
GARDEN COURT
CHAMBERS

Urgent applications in homelessness and community care cases

Tessa Buchanan

Garden Court Chambers

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Homelessness

The key statutory tests

- **Homelessness**: s175 HA 1996.
- **Threatened with homelessness**: defined at s175 HA 1996.
- **Eligibility**: s185 HA 1996 and Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006/1294.
- **Priority need**: s189 HA 1996 and Homelessness (Priority Need for Accommodation) (England) Order 2002/2051.
- **Intentional homelessness**: s191 HA 1996.

Non-accommodation duties

- **Duty to make inquiries**: s184(1) HA 1996.
- **Duty to assess applicant's needs and prepare personalised housing plan**: s189A(1)-(7) HA 1996.
- **Prevention duty**: s195(2) HA 1996.
- **Relief duty**: s189B(2) HA 1996.
- **Duty to protect belongings**: s211(2) HA 1996.

Accommodation duties

- **Interim duty to provide accommodation**: s188(1) HA 1996.
- **Main housing duty**: s193(2) HA 1996.
- **Duty owed where main housing duty has been disapplied**: s193C HA 1996.
- **Duty owed to applicants in priority need who became homeless intentionally**: s190(2)(a) HA 1996.
- **Duty to secure accommodation for applicants with priority need who are being referred to another LHA**: s199A(2) HA 1996.

Accommodation powers

- **Power to accommodate pending review**: s188(3) HA 1996. Note that this power becomes a duty where the applicant has requested a review of the suitability of a final accommodation offer or final Part 6 offer: s188(2A) HA 1996.

- **Power to accommodate pending appeal**: s204(4) HA 1996.

Duty to make inquiries (1)

- Duty arises where the LHA have **reason to believe that an applicant may be homeless or threatened with homelessness**: s184(1) HA 1996.
- Duty is to ***"make such inquiries as are necessary"*** for the LHA to satisfy themselves whether an applicant is (a) **eligible** for assistance and (b) if so, **whether any duty, and if so what duty, is owed** to him/her under the following provisions of Part 7 HA 1996: s184(a) HA 1996.
- The LHA **may also make inquiries into local connection**: s184(2) HA 1996.
- On completion of their inquiries, the LHA ***"shall notify the applicant of their decision*** *and, so far as any issue is decided against his interests, inform him of the reasons for their decision"*: s184(3) HA 1996. The applicant must be informed of the right to request a review: s184(5) HA 1996. The notice shall be given in writing and, if not received by the applicant, shall be treated as having been given if it is made available for collection for a reasonable period: s184(6) HA 1996.

Duty to make inquiries (2)

- Application can be made in **any form**: *R (Edwards) v Birmingham CC* [2016] EWHC 173 (Admin); Homelessness Code of Guidance at §18.5.

- **Threshold** for the duty to arise is **low**: *R (Aweys) v Birmingham CC* [2007] EWHC 52 (Admin); *R (Kelly) v Birmingham CC* [2009] EWHC 3240 (Admin); *R (Edwards) v Birmingham CC*[2016] EWHC 173 (Admin).

- Applications can be made to **any department** of the local authority: Code at §18.5.

- An LHA can only refuse to accept an application if it is **based on exactly the same facts** as an earlier application: *R v London Borough of Harrow ex p Fahia* [1998] 1 WLR 1396; *Begum v Tower Hamlets LBC* [2005] EWCA Civ 340, *R (Minott) v Cambridge CC* [2022] EWCA Civ 159.

Duty to make inquiries (3)

- Duty to make enquiries arises **immediately**: *Robinson v Hammersmith and Fulham LBC* [2006] EWCA Civ 1122; *R (Edwards) v Birmingham CC* [2016] EWHC 173 (Admin).

- Does a **referral** received under s213B HA 1996 from a public authority constitute an application? Code says no (§18.7) but it is difficult to see how this fits with the statutory wording.

- A refusal to accept an application can only be challenged by way of **judicial review**.

- Only in the *"most straightforward of cases"* can a decision on the homelessness application be reached on the **same day** as the application is made: *R (Khazai) v Birmingham CC* [2010] EWHC 2576 (Admin).

Interim accommodation duty (1)

- Duty arises where the LHA have **reason to believe that an applicant may be homeless and eligible for assistance and have a priority need**: s188(1) HA 1996.

