HOUSING AND THE CHILDREN ACTS

1. For families with children, where other avenues have failed or are unavailable, accommodation (and support) can potentially be sought under s17 Children Act 1989.

2. For children who are not able to live with their families, accommodation and support can be accessed under s20 Children Act 1989.

3. This paper examines what accommodation powers and / or duties are available, how they can be accessed and the common hurdles and issues that arise. The paper mainly concentrates on s17 Children Act 1989 but there is a short section at the end on s20 (s20, the rights of looked after children and leaving care duties are a complex area which I do not attempt to cover comprehensively in this paper).

4. There is an initial hurdle to be jumped in order to access services under a number of community care provisions including s17 Children Act 1989. (Note that Schedule 3 below does not apply to children seeking accommodation under s20 of the Act) :

SCHEDULE 3 NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

5. Schedule 3 NIAA 2002 excludes the following groups of migrants from specified assistance, including assistance under s17 Children Act 1989, Part 1 of the Care Act 2014, s1 Localism Act 2011 and section188(3) or 204(4) of the Housing Act 1996:
    i. A person with refugee status granted by a non-UK EEA country and any dependents;
    ii. Non-UK EEA nationals and any dependents;
    iii. Failed asylum seekers who have failed to comply with removal directions;

iv. A person unlawfully present in the UK;

v. A failed asylum seeker with family who has not taken reasonable steps to leave the UK voluntarily.

Exemptions from exclusion:

6. Schedule 3 does not prevent provision of support to a British Citizen or a child. Further:

> "*Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance* ***is necessary*** *for the purpose of avoiding a breach of—*
>
> *(a) a person's Convention rights, or*
>
> (b) *a person's rights under the Community Treaties.*"

7. So, before considering asking for an assessment under s17 Children Act 1989, you need to have established that either:
   - Schedule 3 does not apply (e.g. your client is a Zambrano carer or your client is a child seeking s20 support) or
   - Sched 3 does apply but it is going to be necessary for the Local Authority to provide services to your client in order to prevent a breach of their convention or treaty rights.

8. Examples of where it is arguable that services will be necessary to avoid a breach of convention or treaty rights:
   - If services are not provided the applicant would have to leave the country and abandon an existing immigration application made on article 8 grounds
   - If services were not provided, a British Citizen child would have to leave the EU area with their primary carer
   - The result of not receiving services would be a breach of Article 3 (see *Limbuela v Secretary of State for the Home Department [2005] UK HL 66)* and *Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406.)*

9. Practically, this means that a Local Authority is going to have to carry out two assessments where Schedule 3 bites. One assessment to determine whether the applicant fits the criteria for services and a second to determine whether those services are *necessary* to prevent a breach of the applicant's convention or treaty rights.

Birmingham City Council v Clue [2010] EWCA Civ 460

10. Ms Clue was a Jamaican national and an over-stayer. She had three children and applied for leave to remain on the basis that the oldest child had been living in the UK for more than 7 years. The application was made on Article 8 grounds.

    She applied to Birmingham City Council for accommodation and assistance under s.17 Children Act 1989. Birmingham declined on the basis that Schedule 3 NIAA meant that she was excluded from access to s17 support and Ms Clue and her family could return to Jamaica, where they could continue to enjoy a family life. Accordingly there was no breach of Art 8. Birmingham offered a payment for travel and a resettlement grant. Ms Clue made a claim for judicial review, which was upheld. Birmingham appealed.

    Held:

    a) Unless the application for leave to remain is clearly hopeless or abusive, it is not for the Council to consider the merits of the application for leave to remain, where made explicitly or implicitly on convention grounds (which in relation to the 7 years policy was clearly the case). This is properly the province of the Secretary of State to determine.
    b) Where the application would be terminated should the applicant leave the country, as here, the Council's decision would effectively end the application for leave to remain. This was not the Council's decision to make.
    c) The financial situation of the Council is irrelevant. Where the applicant (i) is unlawfully present in the UK within the meaning of para 7 of Schedule 3 Nationality, Immigration and Asylum Act 2002; (ii) is destitute and would (apart

from Schedule 3) be eligible for services of the kind listed in para 1 of Schedule 3; and (iii) has made an application to the Secretary of State for leave to remain which expressly or implicitly raises grounds under the Convention, the demands on the Council's resources can play no part in its assessment of need.

d) Birmingham's human rights assessment in the case was unlawful. Firstly, it took no account of the application for leave to remain. Secondly, the whole emphasis of the assessment was on the right to family life, "there is no indication that Birmingham recognised that to require the claimant and her family to return to Jamaica would interfere with the family's right to private life (their relationships and social, cultural and family ties in the UK) or that they understood that the private life rights of children who were born in the UK or came here at an early age were of particular weight". Accordingly, the human rights assessment was inadequate.

