Public Law Project

Social Services Support for Destitute Migrant Families

A guide to support under s 17 Children Act 1989

This guidance has been produced by the Public Law Project ("PLP"), a national legal charity whose aim is to promote access to justice for marginalised people. PLP specialise in acting for claimants in judicial review challenge and are able to undertake legal aid work. For further details please visit PLP's website at www.publiclawproject.org.uk

We would like to thank the Strategic Legal Fund[1] who provided the funding to make this work possible.

We also wish to express our gratitude to Steve Broach and Louise Price at Doughty Street Chambers for providing invaluable legal advice on the various issues covered in this guidance.

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August 2013

[1] The Strategic Legal Fund for Vulnerable Young Migrants is a project of Trust for London and delivered in partnership with Esmee Fairbairn Foundation and MigrationWork CIC

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INTRODUCTION

Purpose of this guide

The purpose of this guide is to assist voluntary organisations working with destitute migrant families to identify which families can access support from social services. The guide is intended to help advisers advocate on behalf of their clients and to know when to refer a case to a solicitor. This guide is not intended to be a substitute for specialist legal advice.

This guide focuses on the support that may be available under s17 of the Children Act 1989 ("CA 1989") to families who are not entitled to mainstream welfare benefits or housing. This guide will primarily be relevant to those who are not lawfully resident in the UK (including those with outstanding immigration applications) which are not asylum claims and those lawfully in the UK but with a condition that they cannot claim welfare benefits or housing assistance.

Scope of this guide

Who is covered by this guide?

This guide addresses support available under s 17 CA 1989 to migrant families with children who cannot access mainstream benefits, and have no other adequate statutory source of support. These include **persons subject to immigration control** such as the following groups:

- Those who require leave to enter or remain in the UK but do not have it. This includes overstayers, those who have entered the UK unlawfully, and claimants who are subject to a deportation order.
- Those who have leave to enter or remain which is subject to a "no recourse to public funds" condition.
- Those who have leave to enter or remain solely because they are appealing a refusal to vary previous leave.

The guide also applies to "Zambrano carers".

- "Zambrano carers" are most commonly third country nationals who are caring for children who are UK nationals. To be a UK national, the child will have a parent (usually the absent parent) who is either a UK national or has settled status in the UK[2].
- "Zambrano carers" are not subject to immigration control. If they have made a formal application to UKBA, they will usually have a letter recognising this and that they have a right to work. However someone in this position has a directly effective right to reside and to work in the UK in

[2] For this to apply, details of the parent who is a UK national or has settled status should be on the birth certificate, if they are not, your client should seek advice.

European Law on the basis of *Zambrano* C-34/09, whether or not an application has been made to UKBA for recognition of this right. S/he may therefore not have any evidence of his/her status.

- "Zambrano carers" are excluded from entitlement to benefits and child tax credit on the basis of regulations the lawfulness of which is currently under challenge in the High Court.
- This is a fast developing area of law, if you are in any doubt, seek advice.

These are the main groups this guide is addressed to, although other groups may also be covered, for example destitute EU migrants (see further below).

Support under s 17 CA 1989 is also available to children of UK nationals who need services to address issues such as disability; this is outside the scope of this guide.

This guide does not address the support that may be available to:

- Unaccompanied children;
- Adults without children;
- Asylum support under section 4 or 95 Immigration and Asylum Act 1999

For further information in relation to asylum support see the Asylum Support Appeals Project's ("ASAP") website: http://asaproject.org/web/index.php

Arrangement of this guide

PART 1: Key points in relation to whether social services can and should provide support to destitute families

PART 2: Local authorities' legal duties and powers under s17 of the CA 1989

PART 3: Local authorityies' legal duties in undertaking an assessment under s 17 CA 1989

PART 4: Risks that a claimant should be aware of before they approach social services for support.

PART 5: Problem areas

PART 6: How decisions taken by local authorities can be challenged

PART 1: KEY POINTS

- A local authority has a duty under section 17 of the Children Act 1989 to safeguard and promote the welfare of all children "*in need"* in their area and to promote their upbringing by their family.

- A child will be "*in need*" if without services from the local authority they are unlikely to achieve or maintain a reasonable standard of health or development. A destitute child will almost certainly be "*in need*".

- Section 17 CA 1989 gives a local authority the power to provide services, including accommodation and financial subsistence to the entire family of a child in need.

- Some adults are excluded from s. 17 support because of their immigration status. But this exclusion will not apply if refusing to provide support will be contrary to a person's human rights or rights under EU law. Children are not excluded from s. 17 support regardless of their immigration status.

- Access to support is via an assessment. Within 1 working day of receiving a referral social services must acknowledge receipt and make a decision about the type of response that is required. The assessment should then be carried out in a timely fashion that is appropriate to the urgency of the situation. Where particular needs are identified social services should not wait until the end of the assessment before providing services.

- Social services have a legal obligation to undertake an assessment where it appears that a child may be in need. Therefore social services cannot automatically refuse to assess and/or provide accommodation or financial subsistence support on the basis that UKBA are responsible, except where a family are obviously entitled to s95 asylum support. A refusal to assess a destitute child is very likely to be unlawful.

- Social services can decide what services they will provide but this must follow a lawful assessment of the child's needs. In deciding what services they should provide, social services must act fairly, reasonably, within the limits of their legal powers, in accordance with their human rights obligations and with the child's best interest as a primary consideration. A failure to act in accordance with any of these principles could mean that the decision is unlawful.

