



Housing and support for HIV-positive asylum seekers – an update on the law for organisations supporting people living with HIV

Overview

A recent House of Lords decision has changed the rules over whether asylum seekers are housed by their Local Authority Social Services or the UK Border Agency (UKBA). A significant number of HIV-positive asylum seekers who have been receiving accommodation and support from Local Authorities under Section 21 of the National Assistance Act 1948 will be affected by this ruling.

For the purposes of this briefing the term 'asylum seeker' includes asylum seekers, refused asylum seekers, and people applying for leave under Article 3 or 8 of the ECHR. This briefing outlines what the House of Lords ruling means and what the implications are for your service users. A shorter explanation for asylum seekers is also available.

Background

This section provides an explanation of what Section 21 support is. If you are already familiar with this go to the next section.

Section 21 (1) (a) of the 1948 National Assistance Act requires Local Authorities to provide accommodation and support to those

“who by reason of age, illness, disability or any other circumstances are in need of care and attention which is otherwise not available to them.”

In addition asylum seekers must also show that this need has not arisen solely as a result of the effects of destitution.

Many destitute asylum seekers with HIV and other medical problems have been provided with accommodation and support by Social Services because their need for care and attention had not arisen solely because of destitution or the anticipated physical effects of destitution.

The Courts had decided that the meaning of care and attention could extend to the provision of shelter, warmth and food and other basic necessities and if a claimant's need for care and attention was to any material extent made more acute by something other than the lack of somewhere to live or money to live on then they would qualify for assistance under section 21.

In essence healthy and able-bodied asylum seekers would be supported by UKBA if they were destitute and infirm or ill asylum seekers would be supported by Social Services.

A ruling by the High Court and the Court of Appeal in the case *M v Slough Borough Council* had created a legal precedent by deciding that destitute HIV-positive asylum seekers, who were in need of continual medical care, had a need for care and attention which was not solely caused by the lack of accommodation and money.

Slough Borough Council appealed against this ruling and the case has now been heard in the House of Lords.

What did the House of Lords say?

The House of Lords ruled in favour of Slough and overturned the Court of Appeal's decision. They agreed that M did not have a need for 'care and attention' because he did not need 'looking after' beyond a need for medical treatment provided by the NHS. They therefore decided that Slough Borough Council did not have a duty to provide accommodation and support under Section 21 of the National Assistance Act 1948. M should therefore turn to the UKBA for his accommodation and support needs.

Slough Borough Council argued that a need for 'care and attention' meant a need for personal or nursing care in their own home. The House of Lords did not accept this argument.

The Lords decided that a need for care and attention had to mean that an individual needed some help looking after themselves. This could be help with domestic chores or psychological support, and did not have to be personal physical care. As M did not need any such support he did not qualify. As Lady Justice Hale said "Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself".

The Lords also defined what they meant by 'need' in this situation. Lord Neuberger said: "in need of plainly means more than merely 'want' but it falls far short of 'cannot survive without'". So a 'need for care and attention' does not have to mean the person will die or suffer severe harm if that need is unmet, but there must be some basis for the need. The person therefore will have to be able to show that there is something they cannot do or have trouble doing for themselves which it is reasonable for someone else to help them with.

What does this mean?

The ruling means that some asylum seekers in receipt of Section 21 support may no longer be entitled to that support.

Asylum seekers who do not have any support needs, other than their medication and a place to live, will no longer be entitled. These people will become the responsibility of the UKBA to house and provide financial assistance to, and should apply to the UKBA for support.

But, importantly, where people need some help, such as nursing care in their own home, or a counsellor, or help with domestic chores, there may be a case for receiving Section 21 support. If someone needs personal care in their own home then they will certainly still be eligible for Section 21 support. If they have other care needs they may well be able to make a case for receiving Section 21 support.

What happens now?

Local authorities are beginning to review their cases and may contact individuals in order to conduct a new assessment of their care needs. Following this, they will decide whether or not to continue Section 21 support.

What should we do?

If your service users are told their case for Section 21 support is being reviewed or their support is being withdrawn they should seek immediate legal advice. Because of the way the House of Lords defined 'care and attention' they may be able to challenge the decision. A solicitor can also help advise them on other options for financial assistance and accommodation. You can also assist your service users by helping to identify any needs for care and attention they may have.