R (KA) v Essex County Council [2013] EWCA Civ 1261

11. The claimant was unlawfully in the UK. She applied for accommodation and other assistance for herself and her three children under Children Act 1989 section 17. The council declined that help.

    The High Court quashed that decision on the basis that a refusal of assistance would frustrate her ability to pursue appeals about her immigration status in this country and thus infringe her procedural rights under Article 8. The council appealed. The Court of Appeal dismissed the appeal. It had been rendered academic by recent UKBA guidance and by the fact that the claimant had an imminent hearing before a tribunal about her removal from the UK.

S17 CHILDREN ACT 1989

12. Section 17 provides as follows:

"(1) it shall be the general duty of every local authority... -

a) *to safeguard and promote the welfare of children* ***within their area*** *who are in need; and*

b) *so far as is consistent with that duty, to* ***promote the upbringing of such children by their families***

, by providing a range and level of services appropriate for those children's needs…

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

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include ***providing accommodation and giving assistance in kind or in cash…***

(10) For the purposes of this Part a child shall be taken to be in need if -

a) *he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;*

b) *his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services… or*

c) *he is disabled*

and 'family' in relation to such a child includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part…

'development' means physical, intellectual, emotional, social or behavioural development; and 'health' means physical or mental health"

S11 CHILDREN ACT 2004

13. In the exercise of any s17 Children Act 1989 functions (including assessment and service provision), the Local Authority must comply with s11(2) Children Act 2004 (the "welfare duty"):

    (*2) Each person and body to whom this section applies must make arrangements for ensuring that—*

    (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and

    (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need

14. Section 11 does not require that the children's welfare should be paramount or even a primary consideration. However as held in *Nzolameso v. City of Westminster [2015] UKSC 22*, if ECHR rights are engaged, they are to be interpreted and applied consistently with international human rights standards, including Article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"), which provides:

    "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

KEY QUESTIONS FOR THE LOCAL AUTHORITY

15. The two initial key questions are:

    - Is the child **in the area**
    - Is the child **in need**

IN THE AREA

16. The duty of assessment lies in the district where the child is physically present. There is no concept of "ordinary residence" or "local connection". The area where the child is currently residing (even if it has only been for a few days) counts, as does the area where the child is at school or college. Where a child is at school in a different area to the place s/he is sleeping – then both Local Authorities have duties.

17. Local Authorities must co-operate with each other to fulfil their duties in respect of children (see s27 Children Act 1989 and s10 Children Act 2004). Where an applicant approaches one authority, but that authority is of the view that another authority has the duty, then the proper approach is for the first authority to seek the co-operation of the second rather than shuttling the applicant backwards and forwards between different Local Authorities.

R (on the application of Stewart) v LB Wandsworth, LB Lambeth, LB Hammersmith & Fulham [2001] EWHC Admin 709

18. Ms Stewart applied for s17 assistance in all three boroughs. The children attended school in Wandsworth, but lived in Lambeth in a hostel owned and managed by Hammersmith & Fulham. The court found that the duties of assessment lay with both Wandsworth and Lambeth and that the duties of co-operation in section 27 Children Act 1989 applied.

19. The principles set out in the Stewart case were confirmed in *R(M) v LB Barking & Dagenham, Westminster City Council [2002] EWHC 2663 (Admin)* and *R (*AM*) v London Borough of Havering and London Borough of* Tower Hamlets *[2015] EWHC 1004 (*Admin).

IN NEED

20. A child without accommodation is a child in need – *R v Northavon District Council, ex p Smith [1994] 2 AC 402 , R (G) v Barnet LBC [2004] 2AC 2018 and R (G) v Southwark LBC [2009] 1WLR 1299.* A child whose parent is unable to access the basic necessities of life due to lack of money (i.e. a destitute child) is also in need.

21. For families without recourse to public funds, the assessment of need is, in essence, a destitution assessment. A family will be destitute if:

    - they do not have adequate accommodation or any means of obtaining it (irrespective of whether other essential living needs are met); or
    - they have adequate accommodation or the means of obtaining it, but cannot meet essential living needs.

22. Even if a family has the resources to secure its own accommodation, if it is in practice unable to do so either in the immediate future or at all (e.g. because they are caught by the Right to Rent restrictions), the decision that a child is not "in need" will be unlawful. It is an error of law to conflate the availability of accommodation with the resources with which to obtain accommodation: see e.g. *R. (N) v Greenwich LBC* [2016] EWHC 2559 (Admin).

