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# ACCESSING SUPPORT UNDER THE CARE ACT 2014 FOR PEOPLE WITH NO RECOURSE TO PUBLIC FUNDS

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# Background to the Care Act

1. The Care Act came into force on 1 April 2015. The previous community care regime was particularly complicated with various provisions appearing to contradict each other. The intention of the Care Act was to consolidate the previous statutes including the National Assistance Act 1948 and Chronically Sick and Disabled Person Act 1970 into one central piece of legislation. The Care Act has now brought the provisions together and established an “outcome centred” approach to community care for adults with care needs and the carers who support them.
2. As the Care Act is relatively new, there is very little case law and therefore a number of grey areas as to how it should operate in practice.
3. Many charities working in the migrant sector often encounter migrant adults with disabilities and/or vulnerabilities who may also be destitute and/or street homeless. In these circumstances the adult may be able to access support from their local authority under the Care Act 2014. Unfortunately it appears in practice many local authorities have a misunderstanding of their duties and powers in this respect resulting in unlawful decisions.
4. It is hoped that this paper briefly explains the key elements of the statutory framework, what issues may arise in referring **migrant adults** to local authorities under the Care Act and suggest some practical tips in dealing with said issues.

## Framework, general duties and definitions

### Legal framework and guidance

5. The following legislation, regulations and guidance will be referred to in this paper:
  - a) The National Assistance Act 1948 (“NAA 1948”)
  - b) The Care Act 2014 (“CA 2014”)
  - c) The Localism Act 2011

- d) The Care and Support (Eligibility Criteria) Regulations 2015
- e) The Care and Support (Disputes Between Local Authorities) Regulations 2014
- f) Care and Support Statutory Guidance (Updated 26 October 2018)
- g) Home Office Guidance: Asylum Seekers with Care Needs version 2 (3 August 2018)
- h) Non-statutory guidance: NRPF Network Guidance: Adults with care and support needs

## Wellbeing

6. The CA 2014 is underpinned by the general duty placed on local authorities by section 1 to promote an individual's wellbeing.

7. Wellbeing is defined as :

- a) *personal dignity (including treatment of the individual with respect);*
- b) *physical and mental health and emotional well-being;*
- c) *protection from abuse and neglect;*
- d) *control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);*
- e) *participation in work, education, training or recreation;*
- f) *social and economic well-being;*
- g) *domestic, family and personal relationships;*
- h) *suitability of living accommodation;*
- i) *the individual's contribution to society.*

8. LAs also have a duty to have regard to the following matters in exercising their duties and powers under the CA 2014—

- a) *the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;*
- b) *the individual's views, wishes, feelings and beliefs;*

- c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;
- d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);
- e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
- f) the importance of achieving a balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual;
- g) the need to protect people from abuse and neglect;
- h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.

## Preventative Duty

9. There is a further general duty under section 2 on a local authority to provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will—
  - (a)contribute towards preventing or delaying the development by adults in its area of needs for care and support;
  - (b)contribute towards preventing or delaying the development by carers in its area of needs for support;
  - (c)reduce the needs for care and support of adults in its area;
  - (d)reduce the needs for support of carers in its area.
10. In exercising this preventative duty the local authority must have regard to—
  - (a)the importance of identifying services, facilities and resources already available in the authority's area and the extent to which the authority could involve or make use of them in performing that duty;

(b) the importance of identifying adults in the authority's area with needs for care and support which are not being met (by the authority or otherwise);

(c) the importance of identifying carers in the authority's area with needs for support which are not being met (by the authority or otherwise).

## Needs for Care & Support

11. Support provided under the CA 2014 revolves around whether or not an adult has needs for care and support.

12. The definition of "needs for care and support" is not defined in the CA 2014 however recent case law has referred to its definition as akin to the previous term of "care and attention" set out in the NAA 1948. The meaning of this previous term was discussed in the case of *R(M) v Slough BC [2008] UKHL 52* where Baroness Hale stated:

*"The natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person cared for which he cannot or should not be expected to do for himself: it might be household tasks which an old person can no longer perform or can only perform with great difficulty; it might be protection from risks which a mentally disabled person cannot perceive; it might be personal care such as feeding, washing or toileting. This is not an exhaustive list. The provision of medical care is expressly excluded."* [para 33]

13. In that case M was an asylum seeker who was HIV positive and was homeless. He required regular medical checks, medication and a fridge to keep his medication in. The matter eventually reached the House of Lords which concluded that he did **not** have needs for care and attention. In his judgement Lord Neuberger stated:

***"...I do not consider that "care and attention" can extend to accommodation, food or money alone (or, indeed, together) without more. As a matter of ordinary language, "care and attention" does not, of itself,***

*involve the mere provision of physical things, even things as important as a roof over one's head, cash, or sustenance..." [para 56]*

14. To date the meaning of "care and support" within the CA 2014 has yet to be explored by the Courts - however in the case of *SG v Haringey [2015] EWHC 2579 (Admin)* it was stated that the principles of pre-CA 2014 case law continued to apply and in that case the judge drew no distinction between the meaning of "care and support" and "care and attention". The later case of *GS v Camden [2016] EWHC 1762 (Admin)* set out that there could be a distinction between the terms, however this was not expanded upon and this is yet to be discussed in further detail by the Courts.
15. When considering whether or not an adult may be supported under the Care Act, the main question is: **do they have needs for care and support that meet the above definition?** If the answer is no, it is unlikely that will be provided with support by the local authority under the Care Act.