- If the parents are excluded from s. 17 support, social services may undertake a further assessment to establish whether refusing to provide them with support would breach human rights law. Social services will usually consider whether any breach of human rights could be avoided by assisting a family to return to their country of origin and if there are any barriers to a family's return.

- If social services say that they can only assist by taking a child into care this should be robustly challenged. Social services do have the power to support the whole family.

- Support under section 17 CA 1989 is not within the current definition of “public funds”, so receiving s17 support will not be in breach of a “no recourse to public funds” requirement.

REMEMBER: A local authority may be acting unlawfully in refusing to assess and/or provide support to a destitute family. If your client is in this situation, consider referring him/her to a solicitor.

PART 2: LEGISLATIVE FRAMEWORK DUTIES AND POWERS UNDER SECTION 17 OF THE CHILDREN ACT 1989 ("CA 1989")

2.1 The section 17 duty

Section 17(1) of the CA 1989 imposes a general duty on local authorities to safeguard and promote the welfare of children within their area who are "*in need"*. This applies to all children in the UK regardless of their nationality or immigration status.

As long as it is not contrary to the welfare of the child, section 17(1)(b) provides that a local authority should promote the upbringing of children in need "*by their families*". You can find the full text of s 17 here:

http://www.legislation.gov.uk/ukpga/1989/41/section/17

2.2 When will a child be "in need"?

The definition "*in need*" is very broad. A child will be in need according to section 17(10) if:

- He/she 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*"; or

- His/her "*health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services*"; or

- If he/she is disabled[i]

All children have needs which others must meet until a child is old enough to look after themselves. A "*child in need*" for the purposes of section 17(10) is a child whose needs will not be properly met if social services do not provide services (see *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151).

KEY POINT: a child whose family is destitute will almost certainly be a child "*in need*".

2.3 "Within the area" of a local authority

Local authorities are under a duty only in relation to a child within their area. But "*within the area*" simply means that a child has to be physically present in the geographical area of the local authority to trigger the section 17 duty.

It is possible for a child to be "*within the area*" of more than one local authority. For example, they may live in one borough and go to school in another. They are therefore "*within the area*" of both local authorities (see *R v Wandsworth LBC ex p Sandra Stewart* [2001] EWHC 709 (Admin). In this case both authorities, Wandsworth and Lambeth, had a duty to carry out assessments and were ordered to do so.

2.4 Power to provide accommodation and subsistence

Subject to specified exclusions (see page 10 for further details), local authorities have the power to provide a range and level of services appropriate to meet a child's needs, including providing accommodation and financial subsistence (section 17(6) CA 1989).

Section 17(3) CA 1989 makes it clear that a local authority has the power to provide support to the entire family.

Whilst social services are not under a duty to meet every assessed need, they must lawfully exercise their discretion as to what services they will or will not provide. Any decision as to what needs to meet must be taken following a lawful assessment which identifies the needs and consequences for the child if services are not provided. In deciding whether or not to provide services, social services must act in accordance with well-established public law principles and human rights obligations.

Social services must ensure that they:

- Act within the limits of the powers given to them by law;
- Do not impose blanket policies which prevent them from giving consideration to the facts of an individual case where such consideration is required;
- Act in a procedurally fair manner;
- Act reasonably and rationally;
- Act in accordance with a person's convention rights as set out in the European Convention of Human Rights ("ECHR");
- Ensure that the child's best interest is a primary consideration when deciding what support they will or will not provide *(*see *ZH Tanzania v Secretary of State for the Home Department* [2011])

In some cases Article 8 European Convention on Human Rights (ECHR), which protects the right to private and family life, and Article 3 ECHR,which prevents inhuman and degrading treatment may impose a positive obligation on a local authority to provide support (see further below).

KEY POINT: Depending on the facts of an individual case, a refusal to provide support to a destitute family may be unlawful because it does not comply with the above principles. Unlawful decisions can be challenged by judicial review (see page 29 in this guide).

2.5 Exclusions from s 17 of Children Act 1989

There are two main exclusions for s. 17 support:

- Schedule 3 of the *National Immigration and Asylum Act 2002* ("NIAA 2002") excludes certain adult migrants from receiving section 17 support (see 2.5.1 below).

- Section 122 of the Immigration and Asylum Act 1999 excludes a family who could claim s. 95 asylum support (see 2.5.2 below)

2.5.1 The Schedule 3 NIAA 2002 exclusion

Schedule 3 excludes certain migrant adults from receiving financial subsistence of accommodation under s. 17 (see the table below for further details). **However, there is an important exception to this exclusion** If refusing to provide s 17 support would result in a breach of a person's rights under the ECHR or EU law then they will not be excluded even if they are in an excluded category (see below for more details about this exception).

KEY POINT: Leaving a person destitute in the UK is likely to breach human rights

Who is and is not excluded by Schedule 3?

