country' are excluded from social services support by Schedule 3 NIAA. Local Immigration Teams when providing immigration status checks can provide this information.

Category 3 – *refused asylum seeker who has failed to comply with removal directions* – does not include those whose asylum cases have been refused as all appeal rights exhausted and have merely been told to return to their country of origin. Individuals will only fall into this category if they have failed to comply with removal directions i.e. they have been given a time and a means to leave the UK and have failed to take this up.

Where parents fall within one of the four categories listed under Schedule 3 Section 54 NIAA, they are ineligible for support or assistance under the following provisions unless it would breach the family's human rights or Community Treaty rights:

⁸ The Queen (on the application of AW) v London Borough of Croydon The Queen (on the application of A, D, and Y) v London Borough of Hackney & Secretary State (interested party) [2005] EWHC 2950 QB

- section 21 or 29 National Assistance Act 1948
- section 45 of the Health Services and Public Health Act 1968
- section 12 or 13A of the Social Work (Scotland) Act 1968
- Article 7 or 15 of the Health and Personal Social Services (Northern Ireland) Order 1972
- section 21 of and Schedule 8 to the National Health Service Act 1977
- section 29 (1) (b) of the Housing (Scotland) Act 1987
- section 17, 23C, 24A or 24B of the Children Act 1989 (welfare and other powers which can be exercised in relation to adults)
- Article 18, 35 or 36 of the Children (Northern Ireland) Order 1995
- sections 22, 29 and 30 of the Children (Scotland) Act 1995
- section 188(3) or 204 (4) of the Housing Act 1996 (accommodation pending review or appeal)
- section 2 of the Local Government Act 2000 (promotion of wellbeing)
- a provision of the Immigration and Asylum Act 1999

5.5.1 Additional duties where Schedule 3 Nationality, Immigration and Asylum Act 2002 apply

Where the family falls within one of the excluded groups in point (iv), the local authority should carry out a Child in Need assessment and a human rights assessment to establish whether there is an obligation on the local authority to provide support in order to prevent a breach of a family's human rights. In the case of EEA nationals, the human rights assessment must also determine whether support is necessary to prevent a breach of their rights under the Community Treaties (EU law). The findings of a Child in Need assessment can be incorporated into the human rights assessment.

A template human rights assessment has been produced by the NRPF Network and can be accessed using the following link:

http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Rtf/human_rights_assessment.rtf

Additionally, Schedule 3 (14) NIAA places a requirement on the local authority to inform UKBA Enforcements and Removals when someone who falls into the 3rd or 4th categories of exclusions⁹ under Schedule 3 NIAA requests support. This can be reported to the Local Immigration Team in your area. A list of LIT contact details can be found at:

http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Pdf/local_immigration_teams.pdf

Schedule 3 NIAA also places a legal duty on the authority to consider return to country of origin as the limit of its powers.¹⁰ The implications of this legal duty are considered in detail in Part 7 of this guidance.

⁹ 3rd: A refused asylum seeker who has failed to comply with removal directions

4th: A person unlawfully present in the UK

¹⁰ R (on the application of Kimani) v Lambeth London Borough Council [2003] EWCA Civ 1150

5.5.2 Those not excluded from social services support by Schedule 3 Nationality, Immigration and Asylum Act 2002

The following groups of people are not excluded from the social services provisions listed in Part 5.5 and may therefore, after assessment, be eligible for those services:

- Those who are on valid visas
- Asylum seekers
- All appeal rights-exhausted refused asylum seekers who originally applied for asylum at port-of-entry
- British nationals
- Children of any nationality

Although the restrictions under Schedule 3 NIAA are not applicable to children, their parents may be excluded from Section 17 CA support. Because there is however a general duty under the Children Act 1989 to promote the upbringing of children by their family, local authorities should seek to resolve the situation of the family as a whole. It is therefore good practice to support the children and parent(s) together, to find a resolution to the issues which have rendered the family destitute and to only consider taking children into care where there are explicit child protection concerns warranting such a response.

6. Assessments of need where Schedule 3 Nationality, Immigration and Asylum Act 2002 does not apply

The assessment of the family/parents will depend on the presenting needs. That is, whether the parent is presenting solely as having a child or whether the parent is presenting as having community care/community mental health needs in their own right.

6.1 Families with children – child in need assessments under Section 17 Children Act 1989

A child that is destitute may be considered a child in need and therefore may be eligible for local authority assistance under Section 17 CA. If there are no child in need concerns other than destitution, the local authority must consider whether other financial support can be accessed by the family, such as mainstream benefits (public funds) for EEA nationals, UKBA support for those in the asylum process, voluntary return for visa overstayers (in cases where the child would cease to be a child in need on returning to their country of origin and where no human rights breach would result.

More details in Part 7.6) or support from the Sojourner Project where people on spousal visas are fleeing domestic violence. If the family is eligible for support under Section 95 IAA, this is their only option for financial/accommodation support.

It is essential that a 'child in need' assessment is carried out under the Children Act 1989. A separate assessment should be completed for each child in the family. The assessment should be child-focused, based on the needs of the child and on any potential risk there is to the child. The local authority should also establish the ordinary residence, destitution and immigration status of the child(ren), as these may differ from those of their carer(s).

For families caught by Schedule 3, Section 54 NIAA, the Child in Need assessment must include additional elements and must feed into a human rights assessment. Further information on this is given in Part 7 of this guidance.

In accordance with the Assessment Framework published by the Department of Health,¹¹ there needs to be a thorough understanding of the:

- developmental needs of children;
- capacities of parents/caregivers to respond to the needs of those children; and
- impact of wider family and environmental factors on both parenting capacity and children.¹²

This assessment framework for the assessment of children in needs and their families can be accessed using the following link:

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008144

An example of what might constitute a 'child in need' for the purposes of Section 17 CA includes: a disabled child or young person; those with emotional and behavioural difficulties; or those with caring responsibilities. It is also important to check that the child has access to appropriate health and educational provision.

Some guiding questions in the Child in Need assessment could be:

- What support networks are available as an alternative to financial support under section 17 Children Act?
- Are the developmental needs of the children being met?
- Does the parent have capacity to respond to the needs of his/her children aside from the current restrictions to employment and/or benefits in the UK?

¹¹ *Assessing Children in Need and their Families*, DoH (2000)

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008144

¹² Immigration status and no recourse to public funds is an environmental factor that impacts upon parenting and children.

- Is there is contact between the child and their father/mother, is the nature of this contact at a level that would engage Article 8 i.e. is it a meaningful & close bond essential to the child's development?
- What is the impact of wider family and environmental factors on both parenting capacity and children?

If the child is found to be a child in need then the local authority has a duty to provide services, which may include a specific duty to accommodate the child. Under the Children Act 1989 this can be in the form of accommodation of the child alone under Section 20 CA or by the provision of services which can include accommodation for the child and their carer under Section 17 CA. In making such a decision careful and reasoned consideration needs to be given to the child's individual needs as well as the child's and carer's right to family life under Article 8 of the European Convention on Human Rights (ECHR).

Where the parent is caught by the exclusions under Schedule 3 NIAA, a human rights assessment should be undertaken as well as a Child in Need assessment (refer to Part 7 below).

6.2 Community care/community mental health assessments of parents

The duty to assess a person's community care needs arises under Section 47 of the National Health Service and Community Care Act (NHSCCA) 1990. This imposes a duty on the local authority to make an assessment of a person's needs, irrespective of whether s/he request/s the assessment. Whether there is an appearance of need for community care services or not the local authority must assess the person. If the person and their family have no immediate access to accommodation, the authority should house them pending the outcome of the assessment(s).

In almost all situations where a parent requests a community care assessment, such an assessment should be completed, because the threshold to trigger the assessment is very low. This is based on the appearance of needs, not on the likelihood of entitlement to services.¹³ The assessment of community care needs should be done in conjunction with a child in need assessment where the family are presenting as destitute.

If the parent is presenting as in need of residential accommodation, the assessment must address whether a duty is owed to provide the parent with residential accommodation under Section 21 National Assistance Act 1948 (NAA). The duty to provide residential accommodation applies to persons over the age of 18 who are in need of 'care and attention'. In assessing whether a parent is owed a duty under Section 21 NAA, the key question is not one of destitution, but of the need for care and attention (meaning a need for 'looking after') that is *not otherwise available*.

Local authorities should be mindful of the judgement in the House of Lords case of *M v Slough Borough Council* (2008), which defined 'care and attention' under Section 21 NAA as a need for 'looking after'. This includes things such as needing help with dressing, toileting or shopping, or a

¹³ R v Bristol cc ex p Penfold 1998

need to be watched over to prevent harm to oneself or to others. A need for *medical treatment* alone does not constitute a 'need' for care and attention under section 21 NAA.