## Care Act Assessments

### Threshold for conducting an assessment

16. Section 9 of the Care Act sets out the threshold to carry out an assessment of an adult. The threshold is particularly low:

"Where it **appears** to a local authority that an adult **may** have needs for care and support the local authority must assess:

  - a) Whether the adult does have need for care and support, and;
  - b) If the adult does what those needs are"

17. The LA must carry out the assessment - regardless of whether or not they think the individual is eligible for support (either due to financial resources, ineligible needs or immigration status). The duty to carry out an assessment will likely be triggered by a referral from a charity organisation.

### What an assessment will cover

18. Section 9(4) of the CA 2014 sets out what an assessment should consider:

*the impact of the adult's needs for care and support on the matters specified in section 1(2) [wellbeing as defined above]*

*the outcomes that the adult wishes to achieve in day-to-day life, and*

*whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.*

19. The statutory guidance sets out:

6.5 *The aim of the assessment is to identify what needs the person may have and what outcomes they are looking to achieve to maintain or improve their wellbeing.* The outcome of the assessment is to provide a full picture of the individual's needs so that a local authority can provide an appropriate response at the right time to meet the level of the person's needs. This might range from offering guidance and information to arranging for services to meet those needs. The assessment may be the only contact the local authority has with the individual at that point in time, so it is critical that the most is made of this opportunity.

...

6.9 *The purpose of an assessment is to identify the person's needs and how these impact on their wellbeing, and the outcomes that the person wishes to achieve in their day-to-day life. The assessment will support the determination of whether needs are eligible for care and support from the local authority, and understanding how the provision of care and support may assist the adult in achieving their desired outcomes...*

20. The recent case of *R(Antoniak) v Westminster City Council [2019] EWHC 3465 (Admin)* confirmed that an assessment under section 9 should always assess "the needs arising from the individual's own identity and characteristics, whether or not they are, at the time of the assessment being met".

21. In that case a Care Act assessment was found to be unlawful as the local authority had concluded that the adult did not have needs in relation to cleaning, maintenance and meal preparation. However it was evident from information set out elsewhere in the assessment that the adult did in fact have needs for support in these areas, but this support being provided by a voluntary organisation. The Court held that "a needs assessment will not fulfil the requirements of s.9 if it does not include all the individual's needs, whether currently being met or not."

22. As part of the assessment the local authority must involve the adult, any carer and person whom the adult asks to be involved or, where the adult lacks capacity who appears to the authority to be interested in the adult's welfare.
23. Therefore if a referral is made by a charity, the local authority may involve the charity caseworker in the assessment.

### Assessment timeframe

24. There is no specified timeframe for completing an assessment under the Care Act although the statutory guidance sets out:

6.29 An assessment should be carried out over **an appropriate and reasonable timescale taking into account the urgency of needs** and a consideration of any fluctuation in those needs. Local authorities should inform the individual of an indicative timescale over which their assessment will be conducted and keep the person informed throughout the assessment process.

### Carer's assessments

25. A local authority may also have a duty to assess whether a carer may also have needs for support in caring for an adult. Similarly, this threshold is a low one:

"where **is appears** to a local authority that a carer **may** have needs for support (whether currently or in the future)".

26. The assessment must assess the following:

- (a) whether the carer is **able**, and is likely to continue to be able, to provide care for the adult needing care,
- (b) whether the carer is **willing**, and is likely to continue to be willing, to do so,
- (c) the impact of the carer's needs for support on the matters specified in section 1(2), **[wellbeing as defined above]**
- (d) the outcomes that the carer wishes to achieve in day-to-day life, and
- (e) whether, and if so to what extent, the provision of support could contribute to the achievement of those outcomes.

27. When making a referral for an adult with care needs it may be advisable to ask whether they rely on anyone to assist with their needs. If they do, it is worth exploring with the carer whether they consider they have any needs for support. If so, a joint referral requesting both a carer's assessment and an assessment of the adult with care needs is advisable.

