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Challenging refusals to assess or provide support under section 17 Children Act 1989

Section 17(1) of the Children Act 1989 imposes a general duty on local authorities to safeguard and promote the welfare of 'children in need' within their area. However, in practice, there are often refusals or delays in conducting an assessment or providing support.

Find more information on the case law referenced in this resource here.

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Refusal to assess

The local authority must carry out an assessment if there is any realistic prospect that the child may be in need. The threshold to trigger a child in need assessment is very low. However, in practice, local authorities often refuse to assess.

What can I do?

- Ask why the local authority is refusing to assess the family and remind them that they have a duty to assess if the child 'may' be in need. The most frequent reasons for refusing to assess are explored in the next pages.

Case law or guidance	Summary
R v LB Barnet ex. p. G [2003] UKHL 57	House of Lords decision that s17 imposes a duty on a local authority to undertake an assessment.

R (C,T,M,U) v Southwark LBC [2016] EWCA Civ 707	Court of Appeal decision in relation to s17 subsistence. It sets out the requirements of a lawful assessment and guidance on s17 duty and powers.
Working Together to Safeguard Children, 2023	Statutory guidance which a local authority should follow during the assessment process. This confirms that s17 imposes a duty to undertake an assessment.

Failure to provide interim support

It can take up to 45 working days to complete a child in need assessment, but if there's an urgent need for support then the local authority can provide interim support on a 'without prejudice' basis. Interim support is available, but it can be challenging to get a local authority to provide it.

What can I do?

- Explicitly state that interim support is needed and the date it is needed by.
- Provide supporting evidence such as an eviction letter (with an eviction date), proof of loss of income, bank statements, supporting letters from friends etc.
- Refer to the Working Together to Safeguard Children guidance below.

Case law or guidance	**Summary**
Working Together to Safeguard Children, 2023	147: Action to meet a child's needs can begin even before assessment has concluded. 155: In some cases, the needs of the child will mean that a quick assessment will be required. In all cases, as practitioners identify needs during the assessment, they do not need to wait until the assessment concludes before providing support or commissioning services to support the child and their family.

No recourse to public funds

Sometimes a family will be refused an assessment on the basis that they have No Recourse to Public Funds (NRPF).

What can I do?

- Remind the local authority that support under section 17 CA 1989 is not a public fund.
- Provide evidence demonstrating that the family is not excluded under schedule 3 Nationality, Immigration, and Asylum Act 2002 (e.g. BRP or letter from solicitor)

Case law or guidance	Summary
List of public funds	https://www.gov.uk/government/publications/public-funds--2/public-funds Section 17 is not listed here.
Schedule 3 Nationality, Immigration, and Asylum Act 2002	https://www.legislation.gov.uk/ukpga/2002/41/schedule/3 Individuals with LLR (NRPF) are not excluded by schedule 3.

Immigration status

Schedule 3 Nationality, Immigration, and Asylum Act 2002 excludes some adult migrants (including people who are undocumented) from accessing support under section 17.[1] However, the exclusion does not apply if the situation is so serious that a failure to provide support would breach human rights under the European Convention of Human Rights. The exclusion under schedule 3 does not apply if the parent is in the UK lawfully (e.g. they have leave to remain).

If a family is excluded by schedule 3, the local authority should conduct a Human Rights Assessment to consider whether any human rights breach could be avoided by advising or assisting the family to return to their country of origin.

The local authority will not be able to advise or assist a family to return to their country of origin if there is a legal or practical barrier preventing their return:

- Legal barrier: this could include a pending human rights immigration application, appeal or judicial review. If the family has not yet submitted a human rights application, they may still have a legal barrier to return if they have received immigration advice that they have the grounds to make an application and be taking steps to do so.
- Practical barrier: this could include being physically unable to travel because of a very serious health problem or the late stages of pregnancy. A practical barrier could also exist if the family do not have valid passports or enough money to travel. However, practical barriers can often be overcome (e.g. after the baby is born, or by the council helping the family to acquire passports). NB: if someone is suffering from a health problem serious enough to prevent travel, the council is likely to expect the person to receive positive immigration advice about a human rights claim on medical grounds.

[1] https://www.legislation.gov.uk/ukpga/2002/41/schedule/3

If there is a legal or practical barrier preventing a family from returning to their country of origin, then social services must assess and provide support to avoid a breach of their human rights.

What can I do?

- Point to any breaches of Article 3 or Article 8 ECHR if support were not to be provided (e.g. homelessness, destitution, or separation of the family).
- Share advice note from solicitor or proof of a pending immigration application based on human rights grounds.
- Refer to the *Clue* and *KA* cases (below).