- If the LHA have reason to believe that an applicant may be homeless and eligible and may not have become homeless intentionally and may be **re-applying within 2 years of accepting a private rented sector offer** then the duty arises irrespective of priority need: s188(1A) HA 1996.

- Duty arises **irrespective of any possibility of referral** of the applicant's case: s188(2) HA 1996.

- **Threshold** for duty to arise is **low**: *R (Kelly) v Birmingham CC* [2009] EWHC 3240 (Admin); Code at §15.5.

Interim accommodation duty (2)

Duty ends where:

- LHA decide that applicant does not have a priority need and
  - Applicant is notified that no relief duty is owed; or
  - Applicant is notified no duty under ss190 or s193 will be owed once the relief duty ends
- Or, in any other case, whichever is the later of:
  - Relief duty ending or LHA notifying applicant they do not owe the relief duty; and
  - LHA notifying applicant what other duty if any is owed upon the relief duty ending.

S188(1ZA) and (1ZB) HA 1996. See *R (Mitchell) v Islington LBC* [2020] EWHC 1478 (Admin).

Interim accommodation duty (3)

- If the applicant has re-applied within 2 years of accepting a private rented sector, duty will end upon the later of:
  - Relief duty ending or LHA notifying applicant they do not owe the relief duty; and
  - LHA notifying applicant what other duty if any is owed upon the relief duty ending.

  S188(1ZB) and (1A) HA 1996.

- If the applicant has requested a review under s202(1)(h) HA 1996 of the suitability of a final accommodation offer or final Part 6 offer, duty continues until the decision on review has been notified to the applicant: s188(2A) HA 1996.

- The LHA does not have to secure alternative accommodation for an applicant who refuses interim accommodation unless a change in the applicant's circumstances would render that accommodation unsuitable: *R (Brooks) v Islington LBC* [2015] EWHC 2657 (Admin).

Main housing duty (1)

- Duty arises where LHA are satisfied that **an applicant is homeless and eligible for assistance and has a priority need and are not satisfied that the applicant became homeless intentionally and the relief duty has come to an end**: s193(1) HA 1996.

- **Duty will not arise if it has been disapplied by s193A(3) HA 1996** because the applicant refused a final accommodation offer or final Part 6 offer: ss193A(3) and 193(1A) HA 1996.

- **Duty will also not arise if the applicant has been given notice under s193B(2) HA 1996** that he or she deliberately and unreasonably refused to take a step set out in the PHP, although the LHA must still secure accommodation under s193C: ss193(1A) and 193C(4) HA 1996.

Main housing duty (2)

- Duty is **non-deferrable**. Per Lewis LJ in *R (Elkundi) v Birmingham CC* [2022] EWCA Civ 601 at §108:

  > *The duty under section 193(2) is a duty to secure that suitable accommodation is available. That duty arises once the criteria in section 193(1) are met. The duty is an immediate, non-deferrable, unqualified duty to secure that suitable accommodation is available. What is "suitable" will depend upon a number of factors. Furthermore, accommodation may be suitable in the short term even if that particular accommodation would not be suitable in the medium or long term. If the duty is owed, and particular accommodation ceases to be suitable, the local housing authority is under a duty to secure that other suitable accommodation is available (whether or not that is also only suitable in the short term) until the duty in section 193(2) comes to an end.*

- A decision that the **duty is not owed or has come to an end** is challenged by way of a review and appeal under ss202 and 204 HA 1996: s202(1)(b)(f) and (g) HA 1996.

- A **failure to comply** with the main housing duty may be challenged by judicial review.

Main housing duty (3)

The circumstances in which a mandatory order to enforce the main housing duty may be granted were considered by the CA in *Elkundi* at §§129-150 (NB: this aspect of *Elkundi* has been appealed):

- **Starting point is that the LHA is failing to comply with a statutory duty** owed to a homeless person.
- A **range of factors may be relevant** to whether to grant mandatory relief, including:
    - **Nature of accommodation** and extent to which it is unsuitable;
    - **Impact** on living conditions of applicant and family;
    - **Length of time** applicant has been in unsuitable accommodation;
    - **Likelihood of suitable accommodation being secured** in relatively near future;
- CA recommended list of factors set out in *R (Khan) v Newham LBC* [2001] EWHC Admin 589:
    - Efforts made by the LHA to find suitable accommodation.
    - Any other factors relevant to the case (in that case, late concession of breach).
- **Financial difficulties cannot justify non-compliance**.