## Refusing an assessment

28. Section 11 of the CA 2014 sets out where an adult refuses the assessment the LA are no longer bound by their duty to carry out an assessment unless:

- *The adult lacks capacity; or*
- *The adult is experiencing or is at risk of abuse or neglect.*

## Capacity

29. Where a local authority considers the adult would experience substantial difficulty in any of the following:

- understanding or retaining relevant information;
- using or weighing that information as part of the process of being involved;
- communicating their views, wishes or feelings (whether by talking, using sign language or any other means)

They are under a duty to arrange for an independent advocate to represent and support the adult throughout the assessment, preparation and revision of the support plan. (section 67 of the CA 2014)

## Which local authority to refer to?

30. When considering which local authority should support an adult with care needs the main test is **ordinary residence**. This is not set out in the CA 2014 but the statutory guidance refers to the case of *Shah v London Borough of Barnet* which defined ordinary residence as:

*a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration*

31. If an adult does not have a settled residence (eg: they are destitute) they should be referred to the local authority where they are physically present. (see section 18 CA 2014).

### *Meaning of “voluntarily purpose”*

32. Issues may arise where an adult has been placed in an area as opposed to going there “voluntarily” as is often the case when an adult is given accommodation on a “no-choice” basis (for example via asylum support). This issue was discussed in the case of *R(Mani) v Lambeth LBC [2002] EWHC 735 (Admin)* where the Court held that as the Claimant had been continuously living in the area for 6 months, it was considered sufficiently voluntary for the purposes of the ordinary residence test.

33. There may be arguments that can be made once an assessment has been carried out and the LA has concluded the person requires accommodation, that the accommodation provided should be in a certain area in order for it to be suitable to meet the adult's needs (eg: close to their support network who provide care and assistance). This has yet to be tested in the Courts.

### *Disputes between LAs*

34. There may also be cases where there is a dispute between local authorities as to who should assess/provide support. In these situations, there is a specific procedure set out in The Care and Support (Disputes Between Local Authorities) Regulations 2014 that LAs should follow.

35. Importantly Regulation 2 sets out:

*“The authorities must not allow the existence of the dispute to prevent, delay, interrupt or otherwise adversely affect the meeting of the needs of the adult or carer to whom the dispute relates.”*

36. This is further reiterated in the Care and Support statutory guidance which sets out at paragraph 19.11:

*The determination of ordinary residence must not delay the process of meeting needs. In cases where ordinary residence is not*

*certain, the local authority should meet the individual's needs first, and then resolve the question of ordinary residence subsequently. This is particularly the case where there may be a dispute between 2 or more local authorities.*

## Eligibility

37. Once the assessment has concluded that an adult does have needs for care and support - the local authority will then need to determine whether those needs meet the eligibility criteria.
38. The eligibility criteria is set out in the Care and Support (Eligibility Criteria) Regulations 2015:

An adult's needs meet the eligibility criteria if—

- the adult's needs arise from or are related to a physical or mental impairment or illness;
- as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2)[**below**]; and
- as a consequence there is, or is likely to be, a significant impact on the adult's well-being.

The specified outcomes are—

- managing and maintaining nutrition;
- maintaining personal hygiene;
- managing toilet needs;
- being appropriately clothed;
- being able to make use of the adult's home safely;
- maintaining a habitable home environment;
- developing and maintaining family or other personal relationships;
- accessing and engaging in work, training, education or volunteering;
- making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and

- carrying out any caring responsibilities the adult has for a child.

An adult is to be regarded as being unable to achieve an outcome if the adult—

- is unable to achieve it without assistance;
- is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;
- is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
- is able to achieve it without assistance but takes significantly longer than would normally be expected.

39. Where the level of an adult's needs fluctuates, in determining whether the adult's needs meet the eligibility criteria, the local authority must take into account the adult's circumstances **over a period of time** to establish accurately the adult's level of need.

40. Once the assessment has been concluded, the LA have a duty to provide the decision and reasons for it in writing. [Section 13(2)CA 2014] It is always advisable for organisations supporting adults to request decisions made by local authorities in writing as it will inform any potential challenges.

## Charging for services

41. LAs do have the power to charge for services provided under the CA 2014 - however the statutory guidance states that “people should only be required to pay what they can afford.” [paragraph 8.2 ]

42. If the LA do decide to charge for services - they are required to carry out a financial assessment to determine how much to charge. The statutory guidance states that the LA should not charge “more than is **reasonably practicable** for them to pay”. [paragraph 8.2]

43. It is likely that many of our clients will likely be unable to afford to pay for any services. If clients are told they will be charged for services they cannot afford without a proper financial assessment consider referring for legal advice.

**44. Important to note LAs cannot charge for carrying out assessments.[statutory guidance paragraph 8.60]**

## Meeting assessed needs

### Duty to meet eligible needs

45. Under section 18 of the CA 2014 where an LA has assessed an adult has eligible needs for care and support they have a duty to meet these needs where:

- *the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,[and]*
- *There is no charge for meeting the needs or if there is either the adult's financial resources are below the limit or the adult lacks capacity to arrange for the provision of care and support and there is no one authorised to do so on their behalf.*

46. Where it can be shown that these needs are met by a willing carer - this duty do not apply (section 18(7)CA 2014).

47. It is important to note however that the LA should assess whether the carer is capable of providing suitable and adequate care in order to meet the adult's needs as well as the impact this will have on the carer.

