HOUSING FOR MIGRANTS WITHOUT ACCESS TO PUBLIC FUNDS

1. Accommodation (and support) can potentially be sought under the Children Act 1989, the Care Act 2014 and the Localism Act 2011[1]. This paper examines what accommodation powers or duties can be found in each Act and how someone who is ineligible for mainstream housing (because of their immigration status) may access services.

2. There is an initial hurdle to be jumped in order to access services under these Acts.

SCHEDULE 3 NATIONALITY, IMMIGRATION AND ASYLUM ACT 2002

3. 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:

4. 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.*"

[1] *There is also accommodation provision by the Home Office for some asylum seekers / ex asylum seekers. Rights to s95 and s4 are touched upon at the end of this paper. s20 Children Act 1989 accommodation for minors is not covered in this paper.*

5. So, before asking for an assessment under s 17 of the Children Act 1989, the Care Act 2014 or the Localism Act 2011, you need to have established that either:
    - Schedule 3 does not apply (e.g. your client is a Zambrano carer or your client has limited leave to remain) or
    - Schedule 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.

6. It may be arguable that services will be necessary to avoid a breach of convention or treaty rights where:
    - 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 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), Anufrijeva v London Borough of Southwark [2003] EWCA Civ 1406.) and De Almeida, R (on the application of) v Royal Borough of Kensington & Chelsea [2012] EWHC 1082 (Admin)*

7. Practically, this means that a Local Authority is going to have to carry out two assessments where Schedule 3 bites. One 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. This second assessment is often referred to as a Human Rights assessment.

8. The Children & Families Practice Guidance for Local Authorities[2] summarises the Human Rights assessment process as follows:

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

(1) Can the family freely return to the parent's country of origin?

[2] *Practice Guidance for Local Authorities - Assessing and Supporting Children & Families who have NRPF* (April 2018). I refer to this throughout this paper as 'The Children & Families Practice Guidance".

(2) If so, would return result in a breach of the family's human rights under the ECHR?

(3) Would return result in a breach of the family's rights under European treaties? (EEA nationals and dependent family members of EEA nationals)"

Birmingham City Council v Clue [2010] EWCA Civ 460

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

10. She applied to Birmingham City Council for accommodation and assistance under s.17 Children Act 1989. Birmingham declined on the basis that she was excluded by Schedule 3 NIAA and Ms Clue and her family could return to Jamaica, where they could continue to enjoy a family life. Birmingham offered a payment for travel and a resettlement grant. Ms Clue's claim for judicial review was upheld. Birmingham appealed:
    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 on convention grounds. This is 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. Where the applicant (i) is unlawfully present in the UK; (ii) is destitute and would (apart from Schedule 3) be eligible for services; and (iii) has made an application 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 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".

11. Practitioners should note that Paragraph 14 of Schedule 3 of the Nationality Immigration Asylum Act 2002 requires a local authority to inform the Home Office when a person requesting support is, or may be, excluded from receiving care and support on the basis that they are:
    a. suspected or known to be unlawfully present in the UK
    b. a refused asylum seeker who has not complied with removal directions, or
    c. a refused asylum seeker with dependent children who have been certified by the Secretary of State as having failed to take steps to leave the UK voluntarily.

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 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. 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 residing – 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).

20. More recently in *R (BC) v Birmingham City Council [2016] EWHC 3156 (Admin),* a Jamaican overstayer and her six year old son had been living with the mother's partner in Bromley. The relationship broke down in July 2016 and the mother moved in with her cousin in Birmingham. Her son stayed with a friend in London until October, when he joined his mother in Birmingham. A few days later, the family requested assistance from Birmingham City Council.

21. Birmingham City Council did not initially undertake a child in need assessment, instead offering the family transport back to Bromley, asserting that the other local authority was responsible because that was the family's area of origin in the UK. The judge found that, as the child was now living in Birmingham, the child's physical presence was sufficient to establish that it fell to Birmingham City Council to assess the child's needs under section 17.

IN NEED

22. 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.

23. For families without recourse to public funds, the assessment of need is, in essence, a destitution assessment. This is the same assessment that is used for asylum support. 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.

24. 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).

25. 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?

26. 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 …

27. 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.

28. 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.

29. This was confirmed in the case of *R (*AM*) v London Borough of Havering and London Borough of* Tower Hamlets *[2015] EWHC 1004 (*Admin) AM's children were in Havering's area, having been placed there by Tower Hamlets under an interim homeless duty. After Tower Hamlets decided the family were intentionally homeless, they applied to Havering for s17 assistance. 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.

30. Firstly "*the statutory threshold, across which the obligation on a local authority to assess a child in need arises, is a relatively low one"* and secondly 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"*

Ongoing duty to assess

31. The case of *R(AC & SH) v LB Lambeth Council* [2017] EWHC 1796 (Admin) involved a mother and two children. In September 2016, following an assessment of the family's circumstances, the local authority found the children not to be in need and gave 12 weeks notice to leave their accommodation. In December, the family's solicitors informed the local authority that the elder child had received a recent formal diagnosis of autism. The local authority decided that, although the elder child was a child in need due to his autism, this information made no significant changes to the family's circumstances or the outcome of the child in need assessment and did not undertake a new written assessment. The court found that the assessment was defective and the Local Authority were ordered to redo the child in need assessment and accommodate the family in the interim period

32. In *R (on the application of CO) v Lewisham LBC* [2017] QBD (Admin) the Local Authority had initially found the children not to be in need because the mother had support from family and friends, in addition to her own resources. The assessment raised concerns about the mother's credibility. Her relatives later provided statements to confirm they had withdrawn their support, and since March 2017, the family stayed in hotels. The local authority, placing reliance on the first assessment and doubts about the mother's truthfulness, found that the children were still not in need. The court found that the Local Authority's reassessment failed to properly consider the new evidence and so did not obtain a full and accurate picture of the family's situation, which was that the mother's income was insufficient to support her family and also fund accommodation.

GUIDANCE

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

34. The guidance provides that 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.

35. 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).

36. 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 (April 2018). I refer throughout this paper to this guidance as the Children & Families Practice Guidance. This is a very detailed and useful resource.

Timelines:

37. 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).

38. The *maximum* timeframe for completing an assessment is 45 working days from the date of referral (para 75).

INTERIM PROVISION OF ACCOMMODATION / SUPPORT:

39. 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 statutory guidance).

40. 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.