Several test cases have followed since 2008 which have clarified the threshold for support, but the main test remains that set out in Slough. These cases are considered in more detail in our practice guidance for assessing and supporting adults with NPRF, which can be accessed using the following link:

http://www.islington.gov.uk/DownloadableDocuments/CommunityandLiving/Pdf/adults_nprf_guidance.pdf

If the adult is accepted for support and is able to meet the assessed needs of their child, other than financially, it follows that their dependent children should also be supported under Section 17 CA in order that they can remain in their parent's care. A child in need assessment should also consider whether the child has needs over and above those that apply to the carer, for example special needs or services the parent is unable to provide by reason of illness or disability. Where the family would otherwise be eligible for section 95 support from the UKBA, the local authority can apply to the UKBA to cover the cost of support provided to dependents (more information in Part 5.4 of this guidance).

6.3 Expectant and nursing mothers

Expectant and nursing mothers may qualify support under Section 21(1)(aa) of the NAA, which gives local authorities the power to provide residential accommodation for expectant and nursing mothers who are in need of care and attention which is not otherwise available to them.

Section 21(1)(aa) is a power not a duty. The consideration of exercising this power must be reasonable and rational, all relevant factors must be considered and irrelevant ones ignored. This includes a consideration of the existence of alternative support such as that provided by friends or family and support from the UKBA.

The case of *R (Gnezele) v Leeds City Council*; *R (Dayina) v Leeds City Council* ruled that refused asylum seeker expectant or nursing mothers were excluded from support under Section 21(1)(aa) NAA because they were lawfully entitled to Section 4 IAA support i.e. UKBA support in this context can be considered as 'otherwise available'. The case also clarified that expectant and nursing mothers who are in need of residential accommodation are dealt with exclusively under Section 21(1)(aa) in the absence of any other needs for care and attention not associated with pregnancy or nursing a baby. The case held that destitute expectant or nursing mothers are not in need of care and attention by reason of their being pregnant or nursing a child meaning that the duty under Section 21(1)(a) does not arise. If the expectant or nursing mother had a separate need for care and attention (i.e. 'looking after') of the kind outlined in 6.2 above then the duty under Section 21(1)(a) may arise.

For expectant and nursing mothers who have no access to any other form of support and are not excluded from Section 21 (1)(aa) NAA support by Schedule 3 NIAA, this power may become a duty.

There is no legal definition of what constitutes 'expecting' under Section 21 (1)(aa) NAA and the fact of pregnancy therefore is enough to bring a woman for consideration of support under this statute. It is

not lawful to implement a policy of what constitutes 'pregnancy' in the absence of statutory guidance or legal precedence.

Similarly, there is no legal definition of 'nursing' under Section 21(1)(aa) NAA. Local authorities should establish policies outlining the length of time support will be provided under this power, to ensure consistency of service provision. On termination of Section 21 (1)(aa) NAA support, Child in Need duties may arise and the relevant assessment(s) should be undertaken.

Support under Section 21(1)(aa) is excluded by Schedule 3 NIAA. If a woman seeking this support falls into one of the categories listed under Schedule 3 NIAA (such as an EEA national or a visa overstayer), this support can only be provided subject to a Human Rights Assessment.

In the late stages of pregnancy, it may be impractical for a woman to travel to her country of origin and this may be a practical barrier to return. See Part 7.1 for more information on how this affects the human rights assessment.

7. Child in need and human rights assessments in cases where Schedule 3 Nationality, Immigration and Asylum Act 2002 applies

Schedule 3 NIAA restricts local authorities from providing assistance to four categories of person subject to immigration control, as referred to in Part 5.5 above.¹⁴ In such cases, there is a legal duty placed on local authorities to consider resolving the family's destitution by offering assistance in returning the family to the parents' country of origin. This is because they are excluded from entitlement to support under Section 17 CA and if the child ceases to be a child in need on returning, no other support from social services is necessary in the UK.¹⁵

In cases involving children where the parents are excluded from support under the Children Act by Schedule 3 NIAA, a Child in Need (CIN) assessment and a Human Rights Assessment must always be carried out. Where Schedule 3 NIAA applies, the CIN assessment(s) must consider whether the child(ren) is/are 'in need' in the UK and whether the child(ren) would be 'in need' if they were to return to the parent's country of origin. This will require some enquiry into the existence of services in the

¹⁴ EEA nationals and any dependents; persons granted refugee status by another EEA state and any dependents; refused asylum seekers who have failed to comply with removal directions, and any dependents; persons unlawfully present in the UK (this includes people who have overstayed their visas or failed asylum seekers who made their initial asylum claim in-country).

¹⁵ R (on the application of Kimani) v Lambeth London Borough Council [2003] EWCA Civ 1150

parent's country of origin (see Part 7.6 for more detail). The findings of the CIN assessment should be incorporated into the Human Rights Assessment.

A human rights assessment enables a humane and reasoned approach to statutory restrictions to services. The purpose of the Human Rights Assessment is to:

- Meet statutory duties imposed by Schedule 3 NIAA 2002
- Seek a solution to the family or individual's destitution in the UK.
- Facilitate an open conversation with the family/individual to consider all their available options.
- Seek alternatives to enforced removal by the UKBA.
- Provide transparency in the decision making process, seeking legal advice where necessary

A human rights assessment should include:

- the support history of family in the UK;
- findings of the Child in Need assessment;
- family, friends and other ties the person has in the UK and in the country of origin;
- whether the parent will be homeless, be able to work, access services in the country of origin;
- whether there are any health needs that need to be considered;
- case law and legislation that needs to be considered; and
- what support will be offered to family by the local authority in order to avoid breach of their human rights.

The NRPF Network has developed a template [Human Rights Assessment](#) that local authorities can use in assessing families that are excluded from Children Act support by Schedule 3 NIAA. This assessment has been accepted by the Courts as a legal document for assessing duties under the Human Rights Act to people with NRPF.

If a local authority concludes that it would be a breach of the family's human rights or Community Treaty rights to withhold or withdraw support, then it follows that support would be provided to the family using powers under Section 17 Children Act 1989.

However, case law has established that there is no duty under the ECHR to support foreign nationals who are freely able to return to their country of origin.¹⁶ If it is a viable option for the family to return home, but they refuse to do so, any hardship or degradation suffered will be a result of their decision to stay in the country and not as a result of any breach of human rights by the local authority.

Below we list the considerations to be made within a Human Rights Assessment in order to arrive at a lawful conclusion regarding the decision of whether support is provided to a family that is excluded from Children Act support by Schedule 3 NIAA.

¹⁶ see *R (Kimani) v Lambeth LBC* [2003] EWCA Civ 1150; *Grant v Lambeth LBC* [2004] EWCA Civ 1711 (CA)

7.1 Practical and/or legal barriers to return

The first question to be asked in a human rights assessment is whether there are any legal or practical obstacles to the family returning to their country of origin. In the case of *R (on the application of AW) v Croydon LBC*; *(R (on the application of A, D and Y) v Hackney LBC and another (2006))* it was judged that if there are no legal or practical obstacles to return (to the country of origin), the denial of support by a local authority does not constitute a breach of human rights (although Article 3, 8 and 6 rights would need to be considered).

If indeed there is a legal and/or practical obstacle to the family returning, a local authority would be expected to revert to its residual powers and duties, in this instance Section 17 CA, to accommodate the family. That is because it would be a breach of the family's human rights under Article 3 ECHR to leave them destitute in the UK.¹⁷ This support is temporary and should be reviewed regularly to take into account any changes in circumstances.

7.1.1 Legal barriers

It is important to note that where a person has made a fresh application for asylum or fresh representations to the Home Office based on human rights, this will be relevant to the human rights assessment. The *Clue v Birmingham City Council (2010)* judgment illustrates that a local authority cannot refuse support to a destitute family where there is an outstanding human rights application to the Home Office, unless that application is "obviously hopeless or abusive". That is because a local authority does not have the power, except in obviously hopeless or abusive cases, to effectively perform the functions of the immigration authorities by concluding that the family can return to their country of origin to resolve their destitution. In other words, a local authority does not have the power to determine the validity of a person's/family's human rights claim.

The claim/representations will be "obviously hopeless or abusive" where the claim/representations merely repeat the grounds previously cited which were not accepted by the immigration authorities, or where no human rights claim is made out on the facts at all. In only the clearest of these sorts of cases will the local authority be able to conclude that there would be no breach of human rights for the family to return home before the Home Office has determined the claim.

If an application is made to the Home Office on Article 3 human rights grounds, this is effectively an asylum application and the family will become eligible for Section 95 IAA support. To make an application for Section 95 IAA support, they should be referred to the nearest one-stop service:

<http://www.ukba.homeoffice.gov.uk/asylum/helpandadvice/onestopservices/>

7.1.2 Practical barriers

Examples of practical barriers to return include:

¹⁷ *R (Limbuela) V Secretary of State for the Home Department [2004]*

- Those in the late stages of pregnancy who cannot board a plane (though they may be eligible for Section 4 IAA support in such circumstances if they are a failed asylum seeker, and should seek that support in the first instance).
- Those with health conditions which mean that they cannot travel e.g. those undergoing treatment for tuberculosis.
- Those who have no travel documents
- Those from countries where there is no safe route of return. This list changes from time to time and you should contact your Local Immigration Team for the latest information.