***NOTE: This duty to meet eligible needs is subject to the exclusions set out below.***

### Power to meet non-eligible needs

48. Section 19 of the CA 2014 sets out the power of local authorities to meet non-eligible needs for care and support.

49. This power can be exercised following an assessment or prior to an assessment where the need is urgent (regardless of whether the adult is ordinarily resident in its area).[section 19(3) CA 2014]. **Note:** however the section 19 power is still subject to the exclusions explained below.

50. In cases where it appears clients have needs for care and support that require urgent attention a request can be made that the LA exercise this power to provide the services whilst they carry out an assessment. If the LA respond to

such a request stating they **can never** provide services until an assessment is carried out, this is incorrect in law and could be challengeable.

51. Following an assessment if it has been identified that a client has needs for care and support that do not meet the eligibility criteria outline above, the LA can still meet these needs by exercising their discretion if the adult is ordinarily resident in the authority's area or in the area but of no settled status. [section 19(1) CA 2014]

52. Where the LA is aware (or ought to be aware) that an adult has non-eligible needs and, if those needs went unmet there would be a significant risk of harm to the adult (including abuse or neglect), it is arguable that this power is elevated to a duty in conjunction with the LA's human rights obligations.

## How to meet needs

53. Section 8 of the CA 2014 sets out that LAs can meet an adult's needs under the Care Act by providing:

- accommodation in a care home or in premises of some other type;
- care and support at home or in the community;
- counselling and other types of social work;
- goods and facilities;
- information, advice and advocacy.

54. They can do so by carrying out the following steps:

- by arranging for a person other than it to provide a service;
- by itself providing a service;
- by making direct payments.

**Note :** this is not an exhaustive list. Where the LA identifies eligible needs for care and support or decides to exercise their power to meet non-eligible needs, they have a **wide discretion** as to how to meet these needs, however they should ensure to act lawfully and in a way that is fair, rational and in accordance with their duties under the Care Act 2014 (eg: to promote the individual's wellbeing) as well as in line with their human rights obligations.

# Exclusions for those subject to immigration control

55. The assessment of an adult's needs should be carried out regardless of their immigration status however, once it has been established that an adult has eligible needs for care and support, the LA must then consider whether they can lawfully provide services in light of the exclusions set out in section 21 of the Care Act and Schedule 3 of the Nationality, Immigration and Asylum Act 2002 explained below.

## Destitution-Plus test (section 21 CA 2014)

56. In order for adults with NRPF to qualify for support under the CA 2014 they must have needs more than those arising out of destitution.

57. Section 21 sets out that a Local Authority may not meet the needs for care and support of an adult subject to immigration control whose 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.

58. An adult "subject to immigration control" is defined in section 115(9) Immigration and Asylum Act 1999 as a person who is not a national of an EEA State and who:

- Requires leave to enter or remain in the UK (but does not have it); or
- Has leave to enter or remain in the UK but with an NRPF restriction; or
- Has leave to enter or remain given as a result of a maintenance undertaking;

59. This exclusion is known as the "destitution-plus test". The Courts have considered the similar exclusion under the National Assistance Act 1948 in detail, however there has been little case law on the exclusion under the CA 2014.

60. In the case of *R v Wandsworth LBC ex p O* [2000] when considering the exclusion the Judge stated that the need for assistance does **not** arise solely

out of destitution where it is “*to any material extent made more acute* by some circumstance other than the mere lack of accommodation or funds”.

61. Later, in the case of *R (PB) v Haringey LBC [2006]*, the Court decided that a Claimant with moderate depression which was made more acute if she was rendered street homeless (but arose from factors other than just destitution such as her anxieties about her children being taken into care which had previously triggered suicidal thoughts) did meet the destitution plus test. The Judge stated that the local authority could have only decided that she did not meet the destitution-plus test if the sole cause of her depression was the physical and mental effects of being destitute which, based on the medical evidence and the assessment report, it could not rationally conclude.
62. It is therefore important even when making initial referrals to LAs relating to destitute migrant adults to highlight all needs and specifically set out that these arise from factors other than destitution. If the needs arise solely due to destitution, it is likely the LA will refuse to provide support and, in light of this exclusion, a refusal on this basis may be difficult to challenge.

### Schedule 3

63. Under Para 1 Schedule 3 of the Nationality Immigration and Asylum Act 2002 ("NIAA 2002")the following adults (and their dependents) are excluded from receiving support under Part 1 of the Care Act:
  - Non-EEA nationals with refugee status abroad;
  - Citizens of other EEA countries;
  - Failed asylum seekers;
  - Those who are in the UK in breach of the immigration laws (and who are not asylum seekers);
  - Failed asylum seekers with a dependent child who the SSHD consider have failed (without reasonable excuse) to take reasonable steps to leave the UK or put themselves in a position to leave the UK.
64. **Unless** the exercise of the powers or duties are necessary to avoid a breach of a person's Convention rights or rights under the EU Treaties. [Para 3, Schedule 3 NIAA 2002].