A: Excluded by schedule 3 NIAA 2002	B: Not excluded by schedule 3 NIAA 2002
People granted refugee status in other EEA states;	Children
Adult citizens of other EEA states;	Asylum seekers (NB: but they cannot receive accommodation and subsistence if entitled to s95 asylum support, see below)
Adult failed asylum seekers who have failed to co-operate with removal directions or in respect of whom the S of S has certified they have failed to take steps to leave the UK voluntarily . This class includes both single adults and those with children born to a parent after they ceased to be an asylum seeker for support.	Failed asylum seekers who do not fall within A

Dependants of all of the above defined in Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations (WWS Regs) 2002	
A person unlawfully in the UK i.e. a person who requires leave to enter or remain in the UK and does not have it	"Zambrano" carers, those on valid visas, and those with limited leave to remain in the UK subject to a no recourse to public funds requirement

Exceptions to the Schedule 3 exclusion

However, as set out above, there is an important exception to the Schedule 3 exclusion. If not providing support would be contrary to a person's human rights under the ECHR or EU law, then the Schedule 3 exclusion will not apply.

Breach of human rights

Leaving a family destitute in circumstances where they have no other means of accessing support may be contrary to Article 3 of the ECHR which prohibits inhuman or degrading treatment (see *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66). Refusing to accommodate the family together may also breach each of the family member's rights to respect for their family and private life under Article 8 ECHR.

Accordingly, where a refusal by the local authority to provide support will leave a family destitute, there is a very strong likelihood that the human rights exception to the Schedule 3 exclusion will be triggered.

Avoiding a breach of human rights by return to country of origin

In *R (Clue) v Birmingham County Council* [2010] EWCA Civ 460 the Court of Appeal held that when considering whether it was necessary to provide support to a person otherwise excluded by Schedule 3 in order to avoid a breach of human rights, the local authority had to consider:

1. Whether the claimant would be destitute if not provided with support. The local authority could take into account whether the claimant could avoid destitution by accessing other sources of support;

2. If so, whether there was any reason why the claimant could not return to their country of origin. If the only impediment to return was a practical one, the local authority could simply provide the means of overcoming it, such as providing funds to pay for the journey.

3. If the reason why the claimant could not return to their country of origin was because they had made an application for leave to remain on human rights grounds, then the local authority could consider whether the application was obviously hopeless or abusive, but should not otherwise consider the merits of the application as that was a matter for UKBA.

4. If the application was not obviously hopeless or abusive, the local authority should provide support until a final decision was made on the application by UKBA. In that case, the local authority could not take the availability of its own resources into account.

5. If no application for leave to remain had been made to UKBA, the local authority had to consider for itself whether there are any human rights reasons why the claimant could not return to their country of origin. In deciding whether any interference with the claimant's human rights was proportionate, it was entitled to take into account other calls on its resources.

In *R (KA) Nigeria) v Essex CC* [2013] EWHC 43[3] (Admin) the High Court extended the principle in Clue to families whose application for leave to remain has been refused but who have yet to be issued with removal directions. It was recognised by the court that a family in this situation had no right of appeal against the refusal decision, but could appeal removal directions once made. It was held that if a decision by the local not to provide support had the effect of depriving a person of that right of appeal, this could itself constitute a breach of human rights and so support should not have been refused.

KEY POINT: If your client has an outstanding immigration application or a possible right of appeal against removal directions once issued, the local authority may need to provide support to avoid a breach of human rights. Even if there is no outstanding immigration application, the local authority should still undertake an assessment to establish whether support needs to be provided to prevent a breach of human rights and whether there are any human rights reasons why a family cannot return home.

2.5.2 Section 122(5) IAA 1999 exclusion from s 17 support

Section 122(5) of the *Immigration and Asylum Act 1999* ("IAA 1999") prohibits social services from providing accommodation and financial subsistence (but not other forms of support) under s17 CA 1989 to those who are supported under section 95 or 94(5) IAA 1999 (or to where it is reasonable to believe that they could make a successful application for section 95 or 94(5) support).

[3] This case has been subject to judicial criticism and see for instance *R(MN and KN) v LB Hackney* [2013] EWHC 1205, which is discussed further below. However, the judge's comments in that case were "obiter" and KA remains good law.

In brief a person over the age of 18 (and their dependents) who meets the destitution test[4] may be entitled to:

- Section 95 support if they have an outstanding asylum claim or claim under Article 3 of the ECHR that has been "*recorded*" by UKBA; or

- Section 94(5) support if their asylum or A3 ECHR claim was determined at a time when children were present in the family (see s94(5)) and they meet the criteria for asylum support.

If your client's initial asylum application was refused, but s/he has since made fresh claim for asylum which is still under consideration, s/he will not usually be entitled to support under s 95 IAA 1999.

For further information about s95 or 94(5) asylum support please visit ASAP's website:

http://asaproject.org/web/index.php?option=com_content&view=category&id=39&Itemid=102

Key Point: You should take care not to describe a person as an asylum seeker to social services unless you are sure that their claim has been recorded. If you know that they are a current asylum seeker with a recorded claim, they should be referred to UKBA for accommodation and subsistence support.

[4] A person is "destitute" if they do not have adequate accommodation or enough money to meet living expenses for themselves and any dependants now or within the next 14 days

PART 3: ARE THERE ANY RISKS OF REFERRING A FAMILY TO SOCIAL SERVICES?

Frequently your client's primary concern will be addressing his/her destitution and s/he may feel that this outweighs all other risks. Nevertheless, before you make a referral to social services there are certain risks that you and your client should consider.

- Local authorities will generally check the claimant's immigration status with UKBA as part of their assessment. The local authority has a legal duty to inform UKBA Enforcement and Removals about someone who has failed to comply with direction removals or who is unlawfully present in the UK. If UKBA are not aware of the family, they could be very shortly.

