**Housing adult migrants via Community Care**

**The Legal Framework**

***Statutes***

1. Local authorities have responsibility for arranging ‘community care services’ under NHS & Community Care Act 1990 (‘NHSCCA 1990’). It defines community care services and provides the legal framework for both *assessment* and the *provision* of such services. There are then specific statutes dealing with different areas of provision eg National Assistance Act (NAA) 1948. Section 7 of the Local Authority Social Services Act 1970 (‘LASSA 1970’) *requires* social services authorities to follow statutory guidance and directions issued by the Secretary of State for Health.
2. Under the NAA 1948 s21 local authorities have a duty to provide:

‘*residential accommodation for persons who are aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them’*. Under s21(1)(aa) in relation to nursing mothers, local authorities have a power and not a duty to provide accommodation; the power is not limited to those who are over the age of 18 years (see *R (G & D) v Leeds CC*  [2008] EWHC).

#### **Directions**

1. The most relevant are:

*Approvals and directions for arrangements from 1 April 1993 made under schedule 8 to the National Health Service Act 1977 and Sections 21 and 29 of the National Assistance Act 1948* (LAC (93)10)). The Community Care Assessment Directions 2004 govern the assessment procedure, including consulting and agreeing on the assessment. The *National Assistance Act 1948 (Choice of Accommodation) Directions 1992* are useful for challenging unsuitable accommodation (LAC (92)27).

#### **Guidance**

1. The previous Fair Access to Care Services (FACS) Guidance was replaced in February 2010 by *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care Guidance on Eligibility Criteria for Adult Social Care,* England 2010 (‘updated Eligibility Guidance’). Updated statutory guidance on ordinary residence was issued on 15 April 2011: *Ordinary residence: guidance on the identification of the ordinary residence of people in need of community care services, England*. Such guidance should be followed by local authorities although an authority has ‘liberty to deviate from it where the local authority judges on admissible grounds that there is good reason to do so, but without freedom to take a substantially different course.’ (*R v Islington LBC ex p Rixon* [(1998) 1 CCLR 119, 15 March 1996).

**Right to a community care assessment?**

1. The duty to carry out a community care assessment under s47 NHSCCA arises when a Local Authority is aware that **a person *may* be in need of community care services which it has a *power* to provide**. There is no direct ‘person subject to immigration control’ exclusion from the right to a community care assessment under s47. There may be an indirect exclusion where the local authority has no power to provide services e.g. to a failed migrant by virtue of Nationality, Immigration and Asylum Act (NIAA) 2002, Schedule 3 (see Ranjiv’s notes and below).
2. The threshold test for assessment is low, and does not depend on whether the Local Authority would be likely to provide the relevant services (*R v Bristol City Council ex p Penfold* (1998) 1 CCLR 315).
3. In *R (NM) v London Borough of Islington & Ors* [2012] EWHC 414 (Admin) a prisoner with learning disabilities sought a community care assessment, to enable him to demonstrate he would have accommodation and support if he were to be released. NM relied observations of Stanley Burton J in *R (B) v Camden LBC* (2005) EWHC 1366 (Admin): ‘In my judgment, the words “a person may be in need of such services” refer to a person who may be in need at the time, or who may be about to be in need’. Although the court dismissed NM’s application, stating that his release was too conditional and speculative to fall within the narrow class of future provision covered by s47, it made clear that in a number of other situations, including release from prison or discharge from hospital, it may be sufficiently clear that a person is likely in the very near future to be present in the area of the local authority, and in such circumstances the obligation to assess under section 47 would arise before the person actually is in the community.
4. The trigger for an assessment is the ‘appearance’ of need so a request may be made by any person (or even UKBA) and it is not necessary for the migrant to co-operate in the process.
5. A carer who provides substantial amounts of care is entitled to participate in the community care assessment and should be informed of their rights to request an assessment of their own ability to provide care (Carers (Recognition and Services Act) 1995; *Carers and Disabled Children Act 2000*; Practice Guidance to the Carers and Disabled Children Act 2000; *Carers and Disabled Children Act 2000 and Carers (Equal Opportunities) Act 2004 combined policy guidance*, 18 August 2005).