65. If an LA rely on this exclusion as a reason not to provide support under the Care Act 2014 - they **must** assess whether it would be in breach of the adult's ECHR and/or EU rights to do so. This is often referred to as a human rights assessment.

66. The process of consideration for a local authority where Schedule 3 applies was set out in the case of *R(Clue) v Birmingham City Council [2010]*:

- a) The LA must first decide whether the person falls into any of the immigration status categories mentioned above;
- b) If so, the LA must decide whether and to what extent it is necessary to exercise its power or perform its duty for the purpose of avoiding a breach of a person's convention rights. In doing so they can assess whether there are any other sources of accommodation or support available.
- c) The LA must then consider whether there is an impediment to the person returning the country of origin. If these are merely practical (eg: inability to pay for transport) the LA can make transport arrangements for the person in order to avoid a convention breach rather than providing services.
- d) Where the person's return would result in a breach of their ECHR rights the LA must then go on to consider whether an application for LTR has been made either "expressly or implicitly" on Convention grounds.
- e) If so, the LA will be required to provide the support, unless they consider the application to be "obviously hopeless or abusive". **It is important to note that LAs should not be assessing the merits of the immigration application but only need to satisfy themselves that an application is not "hopeless or abusive."**

67. This was a Children Act 1989 case but the principles were applied in the context of adults with care needs in the case of *R(Mwanza) v Greenwich LBC and Bromley LBC [2010] EWHC 1462 (Admin)* where it was decided that there would be **not** be a breach of the Claimants' human rights if support was not provided and there was no impediment to them returning to their country of origin. The Court decided the Claimants were excluded by Schedule 3 and therefore the local authority were not required to provide support.

68. Ultimately, this means where an adult has been assessed to have eligible care needs, has an outstanding immigration application (or arguably is actively taking steps to seek immigration advice in relation to an application - eg: ECF application), and it would be a breach of their convention rights if support was not provided, they should only be refused support under Schedule 3 where an LA is satisfied that the immigration application is hopeless or abusive.

69. If the adult does not have an application pending and there is no impediment to returning to their country of origin - the LA may refuse to provide support - in these circumstances it could be difficult to challenge a refusal.

70. It is therefore advisable for any migrant adult seeking support from the LA under the Care Act to obtain immigration advice as it is likely that the LA will undertake their own checks with the Home Office as part of the assessment.

### Other exclusions:

71. An LA should not provide or arrange services that should be provided by the NHS to meet health needs unless doing so would be incidental or ancillary to doing something else to meet needs for care and support. [s.22 CA]

72. An LA is also prevented from providing housing for adults with care needs where it should be provided under the Housing Act 1996. [s.23 CA]

## Accommodation provided under the Care Act 2014

73. Under section 8 an LA can provide accommodation under the CA 2014 in order to meet an adults needs for care and support.

74. This is a broad power and can be in many forms such as care homes, ordinary accommodation or specially adapted accommodation.

### When can accommodation be provided?

75. There have been a number of cases that have discussed when accommodation should be provided by LAs in order to meet an adult's needs for care and support especially in light of the section 21 "destitution-plus" exclusion (and the similar exclusion under the NAA 1948).

76. The case of *SL v Westminster CC*[2013] UKSC 27 set out that a person was only entitled to residential accommodation where the adult had sufficiently "accommodation-related needs". This is the test in relation to whether or not the LA will provide accommodation. "Accommodation related" needs was defined in that case as:

"...at least to be care and attention of a sort which is normally provided in the home (whether ordinary or specialised) or will be **effectively useless** if the claimant has no home." [paragraph 48].

77. The SL case concerned the previous legislation (the National Assistance Act 1948) however, as set out above, the case of *SG v London Borough of Haringey* [2015] EWHC 2579 it was confirmed that the principle continued to apply under the Care Act 2014 [paragraph 47].
78. It is arguable that where the LA assesses an adult as having eligible accommodation-related needs this gives rise to a duty to provide accommodation under section 18 (duty to meet eligible care needs). However - this has yet to be decided by the Courts. There was discussion in the Court of Appeal case of *SG v Haringey* [2017] of whether or not the LA would be under a duty under section 18 to provide accommodation to adults with eligible accommodation-related needs or whether the LA merely had a discretion to provide accommodation, but due to the case becoming academic, a decision was not taken either way.
79. It was stated in that case however that the LA **must** at least consider as part of the assessment whether to provide accommodation where it has identified eligible accommodation-related needs.
80. In deciding how to meet an adult's needs for care and support (including accommodation-related needs) the LA should not take into account the hypothetical offer of asylum support accommodation under section 95 or section 4 Immigration and Asylum Act 1999. [*Westminster v NASS*[2002] UKHL 38]
81. Arguments can also be made that where an adult has accommodation-related needs that have been identified and the adult has no suitable alternative accommodation, in conjunction with an LA's human rights obligations, a refusal to provide suitable accommodation could be unlawful.

