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Providing accommodation and support to those with an irregular immigration status

Catherine Rowlands, Peggy Etiebet and Tara O'Leary

What are we going to cover?



1. Introduction & welcome – Catherine Rowlands
2. NRPF and Schedule 3 – Peggy Etiebet
3. The Housing Act 1996 – Tara O’Leary
4. The Care Act 2014 – Peggy Etiebet
5. The Children Act 1989 – Tara O’Leary
6. The Localism Act 2011 – Peggy Etiebet
7. Other issues – Peggy Etiebet & Tara O’Leary
8. Questions and answers

••• Introduction and welcome
••• Catherine Rowlands



NRPF
Peggy Etiebet

NRPF – who are they?



- It is used as a catch all term for those excluded from mainstream welfare benefits (housing, homelessness, cash benefits, social care) but it has a precise legal meaning that is different to the common one.
- They are those who have had a no recourse to public funds condition imposed on their grant of limited leave to remain or enter the UK.

NRPF – who are they?



- The NRPF condition may be imposed where a person, who is not a British Citizen, requires leave to enter or remain in the UK (section 3(1)(b) Immigration Act 1971), he is given limited leave, and this limited leave is subject to a condition to maintain and accommodate himself and any dependents without recourse to public funds (section 3(1)(c)(ii) Immigration Act 1971).

NRPF – who are they?



- The NRPF condition does not, prior to 31 December 2020, apply those who are exercising an EU right to reside under the Immigration (European Economic Area) Regulations 2016 (as they do not need permission to enter or remain section (7(1) Immigration Act 1988)) or, post 31 December 2020, those that have a retained enforceable EU right through the EU Settlement Scheme (section 7(1)(a) Immigration Act 1988 to be amended).

NRPF – what are they?



- Public funds defined by Immigration Rule 6.
- It includes housing under Parts 6 and 7 of the Housing Act 1996 (i.e. housing and homelessness support), a range of welfare benefits (e.g. child benefit, child and working tax credit, housing benefit, council tax benefit, income support, income based job seekers allowance) and a discretionary payment under section 1 of the Localism Act 2011.



Schedule 3 NIAA
Peggy Etiebet

Schedule 3 NIAA – what is it?



- Schedule 3 Nationality Immigration and Asylum Act 2002
- These are provisions that prohibit LAs from providing support and assistance under various statutory duties and powers to people who are caught by schedule 3 NIAA.
- Note this formulation - the choice of supporting people caught by it has been taken away from LAs. LAs cannot support save in a limited exception.

Schedule 3 NIAA – who is caught?



- Paragraphs 4-7A schedule 3 NIAA
- Common classes are:
 - EEA Nationals
 - Those in the UK who require leave to remain but do not have it and are not an asylum seeker
 - Refugee status abroad
 - Failed asylum seekers who have failed to cooperate with removal directions

Schedule 3 NIAA – what provisions?



- Paragraph 1 schedule 3 NIAA
- Common provisions:
 - Section 17 Children Act 1989
 - The Leaving Care provisions
 - Section 1 Localism Act 2011
 - Part 1 Care Act 2014

Schedule 3 NIAA – what type of support?



- Important to note:
 - LAs cannot provide accommodation and subsistence support under these provisions if the person is not otherwise eligible for support, and for that type of support, under the applicable legislation.

Schedule 3 NIAA - what type of support?



- For example to be eligible for:
 - Section 17 Children Act support by way of accommodation the applicant would have to have a child in her care who is without a home;
 - Care Act support by way of accommodation the applicant would have to have needs for care and support where accommodation was a necessary and appropriate conduit for the practical and effectively delivery of care and support for the relevant looked after needs.

Schedule 3 NIAA – limited exception



- Paragraph 3 schedule 3
- A LA may provide support where and to the extent that the exercise of the power or performance of the duty is necessary for the purpose of avoiding a breach of a person's Convention rights or rights under the EU Treaties.
- Repeat: that support will only be of a type the applicant is eligible for under the relevant legislation. The exception is not a gateway to general support to alleviate destitution once crossed (*Aburas v Southwark*).