23. The question of whether a child is in need is a decision for the local authority to be assessed on normal public law principles. Accordingly a finding that a child is not in need may be challenged on grounds that it is irrational in light of the evidence, that the authority has failed to gather sufficient evidence to make that finding, on

procedural fairness grounds (see, e.g., *R (S and J) v Haringey* [2016] EWHC 2692 (Admin)), or on the basis of a misdirection of law.

WHEN DOES A LOCAL AUTHORITY HAVE TO ASSESS?

24. S17 is to be read with Schedule 2, Part 1 of the Act, which provides:

> Para.1(1) *Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area…*
>
> *Para.3 (1) Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs …*

25. In R(G) v Barnet LBC [2003] 3 WLR 1194 (discussed in more detail below), the House of Lords held that, although s17 does not impose a mandatory duty on a Local Authority to take steps to meet the needs of a child in need, a Local Authority is under a duty to *assess* the needs of a child that appears to be in need. A refusal to meet assessed needs will be challengeable only on public law grounds.

26. The bottom line is that where "it appears to a Local Authority that a child within their area is in need", they must carry out a full child in need assessment in line with the statutory Guidance and in line with the Local Authority's protocol.

*R (*AM*) v London Borough of Havering and London Borough of* Tower Hamlets *[2015] EWHC 1004 (*Admin)

27. There are no shortcuts – in this case Havering's adoption of an "initial" pre - assessment stage was found to be unlawful.

28. AM's children were in Havering's area, having been placed there by Tower Hamlets under an interim homeless duty. The family were found to be intentionally homeless by Tower Hamlets and the family applied for s17 assistance to Havering. Havering

refused to carry out an assessment, relying on various arguments including the proposition that in their non-statutory "initial assessment" they had taken the view that AM's children were not in need and so no full assessment was required. That argument was rejected.

29. The judgment (at para 44) noted "*the statutory threshold, across which the obligation on a local authority to assess a child in need arises, is a relatively low one".*

30. Havering's decision that the children did not cross this low threshold for a full assessment was found to be "*unsustainable*", given the history of the case and the fact that "*Homelessness in itself is a cause for finding that a child is a child in need (see Northavon ex p Smith above)"*

31. The duty to assess is an ongoing one, so where there is a change of circumstances, the Local Authority will be obliged to re-assess:

R (on the application of Kareem) v Lewisham LBC [2017], QBD (Admin)

32. The mother's claim was based upon a decision made by the local authority at the end of the previous year. At that time the material before the local authority was such that it was entitled to take the view that the mother was not credible and a decision was made that the children were not in need. However there had been further material before the local authority the following month when the judicial review was started. There was an ongoing duty on the local authority under s.17 to consider whether it was appropriate to treat the children as children in need.

33. Another successful challenge - *R (on the application of CO) v Lewisham LBC* [2017] QBD (Admin) - also highlighted the importance of the local authority keeping an open mind, carrying out sufficient investigation and reviewing its assessment in the light of new information provided to it, as well as following rules of procedural fairness in permitting the applicant to address matters of concern before the authority reached a negative conclusion.

34. The local authority had conducted an assessment while the applicant was still accommodated, doubting her credibility. In this assessment it predicted that relatives would assist the Claimant with accommodation. After she became homeless and ended up spending all her money in bed and breakfasts and spending nights in hospital emergency rooms it failed to update those conclusions or reconsider them in light of the reasons provided by the relatives as to why they were withdrawing their support. Not taking into account their explanations were serious omissions by the local authority, as it failed to get a full and accurate picture of the family's situation. The local authority's duty under s.17 was an ongoing one, and after the family were no longer in stable accommodation it had a duty to reassess their needs. It failed in its obligation to carry out proper enquiries.

35. As well as failing to carry out a sufficient investigation, the decision was also procedurally unfair because it failed to give the applicant an opportunity to address its concerns: the local authority should have given the mother a list of all her claims that it believed lacked credibility so that she had the opportunity to provide them with further information.

GUIDANCE

36. The current statutory guidance is "***Working together to Safeguard Children***". The most recent version is dated July 2018.

37. The purpose of an assessment (para 38) is to:

- Gather information about the child and family
- Analyse their needs and / or the nature and level of any risk and harm being suffered by the child;
- Decide whether the child is in need (section 17) and / or is suffering, or likely to suffer, significant harm (section 47) and

- Provide support to address those needs to improve the child's outcomes to make them safe.