## Need for only accommodation/Support under the Localism Act

82. Section 1 of the Localism Act 2011 sets out a general power of local authorities to “do anything that individuals generally may do.”
83. The case of *GS v Camden* [2016] EWHC 1762 established that where an adult has a standalone need for accommodation, this cannot be met by the LA under the Care Act 2014 as this does not come under the definition of care and support.
84. However, in that case the Judge decided that the Claimant was so vulnerable that her potential social isolation, pain and the physical difficulties she encountered were such that if she became homeless it would breach her article 3 rights under the ECHR.
85. It was held that, although the Claimant did not have needs that could be met under the Care Act, the local authority were under a positive obligation to exercise their power under section 1 of the Localism Act 2011 to provide the Claimant with accommodation as to do otherwise would result in a breach of Article 3 or Article 8 of her Convention rights.
86. However, in the later case of *AK v Hammersmith & Fulham Council* [2018] EWHC 3453 (Admin) it was held that GS had been wrongly decided and that the LA were prohibited from providing accommodation under the Localism Act by virtue of section 2(2)(a) of the Localism Act and section 185 of the Housing Act.
87. This has recently been confirmed in the case of *R(Aburas) v LB Southwark* [2019] EWHC 2754 (admin).
88. This is highlighted for caseworkers to be aware that where an adult is refused accommodation under the Care Act it may be difficult to run the alternative argument that accommodation should be provided the Localism Act 2011 as there is mixed case law on this matter.
89. It is therefore very important to provide evidence of accommodation-related needs (as defined above) at the outset when referring an adult to the local

authority. If accommodation-related needs cannot be established, it may be difficult to obtain accommodation for the adult from the local authority.

90. It is arguable however that LAs can use their power under the Localism Act 2011 to provide support other than accommodation such as cash subsistence (which could potentially be used to pay for accommodation) where an adult is not eligible to receive accommodation under the Localism Act or the CA 2014. This was alluded to in the *AK v Hammersmith & Fulham* judgement (referred to above) at paragraph 30:

*It was not part of the claimant's case that, as an alternative to providing accommodation, the defendant should provide funds to enable the claimant to secure accommodation. I have heard no submissions as to whether this would be possible under section 1 of the Localism Act and I express no concluded view on it. The position is not straight forward. It is not clear whether such provision is "assistance" within Part 7 of the Housing Act and thereby subject to the prohibition in section 185. Section 206(1) of the Housing Act, which provides for the only ways in which an authority may discharge its functions under Part 7, does not seem to cover provision of finance in order to secure accommodation...*

91. How this would operate in practice is yet to be seen and this has not been discussed further in the Courts.

## Pregnancy and the Care Act

92. Currently there is a particularly grey area in relation to the duties and powers of local authorities toward destitute, pregnant, migrant women who do not have children.

### Previous position

93. It is widely acknowledged that pregnant women will have needs for care and support subject to how advanced her pregnancy is.
94. Under the previous legislation (National Assistance Act 1948) there was an express provision that gave LAs a power to provide residential accommodation for expectant and nursing mothers who are in need of care and attention which was not otherwise available to them.

95. During a government consultation on the Care Act eligibility regulations, responders including mostly local authorities, confirmed that no one who would have been provided with accommodation under the previous legislation would fall out of scope of the Care Act<sup>1</sup>.

96. In drafting the Care Act, regulations and statutory guidance, however, any reference to expectant mothers was omitted.

## How pregnant women may access support under the CA 2014

97. It has previously been argued that the discretionary power set out at Section 19(1) of the Care Act 2014, which empowers a local authority to meet the needs of a person who does not have "eligible" needs as per the Care Act eligibility criteria, could be exercised to meet the needs of expectant mothers. This argument has previously been successful and resulted in some local authorities providing accommodation and support to expectant mothers.

98. It is important to note however that exercising this power is still subject to the schedule 3 and destitution-plus exclusions. This is explained in further detail below.

99. In situations where a pregnant woman presents as destitute, it is advisable to refer the woman to both adult services and children services for support.

100. Local authorities may decide that it is the most practical solution to provide accommodation and support under section 17 of the Children Act because as soon as the child is born the local authority will likely have duties to the child under section 17 of the Children Act 1989.

101. Alternatively the LA can also provide support and accommodation by exercising their discretionary powers under section 19 CA 2014 as explained above.