What could be considered 'care and attention'?

Because the House of Lords did not give a rigid definition, defining what counts as 'care and attention' will depend on each individual's circumstances. If your service users are having their cases reviewed they should include details of any help of any kind that they may need, whether they currently receive it or not. The need does not have to be being met to exist and it does not need to be being met by social services. Your service user may have learnt to cope with their need and adapted to it, but it is still a need. This could include:

- Supervision (even from a distance and even occasionally)
- Help adhering to medication
- Counselling
- Help with domestic chores (cleaning, cooking, shopping)
- Provision of meals (e.g. via a support organisation or friends/family)
- Mental health support
- Personal care

The important thing here is to think widely and ensure that any information which may support a case to retain Section 21 support is provided to the Local Authority.

This is particularly important for those asylum seekers who might not qualify for UKBA support as they were deemed not to have made their asylum claim soon enough.¹ Few asylum seekers are completely ineligible for support from the UKBA, but where they are they should seek immediate legal advice. A case for support can be made under UK human rights law.

It is also very important for refused asylum seekers. If someone qualifies for help from the Local Authority under Section 21 then this may be preferable to receiving Section 4 (Hardship case) support from the UKBA.

Other sources of housing and subsistence support

If assistance under Section 21 is withdrawn then destitute asylum seekers will be entitled to accommodation and financial support or subsistence only support from the UKBA. Advise your service users to talk to their case owner about how to make a claim. Because of dispersal rules, individuals who live in London or the South East may need to be moved to another area (i.e. dispersed).

Under UKBA rules they can only be dispersed after consultation with their treating clinician. Clinicians can advise that dispersal is not appropriate and have the

¹ Under current guidance, asylum seekers must make their claim 'as soon as reasonably practicable', they are considered to have done this if they can give a 'credible explanation' of how they arrived in the UK within three days of applying for asylum.

dispersal delayed. Please advise your clients to disclose their HIV status to the UKBA so their clinician can be involved in decisions.

If making a claim for support, asylum seekers should talk to their clinician and tell them they may be dispersed. The clinician can then make sure the UKBA follow the correct procedure. Advice on the dispersal process is available from NAT at <http://www.nat.org.uk/Information-and-Resources/Asylum-and-immigration.aspx>

The position for refused asylum seekers or others with Article 8 claims who are not asylum seekers may be more difficult to resolve and legal advice should be sought immediately.

For those destitute persons who have had Section 21 assistance withdrawn and who are not entitled to asylum support but cannot be expected to leave the UK (e.g. because of an outstanding Article 8 claim), the Lords has clearly indicated that they can expect accommodation from the UKBA. How this will work in practice is not clear but most likely this would have to be provided on human rights grounds.

Further action

NAT will be monitoring the impact of the House of Lords ruling. Please keep us informed of the impact on your service users, particularly if individuals are left with no support and are at risk of homelessness. We would also be interested to hear about cases where individuals are dispersed without their treating clinician being consulted.

To report cases or for further advice contact Sheonaidh Johnston, sheonaidh.johnston@nat.org.uk or 020 7814 6729.

Additional resources

These additional resources can also provide assistance in advising your service users:

- The *Disability Rights Handbook* helps advisers identify and advocate for care and attention needs. Order from <http://www.disabilityalliance.org/drh33.htm>.
- *Support for Asylum-seekers: a guide to legal and welfare rights* by Sue Willman, Stephen Knafler and Stephen Pierce is a handbook covering welfare provision for asylum seekers from entering the country to being granted asylum or removed from the country. Order from Legal Action Group at <http://www.lag.org.uk/Templates/System/Publications.asp?NodeID=89119&Mode=display>.
- *HIV and the UK Asylum Pathway* (NAT) – provides an overview of the pathway an asylum seeker takes in the UK from application to either integration or removal.
- *The Dispersal Process for Asylum Seekers Living with HIV* (NAT) – advice for health care and voluntary sector professionals on the dispersal process.

Download both documents from: <http://www.nat.org.uk/Information-and-Resources/Asylum-and-immigration.aspx>

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