ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

THE IMMIGRATION ACT 2016: its implementation and potential challenges in Wales

Zoe Harper, Legal Officer, Immigration Law Practitioners' Association[1]

INTRODUCTION

1. The Immigration Act received Royal Assent on 12 May 2016. The Government stated that its purpose in bringing forward this legislation was to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom[2]. The Immigration Act 2016 not only makes changes to immigration law and practice but also extends into other areas such as housing, social welfare and employment in order to create the 'hostile environment' envisaged. Its effects will therefore be of relevance to public lawyers and practitioners in these areas as well as in refugee and immigration law practice.

2. In matters touching on policy areas falling within the competence of devolved administrations, such as housing, local government and social welfare, the Immigration Act 2016 contains provisions applicable to England and, controversially, contains powers to extend these to Wales, Scotland and Northern Ireland through secondary legislation. This raises important questions in relation to devolution and opens up scope for influencing and challenging how relevant provisions are implemented in Wales.

3. This paper begins with a note on how provisions of the Immigration Act 2016 are commenced, considers the implications of devolution for the implementation of the Act in Wales, then provides an overview of its main provisions following the structure of the Act:

    - Labour market enforcement and illegal working;
    - Access to services (restrictions on renting, driving and bank accounts);
    - Enforcement (including immigration detention and bail);
    - Appeals;
    - Support for certain categories of migrants;
    - Language requirements for public sector workers; and
    - The Immigration Skills Charge.

COMMENCEMENT

4. When the Immigration Act 2016 became law on 12 May 2016, only a few of its provisions came into force on that date, with the rest of the Act commenced by order. Only one commencement order has so far been made[3] brining a number of provisions into force on 31 May 2016 and 12 July 2016. Available information on commencement is included within the discussion of the relevant provisions below.

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[1] This paper includes text from briefings and training materials by both Alison Harvey and Zoe Harper at ILPA. More detailed commentary is available in ILPA's training course notes on the Immigration Act 2016 by the same.

[2] *Immigration Bill: Explanatory Notes*, Bill 74-EN, at: http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0074/en/15074en.pdf

[3] *The Immigration Act 2016 (Commencement No. 1) Regulations 2016*, SI 2016/603 at: http://www.legislation.gov.uk/uksi/2016/603/made

IMPLICATIONS OF DEVOLUTION

5. Immigration is a reserved matter and so provisions of the Immigration Act 2016 which fall exclusively within the remit of the Home Office will be implemented in Wales in the same way as in the rest of the UK. However, certain areas of the Immigration Act 2016 impact upon areas within the competence of the devolved administration in Wales. These include:

    - **Sections 39-42 on residential tenancies** giving further force to the 'right to rent' scheme introduced by the Immigration Act 2014 to prevent those without leave to enter or remain in the UK from renting property. Landlords risk a criminal offence if they rent property to a person without leave and are given new powers of eviction.

    - **Section 68 and Schedule 12 on availability of local authority support** creating a framework for local authority support to destitute families with children; removing access to leaving care support under the Children Act 1989 from certain categories of young people; and preventing local authorities from paying higher education tuition fees.

    - **Sections 69-73 on transfer of responsibility for relevant children** enabling the transfer of responsibility for unaccompanied migrant children between local authorities under both a voluntary and compulsory scheme.

6. In each of these areas, the Immigration Act 2016 is drafted to include provisions applicable in England with the Secretary of State granted powers to extend these to Wales, Scotland and Northern Ireland through regulations. The regulations also give the power to amend primary legislation passed by the National Assembly for Wales and other devolved parliaments. The Explanatory Notes to the Bill record the Government's view that a legislative consent motion was not required for any extension and amendments proposed to the Bill to include this requirement were defeated.

7. The UK Government has initiated dialogues with the devolved administrations about bringing these provisions into effect in Wales, Scotland and Northern Ireland. There are therefore opportunities for practitioners to engage with the Welsh government in relation to how it considers the questions of policy and implementation in this process.

8. We understand that there was no consultation with devolved nations prior to the publication of the parliamentary bill which became the Immigration Act 2016 and therefore consideration of the devolved context was unable to inform the main framework of its provisions. The provisions create difficulties in terms of both policy and implementation in the devolved context. For example, Welsh Ministers are under a duty to have regard to the Convention on the Rights of the Child in the exercise of their functions[4] yet the removal of access to mainstream leaving care support under the Children Act 1989 from young people who have exhausted their appeal rights in the UK (and others) is both discriminatory and undermines established child welfare frameworks.