Where clients do not have the correct documents to enable them to travel local authorities should provide support in contacting embassies and accessing their services, or by signposting to organisations such as Refugee Action where clients wish to return voluntarily using the Assisted Voluntary Return programmes.

Where there are no practical or legal barriers to return, a local authority should move on to consider within the Human Rights Assessment any breaches of human rights that may result from offering a route of return to the family in order to prevent a breach of human rights in the UK.

7.2 Article 3 Human Rights Act 1998

Article 3 of the HRA is as follows: *“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”*¹⁸

Article 3 HRA is usually raised in asylum or immigration claims to the UKBA in relation to health issues. If someone has submitted an application to the UKBA based on Article 3 HRA (within the immigration rules), they are *not* caught by the restrictions under Schedule 3 NIAA. Where accommodation and/or services are being requested in such cases, the local authority must consider whether services should be provided under Section 21 NAA or Section 17 CA, as the case may be.¹⁹ Families who submit an asylum (or Article 3 HRA) claim are eligible for Section 95 IAA support from the UKBA and are excluded from financial support provided by a local authority. Where a parent does not have a need for care and attention, the family should be referred to the nearest ‘one-stop service’ for helping applying for UKBA support.

For those who do not have an asylum claim however, the situation is very different. A local authority is required to consider whether the denial of accommodation and/or services would breach a family’s

¹⁸ Article 3 is an absolute right, i.e. if proved, there is no defence. Degrading treatment occurs where a person reasonably feels fear and anguish that is humiliating and debasing, where this is caused by the action or inaction of national or local government.

¹⁹ In the case of fresh (new) human rights and asylum applications the Home Office must record the application before the question of whether central government should provide a service; local authorities can provide support if there is evidence that a fresh claim has been submitted e.g. a recorded delivery number.

Article 3 HRA rights. In other words, a local authority must conclude that withholding/withdrawing support and offering tickets to the family's country of origin would not breach Article 3 HRA rights. If the UKBA or Asylum and Immigration Tribunal (AIT) have already considered the Article 3 HRA issues in a client's asylum/immigration claim, this will be relevant to a local authority's Human Rights Assessment.

The threshold for engaging Article 3 HRA is extremely high. A breach of Article 3 HRA will often be argued on the basis that a person 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. The leading case here is *N v Secretary of State for the Home Department* (2005),²⁰ in which the House of Lords held that the Secretary of State's decision to return a Ugandan woman with HIV and AIDS did not breach her Article 3 HRA 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. It was stated that:

*"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."*²¹

Key matters to assess in considering Article 3 HRA rights are:

- Will the family be destitute in their country of origin?
- Does the family have support networks in their country of origin?
- Will they be able to obtain accommodation (either on their own or with family/friends)?
- Are the parents able to work in their country of origin?
- Are there any Social Services systems or Social Housing systems in their country of origin?
- Where there are health issues, are there any health services/treatments/medication available in their country of origin?
- Has the health of any family member reached a critical stage?
- Are the family's circumstances exceptional?

Local authorities can use country of origin information to support these assessments by providing evidence of services available in various countries and covered in Part 7.6 below.

7.3 Article 8 Human Rights Act 1998

Article 8 of the HRA is as follows: "(1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security,

²⁰ (2005) UKHL 31

²¹ (2005) UKHL 31 (para. 69)

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 a qualified right, i.e. once it is established that the right exists (under Article 8(1)), it is necessary to consider whether any interference with the right is justified “for the protection of health or morals, or the protection of the rights and freedoms of others” (under Article 8(2)).

Article 8 HRA is usually raised in asylum or immigration claims to the UKBA in relation to family connections in the UK. If someone has submitted an application to the UKBA based on Article 8 HRA (within the immigration rules), they are *not* caught by the restrictions under Schedule 3 NIAA. Where accommodation and/or services are being requested in such cases, the local authority must consider whether services should be provided under Section 21 NAA or Section 17 CA, as the case may be.²² Applications based on Article 8 HRA do not entitle individuals/families to UKBA accommodation and support in the same way as applications based on Article 3 HRA.

For those who do not have a pending Article 8 application however, the situation is very different. A local authority is required to consider whether the denial of accommodation and/or services would breach a family’s Article 8 HRA rights. The rights of each family member must be considered. If the UKBA or AIT have already considered the Article 8 HRA issues in a client’s asylum/immigration claim, this will be relevant to a local authority’s Human Rights Assessment.

Article 8 HRA does not create a right of abode in any particular country. It is therefore reasonable for the local authority to consider whether Article 8 HRA rights can be enjoyed in the parent’s country of origin.

The Supreme Court case of (*ZH*) *Tanzania* will be a relevant consideration in a Human Rights Assessment where a child or children are involved, where this has not been considered already by the UKBA or the AIT. The Supreme Court decision specified that the best interests of the child had to be given primary consideration as part of the assessment of proportionality under Article 8 ECHR. The importance of seeking the child’s views was also highlighted. British Citizenship is also to be given greater consideration in the assessment of proportionality under Article 8 ECHR.

The following questions concerning Article 8 HRA must be addressed in the Child in Need Assessment and incorporated into the Human Rights Assessment:

- Look at the family and friendship relationships. Can they be maintained if person/parent and child returned home? What kind of separations would result if returned home? What family/private life relationships exist in the country of origin?
- How long have they spent in the UK?
- Have they worked or volunteered in the UK?
- Would the person be able to work in the country of origin?
- Are they currently studying?

²² In the case of fresh (new) human rights and asylum applications the Home Office must record the application before the question of whether central government should provide a service; local authorities can provide support if there is evidence that a fresh claim has been submitted e.g. a recorded delivery number.

- Would the person be able to further their education if they return home?
- What would be the arrangements for looking after the child in the parent's country of origin?
- Where appropriate (in light of the child's age and understanding), have the child's views been sought?
- Do any of the children have UK citizenship and would it be 'proportionate' to require the family to return to the parent's country of origin?

Country of origin information to support these assessments is covered in Part 7.6 below.

7.4 Article 6 Human Rights Act 1998

In cases where the person is a defendant in criminal proceedings or a party in civil proceedings, it may be relevant to consider whether return to country of origin would infringe the person's right to a fair and public hearing under Article 6 HRA.

In the case of public law Children Act proceedings, it is likely that Article 8 would also arise. In the case of *PB v Haringey*,²³ the court held that the decision that it was a viable option for a mother in care proceedings to return to their country of origin was unlawful because it would result in a breach of her Article 8 rights. This was because she would not be able to participate in the proceedings, including assessments which would have an effect on the Court's determination of the care proceedings. Because the Court considered that Article 8 would be breached, it did not go on to consider whether Article 6 would also be breached in the circumstances.

7.5 Community Treaty rights of EEA nationals

Where a family from an EEA country requests Section 17 CA support, a local authority must assess whether the withholding or withdrawing of support would breach rights under the Community Treaties (CTs) in addition to those under the HRA. The Community Treaty rights that an EEA national may claim would be breached without Section 17 CA support are broadly economic free movement rights. A person will be exercising their rights under the CTs if they are a 'qualified person' under the Immigration (European Economic Area) Regulations 2006, because they are a:

- Jobseeker;
- Worker;
- Self-employed person;
- Self-sufficient person; or a
- Student.

The Local authority must determine whether a person is exercising any of their rights under the CTs, and if they are, whether support and assistance under Section 17 CA 1989 is *necessary* to prevent a breach of these rights.

²³ [2007] EWHC 3275 (Admin)

Whether someone is exercising their rights under the community treaties is a question of fact and can be established through the assessment process. If no family member is exercising a Community Treaty right as a 'qualified person' then there would be no breach of those rights if support were withheld or withdrawn.

For additional information on the rights and entitlements of EEA nationals and the considerations required in the CIN and HRA, please refer to Part 9 of this guidance.

7.6 Conclusions on human rights assessments

A Human Rights Assessment provides an opportunity to explore all of the options of a family or an individual excluded from social services support. A Human Rights Assessment must ask all the relevant questions where a family excluded by Schedule 3 NIAA is requesting Section 17 CA support. These are:

- i. whether there are any legal or practical barriers to the family returning to the parent's country of origin; and if not
- ii. whether there would be any Article 3, 8 or 6 HRA breaches if the family were to return to the parent's country of origin; and
- iii. in the case of EEA nationals, whether there would be a breach of Community Treaty rights if the family were to return to the parent's country of origin.