LEGAL AID ISSUES

41. There are still no delegated functions for emergency funding for a judicial review of a failure to provide accommodation under section 17 Children Act 1989. An emergency application on CCMS will have to be made. If work has to be carried out before emergency funding is granted, it will be at risk (compounding the fact that substantive pre permission judicial review funding is already at risk). In February 2019 the Civil Legal Aid (Procedure) (Amendment) Regulations 2019 SI No 130 took effect giving the director of legal aid casework the discretion to backdate certain legal aid determinations. That discretion applies where an application was made as soon as reasonably practicable and the LAA is satisfied that:
    - it was in the interests of justice for the services to be carried out before the date of the determination; and
    - the services could not have been carried out as controlled work.

ASSESSMENT OUTCOMES

42. 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.

43. 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.

44. In *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].

45. 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?

46. In theory the Local Authority can conclude that services are owed to the child (under s20 Children Act 1989) but not their family.

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

47. In the cases of both G and W, the local authority accepted that they would have 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.

48. The evidence presented by the local authorities suggested that parents under the threat of their children being taken into care, tended to suddenly become resourceful and solve their housing problem for themselves in preference to having their children placed in a children's home or with foster carers (paras 49-50).

49. 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.

50. 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, the higher courts have continued to uphold some decisions of Local Authorities to offer s20 rather than s17 support – for example the case of *R (on the application of Jalal) v Greenwich* [2016] EWHC 1848 (Admin).

51. However it is important to note that these cases have tended to involve families with access to public funds who have been declared intentionally homeless. Where destitution is an issue, the family are less likely to have other options. In such cases the courts have been clear that the purpose of section 17 is to provide a safety net of support for families who either cannot leave the UK or who are lawfully present in the UK but are prevented by their immigration status from being able to claim benefits usually provided to families with a low income. For example in the case of *R(AC & SH) v LB Lambeth Council* (2017) the judge summarised the position:

    'The local authority is empowered to rescue a child in need from destitution where no other state provision is available.'

52. 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. No human rights assessment of any kind was carried out to justify this stance, and the decision was overturned by the High Court.

53. 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 and Article 8 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*).

54. 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.

WHAT SERVICES CAN BE PROVIDED?

55. The following are services that might 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:

56. 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:

57. Shared accommodation with strangers is common, as are out of borough or out of city placements. 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 requirement to promote the children's welfare, or the s11 welfare duty (and the best interests principle), breach of 2004 Housing Act or breach of a Local Authority's own policy.

58. Where conditions are likely to be hazardous or other breaches of the 2004 Housing Act are suspected (e.g. failure to licence a HMO), then the council's Private Sector Standards Team or similar should be asked to inspect the property and take any necessary enforcement action.

59. 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 and are being breached.

60. *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 in a different area of the UK without a specific assessment evaluating the impact of this. The family's subsequent appeal did not seek to challenge this part of the High Court judgment.

61. There still may be potential to bring discrimination challenges to policy / guidance / practices that set different standards for children of destitute migrant families 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 would logically extend to all children.

62. In the pre permission (and so unreported) case of R (Titiloye) v LB Southwark (2018), the destitute Claimant and her two teenage children were accommodated by Southwark in a single room in a flat where each of the 5 rooms were occupied by separate households. There was one shared kitchen and bathroom. Southwark had an additional licensing scheme for HMOs. However they refused, on request, to require that the property be licenced on the basis that families being accommodated under s17 Children Act 1989 were not occupying as their (only or main) "residence" within the meaning of s254 (2) (c) Housing Act 2004. Accordingly such households were not entitled to the protection of a HMO licence, and the associated health and safety / space standards.

63. The Claimant issued a judicial review of the Defendant's refusal to recognise the flat as an HMO, contending that occupation by destitute NRPF families under section 17 CA 1989 would almost inevitably be occupation as their "only or main residence".

64. After the Defendant subsequently rehoused the family in self-contained accommodation, they suggested that the claim had become academic and should be withdrawn. However, the Claimant proposed to continue with the claim on the basis that the evidence appeared to show a systemic problem. Specifically, a FOI response showed that, as at 4 September 2018:
    - the Defendant was accommodating 182 families under section 17 CA 1989;
    - of those, 153 were in accommodation where they shared a toilet, bathroom and/or cooking facilities (the average time spent there being 20 months);
    - of those, 63 were accommodated within Southwark (such that the Defendant would be responsible for issues of HMO licensing); and
    - of those, fewer than 10 were licensed as a HMO.

65. A consent order was filed in which Southwark conceded that the property was an HMO, and that "*that occupation of living accommodation by families accommodated under section 17 of the Children Act 1989 is capable of constituting occupation as their "residence" within the meaning of section 254(2)(c) of the Housing Act ("HA") 2004, even if the accommodation is secured on a nightly-let basis... and where such families are accommodated in such accommodation, without an identified end date, on the basis that they have no other suitable accommodation available to them, they will generally be occupying it as their "only or main residence" within the meaning of section 254(2)(c).*

66. There are also some glimmers of hope in judgments such as *R (CO & Anor) v LB Lewisham Council* (16 June 2017), where the family had stayed in hotels since March 2017 following the withdrawal of support from family members. The judge found that during this period:

    '..the family's accommodation had been hopelessly unstable and totally inappropriate. It was in the children's interests to be housed with their mother but the mother's income was not sufficient to support her children and fund accommodation. The local authority had acted irrationally in finding the children not to be in need and it had failed in its statutory duty to safeguard the children since March 2017.'

67. The Ombudsman is also a potential remedy. In 2017, the Local Government and Social Care Ombudsman investigated a complaint made by a family with NRPF consisting of two parents and two children, one of whom had special educational needs. The family had been placed in a hotel with no cooking facilities so the family could only access hot food if they cooked it at a Children's Centre just less than a mile away, which was not open at weekends or on public holidays. Six months later, the council offered the family a lodge on a caravan park which was turned down by the family. The Ombudsman did not find the council to be at fault for initially placing the family in the hotel or for offering accommodation in the caravan park, which was deemed to be appropriate and reasonable. However, the council was at fault for failing to identify appropriate long term accommodation and for causing the children distress due to the lack of space, with nowhere to do their homework or to play safely outside. The council was ordered to pay the children £100 each[3].

Subsistence – how much?