- If there is no outstanding immigration application on human rights grounds or the possibility of an appeal against removal directions once issued or any other human rights reasons why a family must remain in the UK, social services could conclude that the family can avoid destitution by returning to their country of origin. In this situation, any support offered by social services is likely to be time-limited whilst preparations are made for the family to return home. If your client finds him/herself in this position and is not happy to return to the country of origin, consider referring him/her to a solicitor. Whether it will be possible to challenge such a decision by social services will depend on the facts of an individual case.

- There is anecdotal evidence to suggest that a referral to social services could expedite consideration of a family's immigration application. Some clients may welcome this, but for those whose application is weak, this could hasten a refusal.

- To establish whether a family could access support from other sources a social worker may ask lots of questions which families may find intrusive and unpleasant.

- Social services may threaten to remove the child/ren rather than offer support to the entire family. We consider that where destitution is the only concern, such an approach is likely to be unlawful. If that happens you should refer your client to a solicitor

- In respect of "Zambrano carers", we are aware of cases in which local authorities have argued that, where the whereabouts of the other parent are known, s/he could care for the child, even where high levels of domestic violence by the other parent are acknowledged. If this happens you should refer your client to a solicitor as we consider this approach likely to be unlawful.

- It is advisable to check your client's immigration status carefully before making a referral; if they have an immigration solicitor you may want to speak to them, and if they do not, they may need to seek advice from an immigration solicitor before they take any further steps in relation to support.

KEY POINT: These risks should not necessarily put someone off contacting social services for help. But it is important that these risks are discussed with your client so that s/he can make an informed choice.

Further advice is given later in this guide as to what you can do if any of these issues arise.

PART 4: THE ASSESSMENT PROCESS

Access to the provision of services is via a "child in need assessment". Usually social services will undertake an assessment and will then make a service provision decision. But if support is required urgently, social services can provide it on a "without prejudice" basis pending the conclusion of their enquiries. If your client is refused interim support in urgent situations (for example, a family already street-homeless or about to be evicted), refer them to a solicitor.

4.1 Must social services carry out an assessment?

Social services must assess any child that is or may be "*in need*" (see *R(G) v Barnet LBC* [2003] UKHL 57). Social services can therefore only refuse to assess where there is no realistic prospect that on assessment the child will be found to be "*in need*".

As a destitute child will almost certainly meet the definition of "in need", social services should undertake an assessment. The only likely exception to this is if a family are entitled to s95 or s94(5) asylum support (see 14 above for further details), though it may be necessary for social service to consider the family's situation before they can reach this conclusion.

KEY POINT: Any refusal to assess where a family is destitute and is not entitled to s95 support is likely to be unlawful.

4.2 How quickly must social services carry out an assessment?

An initial assessment needs to be undertaken in a timely fashion, appropriate to the urgency of the situation. "Working Together to Safeguard Children" government guidance published in April 2013 which a local authority are obliged to follow, unless there are good reasons to depart from it, recognises that the

> "timeliness of an assessment is a critical element to the quality of that assessment and the outcomes for the child. The speed with which an assessment is carried out after a child's case has been referred into local authority children's social care should be determined by the needs of the individual child and the nature and level of any risk of harm faced by the child. This will require judgements to be made by the social worker in discussion with their manager on each individual case" (paragraph 54)

The guidance makes clear that within one working day of a referral being received a social worker should make a decision about the type of response that is required and acknowledge receipt to the referrer.

The maximum timeframe for completion of an assessment should be 45 days, but the guidance acknowledges that sometimes the needs of the child will mean that a quick

assessment will be needed. Where particular needs are identified at any stage of the assessment, social workers should not wait until the end of the assessment before providing services (paragraph 54 to 58).

In the case of a destitute family it is likely that social services will need to undertake an assessment urgently and/or provide support on a 'without prejudice basis', particularly if the family are facing imminent street homelessness or are in fact already homeless.

4.3 Making a referral to social services

At appendix [ ] there is a template referral letter.

Key points to cover in a referral to social services are as follows:

1. Request that social services undertake an initial assessment of a child who you consider to be "*in need*" with a view to accommodation and/or subsistence being provided pursuant to their duties under s17 CA 1989.

2. State that your client cannot claim benefits, and explain why not.

3. If relevant, say that your client is not permitted to work because of his/her immigration status. If s/he is entitled to work say if they are not working, and explain why not, or explain if s/he is working but their income is not sufficient to meet the child's needs

4. Very briefly, describe the family's current situation which has given rise to this referral. It is very important that you have clear instructions from your client before you make a referral, so that what you say in this letter is consistent with what the family later tells social services and with what they may have said before. Any inconsistencies that later emerge may undermine the parent's credibility.

5. Whilst it is advisable to be as brief as possible, it may be helpful to refer to the following in your letter:

    a. If your client is facing eviction, let social services know the date and make it clear what will happen to them when they are evicted i.e. if they will be street homeless state that this is the case;

    b. State if there are no family members or friends who are able or willing to provide regular support

6. Briefly describe the family's immigration status and expressly state if there is an outstanding immigration application. However, be careful not to describe someone as an "asylum seeker" if they are not or if you are unsure, as this could wrongly lead to the conclusion that the family is entitled to s95 support which would prohibit social services from providing support.

7. If you know that a family is not entitled to s95 or s4 asylum support you should this in your letter.

8. State that you expect to receive an acknowledgment within 1 working day as per the Working Together guidance and how urgent you consider the need for an assessment. If the situation is extremely urgent, state that the assessment and service provision decision needs to be taken either by a specified date or that in the circumstances the local authority will need to provide support pending the outcome of their assessment.