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<sup>1</sup> Department of Health, Response to the consultation on draft regulations and guidance for implementation of Part 1 of the Care Act 2014, page 23. <https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

## Obstacles in accessing support

102. It is not, however, a foregone conclusion that all destitute pregnant migrant women should be provided accommodation and support under the Care Act 2014 and there are a number of obstacles in obtaining support for women in this position:

- Firstly, the woman will need to establish that she is far along enough along in her pregnancy that she has needs for care and support and/or has additional a physical or mental condition(s) that give rise to needs for care and support (other than **solely** destitution). [the Destitution plus test]
- Secondly, for NRPF women, they will need to establish that refusing to provide support would result in a breach of their human rights (in order to get over the Schedule 3 exclusion). Usually this requires a breach of Article 3 (the prohibition of inhumane and degrading treatment) or Article 8 (right to private and family life). The case of Limbuela confirmed that where someone is street homeless as a result of treatment by a public body, this will amount to a breach of Article 3.

103. It is arguable that in circumstances where an NRPF pregnant woman (with needs for care and support - either as a result of pregnancy or otherwise) is in a domestic violence situation, the only accommodation available is with their abusive partner, and the LA are aware of this situation, a refusal by the LA to exercise their powers under Section 19 and provide safe, alternative accommodation and support would result in a breach of her Convention rights and could be challengeable. This however, has yet to be tested in the Courts.

104. When referring an NRPF pregnant woman to a local authority it is useful to refer to the NRPF Network guidance:

<http://guidance.nrpnetwork.org.uk/reader/practice-guidance-adults/discretionary-powers-to-provide-housing/#52-section-19-of-the-care-act-2014>

Helpfully paragraph 5.2.1 sets out :

"When an expectant mother with NRPF, who has no children in her care, requests assistance with housing, then the local authority should therefore consider using the general power under section 19(1) of the Care Act to provide support, and may also provide interim accommodation under section 19(3) to prevent homelessness before a needs assessment has been concluded. Additionally, the UK is a signatory to the UN Convention on the Elimination of All Forms of

*Discrimination against Women (CEDAW), which requires that pregnant women are given access to appropriate services, including access to nutrition.*

*If the expectant mother is in a group excluded from support by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, then the human rights assessment must consider how the pregnancy impacts on her ability to travel and return to her country of origin.*

*Children's services departments may support pregnant women and, where appropriate, undertake a pre-birth assessment, so housing may be provided by a different council department even though the power to do this exists under the Care Act."*

*It is important to note however that this is non-statutory guidance and therefore LAs are not obliged to follow it.*

## Cross over with other statutory frameworks:

### Asylum Support

105. Where adults with care needs are also eligible for Asylum Support under the Immigration and Asylum Act 1999, local authorities can still provide support and accommodation.

106. It is well established that when local authorities are deciding how to meet an asylum seeker's eligible care and support needs (if the asylum seeker meets the destitution-plus test) local authorities should ignore support available to from the Home Office.

107. Where an adult with care needs has come to the attention of the Home Office, Home Office caseworkers should follow the following guidance (Asylum Seekers with Care Needs version 2 : 3 August 2018)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/731907/Asylum-Seekers-With-Care-Needs-v2.0ext.pdf:](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731907/Asylum-Seekers-With-Care-Needs-v2.0ext.pdf)

#### "Non-urgent needs

Where a newly arrived asylum seeker has potential care needs that do not appear to be urgent, or otherwise to require assessment prior to dispersal, assessment of those needs may await the person being dispersed. A person dispersed to a local authority's area should be considered ordinarily resident in that area, and any needs or carer's assessment will be requested from that local authority.

### Urgent needs

Where a person presents with urgent needs that may require any of the following:

residential care

specific accommodation

day to day assistance with basic personal care

a needs assessment should be requested from the local authority in whose area the adult is present at the earliest practicable point in the process. For example, where a person claiming asylum at a port of entry presents with urgent care needs, the local authority in whose area the port is situated should be requested to do an urgent assessment. If in immediate need of medical care, it will be necessary in the first instance to refer the individual to the nearest hospital.

### Urgent needs where the person has already been accommodated by Home Office

Where, exceptionally, a person has already been accommodated by the Home Office before an urgent care need is revealed, and therefore no request for assessment has been made, an urgent assessment must be requested from the authority in whose area the accommodation is situated. Such an assessment should be requested by the first responder (for instance the accommodation provider, the caseworker or other person, using specialist safeguarding staff where appropriate) when made aware of the care need. Where a local authority is requested to do a needs assessment either because the asylum seeker is ordinarily resident in its area, or is present in its area but of no settled residence, that local authority is obliged to do so in accordance with the terms of the Care Act 2014."

108. The Guidance goes on to state:

"Where a local authority assesses that residential care is not appropriate, a copy of the needs assessment should be requested. The contents must then be considered when assessing any specific accommodation requirements and to inform the receiving local authority of any identified needs for care and support."