38. Every assessment should be focussed on outcomes, deciding which services and support to provide to deliver improved welfare for the child (para 63).

39. Every Local Authority is required to "*develop and publish local protocols for assessment. A local protocol should set out clear arrangements for how cases will be managed once a child is referred into local authority children's social care and be consistent with the requirements of this statutory guidance. The detail of each protocol will be led by the local authority in discussion and agreement with the safeguarding partners and relevant agencies where appropriate*" (para 39).

40. In the case of families with no recourse to public funds, non-statutory guidance is also available in the form of the ***Practice Guidance for Local Authorities - Assessing and Supporting Children & Families who have No Recourse to Public Funds*** (January 2017) ('the Practice Guidance').

Timelines:

41. The statutory guidance provides that within one working day of a referral being received, a local authority social worker should make a decision about the type of response that is required and acknowledge receipt to the referrer (para 71).

42. The *maximum* timeframe for completing an assessment is 45 working days (para 75).

Interim provision of accommodation / support:

43. Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers *should not wait until the assessment reaches*

a conclusion before commissioning services to support the child and their family (para 76).

44. Given that there is no equivalent of s188 (mandatory interim accommodation) in the Children Act 1989, it is vital to set out in detail what urgent services are needed at the outset and to point to the relevant sections of the guidance if you are to obtain emergency housing or services for your clients.

45. Housing practitioners should be aware that delegated functions for emergency funding for a judicial review of a failure to provide interim accommodation are now available for both s20 and s17 cases.

46. However note the very restrictive timelines – judicial review delegated functions may only be used when *"proceedings need to be issued forthwith without the need to follow (or continuing to follow) the pre-action protocol in order to secure accommodation for the client or their family where they are street homeless or will otherwise become so in forty-eight hours…"* [1]

ASSESSMENT OUTCOMES

47. The assessment should identify any needs that the child has and identify how and whether those needs will be met, including, if appropriate, via services from the Local Authority.

48. It is important to note that Section 17 does not impose a *duty* to provide services, or accommodation even if the assessment concludes that services are needed:

[1] The relevant table is here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/737292/Table_of_Delegated_Authorities_Procedure_Regulations_September_2018_Update.pdf

R (on the application of G) v Barnet LBC [2003] UKHL 57:

> *"a child in need … may be eligible for the provision of those services, but he has no absolute right to them" [85].*

R (VC and others) v Newcastle City Council [2011] EWHC 2673 (Admin):

> *"although there is a duty to assess, there is not, as such, a duty to provide the assessed services" [21]*
>
> However
>
> *"Any refusal to provide assessed services under Part III of the CA 1989 is amenable to challenge by way of judicial review in accordance with recognised principles of public law, one of which is that discretionary statutory powers must be exercised to promote the policy objectives of the statute … the broad policy and objects of Part III of the Children Act 1989 are that Local Authorities should provide support for children and families… moreover, in certain circumstances Article 8 or even Article 3 may be engaged" [25]*
>
> *"furthermore, where the assessment is to the effect that there is a need for services, any decision not to provide services will be subject to strict and … sceptical scrutiny" [26].*

49. If the decision whether or not to provide services engages human rights considerations, particularly Article 3, then there may be a positive obligation on the Local Authority to provide support.

Services for whole family or just the children?

50. In theory the Local Authority can conclude that services are owed to the child (under s20 Children Act 1989) but not their family. Such a decision (in the absence of other child protection issues) may be contrary to both the requirement to promote the upbringing of children by their families (in s17), s11(2) of the 2004 Children Act and Article 8.

R (G) v Barnet; R (W) v. Lambeth and R (A) v. Lambeth [2003] UKHL 57

51. G was a Dutch national and mother of a 14 month old child. She was ineligible for housing assistance and the local authority had offered to meet her son's needs under s.17 by providing them both with tickets to the Netherlands, which she refused. W was a mother with two children aged 7 and 16 who the local authority had refused to house on the basis that she had made herself intentionally homeless. A was a mother of two autistic children who had concerns about the quality of the accommodation in which she was living.

52. In the cases of both G and W, the local authority accepted that they would come under a duty to house the children should their parents, "be prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care" However they refused to also house the parents.

53. The evidence presented by the local authorities suggested that what was going on was a game of 'chicken' between local authority and parent – that with this threat floating around in the background, parents tended to suddenly become resourceful and solve their housing problem for themselves rather than have their children placed in a children's home or with foster carers (see paras 49-50).