Case law or guidance	**Summary**
R (Clue) v Birmingham CC [2010] EWCA Civ 460	The Court of Appeal held that where not providing support would entail a breach of human rights, a local authority can consider whether that breach can be avoided by a family returning to their country of origin, and whether there are any impediments to return. The Court found that an outstanding immigration application (that was not hopeless or abusive) is an impediment to return.
R. (on the application of KA (Nigeria)) v Essex CC [2013] EWHC 43 (Fam)	A local authority had erred in withdrawing financial support and assistance from a family which was intending to appeal against an immigration decision raising human rights issues, which was not obviously hopeless or abusive.

Child not 'in need'

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

- Child 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
- Child's "health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services"; or
- Child is disabled

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. However, if the parent is excluded by schedule 3 Nationality, Immigration, and Asylum Act 2002 they will also have to demonstrate a breach of human rights (see section on 'Immigration status').

What can I do?

If an assessment has not been completed:

- Request an assessment, referencing the case law in the 'refusing to assess' section on page one.

If an assessment has been completed:

- Go through the assessment, pointing out any discrepancies in the assessment or failures of the local authority to consider particular evidence.
- Quote what "in need" means - "unable to achieve or maintain a reasonable standard of health or development".
- State why you think the child is in need. That they are unlikely to achieve or maintain a reasonable standard of health or development because of disability, low income, lack of accommodation, unable to access school/healthcare, etc.
- Reference the case law below.

Case law or guidance	**Summary**
R. (on the application of OK and Others) v. London Borough of Barking and Dagenham [2010] EWCA Civ 1101 (Admin)	Local authorities need to properly consider the support available and specifically identify where support will come from. It is insufficient for a local authority to say a child can be supported by their network without specifying particularly where and what kind of support the network can provide.
R (O) v Lambeth LBC [2016] EWHC 937 (Admin)	The judge found that the duty of the local authority is to "take 'reasonable steps to identify' whether a child is in need."
R (on the application of U and U) v Milton Keynes BC [2017] EWHC 3050 (Admin)	The local authority's conclusion that a family had funds to access accommodation was correct, but their failure to account for the family's inability to rent lawfully (under the Right to Rent) made their decision unlawful. The family might be able to stay in a succession of but this would likely render the children 'in need' in any event.
R (JA) v Bexley LBC [2019] EWHC 130 (Admin)	The local authority was overly reliant on inconsistencies and gaps in a client's story, and did not properly evaluate other evidence in order to reach a conclusion that a family was not destitute.

Child not 'in area'

Where a child is 'physically present' in a local authority area, that authority will have a duty to assess. A child will be physically present if they are living, or if they attend school there. If the family is homeless, the child will be physically present in whichever area they most recently stayed

If the child is physically present in more than one local authority area (e.g. living in one borough and attending school in another), both will owe a duty to assess and you can approach either local authority. However, it is acceptable where more than one authority owes a duty to assess for the authorities to agree between themselves who will conduct the assessment, but this should not be to the detriment of a child by delaying the assessment and the provision of support.

Some local authorities wrongly apply the 'local connections' test used for homelessness applications under Part 7 Housing Act 1996. The only test for section 17 is physical presence.

What can I do?

- Contact the local authority that is refusing to assess or provide support and ask for their decision in writing.
- In this email thread, copy in the second local authority and state that the two must cooperate.
- Reference the case law set out below.

Case law or guidance	**Summary**
R v Wandsworth LBC ex p Sandra Stewart [2001] EWHC 709 (Admin)	The test for "within the area" is "physical presence". A child can be physically present in more than one area. If a child is physically present in more than one area, each local authority does not need to undertake its own assessment, but there is a need for cooperation between local authorities.
R (N) v Newham LBC [2013] EWHC 2475 (Admin)	A duty to assess under s17 did not depend on the child being ordinarily resident in a local authority's area. Physical presence was the test.
R (BC) v Birmingham CC [2016] EWHC 3156 (Admin)	Physical presence was both necessary and of itself sufficient to establish that a child was within a local authority's area.

Family refusing to cooperate

Section 17 is voluntary and based on consent. If a family is refusing to cooperate, then the local authority can conclude that they have withdrawn consent. Section 17 assessments also rely on evidence gathering to determine whether the child is in need.

There might be lots of different reasons as to why a someone is struggling to provide evidence. It may be that they have a distrust of authorities and institutions, and they don't feel comfortable sharing information. Or there may be communication issues or a breakdown in relations with the social worker.

Some local authorities may also have unreasonably high evidential requirements that prevent families from accessing support.

What can I do?

- Speak to the client and find out what has happened. Is there a problem with providing documents? Refer to emails and check if requested documents have already been provided.
- Explain in writing why documents are unable to be obtained/which ones have been provided and when further documents might be expected to be provided.
- If the information is dependent on someone else (eg a friend, host, or ex-partner) explain that the client cannot control someone else's actions or responsiveness, and the client is fully cooperating themselves.