A conclusion must be reached as to whether the child would cease to be a 'child in need' on return to the parent's country of origin. The assessment must also balance the views expressed by the parent and the information that is known to the local authority about the parent's country of origin. This information can be from a number of sources, including:

- Home Office Country of Origin Information reports - http://www.homeoffice.gov.uk/rds/country_reports.html
- UKBA Operational Guidance Notes provide summaries of the general, political and human rights situations in various countries: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/>
- International Organisation for Migration IRRiCO service - <http://irrico.belgium.iom.int/>
- The Information Centre about Asylum and Refugees (ICAR) lists other sources of COO information at: <http://www.icar.org.uk/12693/country-of-origin-resources.html>

The HRA must conclude with the options a local authority will offer a family in order to prevent a breach of human rights/community treaty rights. These may be:

- a) provide temporary Section 17 CA support in the UK and where relevant advise the family to seek advice from an immigration solicitor; or
- b) offer assistance to the family in returning to the parent's country of origin (see Part 16 of this guidance for more information on voluntary returns).

8. Children with UK citizenship

A child may acquire UK Citizenship in a range of situations, including when they are born in the UK and have one British or 'settled' parent. For more information about applying for British Citizenship for a child, see: <http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/children/britishcitizen/>

Following the judgement in the case of *Zambrano* in the European Court of Justice in 2011, the UKBA will be amending the Immigration (European Economic Area) Regulations 2006 before the end of 2011 to issue documentation to carers of British children, giving them the right to live in the UK. The judgement creates a right to reside and work for the sole carer of a dependent British citizen when that carer has no other right of residence in the UK and removing the carer from the UK would mean the British citizen would have to leave the European Union. Until the regulations are changed, carers in this position are advised to apply to the UKBA using an EEA2 application and provide evidence of: the British Citizenship of the child; the relationship between the applicant and the British citizen; and of dependency between the applicant and the British citizen.

Applicants will be issued with a certificate of application and this will grant them a right to work and access public funds. If an applicant faces difficulties accessing public funds, they should seek independent legal advice. The AIRE Centre are able to advise in these situations: www.airecentre.org

Once changes to the regulations are made, the application will be given full consideration by the UKBA and documentation will be issued under the regulations to those who meet the final agreed policy.

9. European Economic Area (EEA) nationals

The European Economic Area (EEA) comprises the 27 European Union countries,²⁴ plus Iceland, Lichtenstein and Norway. Nationals of Switzerland, which is not in the EEA, are permitted to work and live in the UK in the same way as other EEA nationals.

In 2004, eight countries joined the European Union and faced some restrictions to accessing benefits and the labour market in the UK. The Accession 8 (A8) countries were Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia. The restrictions facing A8 nationals have now ended and nationals of these eight countries have the same access to benefits and the labour market as 'old member state' nationals.

Romania and Bulgaria joined the European Union in 2007 and are also known as Accession 2 (A2) countries. Nationals of Romania and Bulgaria still face restrictions to benefits and the labour market. More details are provided in Part 9.3.

²⁴ See Part 21 for a list of EEA countries

9.1 EEA nationals' eligibility for public funds

This paper does not aim to provide guidance on how to assess the eligibility of a person from abroad to 'public funds', but rather provides background information to contextualise why certain decisions are made which leads to an EEA family being referred to social services departments for accommodation and support. Further information regarding EEA nationals' eligibility for public funds is provided by a number of organisations, detailed below.

If you are a Housing Adviser or an individual/family seeking support, the following page provided by the Chartered Institute of Housing, provides detailed background: <http://www.housing-rights.info/>

Information about the Right to Reside and Habitual Residence Test, provided by the Department of Work and Pensions, can be found at: <http://www.dwp.gov.uk/docs/dmgch0703.pdf>

Further information from the UKBA and application forms can be found at: <http://www.ukba.homeoffice.gov.uk/eucitizens/rightsandresponsibilities/>

EEA nationals do not require leave to enter or to remain in the UK, however their eligibility for public funds in the UK is subject to some restrictions. EEA nationals will be eligible for public funds if they have (i) a right to reside in the UK; and are (ii) habitually resident:

(i) an EEA national has an automatic 'right to reside' in the UK for three months;²⁵ following the initial three months, an EEA national must be exercising a 'Community Treaty right' as a 'qualified person' in order to have a 'right to reside' i.e. they must be a jobseeker, worker, self-employed person, student or self-sufficient.

(ii) an EEA national will be 'habitually resident' if they have lived in the UK for a minimum amount of time (one to three months) and if they have a 'settled intention' to stay in the UK. This will be assessed in a number of ways by the Department of Work and Pensions, for example looking at whether the family have brought all of their possessions and whether they have 'durable' ties with the UK.

Some key considerations:

- Generally speaking, EEA nationals that are working or self-employed in the UK have access to public funds and do not have to pass the Habitual Residence Test.
- A person may retain worker status if they are temporarily unable to work due to illness or accident.²⁶
- To be a 'worker', the work must be deemed to be 'effective and genuine'.²⁷
- The eligibility of qualified persons to public funds extends to some of their family members.²⁸

²⁵ During the initial three month period, the right to reside does not 'count' for benefit purposes

²⁶ More information on this can be found at: http://www.housing-rights.info/03_4_EEA_workers.html#temporarily-unable-to-work

²⁷ More information on this can be found at: http://www.housing-rights.info/03_4_EEA_workers.html#workers

²⁸ Family members are:

- a husband or wife - (i.e. married, not just partners)

- EEA nationals who are not working but are looking for work, may be eligible for certain public funds if they are 'habitually resident' in the UK, but not housing or homelessness assistance. In Wales however, jobseekers who are habitually resident *are* entitled to housing and homelessness assistance.
- It may be relevant to an assessment of habitual residency that children of an EEA national are in school (*Teixeira ECJ* [2009]).
- EEA migrants may apply for permanent residence after five years of residing as a qualified person and will be able to access public funds thereafter.
- Local authority housing departments have a power under Section 188 Housing Act 1996 to provide temporary accommodation to EEA nationals while they are making a decision on eligibility for public funds or while an appeal is being made on a negative decision.
- EEA nationals fleeing domestic violence will be entitled to public funds if their husband/wife is exercising a Community Treaty right, irrespective of whether that relationship has broken down (but they are still married).

9.2 EEA national families who cannot access public funds

Families that have been refused public funds on the basis that they have no right to reside and/or are not habitually resident in the UK may be referred to Children's Social Services if there are reasons to believe that a child may become destitute and 'in need'.

Schedule 3 of the Nationality, Immigration and Asylum 2002 Act prohibits local authorities from providing support to families with children from EEA countries under Section 17 CA, and only in rare circumstances is support likely to be provided.

A Child in Need and a Human Rights Assessment should be completed on EEA migrants who cannot support themselves and become destitute to ensure that withholding or withdrawing services or offering tickets to the parent's country of origin would not be a breach of their human rights and their

-
- a civil partner
 - a direct descendant (children, grandchildren, etc) of that person or of their spouse or civil partner and either:
 - they are aged under 21; or
 - they are dependent on him/her or on their spouse or civil partner (for example, because disabled or studying)
 - a dependent direct relative in ascending line of that person or of their spouse or civil partner (i.e. a parent/grandparent)
 - an extended family member who has been issued with an EEA family permit; and you are:
 - a dependent family member not covered by the list above
 - a partner (not being a spouse or civil partner) in a 'durable relationship'
 - a relative who, for serious health reasons, is provided with personal care by that EEA national.

rights under the Community Treaties. Part 7 of this guidance outlines the assessment process in detail.

9.3 Accession 2 (A2) nationals

Bulgarians and Romanians (A2 nationals) face restrictions to residing and working in the UK. A2 nationals must apply for [accession worker cards](#) in order to work lawfully in the UK as set out in the Accession (Immigration and Worker Authorisation) Regulations 2006. A2 nationals are restricted to working in certain industries that are classified as having labour shortages. The restrictions facing A2 nationals are likely to continue until December 31st 2013.

A2 nationals who are exempt from worker authorisation are those who:

- are self-employed
- have leave to enter or remain in the UK under the Immigration Act 1971 without restriction on their employment
- were legally working in the UK on 31st December 2006 and had been legally working without interruption for 12 months at that date
- were working legally and without interruption for a period of 12 months falling wholly or partly after 31st December 2006
- are also citizens (dual nationals) of the UK, Switzerland or another EEA country (other than the A2 states)
- are the spouse or civil partner of a UK national
- have a permanent right of residence
- are providing services in the UK on behalf of an employer who is not established in the UK (a posted worker)
- are family members of an EEA or Swiss national who is working in the UK or living in the UK as a student, job-seeker or self-sufficient person (other than family members of an A2 national subject to worker authorisation)
- are in possession of a registration certificate confirming unconditional access to the UK labour market.

A2 nationals do not have a right to reside as 'job seekers' if they have not completed 12 continuous months of authorised employment in the UK. A2 nationals who are out of work and have not completed 12 continuous months of authorised employment will have no recourse to public funds.