Main housing duty (4)

- CA judgment (contd):
  - Where LHA claims that it's not possible to secure suitable accommodation, correct approach is to **ask whether the LHA has taken all reasonable steps to perform the duty**.
  - LHA should address this question with detailed evidence, not references to general difficulties facing LHAs and the housing shortage. Should demonstrate what steps have been taken and what the difficulties are. May need to explain the number of properties of a particular type it has and why it is not possible or appropriate to use them for accommodation under Part 7.
  - **Test is not whether it is *"intolerable"*** for the applicant to occupy the property or whether *"enough is enough"*. Intolerability may be a powerful factor in favour of relief but it is not a minimum requirement.

Accommodation pending review (1)

- LHAs have a **power to accommodate pending review under** s188(3) HA 1996.
- This **power becomes a duty** where the applicant has requested a review of the suitability of a final accommodation offer or final Part 6 offer under s202(1)(h) HA 1996: s188(2A) HA 1996.
- An applicant seeking such accommodation **must ask for it**: there is no duty to automatically consider it.
- The **power may not be exercised** in respect of refugees given refugee status by an EEA state; former asylum-seekers who have failed to comply with removal directions; people who are unlawfully present in the UK; and failed asylum-seekers with dependent children, unless it is necessary to do so to prevent a breach of the applicant's rights under the ECHR or under EU law: paras 1, 3, and 7A, Schedule 3, Nationality, Immigration and Asylum Act 2002.

Accommodation pending review (2)

- An LHA considering a request must take into account the ***Mohammed* criteria** (after *R v Camden LBC ex p Mohammed* (1998) 30 ACR 315):
  - Strength of the applicant's case on review;
  - Whether any new material, information, or information has become known;
  - Personal circumstances; and
  - Any other relevant considerations.
- The LHA must properly consider these factors and not simply pay *"lip-service"* to them: *R (Paul-Coker) v Southwark LBC* [2006] EWHC 496 (Admin).
- The LHA must also take into account the **best interests of any children** under s11 Children Act 2004.
- The LHA must also comply with the **PSED** under s149 Equality Act 2010 if a protected characteristic is, or is potentially, engaged.
- A refusal to accommodate pending review is challenged by judicial review.

Accommodation pending appeal (1)

- LHAs have a **power to accommodate pending appeal under** s204(4) HA 1996.
- The **power can only be used** where the LHA has owed the applicant the interim accommodation duty, the s190(2) HA 1996 duty, the duty to secure accommodation pending referral of the relief or main housing duty.
- The **power may not be exercised** in respect of refugees given refugee status by an EEA state; former asylum-seekers who have failed to comply with removal directions; people who are unlawfully present in the UK; and failed asylum-seekers with dependent children, unless it is necessary to do so to prevent a breach of the applicant's rights under the ECHR or under EU law: paras 1, 3, and 7A Schedule 3, Nationality, Immigration and Asylum Act 2002.
- An LHA considering a request to accommodate pending appeal must take into account the ***Mohammed* criteria**, the **best interests** of any children, and (if engaged) the **PSED**.

Accommodation pending appeal (2)

- A refusal to accommodate pending appeal can be challenged by way of an appeal to the County Court under **s204A HA 1996**.
- The exceptions to this are if the main appeal is against the original decision (not a decision on review) or the appeal is to the Court of Appeal or Supreme Court, in which case a challenge must be by judicial review: *Davis c Watford BC* [2018] EWCA Civ 529; *Johnson v City of Westminster Council* [2013] EWCA Civ 773.
- The Court may grant an **interim order** requiring the LHA to accommodate the applicant pending the determination of the s204A HA 1996 appeal: s204A(4) HA 1996.
- If the Court allows the appeal and quashes the decision, it may either remit the matter back to the LHA or make an order requiring the LHA to accommodate: s204A(6) HA 1996. **It may only order the LHA to accommodate if it is satisfied that failure to do so would substantially prejudice the applicant's ability to pursue the main appeal**: s204A(6) HA 1996.

Suitability (1)

- Suitability:
  - LHA must take into account what accommodation would be suitable for A and what support would be necessary for A to have and retain suitable accommodation when assessing A's case: s189A(2) HA 1996.
  - LHA must try and agree what steps LHA and A will take for purposes of securing that A has and can retain suitable accommodation as part of PHP: s189A(4) HA 1996.
  - LHA must take reasonable steps to help A secure suitable accommodation: s189B(2) HA 1996.
  - Certain duties will end when an applicant accepts or refuses suitable accommodation: s189B(7), s193(5), (7), (7AA), (7F), s193A(2) and (6), s193C(6) and (9), s195(8) HA 1996.