54. The House of Lords confirmed that the duty in s 17(1) is merely a target duty owed in general to the population within the boundaries of the local authority's area, not a specifically enforceable duty owed to particular children: *"A child in need … is eligible for the provision of those services, but he has no absolute right to them".* This case has been widely used by Local Authorities to refuse accommodation to parents of children found intentionally homeless under the 1996 Housing Act.

55. Whilst the G, W and A cases were decided before the Children Act 2004 was in force and thus, before the case law developing the principles of best interests assessments

under section 17, the higher courts have continued to uphold some decisions of Local Authorities to offer s20 rather than s17 support.

R (Bates) v Barking and Dagenham LBC [2012] EWHC 4218 (Admin)

56. The local authority had refused to accommodate Mrs Bates with her children, because of concerns that she was intentionally making herself homeless, refusing to engage with other local authorities or accept an offer of accommodation, and hadn't taken appropriate actions or steps to stop becoming homeless despite professional advice. She was said to be the author of her own misfortune. Unless she changed her approach to her own circumstances, a recommendation would be made to accommodate the children separately from their mother under s.20. The court was referred to *G v Barnet*, and accepted that a local authority could have a policy of this kind which was aimed at the very least to provide a strong prompt to the parent.

57. The principle was reiterated again in *R (on the application of Jalal) v Greenwich* [2016] EWHC 1848 (Admin). This was a father of children declared intentionally homeless. The defendant found that the children were not in need. It extended the temporary accommodation by a few weeks before issuing a decision letter stating that the claimant had the means to secure other accommodation and if he did not do so, it would be assumed that his parenting skills were insufficient and a strategy meeting would be convened with a view to accommodating the children on their own under s.20. On the facts the court found that the local authority had taken sufficient steps to support the family under s. 17 and that its offer to accommodate the children separately was not a breach of Article 8.

58. These cases clearly are of greater significance where the household has been declared intentionally homeless, than destitution cases where the family are less likely to have other options.

59. In *R (on the application of PK) v Harrow LBC* [2014] EWHC 584 (Admin), the local authority's refusal to accommodate the parent together with her children was

declared unlawful. In that case Harrow simply announced that they would accommodate the children, and declared that they had no obligation to the mother. No human rights assessment of any kind was carried out to justify this stance, and the decision was overturned by the High Court.

60. Any decision to refuse to accommodate a family together is at least potentially capable of being challenged as inconsistent with the general duty in section 17(1)(b) to promote the upbringing of children in need by their families, and the duty under section 11(2) of the 2004 Act as well as on public law grounds. The younger the child, the less likely s20 accommodation is to be reasonable. Whether or not the refusal to accommodate the family together amounts to a breach of its members' human rights is a matter for the court to scrutinise rather than a matter where the local authority merely needs to show that these rights were taken into account. (*Belfast City Council v. Miss Behavin Ltd [2007] UKHL 19*). *Clue* emphasises that resource shortages cannot be relied on by the local authority to justify action which breaches a person's human rights.

61. Despite the cases cited above, it is unusual for a Local Authority to be serious about taking children into care (with the enormous costs implications this entails), when there are no concerns about the suitability of the parents. Where NRPF households are being assessed, Local Authorities are far more likely to determine that the family is not destitute as a gatekeeping tactic (which can be harder to challenge) than seriously propose taking the children into care.

Assisting families to return to their country of origin

62. The key case on this issue is *R (Clue) v Birmingham CC* [2011] 1 WLR 99 (see above). Save in obviously hopeless or abusive cases, the local authority is not permitted to prejudge the outcome of an applicant's application for leave to remain based on human rights, by assisting families to return to their country of origin.

63. This means that a pending application for leave will normally mean that it would be a breach of the procedural rights inherent under the Convention to require or to effectively require a person to leave the UK for their country of origin.

64. Where there are no live immigration issues, a local authority may be permitted to consider whether the child's needs can be met and any breach of human rights avoided by assisting the family to return to its country of origin.

65. However in *KA (Nigeria) v Essex County Council* [2013] 1 W.L.R. 1163, the court considered a case where there was no outstanding appeal, but there was a *potential* appeal against removal directions, once they were issued. It was recognised by the court that a family in this situation had no right of appeal against the refusal decision, but could appeal a decision to issue removal directions, once made. It was held that if a decision by the local authority not to provide support had the effect of depriving a person of that right of appeal, this could itself constitute a breach of human rights and so support should be provided to avoid the family being forced to leave the country and thereby forego their ability to appeal such future removal directions.

WHAT SERVICES CAN BE PROVIDED?