Schedule 3 NIAA – limited exception



- Before an LA may lawfully provide support to a person under this exception, it must make a decision that such support is necessary to avoid a breach of Convention and/or EU rights.
- This is done by way of what is colloquially called a Human Rights Assessment (“HRA”) (as the overwhelming majority of applications relate to Convention rights).

Schedule 3 NIAA – limited exceptions



- The Convention rights are typically:
 - an article 8 right to family life or private life in the UK;
 - an article 3 right not to be subjected to inhuman or degrading treatment on the basis of an inability to access medical treatment in the country of origin; or
 - An article 6 right to a fair trial (c.f. care proceedings)
- EU rights are typically (pre Dec 2020) permanent rights of residence, or retained worker status.

Schedule 3 NIAA – limited exception



- If, in the HRA, the LA makes a decision that the applicant can return to their country of origin without any relevant breach, then, should the applicant chose to remain in the UK, there is no breach of their Convention or EU rights.
- In this circumstance the LA cannot provide support. I.e. if the person chooses to remain in the UK then notwithstanding evident destitution the LA cannot lawfully assist (*AR v Hammersmith*).

Schedule 3 NIAA – limited exceptions



- Practical barrier to return:
 - Covid-19 travel restrictions.

••• Can you use Pt VII of the Housing Act
••• 1996?

Tara O'Leary

Who is ineligible?



“Persons from abroad”: s.185 HA 1996 + Code Chapter 7

1. “Persons subject to immigration control”

- Governed by Asylum & Immigration Act 1996 & Immigration Act 1971
- A person who requires leave to enter or remain in UK
- Exceptions who are eligible are prescribed by the Allocation of Housing & Homelessness (Eligibility) (Eng) Regs 2006/1294 - see Reg. 5(1)
- Those ineligible include persons with leave to remain but subject to NRPF condition

Who is ineligible?

'Persons from abroad' under s.185 HA 1996



2. “Other persons from abroad”

- Not subject to immigration control but excluded from eligibility by 2006 Regulations:
 - a. Persons not habitually resident in Common Travel Area (unless a class of persons exempted from the habitual residence test by Reg. 6(2))
 - b. EEA nationals & relatives in UK as job-seekers, 1st 3 months, carers of British citizens, or Zambrano carers (British citizens using EU treaty rights)
 - c. EEA nationals & relatives with a right to reside in other part of Common Travel Area as per (b)

What can be done under Pt VII HA 96?



1. Duty to provide interim accommodation if there is reason to believe A may be eligible, homeless and in PN - pending investigation and s.184 decision: s.188(1)
 - A “low threshold”: para. 15.5 Code Guidance
 - *R (Kelly) v Birmingham CC* [2009] EWHC 3240 (Admin) [§7(iv)]
2. Discretionary power to accommodate pending review of decision on eligibility: ss202(1)(a) & 188(3)

What can be done under Pt VII HA 96?



4. Terminating interim accommodation: “notice periods should take account of the needs of the applicant and the time required for them to access assistance”: CG para. 15.1
5. Duty to provide information and advice regarding homelessness and securing accommodation: s.179(1)
6. Limited duty to households with “restricted cases”: s.193(3B) & (7AD) – discharge of main housing duty by PRS offer only
 - Applicant is eligible but only in PN due to the presence of an ineligible person in household

Apply to lift NRPF condition



- Persons with leave to remain but NRPF condition can apply to Home Office for removal of NRPF condition
- *R (W) v SoSHD v Project 17* [2020] EWHC 1299 (Admin)
– 21 May 2020
- Regime of imposing NRPF condition was unlawful as it did not adequately recognise, reflect or give effect to SoS' obligation not to impose NRPF in cases with imminent risk of destitution.
- HO must now direct officers not to impose condition if A can supply evidence of imminent risk of destitution

What now?



