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Housing standards under s.98, s.95, s.4 and Sch.10: Adults and adults with families

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Garden Court Chambers

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2

Who provides the housing, and how are standards enforced

1. Accommodation provided by the home office on application
2. Migrant Help
3. Who are the key preferred outsourced providers: Clearsprings, Serco
4. Types:
    1. Hotel – "initial"
    2. Accommodation in the community procured by outsourced providers – "dispersal"
    3. Former military barracks, e.g. Penally and Napier (Planning issues)
5. Bail accommodation under para.9, Schedule 10 Immigration Act 2016
6. Suitability/Adequacy (Prevent harm to health of occupiers): Deployment of s 79 EPA 1990, Housing Act 2004 hazards and licencing, best interest of children, disability, discrimination issues – layout of accommodation, location of accommodation – medical treatment . Planning constraints
7. Challenging delays in grant and/or provision/ or adequacy – housing needs. Judicial and applications for various forms interim relief.
8. When granted status – leave – end of asylum support accommodation, homelessness application and local connection

Other forms of care and support

- S 117 Mental Health Act 1983, s 3, 37 & 41. Transfers in prison or immigration detention to detention in psychiatric hospital, Support not excluded
- Care Act 2014 – assessment of need, accommodation pending assessment s 9 and 19(3) Care Act 2014: Final provision of care subject to Schedule 3 of NIAA 2002. Human Rights assessments. Nationality, Immigration and Asylum Act 2002 (legislation.gov.uk)
- Part 3 of NIAA 2002 – also will s 16 of the NIAA 2002 be brought into force? Accommodation centres – watch out
- Ncube Ncube, R (on the application of) v Brighton and Hove City Council [2021] EWHC 578 (Admin) (11 March 2021) (bailii.org)
- Is there still space for s 1 Localism Act 2011 and s 2 Local Government Act 1972 (Wales)?
- Enforcing housing standards – Licencing, hazards and Environmental Protection Act 1990

Outline

1. Accommodation under s.98 Immigration and Asylum Act 1999
2. Accommodation under s95/96 Immigration and Asylum Act 1999
3. Accommodation use of s 99/100 Immigration and Asylum Act 1999
4. Accommodation under s4(2) Immigration and Asylum Act 1999
5. Bail accommodation under para.9, Schedule 10 Immigration Act 2016
6. Unaccompanied child s 17, 20 Children Act 1989: *R. (G) v. Barnet London Borough Council* [2004] 2 AC 208; *R (on the application of S, by his litigation friend, Francesco Jeff) v LB Croydon and EHRC* [2017] EWHC 265 (Admin)refers to section 1(1) of the Localism Act 2011. *R. (on the application of Birmingham City Council) v Croydon London Borough Council* [2021] EWHC 1990 (Admin).; *KA v Croydon LBC* [2017] EWHC 1723 (Admin)) : Often linked to age disputes
7. Asylum Support Tribunal – disputes over entitlement – no Upper Tribunal, Judicial Review

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Section 98 IAA 1999

Home Office's *Immigration Bail*, v.7, p.58 provides that:

"if an asylum seeker being released from immigration detention on bail does not appear to have adequate accommodation or the means of obtaining it and is not a SIAC or Harm case it will usually be appropriate to arrange accommodation under section 98 of the 1999 Act"

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S. 95 - eligibility – overview

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- Under IAA 1999 s95(1) the Secretary of State may provide, or arrange for the provision of support and/or accommodation for:
  - **asylum-seekers** or dependants of asylum-seekers;
  - who appear to the Secretary of State to be **destitute or likely to become destitute within a 'prescribed period'.**
- The prescribed period is 14-days for new applicants. For those who are already receiving support, the prescribed period is 56-days (Asylum Support Regulations 2000 SI no 704 reg 7(a)).

7

Eligibility – 'asylum-seeker'

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- An 'asylum-seeker' is '…a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined' (IAA 1999 s94(1)).
- A 'claim for asylum' means a claim that it would be contrary to the UK's obligations under the Refugee Convention or under European Convention on Human Rights Article 3, for the applicant to be removed from, or required to leave, the UK (IAA 1999 s94(1)).