**Right to an assessment in Schedule 3 cases?**

1. The duty to complete a s47 assessment and care plan only arises in relation to a person for whom a local authority **may** have the power to provide or arrange for the provision of community care services. So in cases where a local authority has no power to provide services due to NIAA 2002, Schedule 3, it has been argued that a more limited duty to assess arises, firstly to carry out an assessment of whether the applicant’s immigration status brings them under one of the five excluded classes and secondly to conduct a human rights assessment to consider whether they are brought back in to entitlement to services and a full s47 assessment. If the second part of the assessment shows that a failure to exercise its powers will result in a breach of ECHR or EU Treaty rights, the authority will then have a duty to carry out a community care assessment and properly consider the relevant provision e.g. under NAA s21, LGA s2, and so on. This was confirmed in the case of *R (Sharef) v Coventry City Council*  [2009] EWHC 2191 (Admin).

**Which authority should assess?**

1. A local authority may not refuse to assess or meet needs because there is a dispute about who will provide services; it must assess even if the applicant is not ordinarily resident in their area (see LAC(93)7 guidance). The ‘authority of the moment’, normally but not necessarily in the area where the migrant is living, should assess. The authority cannot refuse to assess because it considers that a person is not ordinarily resident in its area (*R v Berkshire County Council ex p P* (1998) 1 CCLR 141, QBD).
2. Under the 2011 Ordinary Residence guidance, before referring a matter to the Secretary of State, the local authorities must ensure they have taken all reasonable steps to resolve the dispute, including specified steps. If the dispute is not resolved after three or six months (the period of time is one of the matters subject to consultation), there would be a duty to refer it to the Secretary of State. An applicant who is of no settled residence (such as a refused asylum-seeker), or in urgent need is not ordinarily resident so will be the responsibility of the authority to which they present, by virtue of NAA 1948 s24 (3).

**Urgent accommodation pending the assessment/decision/ delays**

1. The assessment should be carried out within a ‘reasonable time’. In 2011, the local government ombudsman suggested 4-6 weeks from the dare of the original request (LGO (2011) Fact Sheet Complaints about councils that conduct community care assessments.
2. S.47(5) NHSCCA 1990 provides that a local authority may temporarily provide a service without carrying out a prior assessment of needs ‘if, in the opinion of the authority, the condition of that person is such that he requires those services as a matter of urgency’. Where services are provided in an emergency, the duty to assess still remains and an assessment should be done as soon as reasonably practicable. Although it is a power rather than a duty to provide temporary urgent services, in obvious cases of urgent need the courts will order an authority to make provision pending an assessment, see *R (AA) v Lambeth LBC* (2002) 5 CCLR 36.
3. When a person has no settled residence or is of no fixed abode, the authority to which they present should accept responsibility. If there is urgent need the authority to which the person presents should assist on an emergency basis. The case may then be transferred to the authority where the person is ordinarily resident (NAA 1948 s24 and LAC(93) 7 & 10).

**A lawful assessment process?**

1. The assessment should involve the migrant and have regard to their wishes and preferences and those of their carer(s) see Community Care Assessment Directions 2004 and the circular (LAC (2004) 24. The assessment should address any psychological needs of the migrant (*R v Avon CC ex p M (1999) 2 CCLR 185).* It should take into account cultural attitudes and social support needs.

**Assessment outcomes**

**Do eligibility criteria apply to asylum-seekers?**

1. In the normal course of event, the FACS criteria/ revised eligibility criteria based on ‘low, moderate, substantial or critical’ needs would be the trigger for service provision. However s21 operates independently of these criteria. Once a need for care and attention is identified, then the local authority has a duty to consider the accommodation and support needs additionally, see e.g. DoH Practice Guidance on FACS, ‘Implementation Questions And Answers’ published on the DoH website in March 2003 explaining that the FACS criteria – which preceded the current criteria - are not applicable in such cases.