- Many applications left ‘on ice’: now time to issue s.184 decisions?
- What is a reasonable period of notice to end s.188?
- Discretion to accommodate for “reasonable notice period” or pending s.202 review: how long is long enough?
- Providing grants/loans of deposit or rent for limited period to “move on” into PRS or longer-term accommodation. Localism Act 2011?

Useful resources



- [“COVID-19: Housing, planning and homelessness”](#) — LGA webpage compiling govt and third sector resources and guidance
- LGA & Local Partnerships - Local Authority Briefing: [“Housing People who were rough sleeping and those at risk who have been accommodated due to COVID-19”](#)
- Crisis: [“Open Access Toolkit”](#) for local authorities
- [Ministerial Letter](#) 24 June 2020 regarding EEA rough sleeper derogation

••• Can you use the Care Act 2014?
••• Peggy Etiebet

Care Act – can you use it?



- The aim of the Care Act is not to provide general accommodation.
- *R(Aburas) v London Borough of Southwark* [2019] EWHC 2754 (Admin): *‘[t]here is a distinct statutory scheme for the principled and orderly approach to local authority housing, including local authority duties owed to those who are homeless. That distinct scheme is to be found in the Housing Act 1996 (HA96), and there are boundaries between the statutory schemes...It would undermine the integrity of a coherent statutory framework if CA14 became a ‘back-door’ route to claims based on accommodation needs, circumventing the scheme of HA96 and jumping the homelessness queue. As Lady Hale said of the predecessor legislation in the M (Slough) case at §33, the local authority function of addressing ‘looked-after needs’ for care and support:”... is not a general power to provide housing. That is dealt with by other legislation entirely, with its own criteria for eligibility ... [Otherwise,] every homeless person who did not qualify for housing under the Housing Act 1996 would be able to turn to the local social services authority instead. That was definitely not what Parliament intended ...’*

Care Act – can you use it?



- To note:
 - an LA cannot provide accommodation and subsistence support under the Care Act if the person is not otherwise eligible for support, and for that type of support, under the Act.
- Must undertake a CA needs assessment.

Care Act – section 19 power



- Consider s. 19 power as well as the s. 18 duty i.e. if there is 1 need for care and support or other none eligible need consider the s.19 power.
- Section 19 is to be read as imposing a duty to secure a Convention right (in an applicable case) (*Aburas v Southwark*).

Care Act – can accommodation be provided under the Care Act?



- An LA cannot just provide accommodation under the Care Act – there must be a need for care and support as well.
- The need for care and support had to arise *‘from the person’s physical or mental impairment or illness and not because of their lack of accommodation’* and that *‘a “need for care and support” under the Care Act does not include a stand alone need for subsistence or for accommodation or for both subsistence and accommodation (R(AR) v Hammersmith and Fulham [2018] EWHC 3453 (Admin)).*

Care Act – can accommodation be provided under the Care Act?



- Accommodation may only be provided under the Care Act where it is a necessary and appropriate conduit for the practical and effectively delivery of care and support for the relevant looked after needs (*R(Aburas) v London Borough of Southwark* [2019] EWHC 2754 (Admin)).

Care Act – can accommodation be provided under Schedule 3 NIAA?



- The test for applying the limited exception is high.
- The paragraph 3 schedule 3 test is whether there is an imminent prospect of serious suffering caused or materially aggravated by the refusal to provide accommodation so as to secure the support to meet the relevant need(s) for care and attention (*Aburas v Southwark*).

Care Act – section 21 exclusion



- Section 21 Care Act 2014: a local authority may not meet the needs for care and support of an adult subject to immigration control (within the meaning of section 115 Immigration and Asylum Act 1999 where those needs for care and support have arisen solely because the adult is destitute, or because of the physical effects, or anticipated physical effects, of being destitute.