68. Two important principles were established by caselaw in 2014:
    - subsistence should cover the basic needs of the children *and* their carers (*R (PO6) v LB Newham [2014] EWHC 251 (Admin))*
    - a standard flat rate is lawful so long as extra payments are available to meet specified needs (*Mensah v Salford City Council & Bello v Salford City Council [2014] EWHC 3537 (Admin)*)..

69. A standard flat rate based on section 4 rates is common. So long as the Local Authority's policy allows for additional assistance to be provided to address additional

[3] Local Government and Social Care Ombudsman, Hertfordshire County Council (16 010 518) (17 March 2017)

needs that are identified (e.g. the provision of school uniforms or additional assistance for a specific medical need) then such a policy is likely to be lawful.

APPROACHES TO NRPF ASSESSMENTS AND GATEKEEPING

70. Assessments of clients with NRPF can be arduous, humiliating and exhausting. Clients should be warned about what to expect and what will be required of them. They also need to understand that the Local Authority is likely (and may be required) to share information with the Home Office. Fraud officers are embedded in some Local Authority NRPF teams. Some clients, when they understand what is going to be asked of them, may decide not to go ahead with an application for accommodation and support.

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

72. Local Authorities may be particularly suspicious and harsh where a family have survived 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 will want to speak to everyone who has supported the family in the past and find out why that support cannot continue. They will also want to see bank statements (where bank accounts are held[4]) going back a number of years. Each and every transaction will need explaining if the source is not immediately clear.

73. Assessments can become particularly difficult where some people who had made up the family's support network will not speak to the authorities, or do not want it to be known that they had people living with them because of the potential effects on the host's benefit entitlement or breaches of their tenancy agreements.

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

74. An applicant may have been working in breach of their leave conditions to support themselves and their family for long periods but had to stop when the employer found out their status. The applicant is going to have to deal with this in any assessment.

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

75. In this case, the Local Authority had determined that during the assessment, the mother 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. Lambeth decided that the family were not destitute.

76. The Court found that it was reasonable to infer that the family were not destitute. The judge set out how a Local Authority should approach cases where there is evidence that the family have resided in UK for a number of years without access to public funds.

"Whether or not a child is 'in need' … 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].

… If the evidence is that a family has been in this country, without recourse to public funds and without destitution for a number of years, reliant on either work or the goodwill and kindness of friends and family, then the local authority is entitled and indeed rationally ought to enquire why and to what extent those other sources of support have suddenly dried up. In order to make those enquiries, the local authority needs information. If the applicant … does not provide adequate contact details for family and friends who have provided assistance in the past, or cannot provide a satisfactory explanation as to why the sources of support which existed in the past have ceased to exist, the local authority may reasonably conclude that it is not satisfied that the family is homeless or destitute, so that no power to provide arises. [19]

77. 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.*

CARE ACT 2014

80. This part of the paper is not designed to be a full guide to the Care Act 2014. Instead it is designed to deal with the provisions and case law which are most relevant for practitioners seeking accommodation and support for destitute adults.

81. The Care Act 2014 consolidated a number of pieces of legislation that made up adult community care law into one Act, replacing s21 National Assistance Act 1948 and the assessment gateway in the NHS Community Care Act 1990 which have been repealed.

82. There are some notable gaps left by the repeal of s21 National Assistance Act 1948 – including any provision for expectant mothers[5].

KEY RESOURCES

83. The Care Act 2014, The Care and Support Statutory Guidance (updated 26 October 2018) and relevant regulations including the Care and Support (Eligibility Criteria) Regulations 2015/313.

84. There is also non statutory guidance - "*Assessing and supporting adults who have no recourse to public funds (England) Practice Guidance for Local Authorities*" published in February 2018.

SCHEDULE 3

85. The Care Act 2014 is caught by Schedule 3 NIAA and so the notes above (pages 1-4) apply equally to Care Act applicants. If an applicant requires leave to be in the UK but does not have it (for example), s/he will need to not only meet the eligibility criteria for assistance under the Care Act but also demonstrate that the assistance is necessary to prevent a breach of his/her convention or treaty rights.

[5] See para 113 of these notes for more on accommodation and support for pregnant women without recourse to public funds

DESTITUTION PLUS

86. The Act also contains a provision mirroring the "destitution plus" test that was established in s21 National Assistance Act 1948 cases. The relevant provision is contained in s.21 of Care Act 2014:

"21 Exception for persons subject to immigration control

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

Because the adult is destitute, or

Because of the physical effects, or anticipated physical effects, of being destitute."

87. Case law under the 1948 Act had established that a need for assistance does not arise "solely" from destitution where that need is to any material extent made more acute by some circumstance other than the mere lack of accommodation or funds, such as age, illness or disability.

88. As will be seen below, however, a duty will only arise where a need arises from or is related to a physical or mental impairment. This is more restrictive than the old duty to provide residential accommodation and support related to a need for 'care and attention arising from age, disability...*and any other circumstance* '. This renders the new s21 largely redundant save that it will apply to the *powers* under s19 to assist those with *ineligible* needs which arise solely as a result of destitution or anticipated physical effects of being destitute.

DUTY TO ASSESS

89. The duty to assess is set out in Section 9 and is triggered where "it appears to a Local Authority that an adult may have needs for care and support". This trigger applies regardless of the person's ordinary residence or immigration status[6].

[6] See 2.1 Assessing and supporting adults who have no recourse to public funds (England) Practice Guidance for Local Authorities

90. Any care or support that is currently being provided by a carer must be ignored for the purposes of an assessment (6.15 Statutory Guidance). There is no time limit for the completion of the assessment but once it is completed, whether or not an adult has eligible care and support needs, s/he must be given a copy of the eligibility decision. S/he must be given information and advice on meeting or reducing any non-eligible needs, and on preventing or delaying the development of needs in the future.

91. The assessment process and the approach the Local Authority must take are set out in detail in Chapter 6 of the Statutory Guidance.

CARE AND SUPPORT

92. This is a key concept under the Act. An assessment is triggered where it appears that an adult may have needs for "care and support". Most of the caselaw that arose under the 1948 Act addressing the meaning of "care and attention" is likely to be relevant to the new definition.

ORDINARY RESIDENCE

93. A Local Authority will only have a duty to *meet* a person's eligible needs for care and support where the eligible person is "ordinarily resident" in the Local Authority's area. In some cases, where a person is very clearly ordinarily resident in another authority's area, it may be possible to direct them to that authority for an assessment of need. However, there is no legal basis to refuse to assess a person whose place of ordinary residence is in another local authority area. 19.10 of the Statutory Guidance makes it clear that a determination of whether an individual is ordinarily resident in a Local Authority area comes after the assessment of needs and determination of whether there are eligible needs.