- s206(1) HA 1996:

  (1) a local housing authority may discharge their functions under this Part only in the following ways-

  (a) by securing that suitable accommodation is provided by them is available.

  (b) by securing that he obtains suitable accommodation from some other person, or

  (c) by giving him such advice and assistance as will secure that suitable accommodation is available from some other person

Suitability (2)

- S210 HA 1996:
  (1) In determining for the purposes of this Part whether accommodation is suitable for a person, the local housing authority shall have regard to Parts 9 and 10 of the Housing Act 1985 (slum clearance and overcrowding) and Parts 1 to 4 of the Housing Act 2004.
  (2) The Secretary of State may by order specify—
  (a) circumstances in which accommodation is or is not to be regarded as suitable for a person, and
  (b) matters to be taken into account or disregarded in determining whether accommodation is suitable for a person.

- Orders:
  - Homelessness (Suitability of Accommodation) Order 1996/3204
  - Homelessness (Suitability of Accommodation) (England) Order 2003/3326
  - Homelessness (Suitability of Accommodation) (England) Order 2012/2601

- S211(1) HA 1996:
  (1) So far as reasonably practicable a local housing authority shall in discharging their housing functions under this Part secure that accommodation is available for the occupation of the applicant in their district.

Suitability (3)

- ***Saleh v Waltham Forest LBC*** [2019] EWCA Civ 1944 at §17 - key components in any decision are:

  (1) The accommodation must be suitable in relation to the applicant and to all members of the applicant's household normally residing with the applicant…

  (2) There may be degrees of suitability depending on the particular housing duty which falls to be performed…

  (3) It follows that accommodation which was, when provided, suitable may cease to be suitable depending on the changing needs and circumstances of the household and the duration of their intended period of occupation…

- ***R (Elkundi) v Birmingham City Council*** [2022] EWCA Civ 601 at §81:

  Suitability is, as the Judge said, a flexible concept. It will include factors such as the nature of the accommodation, the length of time that the homeless person has been in the accommodation and his and his family's needs. The lack of alternative accommodation may also be a factor affecting what is suitable in the short or medium term as may the fact that the housing authority has limited resources available to secure accommodation. There may be other factors which are relevant either generally or in a particular case. This judgment is not intended to suggest any exhaustive list of factors capable of being relevant to the question of suitability.

Suitability (4)

- See also: *R v Newham LBC ex p Sacupima) (2001) 33 HLR 2, Codona v Mid-Bedfordshire District Council* [2005] EWCA Civ 925 at §46, Ch 17 of the Homelessness Code of Guidance.

- Relevant factors:
  - Likely duration of occupation
  - Location
  - Affordability
  - Space and arrangement
  - Any needs arising from medical issues/disability
  - PSED
  - Best interests of any children

Community care

S17 Children Act 1989 (2)

- Pursuant to s17(10) and (11) CA 1989, a child is in need if:
  - He or 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 or her of services** by an LA under Part 3 CA 1989;
  - **His or her health or development is likely to be significantly impaired or further impaired without the provision of such services**; or
  - He or she is **disabled**, defined as being *"blind"*, being *"deaf or dumb"*, suffering from *"mental disorder of any kind"*, or being *"substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed"*.
- A child who is homeless is a child in need: *R v Northavon DC ex p Smith* [1994] 2 AC 402.

S17 Children Act 1989 (2)

- Imposes a *"**general duty**"* on LAs to (a) **safeguard and promote the welfare of children within their area who are in need** and (b) so far as is consistent with that duty, **promote the upbringing of such children by their families by providing a range and level of services** appropriate to those children's needs: s17(1) CA 1989.

- **LAs must assess the needs of a child** in their area who appears to be in need: *R (G) v Barnet LBC* [2003] UKHL 57 at §77, applying s17 together with Sch 2, para 3 CA 1989.

- The duty to assess should not be deferred: *R (J) v Newham LBC* [2001] EWHC 992 (Admin).

- A child will be in an LA's area if he/she is **physically present** there. A child may be physically present in more than one LA's area: *R (Stewart) v Wandsworth LBC and others* [2001] EWHC 709 (Admin).

- A **fair opportunity** must be given to the family to respond to concerns arising during the assessment process: *R (O) v Lewisham LBC* [2017] EWHC 2015 (Admin).