109. Currently the guidance states that:

"Local authorities (LA) are generally only expected to provide accommodation to asylum seekers if their assessment shows that the person needs the sort of residential care that LA adult services are required to provide. An asylum seeker who has care needs which can be appropriately addressed in asylum support accommodation, and is

*otherwise eligible, should be accommodated by the Home Office following a care assessment."*

110. This guidance suggests that the local authority are only required to provide accommodation to asylum seekers who require residential care and suggests that LAs should consider the hypothetical offer of asylum support accommodation when deciding how to meet an asylum seeker's eligible needs. This arguably contradicts the position set out in the case of *SL v Westminster [2013] UKSC 27*.

111. There may be other instances in which local authorities can provide accommodation. For example: where an asylum seeker does not require residential care, but section 95 accommodation is unsuitable to meet their eligible care and support needs. In these circumstances, where a local authority has assessed that section 95 accommodation is unsuitable and the asylum seeker has accommodation-related needs, it is arguable that the local authority has a duty to meet those needs under section 18 of the Care Act 2014. This issue has yet to be litigated.

## The Children Act 1989

112. There may sometimes be a cross over with the Care Act and the Children Act 1989 in that there may be an NRPF family with an adult with care needs as well as children in need.

113. In those cases, it is advisable to make a referral both to Children's services under section 17 of the Children Act 1989 and to adult services under the Care Act 2014 to ensure that the local authority are fully aware of the needs of the entire family.

## *Young Carers*

114. Section 17ZA of the Children Act 1989 sets out the statutory framework relating to the provision of support by local authorities to young carers.

115. A young carer is defined by as:

*"a person under 18 who provides or intends to provide care for another person"*

116. Under this section a local authority have a duty to carry out an assessment where :

- a) *it appears to the authority that the young carer may have needs for support; or*
- b) *the authority receive a request from the young carer or a parent of the young carer to assess the young carer's needs for support.*

117. There is a further general duty on local authorities to "take reasonable steps to identify the extent to which there are young carers within their area who have needs for support."

118. Where there is a family with a young carer and an adult with care needs, the assessment of the adult's needs will be under the Care Act 2014 and the assessment of the young carer will be under the Children Act 1989.

119. When assessing and deciding how to support young carers, local authorities will be required to have regard to their duties under section 11 of the Children Act 2004 to safeguard and promote the wellbeing of the child.

## Duty to Co-operate

120. Under section 6 of the Care Act a local authority have a duty to co-operate with each of its relevant partners.

121. The statutory guidance highlights the importance of co-operation between different teams within the local authority (ie: Children's Services and Adult Social Services):

*15.23 Local authorities fulfil a range of different functions that have an impact on the health and wellbeing of individuals, in addition to their care and support responsibilities (for example, children's services, housing, public health). It is therefore important that, in addition to ensuring co-operation between the local authority and its external partners, there is internal co-operation between the different local authority officers and professionals who provide these services. Local authorities must make arrangements to ensure co-operation between its officers responsible for adult care and support, housing, public health and children's services, and should also consider how such arrangements may also be applied to other relevant local authority responsibilities, such as education, planning and transport. Arrangements that local authorities could make to ensure co-operation*

*between officers include offering training and establishing systems for information sharing or multi-disciplinary teams.*

122. It is often the case that different teams within a local authority do not co-operate or communicate with each other. It is therefore advisable (if making a number of referrals on behalf of one family) to remind the local authority of their duty to co-operate and include copies of each referral to the respective teams.

## Tips on what to include in a referral:

- Does the adult have any physical or mental impairments or illnesses?;
- If so, what are the adult's needs arising out of these conditions? Ask basic questions about how they carry out everyday tasks eg:
  - a) Preparing food;
  - b) Personal hygiene (bathing, brushing teeth, washing face etc.);
  - c) Toileting;
  - d) Mobilisation;
  - e) Dressing;
  - f) Engaging in education, training, work;
  - g) Recognising risk/dangers
  - h) If they have children – how they care for these children (eg how they take them to school, how they feed them, how they dress them etc.)
- What is the impact of being unable to carry out these tasks? On their own wellbeing? On their relationships with family members?;
- What would the adult like to achieve by being referred to the Local Authority?
- Does the adult require any specific accommodation adjustments/alterations as a result of their impairments/illnesses;
- Medical evidence – GP, Counsellor, physio-therapist etc;
- Any further evidence from professionals relating to needs (eg voluntary organisations, children's school etc.)

## Issues that may give rise to challenge:

- Refusals to assess;
  - Due to being NRPF;
  - Due to “only being destitute”
- Delays in assessing;
- Disputes between local authorities as to who is responsible to assess and provide support;
- Disputes between local authority and the Home Office as to who is responsible to provide support and accommodation;
- Refusals to provide support/accommodation following an unlawful assessment;
- Failures to provide suitable and adequate accommodation and/or support to meet identified care and support needs.

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