94. There is no definition of 'ordinary residence' in the Care Act 2014, so the term should be given its ordinary meaning. More explanation on the meaning of 'ordinary residence' can be found at Chapter 19 and Annex H of the Statutory Guidance.

95. If the person has no ordinary residence anywhere then the authority where s/he is physically present should treat her/him as if s/he were ordinarily resident in its area. In

certain situations, where a person moves from one local authority area into another, that person is deemed to be ordinarily resident in the area where they previously resided (or was present if of no settled residence). This applies where a person goes into hospital, or moves into any of the following 'specified accommodation':

- residential care
- supported housing
- a 'shared lives' scheme (a recognised scheme which enables an adult to receive care and/or have a live-in carer).

The authority where the adult previously lived remains responsible for funding her/his care.

ELIGIBLE NEEDS

96. S13 Care Act 2014, read together with the Care and Support (Eligibility Criteria) Regulations 2015/313, set out the eligibility criteria.

97. A Local Authority only has to provide assistance where the Local Authority is satisfied that "an adult has needs for care and support" and those needs "meet the eligibility criteria" (s13(1) Care Act 2014).

98. The 2015 Regulations set out the detail of the criteria:

"*2(1) An adult's needs meet the eligibility criteria if -:*

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

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

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

These criteria are looked at in more detail below.

Arising from or related to a physical or mental impairment or illness.

99. The Statutory Guidance states:

"6.105 The first condition that local authorities must be satisfied about is that the adult's needs for care and support are due to a physical or mental impairment or illness and that they are not caused by other circumstantial factors. Local authorities must consider at this stage if the adult has a condition as a result of either physical, mental, sensory, learning or cognitive disabilities or illnesses, substance misuse or brain injury."

Specified outcomes

100. The specified outcomes are listed at 2(2) of the 2015 Regulations:

a) *Managing and maintaining nutrition;*
b) *Maintaining personal hygiene;*
c) *Managing toilet needs;*
d) *Being appropriately clothed;*
e) *Being able to make use of the adult's home safely;*
f) *Maintaining a habitable home environment;*
g) *Developing and maintaining family or other personal relationships;*
h) *Accessing and engaging in work, training, education or volunteering.*
i) *Making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and*
j) *Carrying out any caring responsibilities for a child.*

Unable to achieve

101. "Unable to achieve" is defined in the 2015 Regulations as follows:

"(3)…an adult is to be regarded as being unable to achieve an outcome if the adult—

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

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

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

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

102. Fluctuating need:

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

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

Significant impact on the adult's well-being

103. 'Well being' is a key concept in the Care Act and a Local Authority is under a duty to promote an adult's well being in exercising *any* of its functions under Part 1 of the Act:

1(2) "Well-being", in relation to an individual, means that individual's well-being so far as relating to any of the following—

(a) personal dignity (including treatment of the individual with respect);

(b) physical and mental health and emotional well-being;

(c) protection from abuse and neglect;

(d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);

(e) participation in work, education, training or recreation;

(f) social and economic well-being;

(g) domestic, family and personal relationships;

(h) suitability of living accommodation;

(i) the individual's contribution to society.

104. The Statutory Guidance states:

"*6.108 Local authorities must determine how the adult's inability to achieve the outcomes above impacts on their wellbeing. Where the adult is unable to achieve more than one of the outcomes, the local authority does not need to consider the impact of each individually, but should consider whether the cumulative effect of being unable to achieve those outcomes is one of a "significant impact on wellbeing*".

105. The word **significant** is not defined, but the Guidance states:

"6.109. The term "significant" is not defined by the regulations, and must therefore be understood to have its everyday meaning. Local authorities will have to consider whether the adult's needs and their consequent inability to achieve the relevant outcomes will have an important, consequential effect on their daily lives, their

independence and their wellbeing. In doing so local authorities should also consider whether:

- *the adult's inability to achieve the outcomes above impacts on at least one of the areas of wellbeing … in a significant way*
- *the effect of the impact on a number of the areas of wellbeing mean that there is a significant impact on the adult's overall wellbeing."*

And

"*6.114….When considering the type of needs an adult may have, local authorities should note that there is no hierarchy of needs or of the areas of wellbeing as described in chapter 1 of this guidance."*

What happens if the adult meets at least some of the eligibility criteria?

106. Section 13(3) Care Act 2014

"(3) Where at least some of an adult's needs for care and support meet the eligibility criteria, the local authority must—

a) consider what could be done to meet those needs that do,

b) ascertain whether the adult wants to have those needs met by the local authority in accordance with this Part, and

c) establish whether the adult is ordinarily resident in the local authority's area."

DUTIES

107. The Duties are set out in s18 of the Act.

"18 Duty to meet needs for care and support

A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

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

b) *the adult's accrued costs do not exceed the cap on care costs, and*

c) *there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met."*

108. So s18 imposes a mandatory duty where there are assessed needs for care and support which meet the eligibility criteria and where the applicant meets the ordinary residence criteria.

INTERIM AND OTHER POWERS

109. Section 19(1) of the Care Act 2014 permits local authorities to meet needs that do not satisfy the care and support eligibility criteria:

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

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

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

110. This might apply where an adult is only unable to achieve one of the specified outcomes, or where the adult's needs do not arise out of a physical or mental impairment or illness. Note that the powers in s19 are also caught by Schedule 3 NIAA. Even where an adult is not subject to Schedule 3, if the needs arise solely from the effects of destitution, the needs will fall foul of s21 (see para 86 above).

111. Where there is an urgent need, the Local Authority has a power to provide interim accommodation / support before any assessment is completed:

"19(3) A local authority may meet an adult's needs for care and support which appear to it to be urgent (regardless of whether the adult is ordinarily resident in its area) without having yet—

a) *carried out a needs assessment or a financial assessment, or*

b) *made a determination under section 13(1)."*

112. Note that delegated functions are available for urgent judicial reviews of a refusal to provide interim accommodation under s19(3) Care Act 2014 where the provider has a Housing, Public Law or Community Care contract.