8

Eligibility – 'destitution'

- Under IAA 1999 s95(3) an applicant is destitute if he or she:
  - does not have **adequate** accommodation or any **means of obtaining it** (whether or not his or her other essential living needs are met); or
  - has **adequate** accommodation or the means of obtaining it, but cannot meet his or her other essential living needs.
- In assessing destitution SoS must take into account income, assets and support which applicant has, or might reasonably be expected to have, in next 14-days (AS Regs 2000 reg 6(4)).
- See further (generally) *Assessing destitution*, November 2019.

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- In detained cases, court has focused on whether there is a real prospect of applicant being granted bail within the next 14-days, relying on evidence of grant of bail in principle (e.g. *SM v Secretary of State for the Home Department* AS/18/12/38967, 8 January 2019, FTT (Asylum Support)).
- No specific guidance on timeframes - by analogy with the HO's policy in s.4(2) cases, decisions on applications for s.95 support should generally be made within 5 working days. Reasonable efforts should be made to decide an application within 2 working days e.g. where a person is street homeless, disabled, victim of torture, victim of trafficking etc. A fact-sensitive assessment is required.

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Support under s 96 IAA 1999

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(a) by providing accommodation appearing to the Secretary of State to be adequate for the needs of the supported person and his dependants (if any);

(b)by providing what appear to the Secretary of State to be essential living needs of the supported person and his dependants (if any);

(c)to enable the supported person (if he is the asylum-seeker) to meet what appear to the Secretary of State to be expenses (other than legal expenses or other expenses of a prescribed description) incurred in connection with his claim for asylum;

(d)to enable the asylum-seeker and his dependants to attend bail proceedings in connection with his detention under any provision of the Immigration Acts; or

(e)to enable the asylum-seeker and his dependants to attend bail proceedings in connection with the detention of a dependant of his under any such provision.

(2)If the Secretary of State considers that the circumstances of a particular case are exceptional, he may provide support under section 95 in such other ways as he considers necessary to enable the supported person and his dependants (if any) to be supported.

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Service provision – dispersal

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- One of the key concepts underpinning the asylum support regime, intended to alleviate 'pressure' on London and South East. SoS must have regard to 'the desirability, in general, of providing accommodation in areas in which there is a ready supply of accommodation' (IAA 1999 s97(1)(b)).
- Support may be refused/discontinued where applicant fails to travel (AS Regs 2000 reg 19). No choice is the overriding principle.
- Two key policies: (i) *Allocation of Accommodation Policy*, 27 May 2021 (Use of Barracks) ; and (ii) *Healthcare Needs and Pregnancy Dispersal Policy*, January 2016.
- Also Asylum Support Policy Bulletin (publishing.service.gov.uk) 1.1.3 speaks of significant property defect Asylum policy bulletins - GOV.UK (www.gov.uk).
- "Any request to move a person from accommodation that either organisation *considers is unsafe or unsuitable* should be handled on an *urgent* basis" page 14 *Allocation of Accommodation Policy*

12

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- Requests to accommodate in a certain area because applicant receiving treatment will generally be refused as treatment for most conditions available UK wide. But need to avoid unreasonable disruption to treatment should be considered carefully. *Allocation policy* p8.
- Applicants seeking to avoid dispersal will need medical evidence setting out nature and extent of health conditions; nature of treatment & whether it can be readily transferred; effect of interruption of treatment; effect on support networks. *Healthcare policy* p18.

13

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- See e.g. *R (Blackwood) v SSHD* [2003] EWHC 97 (Admin) (on detriment of dispersal to mental health and effect of Article 8) and *R (Wanjugu)* [2003] EWHC 3116 (Admin) (on availability of treatment in dispersal area).
- HO often seek advice from Now Medical. See e.g. *Shala v Birmingham* CC [2007] EWCA Civ 624 & *Guiste v Lambeth* LBC [2019] EWCA Civ 1758 on limitations of such advice. Qualifications, specialism, presence/absence of examination, length of time spent assessing/treating applicant etc. relevant to weight to be given to medical evidence/advice.