66. The following are services that may be provided following an assessment:

- Accommodation with subsistence support in cash or vouchers or a combination of the two;
- Accommodation alone (e.g. if client is working or is receiving child support etc. sufficient to meet the subsistence needs of the family);
- Deposit and advance rent if the family are able to support themselves or access welfare benefits once they have secured accommodation;
- Subsistence alone (e.g. if client is staying at relatives but the relative can't provide food / clothing);

- Services or cash to meet any other assessed needs including, potentially the costs of making an application for leave to remain / British Citizenship / application to lift a NRPF provision.

Local NRPF policies:

67. Many local authorities have policies outlining the type of support available to families with no recourse to public funds and the circumstances in which support will be provided. Some have set up special teams / pilots / even placing home office staff into social worker teams. It will be important to obtain copies of relevant policies / protocols when advising destitute s17 applicants.

Quality / location of accommodation:

68. Shared accommodation with strangers is common, as are out of borough or out of city placements. For example a woman applying for help in London with a pre-school age child without a job might be found accommodation in the North of England rather than in the area where she applies.

69. The quality can be very poor indeed. Because there is no statutory guidance or requirement that the property be "suitable" for the family, any challenge will be restricted to rationality grounds, breach of the s11 welfare duty (and the best interest principle) or a Local Authority's breach of its own policy.

70. Where conditions are likely to be hazardous or other breaches of the 2004 Housing Act are suspected (e.g. failure to licence a HMO either under mandatory or additional licencing provisions), then the council's Environmental Health Department (or more commonly, these days, the Private Sector Standards Team or similar) should be asked to inspect the property and take any necessary enforcement action.

71. Similarly if the overcrowding provisions of the 1985 Act are being breached, the Local Authority should be invited to take enforcement action.

72. Some Local Authorities will have policies about standards in temporary accommodation – it is worth obtaining and reading these to see if it is arguable that these standards do or should apply to s17 accommodation.

73. The social services complaints process is another option.

74. *R (on the application of) C, T, M & U v LB Southwark (2014), EWHC 3983* was an unsuccessful first instance challenge to the manner in which Southwark had discharged its duties to a family under s17 Children Act 1989 including the suitability of the accommodation provided. The High Court determined that the local authority had acted lawfully in providing B&B accommodation for eight months and by providing accommodation in a different area of the UK without a specific assessment evaluating the impact of this. The family's subsequent appeal challenging the High Court's decision to the Court of Appeal did not raise grounds in relation to the local authority's provision of accommodation.

75. There still may be potential to bring discrimination challenges to policy / guidance / practice that sets markedly different standards for children of migrant families with no recourse to public funds and children of settled families. For example, if guidance or policy discourages the use of shared accommodation for children on the basis of the potential damage to their welfare, then this concern surely must extend to all children.

Subsistence – how much?

76. Subsistence is assessed based on what is required to meet the child (and their carer's) basic needs. Many Local Authorities use the Section 4 rates as a guide. Any attempt to pay subsistence which leaves a family with less money than they would have under s4 rates should be challenged, as should any policy that prevents consideration of subsistence above these rates to meet specific needs.

77. Two important principles were established by caselaw in 2014:

a) subsistence should cover the basic needs of the children *and* their carers

b) a standard flat rate is lawful so long as extra payments are available to meet specified needs.

R (PO6) v LB Newham [2014] EWHC 251 (Admin)

"if the council are seeking to keep the family together when that is in the children's interests and to respect their Convention rights, it would make no sense to leave the adults to starve".

R (Refugee Action) v The Secretary of State for the Home Department [2014] EWHC 1033

This was a challenge to the level of support provided to asylum seekers under s95 of the Immigration and Asylum Act 1999, which is likely to be relevant to cases under s17 as it addresses the meaning of "essential living needs" which included:

- Sufficient food to keep healthy and avoid illness
- For those in receipt of support for extended periods, suitable clothing to avoid illness
- Essential toiletries
- The means to travel to appointments when they are out of reach
- The means to communicate with essential services
- Access to education and contribution to wider socialisation costs to promote their development
- Essential household goods such as washing powder, disinfectant etc.
- Nappies, formula milk and other special requirements of new mothers, babies and young children

Different families will require differing levels of support to meet these needs. A parent with HIV may need to spend more money on food to avoid illness. A family

placed a very long way from a school or social services building will need extra travel subsistence. A family with twin babies will have higher clothing and washing costs than one with a 2 year old and a 4 year old. A family with a child with learning disabilities may need to spend more money on activities and materials.

78. However a standard flat rate set out in a Local Authority policy based on section 4 rates may not be unlawful if the policy allows for additional assistance to be provided to address additional needs that are identified (e.g. the provision of school uniforms or additional assistance for a specific medical need). (*Mensah v Salford City Council & Bello v Salford City Council [2014] EWHC 3537 (Admin)*).