‘*where destitute asylum seekers have assessed care needs for which councils may provide community care services, no matter whether these care need fall within or outside council’s eligibility criteria, councils should accommodate such asylum seekers under section 21 of the 1948 Act. The services provided must be sufficient to address their needs, as they are cut off from all other means of support. This position was confirmed by the Law Lords judgment in the case of Westminster City Council v NASS in 2002’.*

1. Although the law appears clear, local authorities have continued to (unsuccessfully) refuse support on the basis that the client does not have substantial or critical needs, (see *R(N) v Lambeth LBC* [2006] EWHC 3427 (Admin*)).* The House of Lords in *M v Slough LBC* further confirms this approach is incorrect. And see the more recent decision in *R (De Almeida) v Royal Borough of Kensington and Chelsea* [2012] EWHC 1082 (Admin) where the court decided that the use of the FACS risk criteria was not appropriate for assessing whether a local authority owes a duty under to provide accommodation under s21.

**The ordinary residence test- which authority pays?**

1. In relation to s21 accommodation, the duty to accommodate covers both migrants who are ordinarily resident in the authority’s area, and those simply living in its area when the need arises, as well as those (whether or not ordinarily resident anywhere) who are in urgent need (see NAA 1948 s 24(3), Approvals and Directions LAC (93) 10).
2. A person will be ordinarily resident is s/he can show a regular habitual mode of life in a particular place, the continuity of which has persisted despite any temporary absences *(Shah v Barnet LBC [1983] 2 AC 309*). Although there is no statutory definition of the terms ‘ordinarily resident’, there is guidance at LAC (93) 7. The 2011 Ordinary residence guidance provides:

*37. A person from overseas who is not excluded from receiving services by virtue of one of these provisions should have their ordinary residence assessed in the usual way. A person’s immigration status may be a factor to take into account in determining ordinary residence; for example it may be relevant to the consideration of the person’s intentions (in accordance with the Shah case). However, the fact that a person is unlawfully resident in the UK does not of itself mean that they cannot acquire ordinary residence in a local authority’s area for the purposes of section 24(1) of the 1948 Act.*

*37b. In ordinary residence determination OR 9 2010 (published on 20/01/2011), the Secretary of State considered that the person’s immigration status was not relevant to the consideration of ordinary residence for these purposes.*

1. *Al-Ameri v Kensington & Chelsea RLBC* [2004] UK HL 4 suggests in the homelessness context that migrants do not acquire ordinary residence where residence has not been voluntarily adopted, eg where housed by NASS. But see also Wilson J’s approach to ordinary residence in the Administrative Court’s decision in *Mani*, finding that a period of six months in NASS accommodation could amount to ordinary residence.

**Not in need of care and attention v destitute plus**

1. In[*R (M) v Slough Borough Council*](http://www.bailii.org/uk/cases/UKHL/2008/52.html) *[2008] UKHL 52 63,* the House of Lords reviewed the case law of the past decade and settled on what appears to be a more restrictive approach to the meaning of ‘in need of care and attention’ than the ‘non-destitution’ needs approach which had become the norm. In the lead judgment, Baroness Hale found that ‘care and attention’ must mean something more than ‘accommodation’. In a key paragraph of the judgment she 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 being 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.’.*

**Care and attention “not otherwise available”**

1. In *R (Mwanza) v Greenwich LBC and Bromley LBC* [2010] EWHC 1462 (Admin)a severely mentally ill client was provided with support from his wife who was assessed as being in danger of ceasing to cope. The assessment identified that this care and attention was currently otherwise available, through his wife, and the court agreed that whilst the wife was coping, the care and attention the Claimant needed was being provided by her, and therefore no s21 duty arose.

**Does care and attention include a need for watching over/ monitoring?**

1. In *R (Shoaib) v Newham LBC* [2009] EWHC (Admin), [2009] All ER (D) 198 (Jun), the Claimant was a refused asylum-seeker with epilepsy who was being accommodated by Newham under s21 NAA 1948. Support was later withdrawn following a review because the social worker decided the claimant did not need ‘looking after’. The Court refused his application for judicial review. They found that the social worker had applied the correct test by considering whether the Claimant needed things to be done for him which he could/should not be able to do for himself. There was plenty of evidence to show that the claimant was able to look after himself. The social worker had acted rationally in deciding that s21 support was not required.
2. In *R (Zarzour) v LB Hillingdon* [[2009] EWCA Civ 1529 the Claimant was a Lebanese asylum seeker aged 36 who was blind. He has no settled accommodation and relied on various friends for accommodation and daily assistance. The assessor's summary was: ‘I feel that Mr Zarzour will be unable to gain the independence he desires unless stable accommodation is found for him. If he continues to move around different temporary accommodation with his friends he will be at increased risk of falls due to the overcrowding and unfamiliar environment and will continue to be dependent on his friends for support. He is unable to access shopping or leave his home alone at present but is likely to be able to do this independently if he is settled somewhere.‘
3. The Administrative Court judge rejected Hillingdon's conclusion and found that Z was entitled to s21 support. He determined that the assessment identified a number of needs including the need for tuition to find his way around, need for assistance with dressing, laundry, for help with shopping, for assistance to keep him safe when he goes out and assistance with providing food. The judge’s decision was later upheld by the Court of Appeal.