Case law or guidance	Summary
R (on the application of S and J) v Haringey LBC [2016] EWHC 3054 (Admin)	It was determined that Haringey had erred in its decision to refuse to provide support on the basis that the mother had failed to provide details of her income and expenditure. It emerged that she had not been asked to provide these. This case is potentially useful if a client has not been given the opportunity to respond to claims against them before an assessment is concluded.

Disbelieving the family and adverse inferences

Local authorities will sometimes find that a child is not in need because they do not believe the family's claim of destitution. However, often there is a credible explanation to apparent inconsistencies or failure to provide information.

What can I do?

- Provide as comprehensive and well evidenced an account as you can.[2]
- Ask the local authority to explain what they don't believe and how they've reached their conclusion. Ask for evidence to back up any assertions.
- Emphasise that it's not fair to be asked to disprove an assertion made by the local authority.[3] The burden of proof being asked for is unreasonably high.

Case law or guidance	Summary
R. (on the application of OK and Others) v. London Borough of	Local authorities need to properly consider the support available and specifically identify where support will

[2] You can find a comprehensive list of evidence to support your referral here: https://www.project17.org.uk/media/118659/Evidence-checklist-October-2021.pdf

[3] Fairness is a Public Law Principle that governs the exercise of power and duties by a public body. Court cases have been decided on the principle of fairness.

Barking and Dagenham [2017] EWHC 2449 (Admin)	come from. It is insufficient for a local authority to say a child can be supported by their network without specifying particularly where and what kind of support the network can provide.
R (O) v Lambeth LBC [2016] EWHC 937 (Admin)	The judge found that the duty of the local authority is to "take 'reasonable steps to identify' whether a child is in need."
R (JA) v Bexley LBC [2019] EWHC 130 (Admin)	The local authority was overly reliant on inconsistencies and gaps in a client's story, and did not properly evaluate other evidence in order to reach a conclusion that a family was not destitute.

Children into care

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."

Children can only be taken into care in two broad circumstances. Firstly, if the parent consents under section 20 CA 1989. Secondly, if there are safeguarding concerns and there is a court order following a section 47 CA 1989 assessment. Destitution alone is not a strong enough reason to take the children into care where section 17 support can be provided instead. If the parent cannot take care of the child, the local authority should provide support to ensure they can.

What can I do?

- Request that the local authority put this decision in writing.
- Confirm whether the local authority is assessing the family under s47.
- If not, remind the local authority of their duty to promote the upbringing of children in need "by their families" so long as it is not contrary to their welfare.

Case law or guidance	**Summary**
Section 17(1)(b) Children Act 1989	Provides that a local authority should promote the upbringing of children in need "by their families".
Section 47 Children Act 1989	https://www.legislation.gov.uk/ukpga/1989/41/section/47

Section 4 Asylum Support

Section 4 support (accommodation and subsistence) is available from the Home Office for some destitute refused asylum seekers who have come to the end of their appeals process, are Appeal Rights Exhausted (ARE) and meet the narrow criteria set by the Home Office.

If a family is entitled to support under section 4 Immigration and Asylum Act 1999, then they can either access section 4 or section 17 support. However, the family cannot be compelled to apply for section 4 support instead of requesting section 17 support from the local authority.

Support provided under section 4 may not be sufficient to meet a child's assessed needs. Section 4 is intended to provide the bare minimum level of support to prevent destitution and is not provided in cash limiting access to some items and services. Whilst section 17 is intended to promote the welfare and best interests of the child and is therefore able to provide a much higher standard of support focused upon the individual needs of the child.

For more information, please see our factsheet here.

What can I do?

- Request that the local authority assess the family for support under section 17.
- Refer to the below case law.

Case law or guidance	**Summary**
R (ES) v LB Barking and Dagenham [2013] EWHC 691 (Admin)	A local authority cannot delay carrying out an assessment pending provision of Section 4 support.
VC & Ors, R (on the application of) v Newcastle City Council [2011] EWHC 2673 (Admin)	Section 17 support takes precedence over potential Section 4 asylum support; a local authority cannot refuse to assess under s17 just because a family may be entitled to s4. Section 4 support can only be relied on for discharge of s17 duty where the Secretary of State was willing and able (or if not willing could be compelled) to provide Section 4 support to a family, and Section 4 support would be sufficient to meet a child's assessed needs.
R (on the application of K) v Newcastle City Council [2011] EWHC 2673	As above in VC & Ors.

What are the next steps?

Sometimes advocacy alone is not sufficient in changing the local authority's decision. In these cases, you should contact a community care solicitor who can provide legal advice about Judicial Review. Judicial review is a legal procedure that enables the court to assess whether the local authority has acted lawfully. You can find a solicitor on http://find-legal-advice.justice.gov.uk