Care Act – what now?



- LAs should consider whether they need to do a CA & HRA assessment on a case by case basis before they cease current support.

••• Can you use the Children Act 1989?
••• Tara O'Leary

Duties under Children Act 1989



- General duty to safeguard and promote the welfare of “children in need” within their area, and to promote the upbringing of such children by their families: s.17(1) + (10)
- Services provided to families in need may include “providing accommodation and giving assistance in kind or ... in cash”: s.17(6).
- A general and overriding duty not an absolute duty specific to any particular child in need (plus also contrast s.11 Children Act 2004)
- Duty to accommodate children whose parents/carers cannot look after them: s.20 Children Act 1989

Duties under Children Act 1989



- Duty to request A's permission to refer to social services in eligible cases and if IH: s.213A(1) HA 1996
- LHA duty to provide advice & assistance to social services if requested in such cases: s.213A(5)
- A child without accommodation is a child "in need", and in principle s.17 can be used to support NRPF families: *R (G) v Barnet LBC* [2003] UKHL 57
- But... considerable discretion on how to meet the needs of any child in need. Not the case that accommodation is owed to any or every homeless child. Other measures?

What about immigration status?



- Schedule 3 NIAA 2002... again
- Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002/3078
- Limited support for Sch. 3 families who are (a) given refugee status in another EEA state; (b) EU/EEA nationals, (c) illegal immigrants/overstayers: i.e. travel expenses and/or accommodation until they leave the UK
- Only fallback: accommodation & support if necessary to prevent breach of Convention rights

Social services and human rights



R (Clue) v Birmingham CC [2010] EWCA Civ 460:

- What is the applicant's immigration status?
- If A is in breach of immigration laws and is not an asylum seeker, are the family destitute?
- Is there any impediment to the family returning to their country of origin? (If only funds, then SS can provide)
- If yes, does A enjoy Art 8 rights in the UK and would a return to home country impede those rights?
- The fact A has pending appeal is relevant unless hopeless
- SS should usually not assess whether pending HO applications and appeals are likely to succeed

Social services and human rights



- EU/EEA national in the UK as a jobseeker: could lawfully refuse s.17 assistance as A could meet her children's needs by returning to Spain: *R (Conde) v Lambeth LBC* [2005] EWHC 62 (Admin)
- Very unusual for s.17 support to be given to anyone other than parent/primary carer: *R. (MK) v Barking & Dagenham LBC* [2013] EWHC 3486 (cousin); *R (OA) v Bexley LBC* [2020] EWHC 1107 (Admin) (older brother)
- Beware withdrawing s.17 support if it means A would have to abandon an immigration application or appeal: *R (KA (Nigeria)) v Essex CC* [2013] EWHC 43 (Admin)

••• Can you use the Localism Act 2011?
••• Peggy Etiebet

Localism Act 2011



- An LA cannot provide accommodation and subsistence support under the Localism Act if the person is not otherwise eligible for support, and for that type of support, under the Act.
- Sections 1 & 2: the LA has the power to do anything individuals may generally do unless it is prohibited from doing so by a pre or relevant post commencement limitation.

Localism Act – accommodation



- *AR v Hammersmith*: a local authority was prohibited from providing accommodation under any Act to a person with irregular immigration status by section 185 Housing Act 1996.
- This was a relevant prohibition for the purposes of section 2 Localism Act. As such the local authority could not provide accommodation under the Localism Act to those persons.

Localism Act – payment for accommodation



- Left undecided in *AR v Hammersmith*. Indications by judge are that it is unlikely (c.f. role of section 206(1)(c) 1996 Act.
- *Oxfordshire County Council v The Queen on the Application of Saima Khan v Office of the Deputy Prime Minister* [2004] EWCA Civ 309: ‘[i]t is difficult to believe that Parliament intended to prohibit the direct provision of accommodation to persons like Mrs Khan, but not to prohibit its indirect provision by the giving of financial assistance for the securing of such accommodation.’