Pregnant women

113. The '*Assessing and supporting adults who have no recourse to public funds (England) Practice Guidance for Local Authorities*' deals with the needs of pregnant women with no recourse to public funds at para 5.2.1 as follows:

"The National Assistance Act 1948, which preceded the Care Act 2014, contained an explicit power allowing local authorities to provide care and support to expectant and nursing mothers who do not have care needs in addition to those associated with pregnancy... When the government consulted on the Care Act eligibility regulations, responders… confirmed that no one who would have been provided with accommodation under the previous legislation would fall out of scope of the Care Act. When an expectant mother with NRPF, who has no children in her care, requests assistance with housing, then the local authority should therefore consider using the general power under section 19(1) of the Care Act to provide support, and may also provide interim accommodation under section 19(3) to prevent homelessness before a needs assessment has been concluded. Additionally, the UK is a signatory to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which requires that pregnant women are given access to appropriate services, including access to nutrition.

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

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

114. The equivalent Children's Practice Guidance (see above) confirms at 8.1 that that although the power that may be used to support a pregnant woman is set out in adult social care legislation, it is often the case that a pregnant woman will be supported by Children's Services as an assessment of the mother's parenting capacity may also be required, and, once the child is born, the duty to undertake a section 17 child in need assessment will be engaged.

HOW THE LOCAL AUTHORITY MAY MEET ASSESSED NEEDS

115. This is set out in section 8 of the Act. The Act does not give a finite list but a set of examples of ways in which assessed needs may be met:

"8 How to meet needs

(1) The following are examples of what may be provided to meet needs under sections 18 to 20—

(a) accommodation in a care home or in premises of some other type;

(b) care and support at home or in the community;

(c) counselling and other types of social work;

(d) goods and facilities;

(e) information, advice and advocacy.

(2) The following are examples of the ways in which a local authority may meet needs under sections 18 to 20—

a) by arranging for a person other than it to provide a service;

b) by itself providing a service;

c) by making direct payments…"

APPEALS UNDER THE CARE ACT 2014

116. There is provision for a statutory appeals procedure at section 72 of the Act but the detail of how these should work are to be set out in regulations. Proposals on how the appeals system should work were put out for consultation in February 2015. DHSC factsheet 13, updated on 19 April 2016, stated that the appeals process was due to be in place by April 2020 but it is not clear if this deadline is going to be met.

117. Pending the publication of the relevant regulations, the standard social services complaints process should be used, or judicial review.

COURT CHALLENGES TO CARE ACT DECISIONS

118. There have been two decided cases on support and accommodation for destitute adults under the Care Act 2014:

R (SG) V LB HARINGEY & ORS [2017] EWCA CIV 322

119. The Claimant lived in NASS accommodation but applied for accommodation and support under the Care Act 2014. Haringey conceded it was obliged to ignore altogether the fact that the Claimant had accommodation under the 1999 Act, as had been the case with the National Assistance Act 1948.

120. The Claimant was caught by Schedule 3 NIAA because of her immigration status. She was also caught by s21 of the Care Act 2014. She had a wide range of health issues and although she was implicitly found to be eligible for services under the Care Act 2014 (services were being provided), the council decided she was not eligible for services *by way of accommodation*.

The grounds of challenge in the High Court

121. There were three main grounds of challenge to the Care Act decision.
    - The absence of an independent advocate in circumstances where the Claimant was entitled to one under s67(2) of the Act.
    - The absence of any consultation with the Claimant's GP and / or counsellor.
    - The decision by Haringey that the Claimant did not have any eligible needs or a need for accommodation.

The High Court's conclusions

122. The court found for the Claimant on the first and second grounds. In terms of the third ground the Court found that although Haringey had stated on paper, that there were no eligible needs, in fact they had implicitly decided there were needs as a number of services were being provided. The key question between the parties was therefore whether *accommodation* should be provided.

123. The court considered the established case law on 'care and attention' (*M v* Slough *BC [2008]* UKHL 52 and *SL v Westminster UKSC 27 (2013)*) and confirmed it applied to the Care Act 2014 .

"*47. I first reiterate that the authorities already considered stand for these propositions, which I think continue to apply under the Care Act: (a) the services provided by the council must be accommodation-related for accommodation to be potentially a duty; (b) in most cases the matter is best left to the good judgment and common sense of the*

local authority; (c) "accommodation-related care and attention" means care and attention of a sort which is normally provided in the home or will be "effectively useless" if the claimant has no home.

48. Mr Burton submits there is a duty here to provide accommodation because it would be irrational not to do so in order to meet the adult's care and support needs. He has the lesser case, however, that the Council did not ask itself the correct questions. I agree … that the only suggestion that the question of whether or not the defendant was under a duty to provide accommodation was even considered by the defendant is contained in the pre-action letter. I also accept that there is no evidence that the defendant asked itself whether, even if services could have been provided in a non-home environment, they would have been rendered effectively useless if the claimant were homeless and sleeping on the street… I thus think that the care plan has to be redone.

124. The court declined to reach a decision that accommodation should be provided on an ongoing basis:

"52. I do not accept that any others than (d) and (i), as I have set them out, are truly accommodation-related, and in any event I think it is still within the discretion of the local authority to decide that notwithstanding these services it is not appropriate to meet needs through the provision of accommodation.

54. As I have already trailed, Mr Burton is, I think, on stronger ground when he says the decision-making here was defective. As he says, it is not clear that the defendant actually gave consideration to the need to provide the claimant with accommodation when it made the decision of 20 May."

125. So the real failure was Haringey's failure to ask itself the right questions. The judge found no evidence that Haringey had ever asked itself whether, even if the necessary services could have been provided in a non-home environment, they would have been rendered effectively useless if the claimant were homeless and sleeping on the street.

126. The High Court quashed Haringey's decision but declined to grant any other substantive relief, including the granting of a declaration to the effect that the local authority was bound to provide the claimant with accommodation.

127. SG sought permission to appeal to the Court of Appeal. It was SG's case that the Judge's comments at para 52 of the High Court judgment amounted to an acceptance that SG had established accommodation needs, and that being the case, the Local Authority's discretion was not at large. The judge should have found that Haringey were under a statutory duty to provide accommodation in order to discharge their s.18 duty to meet SG's needs rather than ruling that it was a matter for Haringey whether it could meet her needs through the provision of accommodation or in some other way. Despite the fact that by the time permission was considered, SG had been granted full refugee status and was therefore entitled to mainstream support, permission was granted due to the general importance of the question which was being posed.

