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7 April 2014

Dear Sir or Madam

Proposed judicial review: R (on the application of Project Seventeen) v London Borough of Lewisham

1. We write on behalf of the above named client in relation to London Borough of Lewisham's pilot approach in respect of assessing families for support pursuant to its duties under s17 of the Children Act 1989 ("CA 1989").

2. Please treat this letter as a letter before claim and respond within 14 days i.e. by 21 April 2015. Please note that failure to respond as requested may result in our client taking steps to initiate judicial review proceedings without further reference to you.

3. Details pursuant to the protocol appear below.

The Proposed Defendant

4. Should legal proceedings be required, the defendant will be the London Borough of Lewisham ("the Council")

The Claimant

5. The Claimant will be Project Seventeen ("Project 17") of 39c Tressillian Rd, Lewisham, SE4 1YG. Registered charity number: 115262.

6. As you are aware, Project 17 are a charity based in Lewisham who provides advice and assistance to families with no recourse to public funds ("NRPF") in need of support from their local authority.

The details of the legal advisers dealing with this matter; reference details; address for reply and service of court documents

7. Our address details are given on the letter head above. This matter is being dealt with by Clare Jennings of Matthew Gold and Co. Ltd.

8. Please advise us whether you will be using internal or external legal advisors and of their contact details.

9. The address for reply and service of court documents is the address contained on the letterhead. Please note we do not accept service by email in the absence of prior and specific agreement to do so.

The details of the matter being challenged

10. The decision of the Public Accounts Select Committee ("PASC") to recommend that the pilot approach in respect of s.17 CA 1989 assessments of families with NRPF be mainstreamed and made permanent and the ongoing operation of what we contend is a flawed eligibility criteria and assessment process.

11. Whilst we appreciate that the Cabinet has yet to respond to PASC's recommendations, we consider that the Claimant is entitled to challenge the decision of 5 February for the following reasons.

    a. The pilot project is already in force and therefore the rights of applicants for s.17 support are already being affected.

    b. The Council is now working with other local authorities to roll-out this approach more widely, and indeed, has secured DCLG funding for this purpose.

    c. The grounds of challenge concern the legality of the pilot scheme;

    d. The evidence gathering process has now concluded and no further evolution of the pilot scheme is proposed. The current and only proposal is that it be adopted by the Cabinet in its current form.

    e. There is no condition precedent to the final and permanent adoption of the pilot scheme.

12. Should you disagree that Project 17 are entitled to challenge the decision of 5 February and contend that Project 17 should await the Cabinet's decision, please state this in terms and set out the reasons for your position. Please also confirm the anticipated date for the Cabinet providing its response.

13. In the absence of a response to the above point, we shall assume it is agreed that Project 17 is entitled to challenge the decision of 5 February 2015.

Factual Background

14. In or around June/July 2014, as a result of a significant increase in spending on NRPF families pursuant to the duties and powers imposed by s.17 of the Children Act 1989 ("s.17 support"), a new pilot scheme was introduced changing the way in which the Council assessed families with NRPF.

15. On 9 July 2014 it was agreed that PASC would investigate and examine the Council's spending on NRPF issues and this matter was added as an item to its work programme, a decision noted by the Mayor and Cabinet on 16 July 2014.

16. The Financial Forecasts report of 3 September detailed the impact of the pilot scheme in its first month of operation. It was reported that of the 58 cases that presented to the Council, 50 were assessed as being ineligible at the triage stage, 8 families were provided with accommodation on a temporary basis pending the outcome of the full assessment and only 1 had been accepted for ongoing support (see paragraphs 6.2.1 and 6.2.2).

The Scoping Report

17. The scope of PASC's investigation into NRPF expenditure was set out in the Scoping Report of 22 September 2014.

18. At paragraph 4.3 the Scoping Report described who would qualify for s.17 CA 1948 and s.21 NAA 1948 in the following terms:

> "In order to qualify for support under these acts, individuals must be able to prove that they are:
>
> - The responsibility of Lewisham Council and that their need arose within this borough
> - They are destitute with no means of support available
> - Their immigration status does not exclude them from support

19. Further, paragraph 5.7 the Scoping Report stated that *"there are limited number of reasons why a local authority can decide not to support presenting individuals"* and described those reasons as follows:

> - "The individual or family is not 'ordinarily resident' in the borough or has sought/is receiving support from another local authority.

- The individual or family is not destitute or homeless.
- In the case of adult social care, the individual does not have care needs in line with the criteria outlined in the National Assistance Act".

20. Paragraph 5.12 of the Scoping Report recognised that the majority of individuals presenting to the Council were women from the Caribbean and Africa.

21. The Scoping Report then described the work that has been undertaken so far in establishing the pilot scheme and reported that a dedicated team consisting of 5 case workers and a Home Office secondee had been formed. At paragraph 6.2 the report stated that:

> "The team have transformed the assessment process, separating eligibility assessments from need assessments undertaken by social workers. At first point of contact, robust triage assessments are undertaken with which [sic] includes detailed electronic financial checks, checks of council systems and live Home Office status checks and a short investigative interview. For those who satisfy the requirements of the triage assessment, emergency accommodation and subsistence is put in place whilst more thorough checks are completed".

22. The "*significant impact*" of the "*robust front door approach*" is described at paragraph 6.3 of the Scoping Report. It was reported that in the first 2.5 months of the scheme's operation, 96 cases had presented to the Council, of which only 1 case was accepted for ongoing support and a further 8 cases had been accepted for temporary support pending the outcome of a full assessment. At paragraph 6.4 it was noted that prior to the pilot scheme's introduction, approximately half of all cases were being accepted for support so this was a significant reduction.

23. Key lines of enquiries to pursue were set out at paragraph 9 and included establishing:

    (a) the national and local context for s.17support;

    (b) who presents as NRPF in Lewisham and the types of support offered to them;

    (c) the extent of the problem in Lewisham in comparison with other areas;

    (d) the interventions that have been taken in Lewisham to address the increase and future pressures.

24. Further, paragraph 9.2 provided that once this information had been gathered the Council could consider:

a. how effective the interventions have been in addressing the growth of NRPF;

b. how the expenditure will be managed;

c. what are the impacts of the interventions taken on those presenting as NRPF and what will be the impact of further interventions;

d. what is Lewisham doing to work with groups and agencies that support people with NRPF and signpost them to the Council and to address future pressures.