Localism Act – subsistence payments



- Unclear.
- No Act that I am aware of that prohibits a local authority from making subsistence payments for section 2 to bite on.
- Consistent with *Khan* where the court held that there was no power under section 21 National Assistance Act 1948 (“NAA”) to provide funds for items not connected with accommodation e.g. clothes. As such the prohibition on the provision of section 21 accommodation (and related services) to those subject to immigration control in section 21(1A) of the NAA did not relate to the provision of funds for clothes.

Localism Act – subsistence payments



- But did Parliament intend for the Localism Act to be used to circumvent or override a clear statutory scheme which prohibits people with irregular immigration status from accessing subsistence support?

Localism Act – NRPF



- Those who are subject to a NRPF condition are also excluded from discretionary payments made under the Localism Act as it is classed as public fund.
- Immigration Rule 6(i): *a discretionary payment made by a local authority under section 1 of the Localism Act 2011*'.

Localism Act – schedule 3



- If an LA chooses to use of section 1 Localism Act to provide funds for accommodation and/or subsistence then this use remains subject to schedule 3 NIAA.
- I.e. an LA cannot use it except where it has decided, in an individual case and following a HRA, that its use is necessary to avoid a breach of Convention and/or EU rights.

Localism Act – what now?



- Is it being used & if yes on what basis?
- Does LA need to consider & make a decision on whether it can lawfully use Localism Act in that way?
- Does LA need to undertake a HRA assessment?
- Risk assess for implications in other areas e.g. where there is an alleged breach of Art 8 in current accommodation & no suitable property for eligible person?



Other issues

Right to Rent immigration checks



- PRS landlords and agents under an obligation to check immigration status of renters before signing tenancy
- Person has no right to rent accommodation if s/he:
 - Does not have valid leave to enter/remain in UK
 - Has not been granted discretionary permission to rent by the Home Office (e.g. pending immigration appeal)
- Scheme does not apply to anyone with right to remain (NRPF or otherwise), EEA/EU nationals, non-EEA nationals exercising EU Treaty rights (e.g. Zambrano carers) etc.

Right to Rent immigration checks



- The rules: ss. 20 – 37 Immigration Act 2014
- *R (JCWI) v SSHD* [2020] EWCA Civ 542, April 2020: the Right to Rent scheme is not discriminatory
- No suspension of right to rent during pandemic: only temporary suspension of requirement to check original documents – can now be done remotely or later
- BUT s.21(3): HO can grant permission to rent
- Usually if A has immigration appeal, exceptional circumstances and necessary to protect Conv. rights
- *R (Stewart) v Birmingham CC* [2018] EWHC 61 (Admin)

Failed Asylum Seekers – Section 4 support



- A failed asylum seeker may be provided with accommodation (and support in kind) by the Home Office pursuant to section 4(2) of the Immigration and Asylum Act 1999 and regulation 3(1)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005/930 where the provision of accommodation is necessary to avoid a breach of a person's Convention rights.

Failed Asylum Seekers – section 4 support



- The provision of accommodation where necessary to avoid a breach of Convention rights is the same test LAs apply.
- There is therefore an alternative and similar avenue of support for this class of persons that they may be signposted to (see e.g. *Aburas*).

Coronavirus Act 2020 – what effect?



- There is nothing in the Coronavirus Act 2020 that empowers local authorities to provide accommodation and support to persons with irregular immigration status.

Suspension of Derogation



- Luke Hall letter of 24 June 2020.
- EU derogation (normally applied through Article 24(2) of the EU Free Movement Directive) is extended nationally to enable LAs to accommodate and support a specific group of rough sleeping EEA nationals for up to 12 weeks.
- This approach does not extend to statutory services or welfare benefits - only non statutory services such as hostels.



Questions and Answers



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