S17 Children Act 1989 (3)

- Assistance may be provided to the **family** of a child in need, may include **accommodation**, **assistance in kind**, and/or **cash**, and may be **unconditional or subject to conditions** as to repayment: s17(3), (6), and (7) CA 1989.

- Assistance may be provided outside the area of the LA providing the services: *R (J) v Worcestershire CC* [2014] EWCA Civ 1518.

- Although a *"general duty"*, **LAs must act so as to promote the object of the statute** and a refusal to provide services needed will be subject to *"strict and, it may be, sceptical scrutiny"*: *R (VC) v Newcastle CC* [2011] EWHC 2673 (Admin).

- LAs must demonstrate how their decision has had regard to the need to safeguard and promote the welfare of children pursuant to **s11 Children Act 2004**.

- If there is a material change in the circumstances on which the assessment was based, the LA may have to **reassess**: *R (AA) v Southwark LBC* [2020] EWHC 2487.

S17 Children Act 1989 (4)

- Support under s17 CA 1989 comprising of accommodation or support to meet essential living needs cannot be provided to children of asylum-seekers where support may be provided under s95 Immigration and Asylum Act 1999: s122 IAA 1999.

- However, children of failed asylum-seekers can be supported under s17 CA 1989 even if the family are entitled to support under s4 IAA 1999: *R (VC) v Newcastle City Council* [2011] 2673 (Admin).

- Support under s17 CA 1989 cannot generally be provided to refugees given refugee status by another EEA state; failed asylum-seekers who have failed to comply with removal directions; persons who are not asylum-seekers and are unlawfully present in the UK; and failed asylum-seekers with dependent children who have not taken reasonable steps to leave the UK, unless it is necessary to provide support to prevent a breach of ECHR rights: s54 and Schedule 3, Nationality, Immigration and Asylum Act 2002. See *R (Clue) v Birmingham City Council* [2010] EWCA Civ 460.

S20 Children Act 1989 (1)

- LAs must provide accommodation for **any child in need in their area** who appears to them to **require accommodation as a result of** there being **no person who has parental responsibility** for him or her; his or her being **lost or abandoned**; or the **person who has been caring for him or her being prevented from providing suitable accommodation or care**: s20(1) CA 1989.

- **LAs must provide accommodation for any child in need in their area who is 16 or over** and whose **welfare** the LA consider is likely to be **seriously prejudiced** if they don't provide accommodation: s20(3). CA 1989

- LAs **may provide accommodation** for any child in need within their area, even if a person with parental responsibility can provide him/her with accommodation, **if they consider that to do so would safeguard or promote the child's welfare**: s20(4) CA 1989.

S20 Children Act 1989 (2)

- The LA must ascertain and give due consideration to the **child's wishes and feelings**: s20(6) CA 1989.

- An LA **may not provide accommodation if the child is under 16 and a person with parental responsibility objects** and is willing and able to provide accommodation: s20(7) CA 1989.

- It is **unlikely to be reasonable to force a capacitous and fully-advised child to accept accommodation under s20 CA 1989** against his or her will: *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14.

- There are no restrictions to the provision of s20 CA 1989 accommodation on the basis of immigration status.

S20 Children Act 1989 (3)

- Per Baroness Hale in *R (G) v Southwark* LBC[2009] UKHL 26 at §28, s20(1) CA 1989 involves a series of questions:
  1) Is the applicant a child?
  2) Is the applicant a child in need?
  3) Is the child within the local authority's area?
  4) Does the child appear to the local authority to require accommodation?
  5) Is that need for accommodation the result of (a) there being no person who has parental responsibility for him or her; (b) his or her having been lost or having been abandoned; or (c) the person who has been caring for him or her being prevented from providing suitable accommodation or care?
  6) What are the child's wishes and feelings regarding the provision of accommodation?
  7) What consideration is duly to be given to those wishes and feelings?
  8) Does any person with parental responsibility who is willing to provide accommodation object? This does not apply if the child is over 16 and consents to being accommodation.
  9) If there is a relevant objection, does to the person in whose favour a residence order is in force agree to the child being looked after?

S20 Children Act 1989 (4)

- A **wide range of accommodation may be provided** under s20 CA 1989: s22C(6) CA 1989 and *Prevention of homelessness and provision of accommodation for 16 and 17 year old young people*, chapter 5.