10. Families fleeing domestic violence

The current Home Office and Association of Chief Police Officers (ACPO) definition of domestic violence (DV) is:

“any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”

This definition is also used by the Crown Prosecution Service,²⁹ the Ministry of Justice³⁰ and the UK Border Agency.

Families fleeing domestic violence who are assessed as being destitute are eligible for temporary support under Section 17 CA pending the outcome of a social services assessment.

Families that are not caught by the restrictions to support under Schedule 3 NIAA should be assessed for support under the Children Act 1989. This is with the exception of families where the parent entered the UK on a Spouse visa, who should be referred to The Sojourner Project (more in Part 10.2). More detail on this assessment process is provided in Part 6.1 of this guidance.

European Economic Area (EEA) nationals fleeing domestic violence may be eligible for assistance from mainstream housing departments or refuges if they or their partner are exercising a Community Treaty right as a ‘qualified person’, as per the definition in Regulation 6 of the Immigration (European Economic Area) Regulations 2006. This is also the case if the client is not an EEA national but is married to an EEA national.

Support provided to EEA nationals who have NRPF or other families fleeing domestic violence who are excluded from Children Act support by Schedule 3 NIAA will be subject to a Child in Need and Human Rights Assessment. More information on this assessment process is provided in Part 7 of this guidance.

The Sojourner Project can be accessed by anyone who was given a spouse or partner visa and whose relationship broke down during the probationary period because of domestic violence. This includes those currently on spouse / partner visas, those who have overstayed them and those who were granted them but then ‘switched’ into another immigration category.

Those who have overstayed their spouse visa may be eligible for Sojourner Project funding if the domestic violence took place during the Spouse visa’s two year period, and should be referred to Sojourner for an assessment.

If a family with NRPF presents to a local authority following DV and does not meet the criteria for support from the Sojourner project³¹, the local authority must consider whether a duty to support arises under either Section 17 of the Children Act 1989 or Section 21 National Assistance Act as the case may be.

²⁹ See the CPS’ *Policy for Prosecuting Cases of Domestic Violence* (2010)

³⁰ See the Ministry of Justice’s *A Guide to Civil Remedies and Criminal Sanctions* (February 2003, updated March 2007)

³¹ Such as those who did not enter on a spouse/partner visa or those who are unlawfully in the UK having overstayed a grant of limited leave

Families who are eligible for support under the Children Act and are placed in a refuge by a local authority in another local authority area will be 'ordinarily resident' for the purpose of accessing social services support in the *placing* borough, not the borough in which they were placed.

10.1 Domestic Violence Rule

If an adult has been in the UK on a spouse/partner visa and they and/or their dependent become victims of domestic violence during the visa's probationary period, they can apply for indefinite leave to remain (ILR) under the Domestic Violence Rule (DVR). The local authority should advise the person to seek appropriate advice for an application under this rule and if the two year visa is nearing its end to stress the urgency of this, but should not give immigration advice themselves.³² The application costs £972 to submit; however this fee will be waived if the applicant can prove they are destitute. A letter from a supporting organisation such as the local authority or refuge would be sufficient evidence of destitution.

An applicant will be considered destitute if he/she is able to provide evidence to the UKBA that shows that at the time that he/she is making the application:

- he/she does not have access to sufficient funds to pay the fee; and
- she/he has total and necessary reliance on a third party for the provision of things like a place to stay and food. A third party could be a friend or family member, a women's refuge or support from a local authority.

Local authority staff may be asked to provide evidence in support of any aspect of the application and with the agreement of the person concerned may do so in relation to reports of domestic violence.

UKBA guidance on the DVR application and the latest application form itself can be found on the following website:

[http://www.ukba.homeoffice.gov.uk/ukresidency/settlement/applicationtypes/applicationformset\(dv\)](http://www.ukba.homeoffice.gov.uk/ukresidency/settlement/applicationtypes/applicationformset(dv))

In some cases where people fear returning home because of the stigma associated with domestic violence or the breakdown of a marriage for example, an asylum application or an application can be made under Article 3 of the Human Rights Act 1998. In either of these cases, the family would be entitled to UKBA support.

More information about applying for ILR under the Domestic Violence Rule can be found on the Rights of Women website: www.rightsofwomen.org.uk

³² A list of legal aid immigration advisors can be found at:

http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Pdf/legal_aid_immigration_providers.pdf

10.2 The Sojourner Project

The Sojourner Project is a pilot scheme run by Eaves and funded by the Home Office which commenced in November 2009 and will operate until the end of March 2012 (See Part 10.3 below for more information on the future arrangements for The Sojourner Project). The Sojourner Project provides a mechanism for individuals and families with NRPF, who entered the UK on a spouse or partner visa and are eligible to apply for ILR under the Domestic Violence Rule (DVR), to be accommodated and receive subsistence for a limited period of time.

Eaves Housing act as the national coordinating body during the pilot, and identify and manage refuge provision across the UK for victims who are eligible under the pilot.

Who is eligible for this service?

Victims of domestic violence who have NRPF and are admitted to, or granted an extension to their stay in the UK as a spouse, civil partner, unmarried or same sex partner.

Referrals to the scheme can be made by anyone on 0207 840 7147. Once information on the referral's suitability has passed initial assessment, the person/family will be admitted onto the first stage of the pilot. At this stage the referrer will be asked to complete a formal referral form sent by the Sojourner Duty Worker and e-mail it to: sojourner@eaveshousing.co.uk.

Refuges supporting the victims will be provided with funding for 30 working days to support the victim whilst they complete an application for Indefinite Leave to Remain (ILR) under the Domestic Violence Rule.

Once an application is submitted and received by the UK Border Agency, the refuge will be provided with further funding for a maximum of 20 working days whilst UKBA come to a decision on the application.

The refuge that is accommodating the referred person and their children can apply to the Sojourner Pilot Project Manager for financial assistance. Under the pilot a service user is entitled to £60 per week subsistence plus an extra £30 per week for every child. Accommodation costs will also be covered, up to a total of £230 per week.

Funding will be paid a week in arrears on receipt of invoice. In addition, the refuges will also be able to claim for interpreter's costs. However, some interpretation services will be exempt from these conditions, and in such cases a discussion should take place with the Sojourner Project Manager. If services are likely to need more than £150 for interpreting, they should get authorisation from the Sojourner Project Manager.

If the Sojourner Project funding runs out and the family have not yet received a decision on their DVR application, then the local authority where the child presents 'in need' will be required to undertake a relevant assessment.

10.3 Future arrangements for victims of domestic violence on spouse/partner visas

From April 2012, victims of domestic violence who entered the UK on a spouse visa who are currently eligible for support from the Sojourner Project, will be given discretionary leave to remain and will therefore be eligible for public funds for a limited period of time.

This will comprise five weeks whilst an application for ILR under the Domestic Violence Rule is being prepared and five weeks whilst a decision on that application is being made by the UKBA. If an in-time application to appeal a negative decision is made, the period of discretionary leave will continue until that appeal is resolved.

Further details of these proposals will be provided in the NRPF Network bulletins, which are available to download at: www.islington.gov.uk/nrpfnetwork.

11. Leaving care provisions

Former unaccompanied asylum seeking children (UASCs) whose asylum claims have been refused and whose appeal rights are exhausted have NRPF. In general young people who have been looked after as children (including children supported under Section 20 CA) for a period of over 13 weeks (and are therefore ‘former relevant children’) should receive assistance from the local authority under the Leaving Care Provisions, including Sections 23C, 24A or 24B Children Act 1989, though the duties vary according to the period over which the young person was in the care of the Local Authority.

Leaving care duties continue to the age of 21 or until 25 if the care leaver is in full-time education. When leaving care duties cease, it may be relevant for a local authority to consider any other duties that are owed to an individual or family under Section 21 National Assistance Act 1948 or Section 17 Children Act 1989 as the case may be.

The Hillingdon judgement in 2003³³ determined that unaccompanied asylum seeking children (UASCs) would almost always be provided with accommodation under Section 20 CA and not under Section 17 CA. This means that most UASC will be ‘looked after children’ and entitled to leaving care services.

However, the leaving care provisions of the CA fall within Schedule 3 NIAA. Former UASC will sometimes fall within one of the excluded groups, most likely to be “persons unlawfully present in the UK” by reason of particular circumstances of exhausted appeal rights and no further leave to remain. This applies to in-country applicants and most port-of-entry applicants because most UASCs are granted a period of Discretionary Leave to Remain (DLR) in the UK until they are 18 and become unlawfully present (including for the purposes of accessing Children Act support) when this ends and they become ARE. Some UASCs who are not granted DLR and applied at port-of-entry can be

³³ R (Behre) v Hillingdon Council (2003)

classified as 'lawfully present' and not caught by Schedule 3 NIAA when they become ARE. Where Schedule 3 NIAA applies, the duties of the Local Authority to provide leaving care services will be limited, and subject to a Human Rights Assessment. A detailed Human Rights Assessment process is outlined in Part 7 of this guidance.