The Court of Appeal's conclusions

128. The appeal was dismissed, without the central question of whether, having established that an adult has accommodation related needs, a Local Authority would be under a duty to provide accommodation to that adult. The court ruled that the question was academic, not only because SG was now housed, but because no lawful determination had ever been made as to SG's needs:

> *"[22] The role of a local authority under CA 2014, s.18, whether it be a duty or a power, only comes into play after a determination under s.13 has been made to the effect that the relevant individual has accommodation-related care and support needs. As the judge found, the local authority wholly failed to address the question of accommodation during their assessment of the claimant and therefore in this case the local authority had not made a relevant determination under s.13 sufficient to trigger the next stage of the process, with respect to accommodation under s.18. and the care and support plan required by s.23(4)(1)(a). The judge therefore set the May 2015 assessment aside with the implication that it would have to be undertaken afresh. Thus, on the facts of the case and the judge's findings on those facts, any question as to the local authority's role under s.18 was premature and did not fall for determination by the judge*."

129. The question therefore remains unanswered. However the Court of Appeal did accept that the High Court judgment did not set a precedent for the proposition that where accommodation related needs have been found, a Local Authority has discretion as to whether to provide them:

"The appellant's case relating to the interpretation of CA 2014, s.18 is based entirely upon paragraphs 52 and 53 of the judge's judgment. For the reasons that I have given, it is clear that those two paragraphs do not form any part of the reasoning that underpins the judge's determination of these judicial review proceedings. Paragraphs 52 and 53 are no more than passing commentary on an aspect of the claimant's case, which the judge expressly held was not an appropriate basis for determining the claim. These two paragraphs are, therefore, plainly obiter dicta. They could not, and should not, be regarded in any manner as authority or precedent on the interpretation of CA 2014, s.18. If a court in the future has cause to consider the interpretation of CA 2014, s.18 it should, in my view, do so without any regard to paragraphs 52 and 53 of the first instance judgment in this case, but should embark upon the task of interpretation with, as it were, an entirely clean sheet" para 29.

R (GS) V CAMDEN LBC [2016] EWHC 1762 (ADMIN)

130. The Claimant was a Swiss National, unlawfully present in the UK. She sought accommodation and support under the Care Act 2014. The court considered whether she was entitled to accommodation under that Act or, alternatively, whether Camden were obliged to provide accommodation under s1 Localism Act 2011 to avoid a breach of Article 3 of the ECHR.

131. GS had mental and physical health problems and was wheelchair dependent. She had been accommodated and supported under s21 National Assistance Act 1948 by Camden when she was assessed as having a persistent delusional disorder and lacking capacity to decide whether to return to Switzerland.

132. In October 2015 the case was re-assessed, but this time under the provisions of the Care Act 2014. The conclusions on that assessment were that:
    - GS did not have a need for care and support under the Act
    - GS' mental disorder did not prevent her from being able to achieve two or more outcomes under the eligibility criteria
    - A need for accommodation was not a need for care and support

133. GS challenged the decision on the grounds that her need for accommodation amounted to care and support within the meaning of the Act and in any event, if she were not provided with accommodation this would result in a breach of Article 3, ECHR.

134. She was unsuccessful on the first point, but successful on the second. However the potential breach of Article 3 did not result in a duty under the Care Act, instead an accommodation duty arose under the Localism Act 2011.

135. *M v Slough BC [2008] UKHL 52* and *R(SL) v Westminster CC [2013] UKSC 27* were revisited and the court confirmed they continued to be good law in relation to the need for care and support. The Court decided a need for care and support, meant more than a need for accommodation. The fact that accommodation could be provided by an authority under s.8 did not mean that a need for accommodation was a need for care and support. Accordingly there were no obligations to GS under the Care Act 2014.

136. Further, the court confirmed that a need for accommodation alone does not amount to a need for care and support. Given that both sections 18 and 19 refer to meeting an adult's needs for care and support, neither the duties nor the powers to provide accommodation were engaged. The Local Authority simply had no powers to use the Care Act 2014 to assist GS.

137. However there was a breach of article 3 that gave rise to a positive obligation on Camden to exercise its power under s1 Localism Act 2011.

"*Taking into account the entirety of the Claimant's circumstances including her potential social isolation, physical disabilities, pain, mental health condition and the physical difficulties that she encounters it is my judgement that if she were to become homeless then there would be a breach of article 3.*"

138. This appeared to be a very significant case indeed, enabling those who cannot meet the very strict Care Act eligibility criteria, to access accommodation via the Localism Act 2011 where an Article 3 breach will occur if accommodation is not provided.

139. However the case needs to be balanced against the settled law that an authority can decide not to provide accommodation to an applicant, even if that would result in a

breach of Article 3, if that breach could be averted by the applicant's return to their country of origin.

140. Further, the recent case of AR, R (on the application of) v London Borough of Hammersmith & Fulham [2018] EWHC 3453 (Admin) has cast serious doubt on whether a Local Authority can use s1 Localism Act at all to provide accommodation to an ineligible applicant. This case is discussed below under the Localism Act section.

THE LOCALISM ACT 2011

142. Section 1 of the Localism Act 2011 contains a residual power giving Local Authorities wide powers to do anything for (amongst others) the benefit of persons resident or present in its area. It is subject to Schedule 3 NIAA, as are the other Acts being discussed in this paper. The relevant sections are as follows:

"1(1) A local authority has power to do anything that individuals generally may do.

(2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise—

(a) unlike anything the authority may do apart from subsection (1), or

(b) unlike anything that other public bodies may do.

2(1) If exercise of a pre-commencement power of a local authority is subject to restrictions, those restrictions apply also to exercise of the general power so far as it is overlapped by the pre-commencement power.

(2) The general power does not enable a local authority to do—

(a) anything which the authority is unable to do by virtue of a pre-commencement limitation, or

(b) anything which the authority is unable to do by virtue of a post-commencement limitation which is expressed to apply—

(i) to the general power,

(ii) to all of the authority's powers, or

(iii) to all of the authority's powers but with exceptions that do not include the general power.

…(4) In this section—

"post-commencement limitation" means a prohibition, restriction or other limitation expressly imposed by a statutory provision that—

(a) is contained in an Act passed after the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force on or after the commencement of section 1;

"pre-commencement limitation" means a prohibition, restriction or other limitation expressly imposed by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or

(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1;

"pre-commencement power" means power conferred by a statutory provision that—

(a) is contained in this Act, or in any other Act passed no later than the end of the Session in which this Act is passed, or
(b) is contained in an instrument made under an Act and comes into force before the commencement of section 1."