14

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- **HIV** (*Healthcare policy* pp31-32) – long term relationships between Doctor and patient a crucial aspect of successful management. May be disrupted by dispersal. Also, treatment for associated conditions may be protracted and require input from a variety of specialists which may not be widely available.
- **TB** (*Healthcare policy* pp34-35) – applicants should not be dispersed while conditions is contagious and thereafter only where treating clinician advises.
- **Mental health** (*Healthcare policy* pp35-36) – 'Where an applicant is engaged in psychological and psychiatric services, the dispersal process…

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…wherever possible, must not adversely affect the mental health of an individual and the care he receives… Caseworkers should not assume that because an applicant is not currently engaged in psychological and psychiatric services that he is not experiencing mental health problems. Caseworkers should also be aware that some applicants may be used to a more holistic approach to mental health issues, which may rely more heavily on the support of family and other networks rather than counselling and medication.'

16

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- **Helen Bamber and Freedom from Torture clients** (*Allocation policy* pp12-13) - dispersal should be deferred pending assessment; if applicant being treated then accommodation should be provided as close as possible to treatment centre; if applicant commences treatment then consideration should be given to relocation.
- **Pregnancy** (Healthcare policy pp38-42) – cases to be considered 'sympathetically' on merits 'no single solution likely to be in interests of all pregnant women'. Complicating factors like FGM relevant.

17

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- **Family ties** (*Allocation policy* pp8-9): impact of dispersal on family ties should be considered on a case by case basis with regard to Article 8. See e.g. *R (MG (Iran)) v Secretary of State for the Home Department* (dispersal of applicant to accommodation 130 miles from his young son, coupled with a refusal to pay travel expenses, contrary to European Convention on Human Rights Article 8 and Borders, Citizenship and Immigration Act 2009 s55).

18

Dispersal and Suitability/Adequacy

- Delays in dispersal
- Decisions to disperse out of London where VOT/receiving treatment from specialist organization e.g. HBF
- Suitability/adequacy e.g. requirement for self-contained accommodation, meeting additional needs (e.g. those arising from disability) – see section 95(5) and (6) and Asylum Support Regulations 2000, reg. 13 (1). Care Act 2014 assessment and also s 19(3): s 17 Children Act 1989 assessments in families – support workers views
- Alleged 'failures to travel' – importance of WS evidence – see DMA [2020] EWHC 3416 (Admin) – Court found that SSHD's attempts to blame the Claimants were unfounded.
- R(IO) v SoS [2020] EWHC 3420 (Admin) IO v The Secretary of State for the Home Department [2020] EWHC 3420 (Admin) (14 December 2020) (bailii.org)

19

Reception directive – withdrawal agreement

Articles 13 and 17 of The Reception Directive (Council Directive 2013/33/EU) on standards for the reception of applicants for international protection and Regulation 4 of the Asylum Seekers (Reception Conditions) Regulations 2005 SI 2005/7 provides:

Provisions for persons with special needs

(1) This regulation applies to an asylum seeker or the family member of an asylum seeker who is a vulnerable person.

(2) When the Secretary of State is providing support or considering whether to provide support under section 95 or 98 of the 1999 Act to an asylum seeker or his family member who is a vulnerable person, he shall take into account the special needs of that asylum seeker or his family member

20

Further

(3) A vulnerable person is-

(a) A minor;(b) A disabled person;(c) An elderly person;(d) A pregnant woman;(e) A lone parent with a minor child; or(f) A person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence; Who has had an individual evaluation of his situation that confirms he has special needs.

(4) Nothing in this regulation obliges the Secretary of State to carry out or arrange for the carrying out of an individual evaluation of a vulnerable person's situation to determine whether he has special needs

See *NB & Ors v Secretary of State for the Home Department* [2021] EWHC 1489 (Admin) [158].

S 4 Immigration and Asylum Act 1999

Section 4 of the IAA 1999 provides:

"(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—

(a) he was (but is no longer) an asylum-seeker, and
(b) his claim for asylum was rejected."

...."

