

RE: HOMELESS LINK PLEDGE CAMPAIGN

OPINION

1. I am asked to advise the City of London with regard to the legal implications of signing up to a 'Pledge' proposed by Homeless Link to the effect that it will not co-operate in referring homeless persons to the Home Office.
2. I must say at the outset that any decision to sign up to the Pledge (or not) is a political decision and is likely to have considerably more political significance than legal consequences. This Opinion is concerned solely with the legal implications.

BACKGROUND

3. On 1 December 2020, the Immigration Rules were amended to provide a discretionary basis for the refusal of permission to stay in the UK (where the application was made after 1/12/2020) and for any permission to be cancelled on the grounds of rough sleeping in the UK.
4. The provisions are set out in paragraphs 9.21.1 ad 9.21.2 of the Rules:

Rough sleeping in the UK

9.21.1. Permission to stay may be refused where the decision maker is satisfied that a person has been rough sleeping in the UK and has repeatedly refused offers of suitable support and has engaged in persistent anti-social behaviour.

9.21.2. Where the decision maker is satisfied that a person has been rough sleeping in the UK and has repeatedly refused offers of suitable support, and has engaged in persistent anti-social behaviour, any permission held by the person may be cancelled.

5. On 6/4/2021, the Rules were amended to clarify that "*permission may only be refused or cancelled where a person has repeatedly refused suitable offers of support and engaged in persistent anti-social behaviour*".
6. Consequential to these changes, the Home Office has provided guidance (15/4/2021) to its immigration officers on how these provisions should be implemented.

WHO WILL BE EFFECTED BY THE CHANGES – Status

7. The guidance states that it does not apply to:
 - those granted or eligible for pre-settled or settled status under the EU Settlement Scheme (EUSS)
 - those granted indefinite leave
 - those granted leave under a protection route (for example as a refugee or on the grounds of human rights or for humanitarian protection)
8. In particular, it is stated that "*any EU, EEA or Swiss citizen or their family member who has EUSS status or is eligible to apply for status must not have that leave cancelled on the basis of rough sleeping.*"

WHO WILL BE EFFECTED BY THE CHANGES – Rough Sleepers

9. The guidance states that *"The introduction of rough sleeping as a ground for the refusal or cancellation of permission is not intended to criminalise rough sleeping or to penalise those who inadvertently find themselves temporarily without a roof over their head*

...

The rule will be applied to those who refuse to engage with the range of available support mechanisms and who engage in persistent anti-social behaviour."

10. The guidance recognises that *"Not every rough sleeper will be eligible for statutory support and many migrant rough sleepers will have a condition attached to their leave prohibiting access to public funds. Depending on the person's immigration status there may be limits on the help a local authority can provide where the person is ineligible for homelessness assistance.*

...

You cannot refuse or cancel permission to remain in the UK under the rough sleeping rule where a person hasn't refused support because none has been offered ... because they are not eligible for support."

11. Furthermore *"The bar is set at 'unreasonably refusing to co-operate' so that it does not penalise those who have difficulty co-operating, for example because of poor mental health."*

12. In reality, therefore, these provisions will apply to a very small proportion of the homeless population.

ROLE OF LOCAL AUTHORITIES

13. The Guidance states that *"Local authorities are likely to know rough sleepers in their area and where there is anti-social behaviour will refer them to the police.*

...

A non-UK national who is encountered sleeping rough may be referred to Immigration Enforcement's National Command and Control Unit by either the police, following a referral from the local authority, or directly from a local authority because of their offending or anti-social behaviour and where the person has failed to co-operate with offers of support."

14. It is clear from this that there is no obligation on a local authority to make a referral.

HOMELESS LINK POSITION

15. Homeless Link, a 'national membership charity for organisations working directly with people who become homeless in England', are opposed to the new rules and are asking homelessness organisations and local authorities to sign up to a 'pledge' in the following terms:

- That in order to assist the national effort to end rough sleeping we will make no direct referrals under the rough sleeping Immigration Rules
- The council will also not require any of our commissioned partners to make referrals or pass data to the Home Office under the Immigration rules.
- The council will only share information and data with the Home Office with the explicit and informed consent of the individual.

16. Reading the material provided by Homeless Link, it seems clear that they appreciate that the effect of these provisions is considerably more limited than the headlines might imply. It seems that their primary concern is that people will not approach the relevant services for help if they think, rightly or wrongly, that they are in jeopardy of losing their status.

THE LEGAL EFFECT OF THE PLEDGE

17. In light of the above, it seems that the primary purpose of the Pledge is not to create a legally enforceable 'contract' but to send out a message to re-assure potential clients that their status will not be jeopardised.

18. Indeed, as a matter of law, the Pledge would not in my opinion amount to a promise that would be legally enforceable in any meaningful way.

19. The key issue however is that, whereas there is no legal impediment to a local authority deciding not to refer in any individual case, adopting the Pledge would in effect create a policy that, irrespective of the facts of any particular case, no referral will be made.

20. Unlike, say, a voluntary sector organisation or charity, a local authority is an organ of government and its decision-making must be done in accordance with the principles of public law. Every decision of a local authority must be 'lawful'. This means that proper processes must be followed, the decision-maker must take into account all relevant considerations and the decision must be 'rational'.

21. Government Guidance is generally considered to be 'relevant consideration' in public law decision making. This does not mean it has to be followed but it does mean it has to be accorded due weight and any decision that goes against it must be justifiable. In this particular case, the Guidance is provided to Immigration Officials and not to Local Authorities so the weight it carries may be less significant.

22. In this case there are the opposing considerations of, on the one hand, the government's aim of reducing problems of antisocial behaviour associated with rough sleepers and, on the other, the danger that a wider group of vulnerable people will not come forward to access services that are available for them. Any decision to adopt a policy of not referring would have to balance these and any other relevant considerations.

23. Furthermore, there is always a danger in adopting a policy that places a blanket prohibition on what would otherwise be a discretion that it may amount to an unlawful 'fettering' of that discretion. Where a public body has a discretion, a policy as to how that discretion is to be exercised must not be followed so slavishly as to preclude the possibility of departing from the policy in any particular case. (R v Home Department ex p Venables [1985] AC 407)

24. Conversely, it is conceivable that if there were a case where it was considered by the authority that a referral was necessary or preferable, it may be open to the person affected to try to challenge that decision on the basis that the policy was not followed. I don't say that such a challenge would be effective, but it is conceivable.

CONCLUSION

25. The first important point to note is that it is for the Home Office and not the local authorities to determine if, and to what extent, the new rules should be applied in any given case.
26. It is clear from the guidance that it will not apply to the majority of homeless persons.
27. The guidance provides that a non-uk rough sleeper may be referred by the local authority (among other possible referral routes). There is no requirement or obligation that a local authority must make a referral. There is, therefore, no legal impediment to the local authority deciding not to make a referral in any given case.
28. However, a policy not to refer in any case must be implemented lawfully, using the proper procedure and taking into account the relevant considerations.
29. In my opinion, the pledge itself does not create a legally enforceable promise, however, the adoption of a policy not to refer in any case is something that could give rise to a potential public law challenge if it were not followed or, conversely, a challenge on the basis that in following the policy too slavishly, the local authority had fettered its discretion.
30. In reality the chances of a successful challenge may not be particularly high, but, nevertheless, these implications are worth bearing in mind.
31. Please do not hesitate to contact me if you want to discuss further.

Sean Pettit

Five Paper

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