**Which mental health needs require care and attention**

1. In [*SL v Westminster City Council & Ors*](http://www.bailii.org/ew/cases/EWCA/Civ/2011/954.html)[2011] EWCA Civ 954 the Claimant was a gay Iranian refused asylum-seeker with a diagnosis of depression and PTSD who had attempted suicide after his partner died in an Iranian jail. He was being supported by the CMHT at the time he sought s21 accommodation. He received weekly meetings with a social services care co-ordinator who monitored his condition and progress and had linked him to counseling groups and to a befriender.
2. The Court of Appeal allowed SL’s appeal, deciding that his need for weekly meetings with his social worker, counseling and a befriender was sufficient to amount to a need for ‘care and attention’ and that, since such a need had arisen, there would be a duty to accommodate under NAA s21 if “care and attention is not ‘otherwise available’, unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation”.

**Deteriorating condition/ future needs**

1. The threshold for s.21(1)(a), is met “as soon as a person can be said to be in need of some care and attention, even to a relatively small degree” (Lord Neuberger in *M v Slough*) and considering current and prospective need.
2. *R(N) v Coventry City Council* [2008] EWHC 2786 (Admin) concerned a South African national who came to the UK in 2002 on a visitor’s visa. He was HIV positive and in 2006 was admitted to hospital with TB, meningitis and syphilis. He had applied for based on Art 3 ECHR in June 2007; this application was refused and finally determined by August 2007. In 2007 Coventry carried out an assessment and decided although he was destitute he had no care needs, and therefore was ineligible for s21 support. By the time of the proceedings N‘s health had improved. His cousin helped him with basic household chores, but he was able to complete them unaided when necessary.
3. The Court found that in order to establish that there was a duty to provide N with support or assistance, N had to show that he was in need of care and attention, and that need had not arisen solely from his destitution. The local authority's assessment concluded that N was able to manage the activities of his daily life himself, despite his persisting symptoms. The fact that he had previously been assisted by his cousin did not mean that he could not do them or that he needed to have them done by someone else.
4. In [*R (Nassery) v London Borough of Brent*](http://www.bailii.org/ew/cases/EWCA/Civ/2011/539.html) [2011] EWCA Civ 539 the council found that an Iranian asylum-seeker who needed monitoring due to his mental health needs was not in need of care an attention at the time of the assessment. In the Admin Court, the key question was whether he was seeking community care services or medical services. In the Court of Appeal, Lady Arden, referred to *M v Slough* where Lady Hale and Lord Neuberger had accepted that there could be a situation where it was clear that a person was in the early stages of what would be likely to develop into much more serious illness, and some flexibility was allowed provided that at all times there was indeed a need for care and attention. The same must apply to both physical and mental illness. However on the facts of N’s case, at the time of his assessment, N’s condition appeared to be under control. She accepted Brent’s assessment that he had an appropriate level of insight and perception of when help was needed and the ability to act appropriately in seeking it.
5. In *R* ([*De Almeida) v Royal Borough of Kensington and Chelsea*](http://www.bailii.org/ew/cases/EWHC/Admin/2012/1082.html) [2012] EWHC 1082 (Admin), RB K and C and C had refused to assess a terminally ill Portugese national with HIV who had a life expectancy of 6 -12 months and had been evicted from his private rented accommodation. Apart from finding him excluded by Schedule 3 as an EEA national, the council found he was not in need of care and attention because his ability to care for himself fluctuated. They also assessed him as only having low care needs according to the Fair Access to Care Services (FACS) risk criteria and decided he therefore did not have a need for care and attention, so no accommodation duty arose under NAA s21.
6. Again the court turned to *M v Slough*  for guidance: “… it is not a pre-requisite of eligibility under s.21(1)(a) that the person is incapable of performing a domestic task himself. Lady Hale gave the example of “household tasks which an old person ….can only perform with great difficulty”. In the Claimant’s case, it was sufficient that, because of his fragile condition, he reasonably required support with domestic tasks, such as shopping, cleaning, cooking etc. In relation to the fluctuations, it said: “This is not an unusual feature of long-term illnesses, and LAC 93 (10) paragraph 2(5) expressly approved the provision of accommodation for the purpose of caring for those who are ill. A fluctuating need does not necessarily take a person outside the scope of s.21(1)(a). In *Mani* for example, the claimant needed help with household tasks “on days when he is in pain” (at [2]), i.e. not all the time”.
7. The Court found it would be a question of fact in each case whether a person’s condition was such that he should be treated as ‘in need of care and attention’ even though the extent of his need for care and assistance fluctuated from time to time. They contrasted the decision in [*R (Nassery) v Brent LBC*](http://www.bailii.org/ew/cases/EWCA/Civ/2011/539.html)where the Court of Appeal had upheld the Council’s assessment that, despite the claimant’s sporadic past episodes of mental disorder, he was not “in need of care and attention” at the time of its assessment. In De Almeida’s case, the decisive factors were “the seriousness of his illnesses, his ongoing, debilitating physical symptoms, his frequent periods of acute illness requiring hospitalisation, and his very poor prognosis.”