25. In relation to any equalities implications, it was stated at Paragraph 11.1 that "*at this stage there are no specific financial, legal, environmental or equalities implications to consider. However, each will be addressed as part of the review*".

PASC meeting of 22 September 2014

26. The Scoping Report was considered at the PASC meeting of 22 September with the minutes noting the discussion of the following points (paragraph 5.1):

- "While the needs of the people presenting as NRPF are important, the primary focus of the review should be on eligibility.
- Information provided for the review should include the approaches that other local authorities are taking to NRPF, as well as the financial impacts of NRPF.
- Where people are coming from when they presented as NRPF and why Lewisham's numbers are so high.
- Someone from the housing sector should be invited to the evidence session to contribute to the review.
- A representative from civil service should be invited at the evidence session to contribute to the review.
- The need for case studies to highlight how the process works and the issues faced".

27. The key lines of inquiry and the timetable for review as set out in the Scoping Paper were agreed by PASC.

First Evidence Report 5 November 2014

28. On 5 November 2014 the *First Evidence Report* was published.

29. Paragraph 3 of the Report set out the legislative context and provided:

> "Local authorities have a duty to provide assistance to individuals under [s.17 of the CA 1989 or s.21 of the NAA 1948] if:

(e) The individual can provide that they are the territorial responsibility of the council to which they are applying for assistance.

    i. In the case of families, this means that the need which gave rise to the presentation to the local authority occurred within that same local authority (i.e. they became homeless there)

(f) They are genuinely destitute with no other means of support available to them.

    i. The thresholds for destitution are high and are defined as not having the means to provide accommodation or essential living needs.

(g) They are not excluded from support by schedule 3 of the nationality [sic] Schedule 3 of the Nationality Immigration and Asylum Act 2002.

    i. This includes people with refugee status from abroad, a person who has nationality of another EEA state (unless to exclude them would breach their treaty rights), a failed asylum seeker, a person unlawfully present in the UK (if an individual does not have legal status in the UK but is in the process of seeking to regularise their stay, they are not excluded from support). However, authorities can still be compelled to provide services to individuals excluded by virtue of their immigration status where refusal would be a breach of their human rights.

(h) In the case of single adults, they meet our care thresholds for support and can show their need did not arise out of destitution alone".

30. At Paragraph 7 the profile of the NRPF client group was noted and it was reported that almost all of the current NRPF caseload are families where the woman is the primary applicant. It further reported that the majority of applicants are Nigerian (43%) or Jamaican (39%).

31. Paragraph 9 set out the steps that had already been taken and largely repeated what was said in the earlier Scoping Report as detailed above. It reported the technical and process change which has taken place which included "*developing a scripted assessment process using our CRM system to ensure all cases were robustly and consistently assessed*".

32. A quantitative analysis of the impact of the pilot was attempted at paragraph 10. It was noted in the Report that of the 145 new cases which had presented to the Council in the first 4.5 months, 127 applicants were refused support at the initial triage stage (88%); 18 cases (12%) were temporarily supported, of which 6 cases had resulted in support being offered on an ongoing basis. The report noted that this was 4% of the total number presenting and should result in significant cost savings for the Council.

33. At paragraph 11 a qualitative analysis of the pilot scheme was attempted and reference was made to 3 case studies (though only one related to the initial assessment process).

34. At paragraph 11.2 it was reported that there has been a great deal of challenge in the first few months. It was reported that there had been four threats of judicial review and six pre-action protocol actions (we are unclear as to the distinction between the two and trust you will clarify in your response), but that none had progressed to a full judicial review (we are unclear exactly what constitutes a "*full judicial review*" and trust you will clarify this also). The report does not detail why these cases did not progress to a full judicial review, and in particular, whether the reason was because the Council had provided the Claimants with the remedy sought at the pre-action stage.

35. At paragraph 12 the report sets out its learning to date and its conclusion that "*splitting eligibility assessments (now the responsibility of the pilot team) and needs assessment (continues to be the responsibility of social care) has been effective*".

36. It further provided that a full evaluation of its impact will be conducted before January and a decision will be taken whether to extend or mainstream the pilot (see paragraph 13.1).

37. As regards any consideration of the equalities implications of the scheme, the Evidence Report is completely silent.

PASC meeting of 5 November

38. The First Evidence Report described above was considered by PASC at the meeting of 5 November and further oral evidence was presented to PASC by the Council's Officers: Ian Smith, the Director of Children's Social Care; Justine Roberts, the Change and Innovation Manager and Shirley Spong the NRPF Service Manager.

39. Paragraph 6.1 of the minutes records what is said to be the key points highlighted by Mr Smith. In particular, Mr Smith is recorded as reporting:

> "There are strict criteria around eligibility for NRPF, including territorial responsibility, genuine destitution, they are not asylum seekers and that they are seeking to regularise their stay in the UK.
>
> …
>
> Now NRPF cases are picked up within social care, which is not equipped to deal with it. There are a number of reasons for this, partly because assessment by social workers prioritises safeguarding (especially after the huge increase in Child Protection cases in 2012/2013) and not NRPF eligibility criteria and partly because a number of NRPF claims are dubious or fraudulent.
>
> …

> The Clue vs Birmingham case changed case law so that individuals only had to be intending to make an application to the Home Office, rather than having an application registered".

40. Justine Roberts, the Change and Innovation Manager is reported as providing the following information:

> "NRPF cases usually relate to families, which explains why there are a high number of women presenting as NRPF
>
> …
>
> The focus of the pilot is on eligibility for NRPF, with robust and fair processes developed to establish eligibility. Social care need is then assessed outside the pilot scheme once eligibility has been determined.
>
> …
>
> This is a scripted assessment process that uses anti-fraud techniques including credit checking, accessing council and Home Office information".

41. At paragraph 6.3, Shirley Spong the NRPF Service Manager notes the "*unprecedented degree of challenge*" to the process, and that "*people had re-presented numerous times*". However, Ms Spong claimed that *"despite this, no challenge has been successful*" which is said to demonstrate that the "*eligibility criteria used is correct and evidence based*".

42. Similar comments are expressed in response to questions asked by PASC members. The increase in judicial review challenges was explained as being a result of lawyers being able to "*make money challenging decisions*" because legal aid funding was still available for judicial review, whereas other areas of law had been taken out of scope.

43. At paragraph 6.4 Ms Spong highlighted key points including asserting that *"if someone is not territorially connected to Lewisham they are not eligible".*

44. Ultimately PASC resolved that they "*accepted the information provided as evidence for the review*" (see paragraph 6.6).

Second evidence gathering meeting of PASC on 10 December 2014

45. On 10 December 2014 the second, and last, evidence gathering session was held where oral evidence was given by the NRPF Network Manager (a local authority organisation) and a representative from the London Council. No representatives from voluntary organisations working with the client group affected by the pilot scheme were asked to attend or to give evidence.

46. The evidence presented by both the NRPF Network and London Council representatives primarily concerned the burden placed on local authorities in supporting NRPF families. Scant consideration was given to the impact of Lewisham's approach on individual families, save as the NRPF Network Manager urging caution about taking a "*fraud*" approach as the NRPF Network's data sets reveal little evidence of extensive fraud amongst NRPF claimants (paragraph 3.2).

47. At this meeting the further *NRPF – Evidence Session* report was also considered, which for the most part set out the steps taken to date. In relation to the equalities implication of the new approach, it was again noted that "a*t this stage there are no specific financial, legal, environmental or equalities implications to consider. However, each will be addressed as part of the review*".

Attempts by the voluntary sector to engage in the process

48. Following the meeting in November, Project 17 sent a number of emails to the Scrutiny Manager asking for the opportunity to provide evidence and engage in the process. No response was received.

49. Notwithstanding the lack of response to their request, on 2 February, Project 17 sent a lengthy and detailed response to all members of PASC setting out their concerns about the pilot scheme and what was proposed. In summary, Project 17 expressed the following concerns:

    a. That the pilot scheme had introduced a higher threshold for triggering a child in need assessment than that imposed by s.17 of the CA 1989;

    b. That *"destitution"* is not part of the definition of *"in need"*, and that there could be children who met the definition of being in need (such as those living in very poor accommodation conditions or who were living in households where there was domestic violence) who would not meet the Council's criteria of destitution and therefore turned away as ineligible;

    c. That the requirement to prove that the need arose in Lewisham is legally inaccurate, as the test is whether a child is "*within the area*" which simply requires physical presence.

    d. That the Council had not properly understood the Schedule 3 exclusion and the criteria misapplied it by failing to recognise (a) that a child is not excluded by Schedule 3; (b) that there will be categories of migrant not caught by Schedule 3 and in particular, there could be Zambrano carers who have a directly effective right to reside in the UK in accordance with EU law who have not made any application for recognition of this right; and (c) even if a person is excluded by Schedule 3, the Council should be assessing whether refusing to provide support would breach human rights

or EU law. Project 17 informed the Council that some of their homeless clients had been turned away because of their parents' immigration status, notwithstanding the fact that the child would be homeless. Project 17 noted that this did not appear to raise safeguarding concerns for the local authority.

e. That the statistic of 88% of families being turned away at the triage stage without an assessment could mean that homeless families may be slipping through the net and that a child's needs were not being assessed when it should be.

f. That the review focuses primarily on cost-saving measures, and that this cost-driven analysis has prevented proper consideration of the need to safeguard and promote the well-being of children in Lewisham.

g. That some of the data relied upon appeared to be inaccurate and/or unreliable. Project 17 referred to the fact that 4 of their clients who were subsequently supported by the Council had been turned away when they first approached the Council. Project 17 expressed concerns that the data in the report failed to recognise how many of the families eventually supported were initially turned away.

h. That there was no attempt to gather evidence as to what happened to those people turned away. Project 17 expressed concern that those refused support may be driven underground with the children left at risk.

i. That the views of voluntary organisations working with this client group had not been sought.

50. On 3 February 2015, Coram Children's Legal Centre also wrote to the Chair of PASC setting out their concerns about the model adopted by the Council and the move away from safeguarding to assessments of eligibility.

51. On 4 February 2015 the Migrant Rights Network also wrote to the Chair of PASC setting out similar concerns.

PASC meeting on 5 February 2015

52. On 5 February PASC met to consider the draft *Overview and Scrutiny No Recourse to Public Funds Review* report ("the Report") (see further below). At this meeting PASC were asked to agree the draft review report; consider what recommendations to make and note that the final report would be presented to Mayor and Cabinet.

53. The *No Recourse to Public Funds: Draft Report and Recommendations* paper which set out what was being asked of PASC noted the following under the Equalities implications heading:

> "There are no direct equalities implications arising from the implementation of the recommendations set out in this report. The Council works to eliminate unlawful discrimination and harassment, promote equality of opportunity and good relations between different groups in the community and to recognise and to take account of people's differences".

54. At the meeting itself, the Chair of PASC circulated suggested recommendations to the Committee and the officers reassured the Committee that the approach would lead to the savings predicted and that the process was fair. There was no mention of whether there could be equalities implications arising out of this issue nor any reference to the issues raised by Project 17 or the other charities.

55. Ultimately, the Committee commended the officers for their work and agreed the recommendations to make to Cabinet. This included recommending that the "*robust front door approach that has been taken by the NRPF pilot project*" be "*mainstreamed and made a permanent approach*".

Overview and Scrutiny No Recourse to Public Funds Review report ("the Report")

56. The Report largely repeats the information stated in the earlier reports described in detail above. The Report states that the pilot scheme had:

> "demonstrated that a clear, consistent and firm approach could bring down the costs of dealing with NRPF clients considerably and in a way which was both equitable and unlikely to result in successful legal challenge".

57. Paragraphs 7 to 9 of the Report sets out the legislative background and is materially the same as what is said in the report of 5 November 2014. It repeats at paragraph 8 the *"criteria"* for s.17 support set out in Paragraph 3 of the First Evidence Report of 5 November 2014 (see paragraph 29 of this letter).

58. The drivers in demand identified in earlier reports are repeated, and the increase in the number of judicial review challenges since the pilot scheme came into operation is again noted. Again this increase was attributed to lawyers' ability to generate income from such challenges (see paragraphs 10 to 21 of the Report).

59. The report notes "*Lewisham's demography*" with a "*large number of Jamaican and Nigerian families who are statistically more likely to present as NRPF*".

60. The Report also repeats at paragraph 38 Mr Smith's evidence (see paragraph 39 above) that social care were not best equipped to pick up NRPF cases because social workers prioritise safeguarding and not NRPF eligibility criteria.

61. Paragraphs 40 to 45 sets out how the Council has assessed the "*NRPF problem*" and repeats what was said in the earlier reports about the team and processes established as part of the pilot scheme. Paragraph 45 repeats Ms Spongs' earlier oral evidence and states:

> "The focus of the pilot team has been on eligibility for NRPF, with robust and fair processes developed to establish eligibility. Social care need is then assessed outside the pilot team once eligibility has been determined...Officers at the evidence sessions stressed that it had been important to develop a consistent, fair and defendable process for assessing NRPF cases. The organisation can then be confident that decisions have been correctly made and can be stuck by. This is important as support for NRPF can extend over a number of years, so it is vital to get the eligibility process right. In addition there has been an unprecedented degree of challenge to the process. People have re-presented numerous times and other public services such as health have sometimes re-introduced people. The voluntary sector has steered people towards the local authority, while law centres and private practice lawyers have also done so. Despite this, since the start of the pilot project no challenge has been successful, which shows that the eligibility criteria used is correct and evidence based"

62. Paragraphs 46 to 55 sets out the results of the pilot and repeats the statistics given in earlier reports, namely, that 88% of those presenting for support are refused at the triage stage and that only 4% of those presenting overall receiving support on an ongoing basis.

63. Paragraphs 56 to 59 sets out the lessons the Council have learned from the pilot. The Report reiterates the Council's view that:

> "splitting eligibility assessment and need assessment has been effective as the difficulty balancing both elements of the assessment tended to make need outweigh eligibility. This goes some way to explaining the higher number of acceptances prior to the start of the pilot".

64. The Report makes no reference whatsoever to the equalities implication of the scheme having been considered or what the equalities implications may be.

Following PASC's recommendation

65. On 13 February 2015, Shelter, the national housing charity wrote to the Mayor expressing their concerns about the review and proposals.

66. On 18 February 2015 the Cabinet met and noted PASC's recommendation. At this meeting the Cabinet also considered the PASC report entitled '*Matters referred by the Public Accounts Select Committee – No Recourse to Public Funding Review*'. The report set out the context for the review and noted that it was scoped in September 2014, with evidence be gathered in sessions held in November and December 2014 and that the final report and recommendations were agreed in February 2015. Under the heading '*Equalities implications'* at paragraph 6 it is stated that:

> "The Council works to eliminate unlawful discrimination and harassment; promote equality of opportunity and good relations between different groups in the community and recognise and take account of people's differences"

67. There is no evidence in this report of any attempt to analyse the equality implications.

68. On 3 March 2015 in response to the submissions of the various concerned NGOs a meeting was held with Council officers which was attended by Project 17, Migrant Rights Network, Eaves for Women, Coram and Shelter. At this meeting it was confirmed that the evidence gathering stage was over and therefore there was nothing to be gained by concerned parties contacting the Cabinet. As regards the assessment process itself, the officers presented stated that the eligibility criteria of territorial responsibility, destitution and immigration status was in accordance with the law and principles established in *Clue v Birmingham City Council*. The officers advised that there was a scripted process and that the same questions were asked of all applicants. We are instructed that whilst officers acknowledged that the NGOs participating at this meeting had concerns about the Council's eligibility criteria and process, it was made clear to participants that the Council did not accept that their criteria and/or assessment process was in any way flawed. We are instructed that it was apparent to participants that the Council did not intend to reconsider any aspects of its assessment process to address the concerns raised and that the pilot scheme would be mainstreamed and made permanent.

69. On 20 March 2015 Project 17 received a response to their FOIA request for documentation in relation to the s.17 assessment process. For the most part the Council refused to provide the documents requested citing various exemptions. The response also wrongly states that Project 17 has been sent a copy of the interview questions asked as part of the scripted assessment process.

70. However, Project 17 did receive copy of the Council's '*Response to Project 17 submission to the Public Accounts Select Committee*' ("the Response") dated February 2015, which appears to be a document written by officers for members of PASC rather than a response to Project 17 itself.

71. The Response asserts that

> "as the evidence papers which have informed the review to date have explained, the new processes and structures now in place ensure that eligibility is robustly assessed and those who are eligible receiving ongoing support".

72. The Response goes on to assert that the "*new service model introduces a more appropriate balance between assessment of need and assessment of eligibility*" and that this approach is "*now recognised as a model of good practice by a number of local authorities*". Indeed, the Response notes that the Council are

"*now working across five neighbouring boroughs to explore options for a single shared service model*".

73. In relation to Project 17's specific concerns about the eligibility criteria adopted, namely, territorial responsibility, destitution and immigration status, the Response asserts that

> "this three stage eligibility process is in line with the good practice guidance published by the NRPF Network. The framework implements the effect of judgements such as Birmingham v Clue and MN & KN v London Borough of Hackney [2013]. This approach is widely adopted by other local authorities, including our neighbouring boroughs with whom we are now working to develop a single assessment service".

74. The Response also refers to Project 17's submissions that some of the data relied upon appears to be inaccurate or incomplete. The Response purports to address this concern by noting that it is not uncommon for families to re-present to the Council and that where there has been a genuine change in circumstances, the family will be reassessed and there could be a new decision made. However, this does not in fact address the concerns raised by Project 17, which was that the families were wrongly turned away when they first approached the Council for support and were only assessed and supported because of re-presentation with assistance from Project 17.

75. The Response goes on to provide the Committee with updated figures and notes that there have been 218 cases which have been assessed since 16th June 2014 (which does not include re-presentations); with 14 cases currently supported on a temporary basis and 7 new cases accepted for ongoing support since the start of the pilot.

76. Further, the Response then notes the two circumstances in which a family would not be provided with support. First, if they have not proven they are sufficiently destitute. Second, the family does not meet the criteria for being supported by Lewisham because they have other sources of support that they could be expected to access (or recently have been reliant upon) which may be in a different area, or they are not in the process of seeking to regularise their stay with the Home Office.

77. At present the pilot scheme continues to operate whilst the Council works with other local authorities to explore options for a single-shared assessment process.

NRPF Network Guidance

78. The NRPF Network Guidance referred to above, sets out at paragraph 5 its guidance on "eligibility for assessment" and provides that a local authority must:

    a. Establish territorial responsibility, which involves determining where the child/family need arose as the local authority in the area where the need

arose will be responsible for assessing the family (except in certain circumstances).

b. Establish destitution, which is defined as not having adequate accommodation or the inability to meet essential living needs. According to the NRPF Guidance, to establish destitution a family would need to demonstrate that they have no other means of support available.

c. Establishing immigration status to determine whether the restrictions under Schedule 3 NIAA apply or whether UKBA may be an alternative source of support.

LEGAL FRAMEWORK

Children Act 1989

79. The primary statutory provision in this present case is section 17 of the Children Act 1989 (as amended). Insofar as is relevant, s. 17 provides:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) –
>
> (a) To safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) ...
>
> (3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.
>
> ...
>
> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.
>
> (7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).
>
> (8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents.
>
> (9) ...
>
> (10) For the purposes of this Part a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part –

"development" means physical, intellectual, emotional, social or behavioural development; and

"health" means physical or mental health."

80. Section 20 of the 1989 Act empowers local authorities to provide accommodation to children in need in their areas in certain circumstances.

81. Schedule 2, paragraph 1(1) of the 1989 Act provides that:

"Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area."

National Immigration and Asylum Act 2002

82. Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") provides, so far as is relevant that:

"1(1) A person to whom this paragraph applies shall not be eligible for support or assistance under –
...
(g) section 17 ... of the Children Act 1989 (c.41) (welfare and other powers which can be exercised in relation to adults),
...
(2) A power or duty under a provision referred to in sub-paragraph (1) may not be exercised or performed in respect of a person to whom this paragraph applies (whether or not the person has previously been in receipt of support or assistance under this provision).
...

2(1) Paragraph 1 does not prevent the provision of support or assistance –

(a) To a British citizen, or

(b) To a child, or
...
(1) A local authority which is considering whether to give support or assistance to a person under a provision listed in paragraph 1(1) shall act in accordance with any relevant guidance issued by the Secretary of State under sub-paragraph (3)(a).

3 Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of

(a) a person's Convention rights, or

(b) a person's rights under the EU Treaties.

...

6(1) Paragraph 1 applies to a person if –

(a) he was (but is no longer) an asylum-seeker, and

(b) he fails to cooperate with removal directions issued in respect of him.

(2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).

7 Paragraph 1 applies to a person if –

(a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 50A of the British Nationality Act 1981, and

(b) he is not an asylum-seeker.

Children Act 2004

83. Section 11 of the 2004 Act applies to local authorities in England: subsection (1). Subsection (2) provides that:

> "Each person and body to whom this section applies must make arrangements for ensuring that –
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;
>
> (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need."

84. In *ZH (Tanzania)* [2011] UKSC 4, which concerned an equivalent provision to s.11 of the CA 2004 in the immigration context, the Supreme Court held that in order to comply with Article 3 of the UN Convention on the Rights of the Child, the "*spirit, if not the precise language*" of which has been translated into domestic law by section 11, the best interests of the child must be treated as a primary consideration. The child's best interest broadly means the well-being of the child (see paragraph 29) and must be considered first. At paragraph 46, Lord Kerr stated that "*where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them*".

Equality Act 2010

85. Section 149 of the 2010 Act establishes the public sector equality duty ("PSED"). So far as is relevant, provides that:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to –

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(2) ...

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;

(b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

(c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

(5) Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to –

(a) tackle prejudice, and

(b) promote understanding.

(6) Compliance with the duties in this section may involve treating some persons more favourably than others; but that is not to be taken as permitting conduct that would otherwise be prohibited by or under this Act.

(7) The relevant protected characteristics are –
age;
disability;
gender reassignment;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation."

86. There has been considerable judicial scrutiny of the law on the PSED in section 149 of the 2010 Act (and similar equality duties under previous legislation) and the law is clear. In *Bracking v. Secretary of State for Work and Pensions* [2013]

EWCA Civ 1345, [26], the principles to be derived from the authorities on section 149 were summarised as follows:

a. Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation (see *R (Elias) v. Secretary of State for Defence* [2006] EWCA Civ 1293 at 274).

b. An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements (see *R (BAPIO Action Ltd) v. Secretary of State for the Home Department* [2006] EWCA Civ 1293)

c. The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v. Department of Health* [2005] EWCA Civ 154 at [26]-[27] *per* Sedley LJ.

d. A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "*rearguard action*", following a concluded decision (*Kaur & Shah v. LB Ealing* [2008] EWHC 2062 (Admin) at [23]-[24]).

e. These and other points were reviewed in *R (Brown) v. Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, as follows:

    i. The public authority decision maker must be aware of the duty to have "*due regard*" to the relevant matters;

    ii. The duty must be fulfilled before and at the time when a particular policy is being considered;

    iii. The duty must be "*exercised in substance, with rigour, and with an open mind*". It is not a question of "*ticking boxes*".

    iv. The duty is non-delegable;

    v. The duty is a continuing one; and

    vi. It is good practice for a decision maker to keep records demonstrating consideration of the duty.

f. *"[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria*" (*R (Meany) v. Harlow DC* [2009] EWHC 559 (Admin) at [84], approved by the Court of Appeal in *R (Bailey) v. Brent LBC* [2011] EWCA Civ 1586 [74]-[75]).

g. Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "*rigorous in both enquiring and reporting to them*": *R (Domb) v. Hammersmith & Fulham LBC* [2009] EWCA Civ 941, at [79] *per* Sedley LJ.

87. McCombe LJ went on in *Bracking* to identify three further principles, which may be summarised as follows:

a. It is for the Court to decide for itself if due regard has been had, but providing this is done it is for the decision maker to decide what weight to give to the equality implications of the decision (following *R (Hurley & Moore) v. Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), *per* Elias LJ at [77]-[78]).

b. *"[T]he duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean that some further consideration with appropriate groups is required"*: *R (Hurley & Moore) v. Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), *per* Elias LJ at [89].

c. The duty to have due regard concerns the impact of the proposal on all persons with the protected characteristic and also, specifically, upon any particular class of persons within a protected category who might most obviously be adversely affected by the proposal: *Bracking*, *per* McCombe LJ at [40].

88. As to the importance of the second principle, McCombe LJ held, at [60]-[61], that

> "it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude".

89. Further,

> "In the absence of evidence of a 'structured attempt to focus upon the details of equality issues' (per my Lord, Elias LJ in *Hurley & Moore*) a decision maker is likely to be in difficulties if his or her subsequent decision is challenged".

Working Together 2013 Statutory Guidance

90. Detailed guidance on the exercise of duties imposed by s. 17 has been issued under section 7 of the Local Authority Social Services Act 1970 in the form of the *Working Together to Safeguard Children* guidance ("Working Together guidance"). Given its statutory status, the Working Together guidance must be followed absent a considered decision by the local authority that there is good reason to deviate from it (see *R (TG) v Lambeth LBC* [2011] EWCA Civ 526 per Wilson LJ at [17]).

91. Paragraph 26 provides that:

> "Under the Children Act 1989, local authorities are required to provide services for children in need for the purposes of safeguarding and promoting their welfare. Local authorities undertake assessments of the needs of individual children to determine what services to provide and action to take".

92. At paragraphs 27 the Working Together Guidance sets out the purpose of an assessment and makes clear that:

> "Whatever legislation the child is assessed under, the purpose of the assessment is always:
>
> - To gather important information about a child and a family;
> - To analyse their needs and/or the nature and level of any risk and harm being suffered by the child;
> - To decide whether the child is in need (section 17) and/or is suffering or likely to suffer significant harm (section 47); and
> - To provide support to address those needs to improve the child's outcomes to make them safe".

93. Paragraphs 32 to 35 sets out the principles and parameters of a good assessment and emphasise that high quality assessments are child centred and rooted in child development and informed by evidence. According to paragraph 33 a good assessment is one that investigates the following three domains: the child's development needs; parents' or carers capacity to respond to those needs and the impact and influence of wider family, community and environmental circumstances.

94. Paragraph 37 further provides that

> "each child who has been referred into a local authority children's social care should have an individual assessment to respond to their needs and to understand the impact of any parental behaviour on them as an individual".

95. Paragraph 43 makes clear that a "*social worker*" should "*analyse all the information gathered from the enquiry stage of the assessment to decide the nature and level of the child's needs and the level of risk*".

96. Paragraph 64 and the text box that follows sets out the process for managing individual cases. It makes clear that *"once a referral has been accepted by a local authority children's social care the lead professional role falls to a social worker"* (page 26). It further provides that within one working day of the referral having been received a local authority social worker should make a decision about the type of response that is required.

Analysis

97. We contend that your client department's approach is unlawful for the following reasons:

    (a) Erroneous approach in law to criteria used to assess eligibility;

    (b) Failure to comply with the duty to assess;

    (c) Failure to comply with PSED in section 149 of the 2010 Act;

    (d) Discrimination;

    (e) Material error of fact;

    (f) Failure to have proper regard to the best interests of the child.

98. We set out below each of these heads of challenge in turn:

Eligibility criteria

99. It is clear that the Council is applying the following criteria to determine whether a family with NRPF is eligible for support:

    (a) A need to demonstrate that the family are the "*territorial responsibility*" of the Council, which involves a family evidencing that the need for support arose within Lewisham;

(b) That applicants are *destitute*, meaning they do not have the means to provide for accommodation or essential living needs. This is described by the Council as a "*high*" threshold to meet; and

(c) That they are not excluded from support under Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act").

100. It appears from your client department's response to the Committee in respect of Project 17's representations that this criteria may be taken from a publication by the local authority organisation NRPF Network, called "*Practice Guidance for Local Authorities*" (the "NRPF Guidance) and is purported to implement the findings in *R (Clue) v. Birmingham City Council* [2010] EWCA Civ 460 and *R (MN) v. Hackney LBC* [2013] EWHC 1205 (Admin).

101. It is our contention, for the reasons set out below, that the Council has erred in law in setting each of these three criteria:

Territorial responsibility

102. We submit that the Council has misapplied the terms of section 17(1) by adding a requirement which does not exist. Section 17 imposes no need to demonstrate "*ordinary residence*", nor a requirement to show that the need for support arose within Lewisham. Had it been parliament's intention to impose such a specific test, arguably it would have been explicitly stated in the legislation. No such test is provided for in s.17 of the CA 1989. Instead, the only relevant provision is that the individual must be "*within*" the local authority's area. To the extent that you may suggest otherwise, we consider that this is plainly wrong.

103. Further, our position is supported by the case-law on section 17. In *R (Stewart) v. Wandsworth LBC* [2001] EWHC 709 (Admin), [2002] 1 FLR 469 it was held that *"the clear meaning of the words "within their area" in section 17 is … that physical presence is required"*: [23]. The Court specifically rejected a submission that *"the need must co-exist with the presence"* [29].

104. The decision in *Stewart* was specifically endorsed in *R (BM) v. Barking & Dagenham LBC* [2002] EWHC 2663 (Admin) where the Court rejected a submission that the conclusion in *Stewart* needed to be revisited. Further, the Court also rejected an argument that section 17 should be read as if subject to a test of "*ordinary residence*": [14] (see also *R (J) v. Worcestershire CC* [2014] EWCA Civ 1518, [2015] PTSR 127, at [18] where it was held that it was settled law that a local authority had a duty to assess a child physically present in their area).

105. Accordingly, it is submitted that the Council has erred in law in imposing an eligibility criteria which requires a family to prove that they are ordinarily resident in Lewisham and/or that the need arose within Lewisham. To the extent that you

rely upon the NRPF Guidance in respect of *"territorial responsibility"* at paragraph 5, we submit that this part of the NRPF Guidance is also wrong in law.

Destitution

106. We further contend that a criteria that requires a person to demonstrate destitution to be eligible for s.17 support is also wrong in law. Section 17 CA 1989 contains no test of destitution. Instead, what must be demonstrated for section 17 support to be provided is that the child must be "*in need*", which has the specific meaning set out in s. 17(10) of the CA 1989. Section 17(10) provides that a child will be in need if that child would be unlikely to achieve or maintain a reasonable standard of health or development, or that his health or development is likely to be significantly impaired, without the provision of assistance, or that he is disabled. Accordingly, we consider that there will be circumstances in which a child meets the much lower threshold of "*in need*" in s.17(10) CA 1989 but not the "*high*" threshold of destitution. This is not reflected in the Council's criteria which requires a family to prove destitution before they can access an assessment of need.

107. Further, contrary to what you state in your Response, we fail to see how Clue provides authority for the imposition of a "*destitution*" test for accessing a needs assessment. Indeed, we fail to see how the test of destitution accords with the principles established in *Clue*. *Clue* did not consider a general eligibility criteria for s.17 support, or alter the overall test under s.17 which is whether a child is in need. To the extent that destitution is referred to in Clue, this is in the context of adults excluded by Schedule 3, Paragraphs 6 and 7. As you will appreciate, a significant number of those families approaching the Council for support will be Zambrano carers and/or have leave to remain subject to an NRPF restriction, and therefore not fall within the remit of the Schedule 3 at all.

108. Accordingly, we contend that the Council has erred in law by treating destitution as the sole criterion in terms of need in all cases.

Immigration status and the Schedule 3 criteria

109. It is accepted that an adult who falls within one of the migrant classes excluded by Schedule 3 NIAA cannot receive s.17 support unless a failure to provide such support would amount to a breach of a person's convention rights or EU law. However, we consider that the Council's criteria and guidance on this issue contained in the various reports and the Response is incomplete and unlawful for the following reasons:

110. First, there is no reference in any of these documents to the fact that children are not excluded under Schedule 3.

111. Second, there is no reference to Zambrano carers. As you will be aware, Zambrano carers include individuals who are third country nationals with British children who have a directly effective right under EU law to reside in the UK as their removal would lead to a breach of their children's rights as citizens of the European Union. Whilst at first sight a Zambrano carer may appear to fall within one of the migrant classes excluded by Schedule 3, as they have a directly effective right to reside in the UK under EU law, they are lawfully present in the UK and therefore not excluded by Schedule 3. That is the case regardless of whether they have made an application to the Home Office for recognition of (see *Pryce v. Southwark LBC* [2012] EWCA Civ 1572). Accordingly, the Council would need to make an assessment of whether a person may have a Zambrano right of residence. There is no recognition of this requirements in the Council's reports or Response.

112. Third, it would appear that the Council requires a person to demonstrate that they have an outstanding immigration application to meet the immigration status criteria (save as to where they have leave to remain subject to an NRPF restriction). This is evident from the Council's Response where it is stated that one of the circumstances under which a family would not be provided with support is that the "*applicant is not in the process of seeking to regularise their stay with the Home Office*" and officers evidence to PASC. Whilst we accept that a family could not remain in the UK indefinitely without taking any steps to regularise their immigration status, we consider that the eligibility criterion requiring a person to have an outstanding immigration application is flawed because:

a. It does not reflect the fact that Zambrano carers may not have made any applications for recognition of their Zambrano right to reside but may nevertheless still be lawfully present in the UK (see the above paragraph); and

b. Ignores the fact that where a person falls within the Schedule 3 exclusion, a local authority must then consider whether a refusal to provide support would amount to a breach of a person's human rights or EU law and if it would, whether there is any impediment to a person's return to their country of origin to avoid the breach. Whilst it was established in *Clue* that if a person had an outstanding application on convention grounds (providing it was not hopeless or abusive) that would be an impediment to a family's return to their country of origin, it was also held that where there was no such application, a local authority must assess for itself whether there were any human rights reasons why a family could not return (see also the subsequent case of *R (KA) v Essex County Council [2013] EWHC 43 (Fam)*). It is likely that a number of families who approach the Council for s.17 support may not have made an immigration application, but could have grounds to do so. Indeed, there is likely to be an increasing number of families in this situation given that legal aid funding is no longer available for such immigration advice. In these circumstances

the Council must undertake an assessment of the human rights implications of its decision but under the current scheme it appears the applicant would be excluded.

113. For the reasons above, we consider that the approach taken by the Council in respect of the immigration status eligibility criteria as evidenced in the reports and Response, is incomplete and unlawful.

(b) Failure to comply with duty to assess

114. It is well-established that there is a duty under section 17 of the 1989 Act to assess the needs of a child who may be in need (see *R (G) v. Barnet LBC* [2003] UKHL 57, [2004] 2 AC 208, [77]; [110]). The statutory Working Together 2010 guidance also explicitly states that there is a requirement to undertake a needs assessment where it appears a child may be in need. It is also clear from the Working Together guidance that the government envisages that it is a social worker who will undertake such as assessment.

115. In adopting an eligibility criteria which we contend is unlawful for the reasons set out above, the Council is filtering out applicants at the "*triage*" stage, without conducting any assessment of need. We contend that this failure to undertake an assessment of a child's needs, is unlawful as it is a breach of the duty to assess imposed by s.17 of the CA 1989.

(c) Section 149 of the Equality Act 2010 – Public Sector Equality Duties

116. As noted in the various reports, the vast majority of applicants for s.17 support are women primarily from Nigeria and Jamaica. It is therefore clear that the Council's pilot scheme had equality implications surrounding issues of race and gender. Accordingly, in reaching its decision, PASC were required to have due regard to its public sector equality duties ("PSED") under s.149 of the Equality Act 2010 ("EA 2010") and it is submitted that it has failed in that duty.

117. We have already set out above in the factual background section of this letter the references made in the various reports to the equalities implications of this decision. What is striking is that there are almost no references to any of the PSEDs in the reports, much less any proper engagement with the duties. We have also been unable to identify any other documents publicly available evidencing the Council's consideration of its PSED's when considering s.17 support for NRPF families and note that no such documents were disclosed to Project 17 in response to their FOIA request.

118. Further, as noted above, when discussing this issue at the meeting of 5 February 2015, PASC made no reference at all to its PSEDs.

119. In light of the complete lack of documentary evidence that the Council, and in particular, members of PASC, had regard to its PSED when deciding to recommend that the pilot scheme be mainstreamed and made permanent, we contend that the Council has failed to comply with the requirements of PSED in section 149 of the 2010 Act. To the extent that you seek to rely upon what is said in relation to the PSED in the above reports, we do not consider that this is sufficient to demonstrate the required engagement with the PSED such that your duties are discharged.

(d) Discrimination

120. Indirect discrimination on the basis of a protected characteristic is prohibited by the EA 2010.

121. Section 19 of the EA 2010 defines indirect discrimination as covering the situation where a person (A) applies a provision, criterion or practice to another person (B), where that provision, criterion or practice is discriminatory as regards a relevant protected characteristic of B. The provision, criterion or practice will be discriminatory where A applies it to people with whom B does not share a protected characteristic; it puts persons who share the protected characteristic at a particular disadvantage compared to people who do not share that characteristic; it places B at a particular disadvantage; and it cannot be shown to be a proportionate way of achieving a justified aim.

122. We contend that the criterion of exclusion in relation to Schedule 3 of the NIAA 2002 puts NRPF applicants sharing the protected characteristics of race at a particular disadvantage. As noted above, the Schedule 3 criterion in the pilot scheme is misapplied to exclude Zambrano carers from accessing support. By definition, Zambrano carers will be third country nationals and as the reports note, the vast majority of applicants are Nigerian or Jamaican who are "*statistically more likely to present as NRPF"*. Accordingly, nationals from Nigeria and Jamaica are more likely to be applying as Zambrano carers for s.17 support, and are therefore placed at a disadvantage to those who do not share that characteristic because they will be excluded from a needs assessment and s.17 support.

(e) Material error of fact

123. In the various reports it is noted that there has been an increase in the number of challenges to the scheme with many families re-presenting to the Council. However, the reports note that no challenges had succeeded which was considered to demonstrate that the "*eligibility criteria used is correct and evidence based*" (see for example paragraph 45 of the Final Report). It appears to us that this is factually incorrect for the reasons below:

124. First, as noted in Project 17's submissions, of the 5 families referred by Project 17 during the pilot phase considered by PASC, who are now receiving

support, 4 of these families had previously approached the Council directly themselves and had been turned away. Indeed one of these families was turned away twice. In percentage terms that is 80%. The fact that support was given the second time cannot be explained by a change in the families' circumstances because this is not borne out by the facts of the individual cases. Instead, these cases demonstrate that families requiring a s.17 assessment and support are wrongly being assessed as ineligible at the triage phase.

125. Second, of the five families referred by Project 17 now receiving support, in three of these cases an assessment was undertaken and support was given following the threat of judicial review proceedings. Indeed, in one of these cases we acted for the Claimant. Whilst these cases may not have proceeded to a full hearing, or even in the claim being issued, that is not because the claims failed, but rather because the Claimants had *succeeded* in obtaining the remedy sought without the need to do so.

126. Accordingly, we contend that any claims that no challenges have succeeded is plainly wrong, and that the decision of 5 February is flawed by a material error of fact. The criteria for establishing a material error of fact were summarised in *E v. Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 at 1071E, [67] as follows:

> "First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

127. We submit that in this case, there has been a mistake to an existing fact, namely whether or not any cases have succeeded after the introduction of the pilot. Clearly they have. Secondly, this is uncontentious since the Council's officers could easily have verified it. Thirdly, it is not a mistake for which the claimant in the judicial review would be responsible. Indeed, they attempted to bring to PASC's attention the fact that the data relied upon appeared to contain inaccuracies. Fourthly, it appears to have played a material part in the PASC's decision at the 5 February 2015 meeting to continue the pilot. It was presented to the PASC as a relevant factor in determining the efficacy and legality of the project that was being presented to it for further consideration.

(f) Best interests

128. By section 11(2) of the 2004 Act, the Council is required to make arrangements to ensure that its functions are discharged having regard to the need to safeguard and promote the welfare of children. This is commonly understood as an obligation to have regard to the best interests of the child in the exercise of its functions (by analogy, see *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4).

129. We contend that in formulating its pilot project, the Council has failed to consider the best interest of the child either in general terms, or more specifically, how the proposals safeguard and promote the welfare of children within its area. Given our contention that the approach adopted is unlawful and is likely to result in children wrongly being turned away, we submit that the Council's approach is inconsistent with the obligations imposed by domestic and international law to treat the child's best interest as a primary concern and is therefore also unlawful on that basis.

Action required by you

130. If the need for judicial review proceedings are to be averted, the following action will be required:

a. Agree to quash PASC's decision of 5 February 2015 to recommend that the pilot scheme be made permanent and mainstreamed;

b. Agree to cease applying the eligibility criteria that we contend is unlawful;

c. Give an assurance that should you agree to the above steps, but seek to formulate a new eligibility criteria and/or policies or guidance on s.17 assessments you will:

i. Conduct a lawful equality impact assessment;

ii. Seek input from relevant voluntary sector groups working with NRPF families in any evidence gathering exercise conducted (including inviting representatives from voluntary sector groups to give oral evidence at any Committee meetings where such evidence is received);

iii. Agree to consult with relevant voluntary sector groups on any new NRPF criteria, policy and/or guidance formulated.

131. Project 17 hopes that the Council will agree to the above steps which would obviate the need for proceedings to be issued. Moreover, Project 17 would welcome the opportunity in the future to engage in constructive dialogue with the Council on NRPF issues.

Interested parties

132. Please let us know if you consider that there are any other parties who have an interest in the outcome of this matter.

133. A copy of this letter will also be sent to those voluntary organisations that made submissions to PASC for their information.

Information requested

134. Please respond to the following questions and provide the following documents:

a. All reports, memos, emails and letters and any other written material in respect of the formulation and implementation of the pilot scheme (we do not require copies of the reports and minutes that are available on your website and referred to in this letter);

b. Please indicate which of the above documents were considered by PASC;

c. Any documentation not included in (a) above, evidencing consideration being given to the Council's PSEDs. Please indicate whether these documents were considered by PASC;

d. All training material, policy, internal guidance and other written material used by the NRPF team in conducting eligibility assessments, including but not limited to the scripted interview questions;

e. Of those supported since the commencement of the operation of the pilot scheme (either on an ongoing basis or on an interim basis pending the outcome of an assessment), please state how many were initially refused a service at the triage stage and were only assessed after they had re-presented;

f. Please confirm how many NRPF families were assessed and/or provided with support since the beginning of the pilot scheme following a threat of judicial review. Please also provide the names of the firms acting for the Claimants.

g. Please provide copies of any other documents on which you would rely in defence of this claim.

Proposed reply date

135. Please provide a substantive response to this by 21 April 2014.

136. We look forward to hearing from you.

Yours faithfully

Matthew Gold and Co. Ltd.