Regulations

The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 provide that:
"3.— Eligibility for and provision of accommodation to a failed asylum-seeker
(1) Subject to regulations 4 and 6, the criteria to be used in determining the matters referred to in paragraphs (a) and (b) of section 4(5) of the 1999 Act in respect of a person falling within section 4(2) or (3) of that Act are–
(a) that he appears to the Secretary of State to be destitute, and
(b) that one or more of the conditions set out in paragraph (2) are satisfied in relation to him.
(2) Those conditions are that–
[…]
(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

There Defendant has published a policy on the provision asylum support to failed asylum-seekers under s.4(2) IA 1999: 'Asylum support, section 4(2): policy and process' (v.1, 16.02.2018, 'the s. 4 Policy').

23

Policy

"Regulation 3(2)(e) of the 2005 regulations allows a person to be provided with support where that is necessary to avoid a breach of their Convention rights, within the meaning of the Human Rights Act 1998. Article 3 of the European Convention on Human Rights (ECHR) is the prohibition on torture or inhuman or degrading treatment or punishment. The first step in determining whether accommodation and or support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without food, shelter or funds, is likely to be considered inhuman or degrading treatment contrary to Article 3 of the ECHR (see: *R (Limbuela) v Secretary of State* [2005] UKHL 66). The decision maker will therefore need to assess whether the consequences of a decision to deny a person accommodation would result in a person suffering such treatment. To make that assessment it may be necessary to consider if the person can obtain accommodation and support from charitable or community sources or through the lawful endeavours of their families or friends. ***Where the decision maker concludes that there is no support from any of these sources then there will be a positive obligation on the Secretary of State to accommodate the individual in order to avoid a breach of Article 3 of the ECHR***. However, if the person is able to return to their country of origin and thus avoid the consequences of being left without shelter or funds, the situation outlined above is changed.

24

Policy Part 2

This is because:

- There is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (see: *R(Kimani) v Lambeth LBC* [2003] EWCA Civ 1150)
- If there are no legal or practical obstacles to return home, the denial of support by a local authority does not constitute a breach of Human Rights (see: *R (W) v Croydon LBC* [2007] EWCA Civ 266)

A practical obstacle to departure would usually only exist if the person is unable to leave the UK because they lack a necessary travel document but are taking reasonable steps to obtain one, or they are unfit to travel for a medical reason. However, it will be unnecessary to consider whether a person in these circumstances needs to be supported under regulation 3(2)(e) as they are can be considered under regulations 3(2)(a) or (b). Whether there are legal obstacles to return should be considered on a case by case basis on the information available, but examples of where it should usually be accepted that they exist are where:

- they have submitted a late appeal against the rejection of their asylum or Article 3 ECHR claim and the First-tier Tribunal is considering whether to allow the appeal to proceed out of time
- they have submitted further submissions against the refusal of their asylum or Article 3 ECHR claim remain and these remain outstanding.

If the decision maker is unsure as to whether it would be appropriate to provide, or continue to provide, support in any given case for human rights reasons, a senior caseworker should be consulted as part of the decision-making process. If there are no legal or practical obstacles preventing the person leaving the United Kingdom, it will usually be difficult for them to establish that the Secretary of State is required to provide support in order to avoid breaching their ECHR rights." (emphasis added)"

25

Further on policy: Further submissions

"***Further submissions***

The existence of further submissions, combined with the fact that the person does not have access to accommodation and the means to live (or will shortly be in this position) may mean that support will need to be provided to prevent a breach of their ECHR rights.

Wherever possible, the further submissions should be considered at the same time as consideration is given to the support application."

The s. 4 Policy also provides that decisions on eligibility for support should generally be made within five working days, save for certain particularly urgent cases where the decision should be made within two working days:

26

Expedition

"However, a decision on the application should not be unnecessarily delayed to await the further submissions decision. Generally, decisions should be made within 5 working days, but careful consideration should be given to any additional factors that call for the case to be given higher priority and the decision made more quickly.

Where the following circumstances apply, reasonable efforts should be made to decide the application within 2 working days (the list is not exhaustive):

- people who are street homeless
- families with minors
- disabled people
- elderly people
- pregnant women
- persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence
- potential victims of trafficking."