143. The wide powers in section 1 have attracted a number of attempts by applicants to obtain accommodation when they have failed to do so via the mainstream housing Acts, the Children Act 1989 or the Care Act 2014. GS, described above, was a successful attempt to do so.

144. *R (on the application of MK) v Barking & Dagenham LBC [2003] EWHC 3486* was an unsuccessful attempt. MK's application for accommodation and support under s17 Children Act 1989 had failed. She was not, herself a child or a parent but lived with another adult (her aunt) and her children. Barking & Dagenham said there was no power to use s17 Children Act 1989 as they could only do so in order to promote or safeguard children. The children that MK lived with were adequately cared for by the other adult and it could not be said that the children's welfare would be at risk if MK was not provided with accommodation.

145. The court confirmed that the council simply had no power to provide MK with accommodation or support under s17(3) Children Act 1989.

146. On the Localism Act, the court found that the s.1 power was to enable a Local Authority to have the power of an individual:

> *"an individual is not able to provide part III Children Act services nor part VII Housing Act services nor public money which comprise the services and things which the Claimant is, in fact, seeking. Those functions may only be exercised by a local authority. Section 1 of the Localism Act is an enabling section which, for example, gives a Local Authority the power to enter into contracts or leases. It was not intended by Parliament as a means of overriding a clear statutory scheme prohibiting the provision of benefits of all kinds to those unlawfully in the UK."*

147. In GS the MK case was distinguished because:

- In MK the court was dealing with an express pre commencement limitation contained in S17(3) (a restriction or limitation on its exercise, in that it must be provided with a view to safeguarding or promoting the welfare of a child in need) , which meant the power was caught by s2(2) of the Localism Act.

- In GS the parties were agreed that the Care Act 2014, which came into force after the Localism Act 2011, does *not* contain within it a post-commencement limitation on the exercise of the section 1 power. Therefore the restrictions in section 2(2) of the Localism Act did not apply.

148. The '*Assessing and supporting adults who have no recourse to public funds (England) Practice Guidance for Local Authorities*' contains a section on the Localism Act 2011 reflecting the judgment in GS. At 5.3 the Practice Guidance states:

> *"Where a person does not have eligible care and support needs and the local authority has decided not to use section 19(1) of the Care Act 2014 to meet non-eligible needs, it will need to consider whether to use its general power of competence under section 1 of the Localism Act 2011. This gives the local authority a power to do anything that an individual generally may do, and may exercise this power in any way, including for the benefit of residents…*
>
> *Where it has been established that a person cannot return to their country of origin (or Schedule 3 does not apply to them) and they have no other housing options open to them in the UK, then the local authority would need to consider whether the person has particular vulnerabilities that mean refusing support may give rise to a breach of human rights. If the local authority finds that a breach of human rights will occur, then a duty to provide housing under section 1 of the Localism Act may arise….*
>
> *Another example of when section 1 of the Localism Act may be used to provide accommodation is where victims of trafficking or modern day slavery require this due to gaps in the support available to them."*

R (AR) V LB HAMMERSMITH & FULHAM [2018] EWHC 3453 (ADMIN)

149. This case was decided after GS and after the Practice Guidance was published. Accordingly both need to be reconsidered in the light of the new case.

150. AR was a Lithuanian national who had become unwell, became unable to work as a result and had attempted suicide. He was not eligible for mainstream housing as he was not exercising treaty rights and he sought assistance from social services.

151. He asserted that the Local Authority should use its powers under the Care Act 2014 and / or the Localism Act 2011 to provide him with accommodation and that he required such support in order to avoid a breach of his Convention or EU Treaty rights.

152. The Local Authority's factual findings and conclusions in relation to AR's circumstances are recorded in the judgment:

> *10. [he] "had undergone neurosurgery and was due to undergo further surgery, that injuries to his shoulder and hand continued to affect him, he had difficulties with memory, and was unable to work. He suffered from periods of depression and had attempted suicide in August 2017 when under the influence of alcohol, had been assessed under the Mental Health Act and had been discharged and signposted to alcohol services. There were medical reports … referring to the above injuries, as well as chronic and acute pancreatitis, a history of chronic alcoholism, acute gastritis, and anxiety disorder. The assessment recorded a number of statements by the claimant making it clear that the only assistance that he sought was in obtaining somewhere to live… The only risks identified in the care assessment were those arising from his being homeless. The assessment summary identified one outcome which the claimant was unable to achieve, that he was not able to access and engage in work, training, education or volunteering independently, but the detailed assessment was that this was also due to the claimant's homelessness. The conclusion of the assessment was:*
>
> > *"[AR] has a complexity of acute medical conditions as highlighted throughout this assessment. [AR] nevertheless … is able to live independently and undertake essential day to day tasks. Due to [AR]'s current social situation his ability to further his personal development including further education, retraining is severely compromised. In addition, being homeless can also enforce a sense of social isolation, impacting on [AR]'s confidence and feeling of belonging which could lead to further self medicating behaviour including substance abuse*."
>
> *11. The assessor... concluded that the claimant was not eligible for support under the Care Act because he did not satisfy the requirement of there being "two or more areas where outcome cannot be achieved and there is, or is likely to be, a significant impact on his wellbeing."*

153. The Judge (Judge Markus QC) agreed with the Local Authority's decision. There were simply no powers to provide accommodation under the Care Act 2014. Reg 2(1) requires

any identified needs to have arisen from the person's physical or mental impairment or illness and not because of their lack of accommodation. A homeless person without any impairment or illness may be unable to, for example, maintain personal hygiene or maintain a habitable home environment by virtue of their homelessness but that is irrelevant for the purpose of the assessment of their need for care and support.

154. Moreover, AR only sought "*accommodation and no other care or support .The assessment did not identify any other needs. A stand-alone need for accommodation is not a need for care and support within the Care Act*…"

155. As to the Localism Act powers, they could not be used. The Judge considered GS and found that the court had reached its decision in that case without having considered whether s185 Housing Act 1996 operated as a pre-commencement limitation restricting a Local Authority's power to provide accommodation (i.e. the restriction prevents a Local Authority from providing accommodation to persons who are ineligible). This proposition had not been put to the court in GS.