79. Requests for increased financial support over and above a Local Authority's standard rate can be made, but are only likely to be successful where detailed budgets for the family's income and outgoings are provided with evidenced projections for the additional spending required (i.e. why can't the current money cover the school uniform, how much will the uniform cost, where is the cheapest supplier, why can't the family buy the uniform second hand etc.).

APPROACHES TO NRPF ASSESSMENTS AND GATEKEEPING

80. Assessments of clients with NRPF can be arduous, humiliating and exhausting for clients. They need to be warned clearly about what to expect and what will be required of them. They also need to understand that the Local Authority may share information with the Home Office and may even ask an officer from the Home Office to be present at assessments[2]. Some, when they understand what is going to be asked of them, may decide not to go ahead with an application for support.

81. Local Authorities are assessing need and not what the child would have in an ideal world. The Local Authority will want to satisfy itself that the needs cannot be met

[2] There are Home Office enforcement officers embedded in at least 5 London borough NRPF teams.

elsewhere, e.g. by family, friends, charities, churches, mosques, foodbanks or absent parents (sometimes including those who have been perpetrators of domestic violence and have shown no interest in looking after their children).

82. Local Authorities may be particularly suspicious and harsh where a family have survived to date without access to public funds for a number of years and suddenly (after an immigration application has been made or a child has obtained British Citizenship) approaches as destitute. The question will be asked – why has the support suddenly dried up? The Local Authority is unlikely to be satisfied simply on the word of your client – they will want to speak to everyone who has supported the client in the past and find out why that support cannot continue. They will also want to see an applicant's bank statements (where bank accounts are held[3]) going back a number of years. Each and every transaction will need explaining if the source is not immediately clear.

83. This can be very distressing and difficult for applicants where family members do not want to speak to the authorities, or do not want it to be known that they had extra people living with them because of the potential effects on the host's benefit entitlement.

84. An applicant may have been working in breach of their leave conditions to support themselves and their family for long periods but the work has come to an end when the employer has found out the applicant's status. The applicant is going to have to deal with this in any assessment.

R (MN and KN) v LB Hackney *[2013] EWHC*.

85. In this case a family applied for assistance under s17 Children Act 1989 but were reported to have been evasive and unable to satisfactorily explain why their circumstances had changed such that they could no longer rely on friends and

[3] Since December 2012 banks and building societies have not been permitted to allow applications for bank accounts from persons without immigration status.

family to support them. The social worker decided that the children were not in need:

"[The family] have been reliant on the good will of their friends and family and this has been the situation since they came to the UK. They have not provided any information to indicate what has changed and why the support from family and friends can no longer be provided… [The family] have not explained why this good will and kindness has ceased and have given very scant information about how they have supported themselves in this country to date. They have provided no contact details for family and friends who provided assistance for the first nine years of their stay in the UK some of whom continue to provide financial assistance…"

"[The family] have sustained a life in the UK without services for 10 years. It is the author's view that this family is resourceful and has successfully managed to bring up two children without state support for the last 10 years and they will be able to continue to do so without state support."

The High Court upheld this approach:

"[U]nless and until a local authority has determined that a child within its area is "in need", its powers under section 17 to provide services to the child or the child's family are not engaged. Accordingly, since in this case the assessments undertaken by [the social worker] did not conclude, and Hackney did not decide, that as of 16 March 2012 the claimants were "in need", Hackney did not have power under section 17 to provide accommodation or any other assistance to the claimants or their parents [42]."

O, R (on the application of) v London Borough of Lambeth [2016] EWHC 937 (Admin)

86. This was a judicial review of a decision by Lambeth that services under section 17 were not required because the family were neither homeless nor destitute. The claim was brought by O, a child, through her mother PO as litigation friend. The family claimed to be homeless and destitute. At a first assessment, there were

unexplained payments into PO's account totalling about £9000 in the last year, from 'Eze CC'. In addition, Ms J, with whom they were staying, was claiming child benefit and child tax credit for O.

On a second assessment, four months later, PO presented bank statements showing no income after the first assessment. The assessing officer concluded that PO was likely to be still receiving the funds. During enquiries, PO had given inconsistent answers to questions about sources of income and had lied about having worked (in breach of her leave conditions). Contacts that were given to the Local Authority did not co-operate with enquiries or failed to provide full answers to questions put to them.