- Note however that reg 36 of the **Supported Accommodation (England) Regulations** 2023/416 will, when it comes into force, restrict the ability of local authorities to place looked after children in unregulated supported accommodation.

- A child who is being accommodated under s20 CA 1989 and who has been so accommodated for more than 24 hours will be a **looked after child** to whom a wide range of duties are owed: s22 CA 1989. A child who has been looked after for more than 13 weeks (where that period of 13 weeks began after the age of 14 and ended after the age of 16) will be an **eligible child**: para 19B, Schedule 2 CA 1989. An eligible child becomes a **former relevant child** on turning 18: s23C(1) CA 1989.

- LAs cannot side-step the s20 CA 1989 duty by claiming to have acted under another power or duty: *R (G) v Southwark LBC* [2009] UKHL 26.

Section 95 support, Section 4 support and Schedule 10 support

Alex Schymyck, Garden Court Chambers

11 May 2023

Overview of support available from the SSHD

- All three types of accommodation are provided from the same pool of hotels, shared accommodation and self-contained accommodation.

- Migrant Help do much of the administrative work.

- Huge pressure on the system at the moment due to spike in asylum arrivals/failure to prepare for end of Dublin III:

  - Low quality hotels
  - Unusual and unsuitable accommodation, for example, barges
  - Local authorities challenging the dispersal of asylum-seekers

Section 95 Support - Eligibility

Section 95 (1)-(3), Immigration and Asylum Act 1999:

(1) The Secretary of State may provide, or arrange for the provision of, support for—
(a) asylum-seekers, or
(b) dependents of asylum-seekers, who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed.
...
(3) For the purposes of this section, a person is destitute if—
(a) he ***does not have adequate accommodation*** *or any means of obtaining it (whether or not his other essential living needs are met); or*
(b) he has adequate accommodation or the means of obtaining it, but ***cannot meet his other essential living needs****.*

Section 95 Support – Eligibility (continued)

- Eligibility not normally an issue – first-time asylum seekers.
- 'Asylum' includes Article 3 ECHR claims as well as Refugee Convention claims.
- Exception in Regulation 4 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 for people with refugee status in an EEA state.
- Right of appeal to Asylum Support Tribunal (but no legal aid…).

Section 95 Support - Process

- After application – Section 98 support while application is under consideration
- When Section 95 is granted – dispersal to shared accommodation or self-contained accommodation
- If asylum-seeker becomes ‘appeal rights exhausted’ – 21 days notice of withdrawal of support
- If granted refugee status – 28 days to move into work and/or mainstream benefits
- Subsistence support is paid weekly onto a debit card and can be withdrawn as cash

Section 95 Support - Issues

- Long delays in waiting for dispersal.
  - Families with young children stuck in hotels for over a year

- Terrible quality hotel accommodation.
  - Slugs coming into room
  - No space for separate cots for twin babies
  - Inedible food leaving mother unable to breastfeed

- Two issue are inter-related – accommodation may be adequate for a short period but not for a long period (*R(A) v National Asylum Support Service* [2003] EWCA Civ 1473; [2004] 1 WLR 752)

- Location – policy to provide accommodation outside of London and South East (s. 97, Immigration and Asylum Act 1999)

Section 4 Support - Eligibility

- Regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 sets out eligibility criteria.

- Most important is:

  (e)the ***provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights****, within the meaning of the Human Rights Act 1998*

- Typical situation – submit further submissions in order to qualify.

- But "*a variety of factual circumstances*" in which ECHR rights might be breached by refusal to provide support *R(NS) v Social Entitlement Chamber of the First-tier tribunal* [2009] EWHC 3819 at [14]

Section 4 Support – Eligibility (continued)

- Key issue for sub-paragraph (e) is demonstrating that:

    1. There would be a potential breach of the ECHR if the person was required to leave the UK. This might be Article 3 ECHR (as in *NS*) or Article 8 ECHR (as in *Birmingham City Council v Clue* [2010] EWCA Civ 460; [2011] WLR 99)
    2. There would be a breach of the ECHR is the person remained in the UK and experienced street homelessness (*R(Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396

- (1) is normally easy to fulfil through proof that an application has been made to the SSHD. (2) is fact-sensitive but very unusual for a court to conclude now that street homelessness would not violate Article 3 ECHR – biggest risk is where the SSHD alleges that someone has other support available to them i.e. from a family member.

- Right of appeal to the Asylum Support Tribunal (but again no legal aid).