Following the grant instructions for UKBA's Leaving care (Post 18) grant issues in 2011/12, a human rights assessment must be completed for authorities to receive the extra three months funding from UKBA currently provided for cases that become appeal rights exhausted.

Former looked-after children whose asylum cases are still pending will remain eligible for UKBA grant funding and those with Discretionary Leave to Remain will be eligible for public funds.

The case of *Binomugisha v Southwark [2006]* clarified that Schedule 3 NIAA only restricts a local authority from providing financial support under the Leaving Care Provisions. Former UASCs, even if excluded from accommodation and financial support by Schedule 3 NIAA, will remain eligible for a personal advisor and maintenance of a pathway plan.

The *SO v Barking and Dagenham [2010]* case has helped to demonstrate the continuing responsibilities of local authorities under leaving care legislation for former UASCs who do not come into one of the categories excluded from Children Act support by Schedule 3 NIAA. The Court decided that when reading Section 17 (6) CA to not treat Section 23c CA similarly would lead to unacceptable inconsistency. They therefore found that a local authority does have a general duty to provide a former relevant child with accommodation under section 23C(4)(c) 'to the extent that his or her welfare requires it'. *S(O) v Barking and Dagenham* does not address the exclusions to support under Schedule 3 NIAA as none of the parties to the proceedings thought it relevant to the matters being decided.

SO v Barking and Dagenham [2010] also clarified that a local authority is not entitled to taken into account the availability of UKBA Section 4 IAA support, when considering whether the child should be provided with accommodation. The outcome from the case should not be that the local authority can look to UKBA support when considering support to the former UASC, but the local authority needs to undertake a human rights assessment if Schedule 3 NIAA applies.

This means that local authorities may have a duty to support a former UASC under Section 23C CA if they:

- Have not yet received a decision on their asylum claim;
- Are ARE but originally applied for asylum at port of entry and were never granted Discretionary Leave to Remain;
- Have submitted fresh representations;
- Face practical obstacles to returning to their country of origin;
- Have accepted an offer of voluntary return and are awaiting departure.

If a local authority makes a lawful decision to withhold support following a human rights assessment (in a case where Schedule 3 NIAA applies) an application to the UKBA for Section 4 IAA support can be made. However, this will not have much practical value because the UKBA is likely to refuse the

application for the same reasons that the local authority concluded that the provision of support under section 23c was not necessary in order to avoid a breach of the person's human rights - namely that there are no obstacles to him/her leaving the UK.

12. Children with needs over and above destitution

12.1 Families with a child that has a disability

Where a child has a disability, an assessment must be conducted on the needs of the child and of the carer and their ability to care for the child.

Asylum seeker families where a child is disabled should be supported by the UKBA, who should ensure that the accommodation meets the child's needs. However any additional support that is required should be provided by the local authority where the child is accommodated.

12.2 Safeguarding children

Local authorities have a general duty under the CA to enable children to live with their families. The refusal of support under Section 17 CA may raise safeguarding concerns for the child. This is particularly acute in regards to families caught by Schedule 3 NIAA who are barred from local authority support under the CA. Human rights issues under Article 8 HRA may also be raised.

It is good practice to find solutions to the destitution faced by the family. This may involve exploring options for families to return to their countries of origin, subject to a human rights assessment and a child in need assessment. It may also involve exploring opportunities to apply for leave to remain with the assistance of an immigration solicitor.

12.3 Children subject to Orders under Section 8 of the Children Act 1989

When undertaking child in need assessments, workers should make enquiries about any court orders which apply to the child. Orders under Section 8 of the Children Act 1989 (Residence, Contact, Prohibited Steps and Specific Issue) may affect the provision which can be offered to a family. For example under a residence order there is a specific prohibition on the child being taken out of the country for more than 28 days, and a contact order may require a child to remain in the UK to be

effective. However where such orders are in place it is open to a parent or other party (but not normally the local authority) to seek a variation of the order in the courts.

Therefore if, for example, a residence order is in place to one parent but the child is not having any direct contact with the other parent it may be appropriate for the person holding the residence order to seek the permission of the court to remove the child from the UK.

12.4. Children subject to Care Proceedings

Normally the UKBA will allow a parent limited leave to remain in the UK for the duration of Care Proceedings even if the decision in relation to their application cannot be reached in that timescale. It would generally not be appropriate to expect a parent to leave the UK during the course of proceedings as this could hamper assessments and fetter the court in making decisions in relation to a child. Such instances raise human rights issues.

In *PB v Haringey (2006)*, the court considered that there had not been a consideration of whether Article 8 HRA would be breached if the mother who was party to the Care Proceedings returned to her country of origin, as it would prohibit participation in assessments to inform the family proceedings court of who should care for the child.

The Local Authority may need to consider the provision of support to a family while assessments are underway. If the child is subject of a Care Order any provision is under Section 22 CA, not Section 17.

13. Families that are ineligible for support after assessment

Families who are ineligible for local authority support after assessment should be referred to organisations that can help them return to their country of origin or travel arrangements should be made by the local authority. The Local Immigration Team in the local authority's area should be notified that a Human Rights Assessment has concluded that there is no duty to support a family and what actions are planned as a result.

Non-EEA families should be referred to Refugee Action, which manages the UKBA/EU-funded voluntary return programmes. The most relevant programme for families with NRPF is likely to be the Assisted Voluntary Return for Families and Children (AVRFC) Programme. The AVRFC Programme does not fund return for EEA national families.

Support provided to families as part of the AVRFC programme includes:

- Planning for return - for example the journey from the airport to their home town / village, where they will live, what they would like to do, contacting family

- Applying for travel documents and booking flights
- Assistance at the airports, both in the UK and overseas if required
- Financial support with the flight, and in some cases for temporary help with reintegration
- Information on packages of support that may be available in the country of return including education, employment, training and business.

Referral to the Refugee Action AVRFC Programme can be made by telephone using 0800 800 0007, by email on choice@refugee-action.org.uk or at one of its offices in Leeds, Leicester, London or Manchester.

For more information on the 'Choices' Voluntary Return Programme, please see: <http://www.refugee-action.org.uk/ourwork/assistedvoluntaryreturn.aspx>

Refused asylum seeker families may be eligible for UKBA support after assessment. Please see Pats 5.4 and 5.4.1 for more information on this.

Visa overstayer families who refuse assistance from Refugee Action can be offered a package which matches the support provided by the AVRFC Programme under Section 2 of the Local Government Act 2000.

EEA families who are ineligible for local authority support after assessment can be offered travel tickets to their country of origin under the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002. Embassies may also be able to purchase travel tickets for their nationals. Pending their return to the relevant EEA state, the local authority can provide interim accommodation, but has no duty to provide cash payments. A financial resettlement package can also be offered.

If a family refuses to return to their country of origin in situations where the local authority has no duty to support, any hardship that follows will not be caused by a failing on the part of the authority. This is because the family is making a choice not to return to the country of origin when it is open to them to do so. See Part 14 below for guidance when parents refuse the offer of tickets to their country of origin.

13.1 Family returns process

The family returns process was introduced by the Government in 2011 in order to meet its commitments to end the detention of children. The process consists of four main stages: decision-making; assisted return (including the family conference); required returns; and ensured returns. The process is designed to facilitate the return of families with dignity, ensuring the welfare of children at all times.

The family returns process is facilitated through the Independent Family Returns Panel,³⁴ consisting of a range of professionals, to ensure return plans take full account of the welfare of children involved.

Families outside the asylum process, such as visa overstaying families, are included in this process. Local authorities cannot however refer into the project, as this is managed centrally by the UKBA.

14. Parents who refuse to return to their country of origin after assessment

Where a local authority has carried out the necessary assessments in line with their legal duties and concluded that a family can freely return to the country of origin without a breach of human rights or Community Treaty rights and an applicant then refuses an offer of assistance in returning home, any degradation caused will not result from a human rights breach by the local authority, but from the applicant's own decision to refuse the offer of assistance. This was confirmed by the judgement in *R (Kimani) v Lambeth [2005]*.

If a parent refuses the offer of assistance in returning home and intends to remain in the UK unlawfully, considerable concerns arise with regards to the wellbeing and safety of the child/children. In such circumstances, it is good practice to undertake the following steps:

- 1) Liaise with the Local Immigration Team (LIT) so that the case is given priority by the UKBA Enforcement and Removals.
- 2) Confirm with the relevant embassy and/or the UKBA whether the family have valid travel documents in order to facilitate the family's removal from the UK.
- 3) Work with the UKBA to ensure that the children are not left in the UK homeless and destitute and in breach of Immigration Rules.

If the parent informs the local authority that they have found friends or family who will support them, enquires should be made as to the nature of the support that will be provided and whether this will be suitable to meet the children's needs.

