Support for children in need under Section 17: Local Authority obligations after BCD vs BCT (January 2023)

BCD vs BCT (January 2023) *confirmed that local authorities must provide Section 17 support at a welfare standard for families of children in need where the parent or carer is lawfully in the UK; in other situations, where a family's support is 'capped' at a subsistence level, the support must be at least at Asylum Support levels (plus utilities), and in some cases must be higher, depending on needs.*

This briefing is current as of July 2023.

Local Authority duties to support children in need

Local authorities are required to support and safeguard children in need in their area, in accordance with the Children Act (1989) England, Section 17 (and other relevant law).[1]

What level of support is required for a child in need and their family?

Section 17 support must be adequate to meet the child's needs and the needs of eligible family members (generally, minor siblings and parents/carers). Support may include accommodation, assistance in kind, and financial support. The amount and type of support that is required for a particular child must be centred on the assessment of the child's circumstances and needs. Social workers must assess the appropriate level of support in each individual case, on an equitable basis. The NRPF Network provides further information about the factors that must be taken into account.

The BCD case

BCD is a British citizen child whose mother died in 2020, when BCD was 5 years old. A few weeks before his mother's death, BCD's grandmother, EFG (a Jamaican citizen previously resident in Jamaica), came to the UK on a visit visa to spend time with BCD, his mother, and BCD's 2 older siblings. As a result of BCD's mother's illness and death, EFG became the children's sole carer and was after a time recognized as having a right to reside in the UK based on being the sole carer of a British citizen child (known as a 'Zambrano carer'). At no point was EFG in the UK unlawfully. EFG had no recourse to public funds and insufficient means to support BCD and his siblings. She applied for Section 17

support, as BCD was a child in need.

The High Court Judge held that because EFG was lawfully in the UK, BCD and his family were entitled to Section 17 support at the 'welfare standard' of support – in this case, the same as a fostering allowance: £510/week. The Court also approved a damages settlement of £10,000 in relation to Birmingham Children's Trust's discrimination against BCD. The judgment is final.

Asylum Support plus utilities is the bare minimum

In BCD vs BCT,[2] the Court confirmed that local authorities must not set Section 17 support below Asylum Support levels for any child/family. The judgment raises the floor for Section 17 support to Section 95 (Asylum Support) levels as the absolute minimum. Local authorities must provide Section 17 support – at the very least – at Section 95 levels, and they must also provide support to pay for utilities if the family is liable for utilities. This is because people in asylum accommodation do not pay for utilities from their Asylum Support allowance. The Court did not address exactly what level of support is sufficient for all families; this depends on the specific needs of each individual child and the status of the child and their parents/carers, but Section 17 support must never be below the Asylum Support level.

The Court also held that for children cared for by adults who are lawfully in the UK, the local authority must provide a 'welfare' level of support. This will be higher than Asylum Support levels. The BCD judgment is clear that it is the immigration status of the parent or carer that is key, rather than the status of the child, for some considerations. However, it is a relevant factor if the child is a British citizen; this will increase the chances of entitlement to support at welfare benefit levels. In BCD, the Court found that British children whose parents/carers are not British have a need to be compared with other British children. This must be considered as part of the social worker's assessment of the child's welfare needs. Further, where a child has British citizenship, that may in some cases affect the status of the parent/carer.

The Court in BCD discusses an 'ECHR breach cap' and its application to 'capped' and 'uncapped' families. This refers to the need to avoid a breach of the European Convention on Human Rights, for example to fulfil a child's right to protection from inhumane or degrading treatment (ECHR Article 3) and their right to respect for family and private life (ECHR Article 8). Many children in need are in the 'uncapped' category and are entitled to support at a welfare standard.

The Court indicated that local authorities should consider that families eligible for Section 17 support will benefit from legal advice that might allow them to improve their immigration status (or acquire British citizenship) and/or access public funds and/or be permitted to work.

Which families are 'capped' and which are 'uncapped'?

'Uncapped' families of children in need who must be supported at welfare standards include:

- **Parent/carer has leave to remain or permission to stay** in the UK but no recourse to public funds. This includes a parent/carer with EU

Pre-Settled Status where the parent/carer has no right to reside for welfare benefits purposes and therefore cannot access welfare benefits or housing assistance from the local authority (nationality of children is irrelevant)

- **Parent/carer of British citizen child (Zambrano carer).** Zambrano carer status exists automatically when the parent/carer fulfils the criteria, even if the status has not been formally recognised. For more information about Zambrano carers, see this July 2023 update by Rights of Women. Legal advice will be needed to assess whether a parent/carer qualifies as a Zambrano carer.

The "ECHR breach cap" applies *only* if the adult non-British carer of dependent child(ren) (irrespective of the child's nationality) falls into one of the 'ineligible classes' in Schedule 3 of the Nationality, Immigration, and Asylum Act 2002 [NIAA 2002]. In such cases, support which benefits the ineligible adult as well as the child is limited to [or 'capped' at] a level necessary to avoid an ECHR breach (for example so that the family will not be subject to inhuman or degrading circumstances or experience a violation of their right to family and private life). This is the ECHR breach cap.

Schedule 3 of the NIAA 2002 makes the following persons ineligible for most forms of support:

- Person has refugee status in another country; or
- Person is a 'failed asylum seeker': they previously were, but are no longer, seeking asylum **AND** they have failed to cooperate with Removal Directions requiring them to leave the UK; or
- Person is in the UK in breach of immigration laws (and not seeking asylum); or
- Person is treated as a failed asylum seeker under specific legislation **AND** the Secretary of State has certified that they have failed to take reasonable steps to leave the UK (certain other conditions apply).