Section 4 Support - Process

- No equivalent to s. 98 emergency accommodation.
- Policy states that decisions will normally be made within 5 days but should be dealt with in 2 working days where the individual is vulnerable or street homeless (Asylum support, section 4(2): policy and process, Version 3.0, dated 28 June 2022).
- Similar issues with low quality accommodation.
- Financial payments made onto ASPEN card which can only be used for making purchases i.e. cannot be withdrawn as cash.
- Issues with eligibility for immigration detainees accused of not cooperated with returns process.

Schedule 10 Support - Background

- Home Office is confused about the availability of Schedule 10 Support.

- Historical context is that accommodation used to be available for non-asylum seekers under Section 4(1) of the Immigration and Asylum Act 1999, but that was taken away by the Immigration Act 2016.

- Schedule 10 accommodation replaced it with:
  9(1) Sub-paragraph (2) applies where—
  (a) a person is on immigration bail ***subject to a condition requiring the person to reside at an address specified in the condition****, and*
  (b) the person ***would not be able to support himself or herself*** *at the address unless the power in sub-paragraph (2) were exercised.*
  (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of that person at that address.
  (3) But the power in sub-paragraph (2) applies only to the extent that ***the Secretary of State thinks that there are exceptional circumstances which justify the exercise of the power****.*

Schedule 10 Support - Eligibility

- Home Office policy suggests that it only applies to high harm FNOs.
- But in reality, when read with the HRA 1998 it is effectively the same as s. 4 support but for people who have never claimed asylum.
- If you can establish that there would be an ECHR breach from leaving the UK or remaining in the UK without support then:

    1. The SSHD is obliged to grant immigration bail (if she has not done so already).
    2. The SSHD is obliged to impose a residence condition (if she has not done so already).
    3. The SSHD is obliged to determine that exceptional circumstances exist and therefore provide accommodation.

- Not determined in full JR hearing yet, but this analysis was approved in interim relief judgment in *R(Ganpot) v Secretary of State for the Home Department* [2023] EWHC 197 (Admin)

Schedule 10 Support - Process

- Apply using Bail 409 Form
- Similar timeframes to Section 4 applications – generally 5 days but should be decided in 2 working days where someone is street homeless or vulnerable (*Immigration bail- interim guidance*, Version 2.0, dated 9 July 2021)
- No right of appeal against refusal
- No provision for dependents – important if a family are applying that every family member makes their own application.

Urgent applications: Practicalities and procedure

Nick Bano, Garden Court Chambers

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Urgent applications in the High Court: a high-stakes game

- Inevitably, the application is of particular importance to the client, but lawyers are at particular risk, too.
- *"Any abuse of the 'urgents' procedure will not be tolerated by the court and will be met with appropriate sanction"* (Dame Victoria Sharp P, *DVP v SSHD* [2021] EWHC 606 (Admin).
- The court may invoke its *Hamid* jurisdiction to discipline lawyers.
- Sanctions could include referrals to regulators, costs & discharge of orders.
- In *DVP* the Court explicitly threatened to 'name and shame' firms and individuals.
- Never issue an urgent application without checking section 17 of the *Administrative Court Guide 2022*.

When to make an urgent application

- The question must always be: what would happen if I *don't* make this application? How bad would it be?
- Would expedition suffice instead?.
- Admin Court Guide talks about "*something with irreparable consequences which may be done imminently*".
- Generally, we're talking about imminent street homelessness for particularly vulnerable people.

How to make an urgent application in-hours

- File an application bundle *"on any working day between 10 am and 4.30 pm"* (ACG, §17.5.1).
- This will be put before the 'immediates' judge.
- May be sent by email to immediates@administrativecourtoffice.justice.gov.uk.
- Serve on the other side before (if possible), or at the same time.
- The crucial document is form N463 (next slide).

Form N463

"Form N463 is the standard court form for urgent applications in judicial review cases. It is the application notice, and **the critical document** for the purposes of an urgent application, to which the judge dealing with the application will normally turn first."

Dame Victoria Sharp P

"If any firm fails to provide the information required on [form N463] and in particular explain the reasons for urgency, the time at which the need for immediate consideration was first appreciated and the efforts made to notify the defendant, the court will require the attendance in open court of the solicitor from the firm who was responsible, together with his senior partner. It will list not only the name of the case, but the firm concerned. Non-compliance cannot be allowed to continue".