So followings elements of delay

- Making the decision
- Can be delay in provision
- Delay in moving from initial (hotel/hostel) to dispersal accommodation
- Delay in providing suitable or appropriate accommodation: Best Interest of Children s 55/ Disability

27

Case law

It is well-established that the Defendant is under a general public law duty to act within a reasonable period. See, e.g.:

(1) *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 (Admin), in which it was held that delays in the provision of s.4 IA 1999 accommodation to failed asylum-seekers were unlawful: §65.

(2) *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546; [2007] INLR 450, in which it was held that asylum claims must be dealt with "within a reasonable time" and what amounts to a reasonable time will vary from case to case: §51.

(3) *R (FH) v Secretary of State for the Home Department* [2007] EWHC 1571, in which it was held that delays of around 12 months in determining the claimants' asylum claims were not necessarily unlawful so long as an explanation for the delay was provided and the "approach of the defendant was based on a policy which was fair and applied consistently": §8. It was not open to the defendant to pray in aid insufficient resources to explain an unreasonable delay: §11.

(4) *MK and AH v Secretary of State for the Home Department* [2012] EWHC 1896 (Admin), in which it was held that the defendant's policy – by which applications by failed asylum-seekers for s.4 IAA 1995 asylum support would not generally be considered substantively for up to 15 working days – was unlawful because it gave rise to "a significant risk that the Article 3 rights of a significant number of applicants for section 4 support [would] be breached": §184.

Further *R(Malembera) v Secretary of State for the Home Department* [2007] EWHC 2334 (Admin)

28

Provision by others

99 Provision of support by local authorities.
(1)A local authority or Northern Ireland authority may provide support for persons in accordance with arrangements made by the Secretary of State under section 4, 95 or 98.
(2) Support may be provided by an authority in accordance with arrangements made with the authority or with another person.
(3) Support may be provided by an authority in accordance with arrangements made under section 95 only in one or more of the ways mentioned in section 96(1) and (2).
(4) An authority may incur reasonable expenditure in connection with the preparation of proposals for entering into arrangements under section 4, 95 or 98.
(5) The powers conferred on an authority by this section include power to—
(a)provide services outside their area;
(b)provide services jointly with one or more other bodies;
(c)form a company for the purpose of providing services;
(d)tender for contracts (whether alone or with any other person).

Support under section 4 of the Immigration and Asylum Act 1999 may be provided by arrangements between the Defendant and a Local Authority or any other person. Defendant relies on preferred provider e.g. Serco but can further outsource

29

Issues which have arisen

- Levels of support for essential needs: Financial
- Covid and Temporary case work measures
- Exemptions
- Self contained and single occupancy
- Evictions
- Street homelessness
- Dispersal and provision
- Consideration of damages Art 8/3
- Discrimination, Equality Act 2010 and Article 14
- Compliance with s 55 of the Borders, Citizenship and Immigration Act 2009 Best Interests of Children

30

Possible damages claims

- Financial payments and common law and statutory causes of action.
- Protection of private life under article 8 of the European Convention for Human rights under the Human Rights Act 1998 encompasses a person's physical and psychological integrity. A person's body is an intimate aspect of his or her private life and a sound mental state is an important factor for the possibility to enjoy the right to private life (*Bensaid v UK (Application no. 44599/98) para 47*). Measures which affect the physical integrity or mental health have to reach a certain degree of severity to qualify as an interference with the right to private life under Article 8 (Bensaid v UK, para 46).
- From *Anufrijeva and another v Southwark LBC; R (on the application of N) v Secretary of State for the Home Department; R (on the application of M) v Secretary of State for the Home Department* [2003] EWCA Civ 1406 it is submitted that if a failure to provide suitable accommodation causes an individual to suffer 'inhuman or degrading' treatment such as to compromise their right to physical or psychological integrity, this may constitute a breach of article 8. Article 3 need not be breached, but should be at least engaged. There must be a degree of 'culpability' on the part of a local authority or public body before it will be held to have breached a person's article 8 rights.
- By analogy where there has been a failure to provide accommodation under section 193 of the Housing Act 1996, this is not in itself a breach of article 8 but the issue is whether the failure has caused interference with private or family life. If there has been such an interference, then compensation may be payable (*R v Newham LBC ex parte Morris* [2002] EWHC 1262 (Admin))
- Furthermore, Article 8 is relevant not only to cases where accommodation may not have been provided at all, but also where the accommodation provided (for example in this case, under section 188 of the Housing Act 1988) is not suitable, such that the inadequacies of the accommodation would interfere with private and family life (*R v Enfield LBC ex parte Yumsak* [2002] EWHC 280, (Admin)).
- *R (Bernard v London Borough of Enfield* [2002] EWHC 2282 (Admins) – £8k and Ombudsman decision The case of 20 012 006 - Local Government and Social Care Ombudsman may provide a useful guide esp around para 32
- The Ombudsman's Guidance on Remedies recommends a payment of £150 to £350 per month spent in unsuitable accommodation