Example of family that is 'capped' (ECHR 'breach cap' applies): Bab and Leo

- Bab is the parent of a minor child, Leo. Bab requires permission to stay in the UK but does not have it (Bab is currently present in the UK unlawfully). Bab has no recourse to public funds; and
- Bab and Leo will be destitute imminently; and
- Leo is 'in need'; and
- Bab has made an application to the Home Office for leave to remain (other than asylum) that is not hopeless or abusive (for example, the application could be based on Leo having resided in the UK for 7 years); and
- It would not be reasonable to require Bab and Leo to leave the UK to avoid destitution (in this case, because it would require them to abandon a pending immigration application; in other cases, it might be because leaving is not possible due to practical barriers or would be

unreasonable for other reasons).

- **Note:** Leo might be eligible for **British citizenship**, depending on how long he has lived in the UK, what his status is, how strong his ties are, and other factors. He should be referred to a competent legal adviser for advice. See this guide for more information. Also note that if Bab is granted leave to remain, the ECHR 'breach cap' will no longer apply, and the level of support required may change. With appropriate assistance, Bab may also be able to apply to the Home Office to gain access to public funds rather than Section 17 support.

People seeking asylum

People who are seeking asylum who are destitute must apply to the Home Office for Asylum Support. They and their children are excluded from Section 17 support or welfare benefits to meet essential living needs, but in some circumstances are entitled to support to cover ***'additional welfare needs'*** under Section 122(iv) of the 1999 Act (for example support for a disabled child).[3]

What is the difference between the subsistence standard and the welfare standard of support?

The Court confirms in BCD that:

- **The subsistence standard refers to the amount sufficient to meet essential daily living needs and avoid destitution.** [Judgment at 71]. The subsistence level must be, at the very least, at the Asylum Support rate, but the Asylum Support rate may not be adequate to cover subsistence needs. It depends on the circumstances and what is necessary to avoid breaching ECHR rights for that particular family.
- **Where the parent/carer is not lawfully in the UK and the family may be 'capped',** the local authority must carry out a detailed assessment of the child(ren)'s needs and consider whether a failure to meet those needs will lead to a breach of their ECHR rights. This includes Article 8 family and private life. The BCD judgment makes it clear that where a child in a 'capped' family has a developed family and private life in the UK, this will raise the bar for support, and it is very unlikely that the subsistence standard will be sufficient [Judgment at 108].
- **The Asylum Support level is the absolute minimum, but the judgment states that Section 17 support "cannot be 'benchmarked' against other statutory schemes such as Asylum Support"** [Judgment at 110]. Local authorities must properly assess the needs of the child(ren) and also have regard to the dramatic rise in the cost of living to ensure that basic living needs can be met. Even if the family is limited to the subsistence standard of support, the local authority can still provide some support in kind directly to a child in need (e.g. child counselling, therapeutic activities, etc).
- **The welfare standard is considerably higher than the subsistence standard.** It is not limited to essential living needs. It includes support for 'promoting the child's welfare'. It includes, for example, toys,

recreation, and entertainment. The specific level of support that is appropriate for a particular child/family under the **welfare standard** must be assessed through an exercise of social work judgment and be based on the child in need assessment. [Judgment at 100-101] The welfare standard will almost certainly not be met through Asylum Support levels of payments. In BCD, the Judge held that the required level of support was the same as a fostering allowance.

Conclusion

Where non-British parents/carers of children in need are destitute and have no recourse to public funds but are in the UK lawfully, according to the BCD judgment, the family is 'uncapped' and is entitled to support which meets the children's needs at the welfare standard. This requires a robust assessment of needs. The families of many children in need fall into this category.

The 'subsistence' standard for 'capped' families applies only in certain limited circumstances, as set out above. Local authorities must also undertake a robust assessment of needs where this standard applies, and consider what support is necessary to avoid destitution and a breach of ECHR rights, including rights to family and private life. In no circumstances is it acceptable for a local authority to leave children in need without adequate support.

The BCD judgment raises the floor beneath which no local authority should ever set Section 17 support. The bare minimum for subsistence is the Asylum Support level plus utilities; Section 17 support can never be lower than this for any family of a child in need, but for many families, Section 17 support must be higher than this.

Local authorities and children in need and their family members can all benefit from early referral to competent legal advisors who may be able to assist children and family members to regularise their immigration status or acquire British citizenship and/or gain access to public funds.

Endnotes

1. See also Section 11 of the Children Act 2004. Detailed statutory guidance as to how local authorities, agencies and individual social workers should work together to safeguard and promote the welfare of children is provided in the Working Together to Safeguard Children guidance (July 2018). And see KIND UK and Central England Law Centre's Children in Need briefing, here.

2. [January 2023] EWHC 137 (Admin). See also Central England Law Centre's more detailed summary of the case, here. And see a brief summary of BCT's policy relating to support for children in need, revised following the BCD case, which incorporates many of the findings of the BCD case but leaves a gap with respect to children in need whose families are 'capped' but who have a fairly developed family/private life in the UK and may be eligible for a level of support higher than the subsistence level.

3. See https://medium.com/adviser/new-case-on-social-services-support-for-children-in-no-recourse-families-214d484968f1