9. Enclosures: if you have information that supports what you say in your letter you should enclose copies. The following may be relevant:

    a. Eviction notices

    b. Confirmation letters from UKBA that there is an outstanding immigration application.

You should also advise your client to gather together the following information which may be requested during the assessment. It would be helpful if you too keep a copy.

- Eviction notices
- Letters from UKBA about their outstanding applications
- Immigration application (though this does not need to be given to social services unless expressly requested, the confirmation letter from UKBA may suffice)
- Certificate of application (for Zambrano carers)
- Bank statements for the past 3 months
- Any letters from friends or family who may have given financial support on an ad hoc basis that makes it clear that such support is irregular and will not continue indefinitely[5].

In advance of the assessment it is likely to be helpful to discuss with your client their weekly and/or monthly expenses. There is a template expenditure sheet annexed to

[5] In *R (MN and KN) v LB Hackney* [2013] EWHC 1204 (Admin) it was held that where claimants had not been able to explain how they had supported themselves in the UK for 10 years or why sources of support previously available were no longer available, it was lawful for the local authority to conclude that the children were not "in need" for the purposes of s 17.

this guidance. You could also recommend that your service user keeps a diary of what they spend each day and wherever possible, to keep receipts for any purchases.

4.4 Supporting your client after the referral is made

If you do not hear from social services that they will be undertaking an assessment you should call them, especially where the situation is urgent.

The assessment itself

During the assessment, your service-user will be asked questions about his/her immigration status and their financial situation so that the social worker can determine if the child/ren is "in need" and whether the Schedule 3 exclusion may apply. It is very important that your client co-operates and answers to the best of their ability any questions asked.

During this meeting your client should ask for a copy of the assessment report and when they should expect to receive it. They can also give instructions that a copy be sent to you.

If they are told during the assessment that support will be provided, it would be helpful to get the social worker to give details of what support will be provided, when it will be provided and how they collect it. Your client should also make a note of which social worker is dealing with their case and ask for contact details. If they are told that support will not be provided it is important to ask why.

Your client may find it helpful to have someone with them for moral support. If you accompany your client you should take care that you do not interfere with the assessment process, for example, by answering all the questions for your client. However, there may be times when your intervention is appropriate. For example, if the client is told that they must go to UKBA for support (where they are not eligible for s95 support), or if they are told that the only assistance that can be offered is to remove the child from their parents' care, or if they are wrongly told to make a claim for benefits that they are not entitled to.

After the assessment

If your client was told during the meeting that they would get services from social services, for example, accommodation and/or financial subsistence, it is important to ensure that the promised support is actually provided without undue delay.

If your client was told they would be informed later what support would be provided, you should make sure that social services do in fact make a service-provision decision and that this happens in a timely fashion.

If the family are offered support and it is inadequate, for example, the amount of financial subsistence provided means that their essential living needs cannot be met, you should bring to social services' attention the fact that you are concerned about what they are proposing to provide. It would be helpful to do this by reference to the

things that the children need, but which they will have to go without because of the inadequacy of what is being provided.

It is also important to ensure that you receive a copy of the assessment report. Once this is received your client needs to check whether the content is accurate. If there are any inaccuracies you should write to social services informing them of any errors and asking them to remedy the mistake. This is important in case it later becomes necessary to challenge social services and they seek to rely on any inaccurate information in their assessment report.

You may need to be persistent in your contact with social services to ensure that support does is fact materialise and that your client receives a copy of the assessment report.

KEY POINT: If social services refuse to provide support and/or what they provide is inadequate, your client may need to be referred to a solicitor.

PART 5: ADDRESSING PROBLEMS YOU MAY ENCOUNTER

5.1 Our local authority says "It's not our responsibility, you need to contact another local authority" – can they do this?

A local authority is under a duty in relation to a child within their area (and see 2.3 above), and it is possible more than one authority could be responsible.

Families should not be denied services whilst they are shuttled backwards and forwards between different local authorities. This is not compatible with the local authority's duty to safeguard and promote the welfare of children in need.

Local authorities are under a legal duty to co-operate with each other to fulfil their duties in respect of children (see s27 1989 and s10 CA 2004) and the proper approach would be for the first authority asked to undertake the assessment seeking the co-operation of the other local authority.

If you encounter this situation, we recommend you make the following points to the local authority:

- the reasons you consider that the child is within their area i.e. at school there, currently residing there.

- remind them of their duty to promote and safeguard the welfare of children in need and stating that their current approach is inconsistent with that obligation;

- remind them of their statutory duty to co-operate with other authorities;

- state that they ought to undertake the assessment and/or provide services, whilst seeking co-operation from the other local authority if necessary;

- warning them that if they do not undertake the assessment and/or provide services your client will consider taking legal action to remedy the situation.

In the event that social services continue to refuse to assess, refer your client to a solicitor.

5.2 Our local authority refuses to assess and/or provide support until all documents specified in their policy have been provided – can they do this?

Social services are entitled to make enquiries to establish whether a child is in need, and whether they are prohibited from providing support. Families should co-operate fully with the assessment process and respond quickly to any reasonable requests for documentation.