31

Overview: Para. 9, Sch.10, IA 2016Eligibility

Para. 9 Sch.10 imposes three restrictions on the grant of bail accommodation:

(1) The person must 'be on immigration bail subject to a condition requiring him to reside at an address specified in the condition' (para. 9(1)(a);

(2) 'the person would not be able to support him or herself at the address unless' the power to accommodate were exercised (para. 9(1)(b)

(3) The power to accommodate may only be exercised 'if the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power (para. 9(3).

32

Para. 9, Sch. 10, IA 2016

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Paragraph 9(1)(a) and (b): 'specified address: a 'specified address' can be either an address that is already specified or one that is to be specified, see OH at para. 18-19

Paragraph 9(1)(c): 'exceptional circumstances': must be understood in light of the breadth of the bail power. The para. 1(2) Sch.10 IA 2016 power to release on bail applies to all those liable to detention, whether or not they have ever been detained. The para. 9(2) Sch. 10 IA power to grant bail accommodation applies to all persons granted bail.

33

R (on the application of Humnyntskyi & Ors)

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The Admin Court in R (on the application of Humnyntskyi & Ors) v Secretary of State for the Home Department [2020] EWHC 1912 (Admin) held that:

- HO policy (Immigration Bail) and practice was systemically unfair and an unlawful fetter on discretion
- The policy fettered the SSHD's discretion to considered whether the situation of an individual applicant amounts to exceptional circumstances: para. 296
- Additionally, the 'irreducible minimum of practical outcomes that a fair Schedule 10 policy must achieve and without which a Schedule 10 policy would be unfair' were not met and indeed '[did] not come close' to being met: para. 286

34

Immigration Bail Interim Guidance, 30 Oct 2020

- Interim 'Immigration Bail' guidance was issued post-Humnyntskyi (p.3) in order to cure the unlawfulness identified in that case.
- Makes clear that 'exceptional circumstances' within the meaning of para.9, Sch.10 are not limited to the categories of SIAC, Harm and Article 3 ECHR :

> 'you should proceed to consider whether there are any other exceptional circumstances in their case which might nonetheless warrant the grant of Schedule 10 accommodation. This discretion should be used sparingly where there are specific factors that make it appropriate for the person to be provided with accommodation notwithstanding that they are not a SIAC case, a Harm case or an article 3 case as set out above… If the decision is taken not to grant accommodation, reasons should be provided to the individual as to why their circumstances have not been considered exceptional.'

Para. 9, Sch. 10, IA 2016 – Harm cases

Harm cases:

Defined in the Immigration Bail policy as:

- People granted bail assessed by HMPPS as being at a high or very high risk of causing serious harm to the public.
- FNOs at high risk of harmful offending against an individual (.e.g. domestic burglary, robbery, sexual assault and violence, assessed using the Offender Group Reconviction Scale (OGRS) with a minimum score of 70%

Where that person has nowhere suitable to live in accordance with their license or MAPPA arrangements for a limited period or otherwise at the discretion of the SSHD in the interests of public protection.