If the family move to stay with friends or family in a different local authority area, the following steps should be taken:

- 1) Ensure that a referral is made to Children's Services in the new local authority, that the completed CIN assessment is provided and that all child protection issues are fully addressed (links established with GP, schools informed, etc). It is also good practice to inform other agencies involved in the family's support of the outcome of the assessments and the new

³⁴ More information at:

<http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/04independent-family-returns/>

location of the family – this will include the children’s schools, their GP and any NHS involved services.

2) Share with the new borough the findings of the Human Rights Assessment and the decision to withhold/withdraw support under Schedule 3 NIAA 2002.

At all stages in this process, the offer of voluntary return and a re-settlement package should be kept open to the family, allowing maximum time for enforced removal to be avoided.

15. Families who are granted Indefinite Leave to Remain in the UK

When families supported under Children Act are granted leave to remain in the UK, they no longer have NRPF and are entitled to work and/or access mainstream benefits.

Families may require support in making the transition from social services support and it is good practice to make referrals to the agencies listed below. Reasonable flexibility may be required in this transition period to allow for potential delays in documents being issued and support provided.

Adults requiring National Insurance numbers should call the following number 0845 600 0643. This is the first step in accessing benefits or employment.

In order to apply for benefits, families should be referred to Job Centre Plus (JCP). Families may wish to seek advice from Citizens Advice Bureau or welfare rights services to discuss their options and entitlements.

In order to access housing support, families should be referred to local authority housing departments. Options to transfer existing license agreements into tenancies using Housing Benefit should be explored with landlords, if families would like to stay in their current accommodation.

Adults with social care needs should be referred to the relevant local authority department for an assessment under community care legislation and consideration for a personal budget.

It is good practice on terminating Section 17 Children Act support to write to clients explaining why this support is finishing and what the implications of this will be. Any organisations involved in the care of the family should also be informed of their changing circumstances.

16. NRPF Connect

NRPF Connect will be a national NRPF database for local authorities to record and manage their NRPF services and share certain information about cases with the UKBA.

The NRPF Database will provide the necessary structure for local authorities to accurately account for the NRPF cases they support under social services legislation and share information with the UKBA over a secure intranet system by making use of the Government Connect Secure eXtranet (GCSX). The database will also provide the UKBA with the information required to track and monitor those families and individuals that have not left the country and remain in receipt of services through local authority assistance.

NRPF Connect will allow local authorities and the UKBA to share certain information regarding cases supported, identify any potential fraud and allow for joint resolution of cases. Resolution of cases includes removing individuals who should not be in the UK (but cannot be left homeless by the local authority), or granting Leave to Remain to those who cannot be reasonably be expected to leave the UK.

For updates on NRPF Connect, please check the NRPF Network webpages:

http://www.islington.gov.uk/community/equalitydiversity/refugees_migrants/nrpf_network/nrpfconnect.asp

17. Access to health care

Health care provided by the National Health Service (NHS) is not a 'public fund' and therefore the NRPF condition does not affect access to NHS healthcare. Schedule 3 NIAA does not restrict access to healthcare, however some elements of a care package provided under the National Assistance Act 1948 may be denied or chargeable for certain persons from abroad if they are services provided by the NHS rather than the local authority.

There are separate eligibility processes for people subject to immigration control accessing healthcare provided by the NHS. This sometimes conflicts with eligibility for social services support.

17.1 Primary health care

There are no exclusions to primary care on the basis of immigration status, although the Government will be publishing a consultation in Autumn/Winter 2011 regarding potential charging for primary care services for migrants.

GPs have discretion whether to register patients, regardless of their immigration status, so long as they do not discriminate in so doing. If their list is open, and they accept a British patient in their catchment area, but refuse to register a foreign national in their catchment area, they may be acting in a discriminatory manner.

17.2 Secondary health care

In England, access to free hospital treatment for those with no recourse to public funds depends on whether they can be considered 'ordinarily resident' in the UK (this is a separate definition of 'ordinary residence' to that which is used for the purpose of accessing social services support). A Court of Appeal ruling in March 2009 (*R (YA) v Secretary of State for Health*) found that failed asylum seekers could not be considered as 'ordinarily resident' in the UK and were therefore not entitled to free secondary care. This ruling overturned a preceding ruling by the High Court, which had allowed failed asylum seekers access to free secondary care for a limited period of time.

The Court of Appeal ruling also found that failed asylum seekers cannot be considered exempt from charges by having resided lawfully in the UK for one year prior to treatment, as they do not have the necessary 'leave to enter' in order to reside lawfully in the UK.

There are some exceptions to this, including where a failed asylum seeker requires 'immediately necessary treatment', including all maternity treatment. Treatment should be limited to that which is necessary to enable them to return home, however Trusts should have regard for the likelihood of that person going home. 'Urgent treatment' is what clinicians do not consider immediately necessary, yet it cannot wait until the person can be reasonably expected to return home e.g. cancer. The clinician would need to assess the likelihood of the person returning home in such situations.

Visa overstayers and undocumented migrants are not eligible for secondary care and the same restrictions apply as above. PCTs retain responsibility for funding treatment provided to those who are chargeable for secondary treatment.

Asylum seekers remain eligible for free hospital treatment as well as those being supported under Section 95 or Section 4 Immigration and Asylum Act IAA, as do those on valid visas who can be considered 'ordinarily resident' in the UK. Children who are supported under the Children Act 1989 are exempt from the Charging Regulations, but their parents may not be, depending on their immigration status.

In Scotland and Wales, secondary healthcare remains free of charge for failed asylum seekers, although this does not extend to other groups that are unlawfully present.

18. Access to education

Education is not a 'public fund', so the NRPF condition does not directly impact on access to education.

Primary and secondary education remains free of charge to children under the age of 18, irrespective of immigration status.

Free school meals are not a public fund. Local authorities supporting children under the Children Act who are in school should develop policies regarding payments for school meals.

Post-secondary education is chargeable and separate fees will apply to 'home'/EEA students and non-EEA students. For more information, see:

http://www.ukcisa.org.uk/student/fees_student_support.php

19. Access to legal aid

Legal aid is not a 'public fund', so the NRPF condition does not affect access to legal aid services. However, separate restrictions may apply.

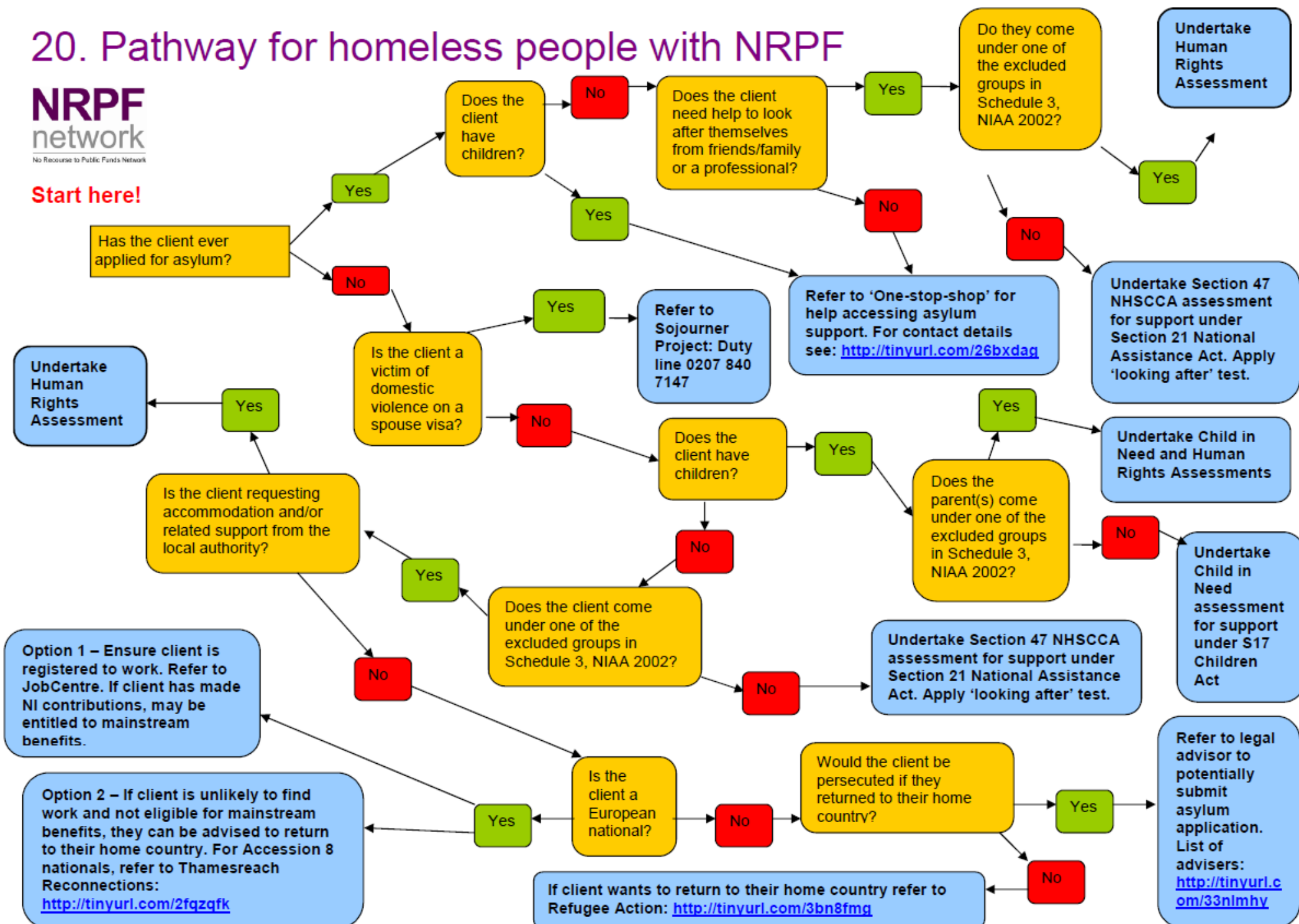
The Legal Aid, Sentencing and Punishment of Offenders Bill will reduce the availability of legal aid for certain areas of law, which will impact on people with NRPF seeking social services support. These include immigration, private family law and welfare benefits.