87. The Court found that it was reasonable to infer that PO was not destitute, given that the visible payments ceased after the first negative decision and there was no satisfactory explanation of that. The Court also found it was reasonable to infer that "*O and PO did not require accommodation because … PO had access to a more extensive network of support available to her than she was prepared to disclose in the assessment and that people in that network could continue to accommodate her.*"

88. On the extent and duty for the Council to make enquiries, the court said:

"Whether or not a child is 'in need' for these purposes is a question for the judgement and discretion of the local authority, and appropriate respect should be given to the judgements of social workers, who have a difficult job….[17]

…An applicant parent who is seeking to persuade a local authority that they and their child are destitute or homeless, so as to trigger the local authority's duties of consideration under section 17 Children Act 1989 is seeking a publicly funded benefit, to which they would not otherwise be entitled, which diverts those scarce funds from other Claimants. Even the process of assessment is a call on scarce public funds. It therefore

behoves such an applicant to give as much information as possible to assist the decision-maker in forming a conclusion on whether or not they are destitute [18].

89. A Local Authority however, cannot assume resources are available where there is no evidence of prior support or of an applicant withholding information. See *R(N) v Greenwich LBC High Court QBD 25 May 2016.*

APPLICATIONS TO LIFT NO RECOURSE TO PUBLIC FUNDS PROVISIONS

90. Where your client has leave to remain which is subject to a no recourse to public funds provision, it is possible to apply to have the provision lifted. The test that your client needs to meet is the standard destitution test described above.

91. There is a standard application form and your client will need to append documentary proof of their destitution and their circumstances. Where a client is already receiving support from a Local Authority under s17, it will be relatively easy to prove destitution so long as the Local Authority agree to confirm that they have found the family to be destitute. Advising about and completing the form is immigration advice regulated by the OISC.

92. The success rate for applications to remove the NRPF restriction is high – the Children's Society suggests around 1/3 of applications are successful, although the rate is higher in cases where it has supported the parent. The applications are typically processed in around 3 months. It is well worth encouraging families to make this application and there may be agencies or voluntary organisations able to support people to do this.

S20 CHILDREN ACT 1989

20 Provision of accommodation for children: general.

1. (1)Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

    (a) there being no person who has parental responsibility for him;

    (b) his being lost or having been abandoned; or

    (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care…

    (6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

    (a) ascertain the child's wishes and feelings regarding the provision of accommodation; and

    (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

2. S20 support is not subject to Schedule 3 and so it is available regardless of immigration status, so long as the child is in need and s/he is homeless because there is no one available to look after him or her.

3. Until the case of *R(G) v Southwark LBC [2009]* UKHL 26, many social services authorities routinely insisted that unaccompanied minors in their care were being assisted under s17 Children Act 1989 in order to avoid the more onerous duties under s20 and the leaving care duties that would follow. The case of G put a stop to this. It made it absolutely clear that an unaccompanied minor seeking support under the Children Act 1989 should be supported under s20 of that Act.

4. S20 accommodation "trumps" the duties under Part VII Housing Act 1996 and so social services cannot lawfully fulfil their duties by referring a child to the housing department[4].

5. There is (very helpful) statutory guidance on the procedure to follow where a 16 or 17 year old child is homeless:
"***Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation***" (originally published in 2010 but updated in 2018).

6. This guidance sets out how an application to either a social services department or a housing options centre should be dealt with in order to ensure that the child is a) not shunted between services , b) provided with interim accommodation without delay and c) provided with a joint assessment.

7. If a Local Authority accepts a young person to be a child in need and agrees that they are owed accommodation duties under s20, the young person will become a "**looked after child**".

8. There are substantial benefits to being accommodated under s20 rather than under Part VII including:

    a) There is no intentional homeless test – so, for example, a young person who has been kicked out of home for anti social behaviour is entitled to assistance

    b) The young person will be supported financially by social services. There is no need to claim Housing Benefit / Universal Credit / Income Support/JSA until the young person is 18 years old.

[4] Note, however a 16 or 17 year old cannot be compelled to accept s20 support and may elect to apply instead for Part VII Housing assistance.

c) When the young person becomes 18 years old they will still have priority need if they need to make a homeless application until they are 21

d) Once the young person has been in social services accommodation for more than 13 weeks they are entitled to:
    - A personal adviser
    - A pathway plan
    - And other services (including assistance with housing if appropriate) up until the age of 21 or up until they are 25 if they are still in education, work or training

9. Note, however, that the post 18 assistance specified in s23C of the Children Act 1989 is subject to Schedule 3. Accordingly a former relevant child's immigration status will need to be looked at carefully to ascertain what duties they may be entitled to once they reach the age of 18.