Para. 9, Sch. 10, IA 2016 – Article 3 cases

31

Article 3 cases:

The interim policy provides that it 'may be' appropriate to consider using the para. 9 Sch. 10 power where both:

- The person does not have adequate accommodation or the means of obtaining it.
- The provision of accommodation is necessary in order to avoid a breach of their human rights (usually rights under Article 3 ECHR – the policy makes reference to the test in *R (Limbuela) v Secretary of State for the Home Department* [2004] EWCA Civ 540.

37

Para. 9, Sch.10, IA 2016 - Article 3 cases

32

- Decision-makers will usually consider: (i) other statutory powers to provide accommodation, e.g. s.95, s.4(2), section 17 Children Act 1989, Care Act 2014; (ii) 'support from charitable or community sources'; (iii) lawful endeavours of family/friends.
- If can access ss4(2) / 95 IAA 1999, Care Act 2014 or s17 Children Act 1989 (migrant families), unlikely to be able to access para 9.
- Exception? significant delays in accessing the alternative support.
- '*exceptionally, however, accommodation may be arranged temporarily under [para. 9, Sch.10 whilst the case is referred to a local authority and pending a decision…as to whether the duty to provide accommodation under the Care Act 2014 (or equivalent) applies*'.

38

Para. 9, Sch.10, IA 2016 - Article 3 cases

See also Detention Services Order 08/2016 - Management of Adults at Risk in Immigration Detention, July 2019

> 'In cases where the detainee requires support and/or accommodation from the Local Authority, the case owner and, where allocated, the non-detained casework team, must arrange a Local Authority needs assessment prior to release...The local DET team should assist the caseworker with signposting for local services wherever possible.' (para. 34)

39

Para. 9, Sch 10, IA 2016 - Article 3 cases

Article 3 cases:

- Policy provides that if the person is able to return to their country of origin then Article 3 would not be breached, relying on R *(Kimani v Lambeth LBC)* [2003] EWCA Civ 1150; *R (W) v Croydon LBC* [2007] EWCA Civ 266.
- 'Genuine obstacle' would include: 'physical impediment or other medical reason'; and 'unable to leave because they do not have the necessary travel document but are raking reasonable steps to obtain one'; 'legal or practical obstacles that mean the person cannot reasonably be expected to leave the UK'

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Para. 9, Sch. 10, IA 2016 - Applying

35

Immigration Bail, v7, (15 January 2021) - contains some limited information on how to apply and timescales for decisions:

- FNO and SIAC: applications from those detained are via the **B1 or Bail 401 form** but CF the release plans duty set out at p.61 of the policy
- Non-FNO and SIAC cases (in detention or on immigration bail in the community) **Bail 409 form.**
- Detained cases: No timescale specified in policy.
- For non-detained cases: 5 working days but '*decision-makers must give careful consideration to any additional factors that call for the case to be given higher priority*' *or* 2 days in specified circumstances (e.g. street homeless, families, children, elderly, pregnant, physical/mental disabilities, torture, trafficking).
- A decision to refuse accommodation should be made on Bail 203. No information on when or how this will be done.

41

Delays

38

Delay is a common issue exacerbated by Covid-19 crisis: Likely delays at two stages: 1) decisions on whether to grant; and 2) provision of accommodation.

Once eligibility has been accepted for accommodation for someone in detention and seeking release: what timescales will be deemed acceptable for HO action?

FTT's procedure in cases involving a grant of conditional bail contingent upon HO accommodation is to list a bail review hearing toward expiry of the currency of the grant. Not uncommon to see multiple grants of conditional bail.

42

Case-law – 'grace periods'

42

AC (Algeria), R (On the Application Of) v The Secretary of State for the Home Department [2020] EWCA Civ 36 (28 January 2020) [at §33]:

"It is clear from that review [1] that the "grace periods" are granted for practical purposes, reflecting the facts of each case and applying a test of reasonableness; [2] that this court has declined to set any overall or absolute limit to such a period as a "long-stop" for all purposes; [3] that the periods have more usually been short, often a few days, but running up to a month, and [4] that there has been some tendency for the periods to increase."