**Quality of accommodation**

**S21 Accommodation**

1. If a migrant client has a preference for particular s21 accommodation which is no more expensive than that proposed by the authority, consider the effect of the *National Assistance Act 1948 (Choice of Accommodation) Directions 1992* as amended (see *Goldsmith v Wandsworth LBC* [2004] EWCA Civ 1170). The September 2003 guidance states at paragraph 3.1 that where a council decides not to arrange a place for someone in their preferred accommodation it must have a clear and reasonable justification for that decision which relates to the criteria in the Directions.
2. The EU Directive laying down minimum standards for the reception of asylum seekers [2003/9/EC of 27 January 2003] ‘the Reception Directive’, is binding on the UK in relation to asylum applications made since 5 February 2005. In the context of the right to work after 12 months, the Supreme Court has suggested it applies to refused asylum-seekers who have made further representations which are not yet decided *ZO (Somalia) and Another) v Secretary of State for the Home Department* [2010] UKSC 36; [2010] WLR (D) 203. Its provisions include:

*The reception of groups with special needs should be specifically designed to meet those needs (Preamble); Family unity should be maintained* (Article 8); *A standard of living adequate for asylum-seekers’ health should be provided taking account of any special needs and including asylum-seekers in detention* (Article 13); *Where there has been an evaluation of a vulnerable asylum-seeker, this should be taken into account* (Article 17). (Vulnerable person is widely defined as including a child, a disabled person, an elderly person, a pregnant woman, a lone parent, or 'a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence').

1. If accommodation for asylum-seekers can engage EU law, then the *EU* *Charter of Fundamental Rights*, with its ‘access to justice safeguards’ may apply, see *NS v Secretary of State for the Home Department and Amnesty International, the AIRE Centre, United Nations High Commissioner for Refugees (UNHCR) and Equality and Human Rights Commission (EHRC) (third party interveners)*C-411/10, 21 December 2011.

**Accommodation under s4 Immigration and Asylum Act 1999**

1. The duty under section 95(1) and s4 IAA 1999 is to provide accommodation adequate to the Claimant’s needs assessed on an individual basis. Regulation 4 of the *Asylum Seekers (Reception Conditions) Regulations* 2005 requires that the UKBA take into account the special needs of the Claimant, who is a disabled person for the purposes of the Regulations. This duty is shored up by the general duties in section 20 of the Equality Act 2010 to provide reasonable adjustments and the section 149(A) ‘due regard’ duty in relation to the Claimant’s disabilities. It appears these duties are regularly ignored, or arguments are made that disabled accessible accommodation is not available and cannot be provided. This does not appear to be lawful.

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