However, local authorities should consider any reasons why a family may not be able to provide all the documentation requested either immediately or at all and it may not be consistent with their duty to safeguard and promote the welfare of a child in need to refuse to assess and/or provide services because certain documents have not been

provided. An unreasonable refusal to assess and/or provide services on an interim basis pending the arrival of documentation should therefore be strongly challenged.

5.3 Our local authority will not assess; they say "It's not our responsibility, you should contact UKBA" – can they do this?

Migrants who are not asylum seekers

If your client has never made an asylum application or an application on the basis of Article 3 ECHR, then s/he is not entitled to asylum support and the local authority cannot require him/her to make an application for asylum support.

Asylum seekers

If your client is an asylum seeker who is eligible for asylum support under s 95 IAA 1999 or 94(5) IAA 1999 s/he should apply for this. An asylum seeker may be entitled to asylum support unless s/he has made an asylum application which has been refused, and s/he has made a fresh application. If his/her household includes a child, entitlement to asylum support will continue after the asylum application is refused.

If your client is eligible for asylum support, social services are prohibited from providing financial and accommodation subsistence. However, they can still provide other services that are not related to destitution. So if the child has special needs or disabilities the local authority can provide services to support those needs.

Failed asylum seekers – s. 4 asylum seeker

Failed asylum seekers can apply for support under s 4 IAA 1999.

If your client is a failed asylum seeker, s/he may be eligible for support under s 4 Immigration and Asylum Act. This is a set amount of support which is set at very low rates (s 4 and s 17 support is compared below).

Your client may be able to argue that s/he should get s 17 support instead of or as well as s 4 support. In *R (VC and others) v Newcastle City Council* [2011] EWHC 2673 (Admin) it was held that, where the local authority was already providing support under s 17 Children Act 1989 the availability of s4 support would only exonerate a local authority of their duties under s17 where:

(a) The Secretary of State was willing and able (or if not willing could be compelled) to provide section 4 support to a family; and

(b) Section 4 support would be sufficient to meet a child's assessed needs.

The judge in the *VC* case held that it was unlikely that a local authority would be able to satisfy the above test for the following reasons: First, given the purpose of the section 17 duty (i.e. to promote and safeguard the welfare of children in need) as compared to s4 asylum support (i.e. to provide the bare minimum to avoid a breach of a person's

human rights) it was highly unlikely that s4 support would ever suffice to meet a child's needs. Second, the s 17 duty takes priority over the s. 4 duty.

In *R(ES) v LB Barking and Dagenham* [2013] EWHC 691, the court held that a local authority could not delay carrying out an assessment under s 17 CA pending provision of accommodation by UKBA under s 4. It also reiterated that the local authority's powers to provide accommodation were more extensive than the Secretary of State's powers under s 4, and held that the child's needs had to be reassessed once the accommodation was provided.

Local authorities therefore should not refuse to assess under s 17 CA on the basis that s 4 support is or may be available. Nor should they automatically refuse to provide support on this basis.

How does support available to failed asylum seekers under s 4 IAA compare to support provided under s17 Children Act?

- Section 17 CA support tends to be paid in cash or on a pre-paid card which can be used like a debit card. In contrast s 4 IAA support is always paid on Azure pre-payment cards which can only be used at certain retailers and it is not possible to withdraw cash from at ATM or obtain cash- back[6]. UKBA has also stated that s 4 support cannot be used to purchase gift cards, petrol or diesel, alcohol and tobacco.

- Section 17 CA support is more variable and uncertain, there are no set amounts paid. S 4 IAA support is paid at £35.39 per person per week.

- Section 17 CA support in theory has the potential to offer a higher level of support than is available under s 4 IAA.

- Claimants are less likely to be dispersed to other areas if they have support under s 17 CA than if they have support under s 4 IAA. However even under s 17, local authorities sometimes accommodate claimants at considerable distances from the authority.

- A claimant receiving support under s 4 IAA is exempt from NHS charges, a claimant receiving support under s 17 CA could still be liable for hospital NHS treatment (subject to a few exceptions)[7], but not for treatment from a GP.

[6] Vouchers may also be provided in a limited number of circumstances for short periods. This is usually when the Azure card has been lost or stolen or a person is waiting for the Azure card to be set up at the beginning.

[7] Some secondary treatment will not be charged for. For example, treatment in A&E or for sexually transmitted diseases. See the NHS (Charges to Overseas Visitors) Regulations 2011 for further details.

5.4 Our local authority says they do not have enough money to meet all the assessed needs so they are not going to. Can they do this?

R (G) v Barnet LBC established that the nature of the duty under s17 is such that social services do not have to meet every assessed need. Social services are entitled to take into account their resources in determining which identified needs they will meet.

However, as set out at page 10 of this guide, the fact that social services do not have a specific duty to meet every need does not mean they have a completely free reign. The decision on what needs to meet must be taken subsequent to a lawful assessment which identifies the needs and the consequences for the child if services are not provided. In certain cases it may be that the consequences are so serious that no rational authority would conclude that this need should not be met – for example, a need for accommodation. In deciding whether or not support needs to be provided, the policy objectives of the CA 1989 should borne in mind, namely, that support should be provided to meet the essential needs of children and families.

If the decision whether or not to provide support engages human rights considerations, then there may be a positive obligation on a local authority to provide support whatever the resource implications.

5.5 Our local authority sometimes threatens to take the child into care rather than give support. Can they do this?

In short, where there are no child protection concerns other than the family's destitution, the answer to this question is almost certainly "**no**", unless there is a risk of serious harm to the child. We would recommend that your client seeks legal advice if this is threatened.