43

Case-law – 'grace periods'

40

Gasztony, R (on the application of) v Secretary of State for the Home Department & Anor [2019] EWHC 2879 (Admin) [at §89 - §90, §101]:

"…where a medical need for release to suitable accommodation has been identified, and the provision of suitable accommodation is in principle within the Secretary of State's power, there must, in my judgment, be a special duty on the Secretary of State to ensure that there is no unnecessary delay in locating and securing appropriate accommodation: and the longer the detention continues, the more stringent must be the duty. Moreover, under the second Hardial Singh principle, there will come a time where the overall length of the detention ceases to be reasonable; and the fact that detention is having an adverse effect on a detainee's mental health will be relevant to the identification of that time."

§101: overall period of 3 months from second application to release 'too long'

44

Interim relief – judicial attitudes

Clues to judicial attitudes

- "I respectfully urge that everything that has happened in the cases before this Court helps show that what is needed now, on all sides, is cooperative, constructive, collaborative engagement, including over data and monitoring, towards a system that wins confidence and respect." *DMA, R, (on the application of) v The Secretary of State for the Home Department* (Rev 1) [2020] EWHC 3416 (Admin) at para. 349 *per* Knowles J

- Court had 'considerable sympathy for the SoS who was facing an 'unprecedented administrative challenge' in light of the Covid-19 emergency: *R (on the application of WP) Poland v Secretary of State for the Home Department.*

45

Interim relief – judicial attitudes

48

- 'Finally we say something about the way in which applications should be brought. The government has responded at pace; decisions are made daily and hourly. This applies to decisions made on immigration control and all areas of government responsibility. The Courts will always stand ready to make decisions on urgent cases. Applicants must bring cases sensibly and proportionately. This is always the case but in current circumstances, this rule must be adhered to. Parties must cooperate at all times before and when bringing cases before the Court'. *Detention Action and Mikhail Ravin v Secretary of State for the Home Department* (CO/1101/2020)

46

Interim relief – recent cases

51

No one-size fits all approach - matters to be considered in considering urgency include:

- Detained/in community
- Risk of Article 3 ECHR breach?
- FNOs – requirement to have address checked/approved by Probation as condition of licence? Subject to registration requirements of Sexual Offences Act?
- Any other restrictions on location/type of accommodation?
- Any mental/physical health issues or other indicators of vulnerability e.g. victim of torture, trafficking etc.

IR - timeframes for the provision of accommodation

Generally speaking, IR orders provide for release:

- 'Forthwith' - 48 hours for vulnerable individuals who are not FNOs including those at risk of street homelessness
- 7 days - 14 days for detained FNOs requiring probation and/or police approved accommodation

See google docs spreadsheet of reported/unreported IR decisions on s.95/s.4/Sch.10

Key resources

- CPR Part 23 and 54 and practice directions
- The Administrative Court Judicial Review Guide 2021 (publishing.service.gov.uk) especially parts 16 - 17
- Must clearly set out the reasons for urgency on the face of the application notice, time at which it was appreciated an urgent app was needed, reasons for any delay, efforts to put Defendant on notice (do not just cross ref to other docs). Two new forms 461 and 463
  - Must set our clearly on the face of the application if a hearing is requested and within what timeframe and why
  - Must comply with duty of candour
  - Must comply with CPR, PDs and other obligations owed to the Court.

DVP & Ors, R (On the Application Of) v The Secretary of State for the Home Department [2021] EWHC 606 (Admin) (17 March 2021)

- "First, those seeking to make use of the 'urgents' procedures are under a duty to the court to satisfy themselves that the application they are considering really is urgent and to adhere, to the letter, to the rules of court which protect the procedure from abuse. This has always been the case. The fact that case papers can now be filed electronically, has not altered the position. Secondly, any abuse of the 'urgents' procedures will not be tolerated by the court and will be met with appropriate sanction".
- Mr Justice Swift - ACO

After you have obtained IR

- Communicate with Defendant.
- Not acceptable for Defendant to make last minute application to vary the order to provide for a longer period to find accommodation (even if order provides for liberty to apply, which it usually does). See comments of Johnson J in OH at 219-220.
- Respond rapidly to any application to vary the order.
- Request for urgent oral hearing?
- Penal notices? CPR 81.2

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51

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52