156. On considering this question, the Judge concluded:

"section 185 of the Housing Act imposes a prohibition on provision of accommodation under any enactment and not merely under the Housing Act. Section 21 (1A) of the National Assistance Act and section 185 of the Housing Act each state that the assistance to which the section relates may not be provided to a person to whom the specified conditions apply. In the instant case there is no other legislation (disregarding the Localism Act) under which the claimant could be provided with accommodation… Section 2(2)(a) of the Localism Act prevents an authority from doing under section 1 "anything" which it is unable to do by virtue of a prohibition expressly imposed by a statutory provision. The "thing" which the claimant asks the authority to do is to secure accommodation for him. Section 185 of the Housing Act prevents the local authority from providing that "thing" to the claimant, and it cannot provide it by way of another statutory power unless it can do so under section 1. Section 2 of the Localism Act … prevents section 1 being used to do that which is prohibited by another statute. The effect of Mr Presland's position is that unless a statute expressly prohibits the exercise of section 1, that provision can be used to do anything which parliament has prohibited. That cannot have been the legislative intention of section 2 because it expressly applies to pre-commencement limitations, and pre-commencement limitations could not

have expressly excluded the exercise of a statutory power which did not at that time exist" para 29

157. The Article 3 arguments were also rejected on the basis that the claimant's circumstances in the UK, if his accommodation were withdrawn, would not get close to the Article 3 threshold, and even if they would, he could easily mitigate the impact by returning to Lithuania where he would be entitled to some social welfare assistance.

158. The Judge did leave open the possibility of using the Localism Act powers (in order to avoid an ECHR breach) to obtain cash assistance from a Local Authority to pay for accommodation at para 30 of the judgment:

"It was not part of the claimant's case that, as an alternative to providing accommodation, the defendant should provide funds to enable the claimant to secure accommodation. I have heard no submissions as to whether this would be possible under section 1 of the Localism Act and I express no concluded view on it. The position is not straight forward. It is not clear whether such provision is "assistance" within Part 7 of the Housing Act and thereby subject to the prohibition in section 185. Section 206(1) of the Housing Act, which provides for the only ways in which an authority may discharge its functions under Part 7, does not seem to cover provision of finance in order to secure accommodation."

HOUSING UNDER SECTIONS 4 AND 95 OF THE IMMIGRATION AND ASYLUM ACT 1999

Section 95 Home Office support

159. An adult[7] with a pending recorded asylum or Article 3 human rights application (or appeal) may apply for support from the Home Office under section 95 of the Immigration and Asylum Act 1999 when they are destitute (have no accommodation or cannot afford to meet their essential living needs now or within the next 14 days).

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

161. The Home Office can provide housing and financial support (subsistence) through a card, which can be used in shops and to withdraw cash. A person who already has accommodation may request subsistence support only.

162. The asylum seeker's dependants[8] will also be provided with support. If the person's asylum claim is unsuccessful and they become appeal rights exhausted, then support will end after 21 days unless there is a child who was part of the household before the claim was finally determined. In such instances, support will continue until the youngest child turns 18 or they no longer meet the requirements, for example, the Home Office has evidence that they are not destitute.

163. A refused asylum seeking family will not be eligible to receive support from the Home Office under section 95 when the first child was born *after* the asylum claim was finally determined by the Home Office or courts, but instead may be able to apply for section 4 support. However, if a child under 18 was part of the household prior to the asylum claim being finally determined, the family should be able to access section 95 support when they have not previously claimed this.

[7] Asylum seekers who are under 18 and arrive in the UK alone are not eligible for asylum support and are, instead, eligible for s20 Children Act 1989 support and accommodation from social services.
[8] husband/wife/civil partner, unmarried couple (if living together for 2 out of last 3 years), child under 18 or adult member of household in need of care and attention due to disability.

Section 4 Home Office support

164. In certain circumstances, destitute refused asylum seekers and their dependants may be provided with support from the Home Office under section 4 of the Immigration and Asylum Act 1999. They need to show that they[9]:

a) are taking all reasonable steps to leave the UK;

b) are unable to leave the UK due to physical impediment to travel or some other medical reason;

c) have no viable route of return;

d) have applied for judicial review in relation to a decision on their asylum claim and have been granted permission to proceed; or

e) require support to avoid a breach of their human rights, for example they have made further submissions for a fresh asylum claim[10].

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

Interplay between Home Office and Local Authority duties / powers

166. If a household are receiving or entitled to receive support from the Home Office under section 95, then section 122 of the Immigration and Asylum Act 1999 prevents the local authority from providing financial support and/or accommodation to a child and its family under section 17 Children Act 1989.

167. There is no comparable provision in relation to section 4 support. The mere fact that support is or may be available under section 4 does not of itself exonerate a Local Authority from what would otherwise be its powers and duties under section 17 Children Act 1989. The case of VC & Ors, R (on the application of) v Newcastle city Council [2011] EWHC 2673 (Admin) makes it clear that section 4 and section 17 establish two discrete regimes established for different purposes:

> [87]…*s 4 provides "an austere regime, effectively of last resort, which is made available to failed asylum seekers to provide a minimum level of humanitarian support. Section*

[9] Reg 3(2) a-e of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005

[10] A refused asylum seeker may qualify for s4 under reg 3(2)(e) because they have further submissions outstanding as part of a fresh claim.

17 in contrast is capable of providing a significantly more advantageous source of support, its purpose being to promote the welfare and best interests of children in need"

168. Accordingly if a Local Authority is approached by a family for assistance on the basis of destitution, then a Local Authority can only refer them to the Home Office if the s4 support is 'available and adequate'. The local authority must have confirmation from the Home Office that section 4 support will be provided and must be able to demonstrate that the support will meet the child's *assessed needs*. Given the fact that s4 provides the minimum necessary to avoid a breach of a person's convention right, and s17 is aimed at promoting the welfare of children, it is doubtful that s4 will routinely be adequate.

169. Even when a family can be referred to the Home Office for support, either because they are eligible for section 95 support, or section 4 support has been assessed as being sufficient to meet a child's needs, it may fall to the local authority to provide accommodation and financial support under section 17 of the Children Act 1989 if there are delays in accessing Home Office support and the child in need assessment establishes that the family have no alternative funds or housing available.

170. A person who is entitled to s95 or s4 support is not disqualified for applying to social services for Care Act 2014 accommodation. The Home Office accommodation is to be ignored for the purposes of the Care Act 2014 assessment and if accommodation is required, should be provided by social services.