Serious harm

In a child protection context a local authority may remove a child form their parent's care, other than in an emergency situation, once an appropriate order has been obtained from the Court. Such an application must generally follow the completion of an assessment followed by a child protection conference and the instigation of a child protection plan. The threshold for any child protection action by a local authority, as set out in CA 1989 s47, is that the child is suffering or is likely to suffer significant harm.

It seems unlikely that a Court would approve any application by a local authority for a care order if the sole basis for the application is that the local authority is refusing to provide support for the family together. This would run contrary to the overriding purpose of CA 1989 Part II, which is for local authorities to provide support to children to safeguard and promote their welfare and "*so far as is consistent with that duty, to promote the upbringing of children by their families*'".

Any such application is likely to be in breach of the client's right to family life under Article 8. It may also be irrational, because it would be much more expensive for a local

authority to take a child into care rather than to provide the family as a whole with accommodation and support.

If this situation arises your client should urgently seek advice from solicitors specialising in public law Children Act work.

5.6 Our local authority says that they cannot provide support to the entire family but they offer to accommodate the child only. Can they do this?

A local authority has the power to accommodate a child separately under s 20 CA 1989. When the local authority says they can only accommodate a child in these circumstances they are almost certainly referring to their powers under section 20. However, this is voluntary, meaning that the parent's consent will be required. If a person with parental responsibility does not consent, then the local authority would be acting outside their powers, and therefore unlawfully, in accommodating the child separately under section 20. Where a child is being accommodated under section 20 a person with parental responsibility may remove them from the accommodation at any time (see s20 (8) CA 1989).

A decision by a local authority to refuse to accommodate a family together on the basis solely that the child could instead be accommodated separately under section 20 would probably be unlawful. This is because the Court of Appeal in *Clue* (see above) established that a local authority must accommodate migrant families together where this is necessary to avoid a breach of their human rights. Requiring a child to be accommodated away from his/her family (or not be accommodated at all) will almost certain entail a breach of the family's rights under Article 8 EHCR rights.

5.7 Our local authority is accommodating the family together but says they only have to provide financial subsistence for the child. Can they do this?

Unless the amount provided said to be for the child only is actually sufficient to meet the needs of the entire family, the local authority may be acting unlawfully. Social services have the power to provide support to the entire family if it is provided with a view to *"safeguarding and promoting the child's welfare"* (s. 17(3)). In order to safeguard and promote a child's welfare it is arguably necessary to provide their parents with adequate subsistence support because if such support is not provided, the parents must either starve themselves to an extent that they are unable to look after the child, or take funds intended to be spent on the child to spend on themselves, or obtain funds by illegal activities, which could result in their imprisonment or deportation. None of these options is consistent with the general duty to safeguard and promote children's welfare, so funding should be made available to meet the parents' subsistence need also.

5.8 Is there a minimum level of subsistence that should be paid to a family, and if so by what criteria should this be determined?

There is no basic minimum standard for s 17 subsistence payments in law. However once a local authority accepts a duty to provide accommodation and support then it must exercise that duty rationally and in accordance with its obligations to safeguard and promote a child's welfare.

Therefore it may be possible to challenge any level of subsistence which is insufficient for the child's development to be safeguarded and promoted. Indeed, if a child's best interest is treated as a primary consideration, arguably financial subsistence may need to be provided at a level that goes beyond simply meeting essential living needs.

Some local authorities routinely provide very low levels of financial subsistence. Although there is no minimum in law, there are relevant comparators such as levels of asylum support under s 95 IAA 1999, or benefit and tax credit rates. There is a suggestion in *R(VC) v Newcastle* (see above), that asylum support under s4 IAA (£35.39 per person per week) may not be enough to meet a child's needs.

If your client is not receiving enough in the way of financial subsistence you should make representations to social services as to why they need more. It will be helpful if you present information as to why what is provided is not enough, and you could address the following factors:

- Do the parents and/or children have to miss meals?
- Can they afford nutritious food?
- Can they afford clothing appropriate for the weather?
- Does the child lack age-appropriate toys that would assist their development?
- Can they afford travel costs for essential journeys?

If social services refuse to increase the amount of subsistence, refer your client to a solicitor for advice.

5.9 Our local authority provides a set rate of subsistence and they are refusing to even consider paying more. Can they do this?

All service provision decisions for children 'in need' must be based on an assessment which treats the child's best interests as a primary consideration. If a flat rate of subsistence is provided regardless of the facts of the case, arguably the local authority will not have properly considered the needs of the child, nor had the child's best interest as a primary consideration. If the family's needs are not being met it is possible that the local authority is acting unlawfully and your client should seek legal advice.

5.10 The accommodation provided is totally unsuitable, is there a legal duty to provide a minimum standard of accommodation to the family?

There is no express legal duty in relation to the suitability of accommodation which local authorities should be providing to migrant families under CA 1989 s 17.

However given the purpose of s 17 to safeguard and promote children's welfare, the suitability of accommodation for migrant families should be broadly assessed against

the standards which apply to other families in social housing. As such, accommodation should be in a decent standard of repair, should have all basic utilities present, should not be damp or infested with insects and should be reasonably large to accommodate the family.

The 'bedroom standard' for social housing will provide a general benchmark for the number of bedrooms the accommodation should have. Similarly in relation to social housing, the law provides that families should only be placed in B&B accommodation if nothing else is available, and should not be kept there for more than 6 weeks.