Sir John Thomas P in *Hamid*

Form N463

17.3 The application for urgent consideration

17.3.1 Any application for urgent consideration using Form N463 must clearly set out:[294]

17.3.1.1 the circumstances giving rise to the urgency. If the representative was instructed late, or the form is filed only shortly before the end of the working day, it is necessary to explain why;

17.3.1.2 the timescale sought for the consideration of the application;

17.3.1.3 the date by which any substantive hearing should take place;

17.3.1.4 that the defendant and any interested parties were put on notice of the application for urgent consideration (or if not, why not, and the efforts made to give notice to them).

17.3.2 This information must be set out on the face of the form. It is not sufficient to cross-refer to other documents.[295] All boxes must be completed. All relevant facts must be include. The beneficiary (or beneficiaries) of the intended relief and the terms of any proposed injunction must be clearly identified.[296]

Out-of-hours applications

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- Should be avoided where humanly possible.
- I.e., if it *appears* that an urgent application may be necessary, it is usually best to prepare to issue an in-hours application bundle and (if necessary) file it before 4.30 pm.
- If this has not been possible, representatives "*should make such an application only if the matter cannot wait until the next working day*" (ACG §17.8.2). Could it wait one day?
- Otherwise, §17.8 of the ACG gives the relevant phone number, and links to the relevant form.

The duty of candour

15.2.3 The duty of candour applies to all claims and applications. However, it applies with particular force to applications made in circumstances where the other party or parties will not have the opportunity to respond (such as urgent applications). In this context, the claimant must:[254]

15.2.3.1 disclose any fact (whether it supports or undermines the application) which it is material for the Court to know when dealing with the application, including (for example) any fact which is relevant to the degree of urgency;

15.2.3.2 make the Court aware of the issues that are likely to arise and the possible difficulties in the application or underlying claim; and

15.2.3.3 present the information in a fair and even-handed manner, and in a way which is not designed simply to promote his own case.

Importance of the duty of candour

"The court will set aside an order obtained without full notice to the other party, if there has been a breach of the applicant's duty of candour to the court, even if the order might otherwise have been justified."

Dame Victoria Sharp P.

The test for mandatory interim relief in housing cases

- The ‘immediates’ judge used to routinely apply ‘strong *prima facie* case’ test, citing *R (Lawer) v Restormel* [2007] EWHC 2299).
- That was challenged in *R (Nolson) v Stevenage* [2021] HLR 2. Hickinbottom LJ declined to grant permission to appeal as the case had become academic, but appeared to recognise that there are strong arguments that the ‘balance of convenience’ test applies instead.
- This approach seems to have caught on: see e.g. *R (MA) v Liverpool CC* [2023] EWHC 359; *R (BAA) v Liverpool CC* [2023] EWHC 252.

What if the 'immediates' judge refuses interim relief?

- Renew the application orally, rather than appealing (*Nolson*).
- This can be done by N244 (ACG §16.7.2)
- Caution: there is no right to renew if the parties have consented to the application being disposed of on the papers *(Collier v Williams* [2006] 1 WLR 1945. So be careful about how N244s and N461s are phrased.

What if the local authority does not comply?

- Hopefully this will happen very rarely.
- The first step is to apply (or threaten to apply) for a penal notice.
- A penal notice should name the relevant people, usually the chief executive and director of housing.
- Ultimately, a claimant could apply to commit senior officials to prison for contempt.

Section 204A appeals: much less procedural certainty

- Local court centres will have their own procedures.
- At Central London Court Court, it appears that a counter appointment is the critical factor.
- CLCC court staff have recently advised that Form N16A (Application for injunction (General form) is the correct or best form, together a telephone call to the urgent injunctions listings number to obtain a counter appointment.
- Advisers may need to be persistent at the counter appointment. We understand that there is a duty judge behind the scenes – it's just a case of getting the papers before them.

Getting around the County Court roadblock

- Potential judicial review of the refusal to accommodate, arguing that the 'alternative remedy' of s.204A applications is ineffective in practice?

- Lodging the appeal at the County Court, and applying (urgently) to the High Court for the proceedings to be transferred under s.41 of the County Courts Act 1984? There do not appear to be any principles applicable to the use of this power – see *Bankole-Jones v Watford* [2021] HLR 33.

- 'Forum shopping' – is there a County Court centre that is particularly efficient? Could the appeal be issued there, at least for the purposes of the urgent application?

Thank you

nickb@gclaw.co.uk

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw