BRIEFING NOTE – Potential strategic legal challenge to embedded immigration officers within local authority children's services departments

The Home Office has set up a trial of placing embedded immigration officers into Local Authority children's services departments. These officers are sitting in on Children Act assessments in a number of local authorities in London, and appear to be used in part to discourage applicants from proceeding with their request for support. There are reports of them providing incorrect immigration advice to parents.

Funding was obtained from the Strategic Legal Fund to look into this issue and this briefing note has been prepared with the assistance of Shu Shin Luh of counsel.

It is our view that the Local Authority's decision to allow the Home Office to sit in on a Children Act assessment is unlawful as there is no authority in law to enable them to disclose all the information that is disclosed in such a meeting to another government body. The reasons for this advice are as follows:

(1) There is a duty on the Local Authority to inform the Home Office that there is a person in their area who may fall into a category of ineligible persons which is contained in paragraph 14, Schedule 3 Nationality, Immigration and Asylum Act ('NIAA') 2002. But this is all the duty permits the Local Authority to disclose. Nothing else, and certainly not the contents of a Children Act Assessment. This duty does not include informing the Home Office about personal information about the children or indeed the family's circumstances. This duty does not permit the Local Authority to inform the Home Office about families with limited leave to remain, Zambrano carers, or those with continuation of leave pending variation pursuant to s. 3C of the Immigration Act ('IA') 1971. The sharing of more general information about a family purportedly under this duty is unlawful – as it exceeds the power provided to disclose information set out in this Act.

(2) The Local Authority has an additional power to provide additional information to the Home office under section 20 Immigration and Asylum Act ('IAA') 1999 for "immigration purposes". But as this is a power and not a duty the Local Authority has to think about whether they want to exercise this power or not. A Local Authority which has a blanket policy / practice of allowing the Home Office to sit in on such interviews will have failed to consider in an individual case whether or not to exercise this power, and therefore its decision to do so will be unlawful.

Where a Local Authority is considering exercising its power it must consider whether the information is for "immigration purposes" in addition to its duties under the GDPR and Data Protection Act which forbid expressly blanket sharing of data.

- The power under s. 20 may be exercised for the purposes of maintaining immigration control. However, in order for this power to be lawfully exercised the Local Authority must know what information will be shared, and be satisfied that this information is necessary for the maintenance of immigration control. The presence of an embedded Home Office worker in a Children Act assessment makes the lawful exercise of this power impossible. The information is shared before the Local Authority can know what it is and whether or not it should be shared.

- The power must also be exercised consistently with the data protection principles. Whilst the GDPR and the Data Protection Act permit data processing under a lawful power, such processing must only occur where it is necessary, proportionate, and fair and complies with the six principles of data processing under that legal framework.

- The Local Authority obtained the Claimant's "consent" to share this information but this consent is not and cannot be freely given when the alternative is destitution or harm to the Claimant's children. It is therefore not valid (Article 7, 4 of the Data Protection Regulations).

(3) The power to share information should be considered with reference to Article 8 ECHR and / or Article 8 CFR and it is arguable that the exercise of this power by allowing the Home Office to access Children Act assessment (being absent of safeguards) is not a proportionate and effective measure to achieve the stated purpose of determining eligibility for s. 17 support given the unacceptable risk that the fundamental rights of privacy of children and families will be significantly impaired.

A potential challenge to this policy

It appears as set out above that this policy could be subject to a systemic challenge and we are keen to progress this. In order to have a good prospect of success it would be useful to find a client with the following:

1. Strong immigration claim

The potential challenge will be likely to mean the Home Office will look carefully at the proposed Claimant's immigration status. It is therefore vital that any proposed Claimant has a robust immigration claim. This could be someone who has been granted leave with No Recourse to Public Funds, a client with Zambrano rights, or a client with a strong outstanding application for leave. I would not advise anyone to take such a case without having a robust immigration claim, as this could lead to a negative decision and removal or detention.

It would be useful to have clients with outstanding applications but also clients with fairly settled immigration situations – Zambrano carers/ or those with NRPF – so we can show that the policy is being applied in a blanket type way.

The other issues outlined below would be useful, but a case could be taken potentially without any of the circumstances identified.

2.Compelling factual circumstances

The challenge is based on a breach of confidentiality, and worse the breach the more compelling the factual circumstances. The Data Protection Act has a concept of "sensitive personal data".

Sensitive personal data means personal data consisting of information as to -
(a) the racial or ethnic origin of the data subject,
(b) his political opinions,
(c) his religious beliefs or other beliefs of a similar nature,
(d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
(e) his physical or mental health or condition,
(f) his sexual life,
(g) the commission or alleged commission by him of any offence, or
(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Therefore any interview where this information is requested or touched on would be more compelling. The more of this type of information that is disclosed to the Home Office, the more compelling the case would be. So for example, if the proposed Claimant disclosed his or her racial or ethnic origin only, this would be less compelling than if a proposed Claimant was asked details of his or her political opinions surrounding his or her asylum claim, details of physical or mental health or condition, sex life, including whether s/he has been working as a sex worker, or subject to domestic abuse et cetera. Likewise, where details of the child's physical or mental health or condition are disclosed then this also makes the case more compelling.

3. adverse effect of the data sharing

In our research we have tried to identify clients who were frightened off making applications for support by the threat of Home Office workers being present. As can be anticipated, many families who have been so frightened off do not present again, nor approach agencies for

Support, so these can be difficult to identify. However, if a family had been frightened off applying because of the threat of data sharing this would be a compelling case.

Should you come across an individual who might be a potential claimant in such a case, please do get in touch with us to discuss further, by emailing Amy Murtagh at amy.murtagh@project17.org.uk or by telephone on 07963509044.

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