If you encounter a family who have been placed in unsuitable accommodation you should request that the local authority either move them (stating the reasons why the accommodation provided is unsuitable) and/or request an assessment with a view to moving the family. If social services refuse and the accommodation is particularly unsuitable, you could refer your client to a solicitor

5.11 Our local authority will not provide any support because the family have no outstanding immigration application – can they do this?

Families without an outstanding immigration application run the risk that social services will conclude that they can return to their country of origin. However, arguably local authorities should provide interim funding whilst they complete their assessment as to whether a family could return home and pending a family's return to their country of origin. This is supported in relation to certain families by the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, see Reg 4.

Difficult issues arise if a family refuses to return home in circumstances where social services have concluded there is no barrier to them doing so. Families in this situation should seek legal advice.

6 CHALLENGING UNLAWFUL DECISIONS

There are two main ways of challenging a local authority decision: making a complaint or bringing a judicial review.

6.1 Complaints

A local authority will usually have a 3-stage complaint process which is publicised on their website. If, having exhausted this process, your client remains unsatisfied with the outcome, a complaint could then be made to the Ombudsman.

The advantage of making a complaint is that it is free, and legal advice is not usually required. The complaints process may be a good means of addressing historic concerns. For example, if social services initially refused to provide support which caused the family to suffer, but they are now providing appropriate support such concerns could be addressed by way of a complaint.

However, in challenging some of the decisions set out in this guide, pursuing the complaints route will not always be the most appropriate course of action.

First, the complaints process may not be capable of achieving the timely resolution that your client needs. For example, if s/he is facing imminent street homelessness or does not have enough money to buy food then the complaints process is unlikely to provide a resolution in time.

Second, if your concern is not whether or not your local authority has followed its own policies or procedures correctly, but rather whether the policy itself may be unlawful, then making a complaint is unlikely to resolve the issue.

If a complaint is not appropriate, refer your client to a solicitor for advice on whether there are grounds to bring an urgent judicial review challenge.

6.2 Judicial review

As a public body, a local authority is required to act fairly, reasonably, in accordance with their legal powers and duties and in compliance with their human rights obligations. Any failure to do so may be challengeable by way of “judicial review”. The judicial review procedure permits the court to review the lawfulness of the conduct of a public body, and may be the most appropriate mechanism to challenge local authority decisions where the situation is very urgent or the local authority is operating an unlawful policy or practice.

A successful judicial review action may not only remedy the situation in relation to the family bringing the JR, but may also result in the local authority having to remedy any unlawful policy or practice, thereby benefiting other families in a similar situation. Even if the local authority settles such cases before a court considers the matter, the

increased costs in having to fight such action may provide a powerful incentive for local authorities to introduce new policies and procedures.

6.3 Bringing a judicial review challenge

If you have been unable to resolve the matter and you are concerned that the local authority's actions may not be lawful, your client should seek legal advice. .

There are strict time limits for bringing a judicial review. A challenge should be brought promptly and no later than 3 months after the decision complained of. Promptness can require that action be taken much sooner than the 3 months deadline. Aside from the JR time limits, in cases concerning destitute families it is likely that their situation will be extremely urgent, particularly if they are facing imminent eviction or are already street homelessness and so immediate action may be required.

The first step a solicitor will usually take in initiating possible judicial review proceedings is to send what is called a "Judicial Review Pre-action Protocol letter". This essentially sets out the facts of the case and why the act or omission of the local authority is unlawful. It will also inform the local authority of the steps that it needs to take to avoid judicial review proceedings being issued. Whilst the usual deadline given to a Defendant to respond to a pre-action protocol letter is 14 days, in very urgent cases, which many of these cases will be, a much shorter response time may be appropriate.

The law is clear and settled in many of the situations covered in this guide and the decision which is subject to the challenge quite obviously unlawful. As a result, many claims of this nature are actually settled without any need for proceedings to be issued. However, if a Defendant fails to respond or fails to take the steps that is said to be necessary in the pre-action letter, then it might be necessary to issue a claim at the High Court.

6.4 Funding legal advice

A destitute family will meet the financial eligibility criteria for legal aid. Therefore solicitors with a contract with the Legal Aid Agency will be able to apply for public funding for your client. If your client is granted legal aid they will not have to pay for legal advice and will be protected from having to pay the local authority's costs if their claim is not successful[8].

There is a list of public law solicitors on PLP's website. PLP may also be able to accept referrals, subject to capacity.

[8] The government has consulted on introducing a "residence test" for legal aid. At the time of writing it is not known whether a residence test will be introduced. If it is, many migrant families will no longer be able to obtain legal aid.

6.5 Checklist: When to refer a case to a solicitor

You should consider contacting a solicitor if you encounter any of the frequent problems covered in the guide, but in particular in the following situations:

- If social services refuse to undertake an assessment (except where s95 support is available) when a destitute family is in need of urgent support;

- If social services refuse to provide appropriate support to a destitute family following an assessment, especially if this decision is based on the following:

    - a policy or practice of offering support to the child only;

    - a policy of only providing a set rate of support regardless of the facts of an family's case

    - where the level of subsistence paid is lower than £35 per person and/or is insufficient to meet the family's essential living needs.

- Where there is any suggestion that they will remove the child and/or accommodate the child only;

- If a local authority refuses to assess under s 17 on the basis the family is entitled to support under section 4 IAA