Legal aid provision will be retained in the areas of asylum, applications under the Domestic Violence Rule (DVR), community care, some family cases involving domestic violence and immigration detention. Judicial review of local authority assessments will also not be affected by the legal aid reforms.

20. Pathway for homeless people with NRPF



Start here!



21. Glossary of terms

Asylum seeker – Someone who seeks refuge in a foreign country because of war and violence, or out of fear of persecution under the terms of the 1951 UN Refugee Convention or Article 3 of the ECHR. In the UK, to be an asylum seeker, he/she needs to lodge an asylum application to the UK Border Agency (Home Office).

Refugee – Refugee status is awarded to someone the UKBA recognises as a refugee as described in the 1951 UN Refugee Convention.

A refugee is a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country...'

Refused asylum seeker – Someone whose asylum claim and appeal to the First-tier Tribunal (Immigration and Asylum Chamber) has been refused and has become All-Appeal Rights Exhausted (ARE).

Unaccompanied asylum seeking child – Unaccompanied children seeking asylum are children who have applied for asylum in their own right, who are outside their country of origin and separated from both parents or a previous/legal customary primary care giver.

Port-of-entry asylum seeker – Someone who applies for asylum at an airport, seaport or trainport when they first arrive in the UK.

In-country asylum seeker – Someone who applies for asylum after passing through immigration control at the UKBA offices in Croydon.

Visitor visa – A document granting temporary stay in the UK for up to six months.

Spouse visa – This visa is usually granted for two years, giving permission to enter or remain in the UK as the husband, wife or civil partner of a person who is settled here or applying to settle here.

EEA (European Economic Area) – The European Economic Area (EEA) comprises the 27 European Union countries, plus Iceland, Lichtenstein and Norway. Nationals of Switzerland, which is not in the EEA, are permitted to work and live in the UK in the same way as other EEA nationals.

The 27 EU countries are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and UK.

A2 (Accession 2 countries) – The Accession 2 (A2) countries joined the European Union on 1 January 2007. They are: Bulgaria and Romania.

Accession Worker Card - A2 nationals must apply for accession worker cards, as set out in the Accession (Immigration and Worker Authorisation) Regulations 2006. These cards restrict A2 nationals to working in certain sectors, including those with labour shortages.

Self-employed or self-sufficient A2 nationals are not required to apply for the accession worker card. The restrictions applicable to A2 nationals will remain until 31st December 2011. However, the government can decide to extend these restrictions for up to a further two years.

Visa overstayer – An overstayer is a person who was allowed into the UK for a limited period but who has remained longer than the time allowed without permission from the Home Office or under the immigration rules.

ILR (Indefinite leave to remain) – ILR is a form of immigration status given by the UK Border Agency. Indefinite leave to remain (ILR) is also called ‘permanent residence’ or ‘settled status’ as it gives permission to stay in the UK on a permanent basis.

ELR (Exceptional leave to remain) – ELR was a form of immigration status in use before April 2003. It was granted to asylum seekers who the Home Office decided did not meet the definition of a refugee as defined in the Refugee Convention but it decided should be allowed to remain in the UK for other reasons.

DLR (Discretionary leave to remain) – Discretionary leave is a form of immigration status granted to a person who the Home Office has decided does not qualify for refugee status or humanitarian protection but where there are other strong reasons why the person needs to stay in the UK temporarily.

Domestic Violence Rule (DVR) – This is an immigration application for women fleeing domestic violence who are in the UK on spouse visas, enabling them to apply for indefinite leave to remain (ILR) as long as they can provide evidence that the relationship broke down permanently before the end of their limited leave (or during the ‘marriage or probationary period’) as a result of domestic violence.

Section 95 support – This is accommodation and subsistence support provided to people within the asylum system under the terms of Section 95 Immigration and Asylum Act 1999.

Section 4 support – Section 4 of the Immigration and Asylum Act 1999 gives the UKBA power to grant support to some destitute asylum seekers whose asylum application and appeals have been rejected. Support granted under Section 4 is also known as ‘hard case’ support.

European Convention on Human Rights (ECHR) – Article 3 – Article 3 of the European Convention on Human Rights (ECHR) states that ‘No one shall be subjected to torture or inhuman or degrading treatment or punishment’. A person can make a claim for protection based directly on Article 3 of ECHR as states are prohibited from returning a person to a country where she/he may suffer a violation of his/her rights under Article 3.

European Convention on Human Rights (ECHR) – Article 8 – Article 8 of the European Convention on Human Rights (ECHR) states that ‘Everyone has the right to respect for his private and family life, his home and his correspondence’. A person can make an application to stay in the UK based on Article 8 of ECHR as states are prohibited from returning a person to a country where she/he may suffer a violation of his/her rights under Article 8, unless those rights can be enjoyed in that country.

All appeal rights exhausted (ARE) – A person will become ‘all appeal rights-exhausted’ when their asylum claim and appeal to the First-tier Tribunal (Immigration and Asylum Chamber) have been refused.

UK Border Agency (UKBA) - The UKBA is a central government department within the Home Office which considers applications for permission to enter or stay in the UK, such as those for citizenship and asylum. More broadly, the UK Border Agency is responsible managing border control, and enforcing immigration and customs regulations.

22. Abbreviations

AIT – Asylum and Immigration Tribunal

ARE – Appeal rights exhausted

CA – Children’s Act 1989

DVR – Domestic Violence Rule

ECHR – European Convention on Human Rights

EEA – European Economic Area

HRA – Human Rights Act

IAA – Immigration and Asylum Act 1999

ILR – Indefinite Leave to Remain

LGA – Local Government Act 2000

NAA – National Assistance Act 1948

NHS – National Health Service

NIAA – Nationality, Immigration and Asylum Act 2002

NRPF – No Recourse to Public Funds

UASC – Unaccompanied Asylum Seeking Child

UKBA – United Kingdom Border Agency

23. Further information

AIRE Centre: <http://www.airecentre.org/>

Children and Families Across Borders: <http://www.cfab.uk.net/>

Child Poverty Action Group (2007) *Migration and Social Security Handbook: A Rights Guide for People Entering and Leaving the UK* (4th edition), London: Child Poverty Action Group

Family Rights Group (2008), *Family Support Services for Asylum Seekers*
<http://www.frg.org.uk/pdfs/11A%20MASTER.pdf>

Home Office *Country of Origin Information* http://www.homeoffice.gov.uk/rds/country_reports.html

NRPF Network: www.islington.gov.uk/nrpfnetwork

NRPF Network (2009) *Guidance on assessing and supporting adults with no recourse to public funds*
http://www.islington.gov.uk/DownloadableDocuments/CommunityandLiving/Pdf/adults_nrpf_guidance.pdf

NRPF Network (2007) *Human Rights Assessment*
http://www.islington.gov.uk/DownloadableDocuments/HealthandSocialCare/Rtf/human_rights_assessment.rtf

Refugee Action: <http://www.refugee-action.org.uk/>

Rights of Women <http://www.rightsofwomen.org.uk/>

Southall Black Sisters: <http://www.southallblacksisters.org.uk/>

Thamesreach Reconnections: <http://www.thamesreach.org.uk/what-we-do/london-reconnection-project/>

24. Acknowledgements

This guidance was written by Jonathan Price, with input from Henry St Clair Miller. The NRPF Network would like to thank Cate Briddick (Rights of Women) and Emmy Chater (Newport City Council) for their comments on the guidance and Rosemary Muffit (Newcastle City Council) for her legal edit.

For further information please contact:

E: nrpf@islington.gov.uk

T: 020 7527 7121

NRPF Network

Islington Town Hall, Upper Street, London, N1 2UD

www.islington.gov.uk/nrpfnetwork

© Islington Council, December 2011