9. The use of secondary legislation to implement certain provisions in the devolved nations means that their application in Wales, Scotland and Northern Ireland also means that provisions identified as incompatible with human rights may be struck down under the Human Rights Act 1998 rather than simply declared incompatible as would be the case for provisions introduced through primary legislation.

[4] Rights of Children and Young People (Wales) Measure 2011 (2011 nawm 2), s.1

OVERVIEW: LABOUR MARKET ENFORCEMENT AND ILLEGAL WORKING (PART 1)

10. The Immigration Act 2016 introduces measures aimed at tackling abuse and exploitation in the labour market and the enforcement of labour market standards whilst introducing a new offence of illegal working that may undermine these aims.

Director of Labour Market Enforcement

11. A new role of Director of Labour Market Enforcement is established by sections 1-9 of the Immigration Act 2016 which come into force on 12 July 2016. Appointed by the Home Secretary and the Secretary of State for Business, Skills and Innovation, the Director will have responsibility for assessing the scale and nature of abuse in the labour market and for developing an annual strategy to tackle this.

12. The Director's strategy will co-ordinate the work of Gangmasters and Labour Abuse Authority, Employment Agency Standards Inspectorate and HMRC's National Minimum Wage team and address labour market abuse such as non-compliance with national minimum wage requirements, modern slavery offences connected to labour exploitation, offences committed by employment agencies and breaches of gangmaster license conditions imposed on those supplying workers to certain industries. In parliamentary debates, it was accepted that reporting on the implementation of the strategy should include evidence of the remedies secured by victims[5].

13. Ministers stated in parliament that enforcing immigration control did not form part of the Director's purpose[6] and that labour market abuse would be tackled regardless of whether workers affected had the right to work in the UK or not[7]. The Act does, however, create large information gateways to enable the Director to act as an information hub in relation to matters of labour market abuse and exploitation which enable the Director to disclose information to the Immigration Service among a wide range of specified public bodies.

Gangmasters and Labour Abuse Authority

14. Sections 10 to 13 of the Immigration Act 2016 also come into force on 12 July 2016, expanding the functions of the Gangmasters Licensing Authority and renaming it the Gangmasters and Labour Abuse Authority to reflect this change.

15. The Authority currently licenses suppliers of workers for the agricultural work and shellfish industries. Its licensing role will be extended to cover other industries which will be specified in regulations and it will be given new police-style enforcement powers in England and Wales to prevent, detect and investigate worker exploitation across all labour market sectors.

16. Concerns were also raised about whether the expanded Gangmasters and Labour Abuse Authority would be adequately resourced and, in this context, about the risk of diverting resources from its licensing activities which play an important role in preventing exploitation.

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[5] Lord Bates, Hansard, 18 Jan 2016, Column 543 at:
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm#16011840000412
[6] Lord Bates, Hansard, 18 Jan 2016, Column 543 at:
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm#16011840000412
[7] Lord Bates, 18 Jan 2016 : Column 544
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm#16011840000412

Labour Market Enforcement Undertakings and Orders

17. In sections 14-30, not yet in force, the Immigration Act 2016 introduces a new regime of labour market enforcement undertakings and orders, backed up by a criminal offence for non-compliance, aimed at deterring the exploitation of workers by employers[8]. This has the effect of introducing custodial penalties for a number of labour market offences (such as non-payment of the national minimum wage) which are currently only punishable with a fine.

18. In accordance with a code of practice, a labour market enforcement body may issue a notice to a person, association, company or partnership that it believes is committing or has committed a 'trigger offence' under specific labour market legislation. The notice invites its recipient to give a formal undertaking to comply with measures that the body considers just and reasonable to prevent or reduce the risk of non-compliance with legal employment requirements. The types of measures that may be imposed will be described in regulations and the undertaking would last for a specified period up to a maximum of two years.

19. If the person or company chose not to give an undertaking or breached their undertaking, the enforcement body could apply to a Magistrates' Court for a Labour Market Enforcement Order to be imposed with similar measures and restrictions. A right of appeal to the Crown Court would exist against an order made or refused by the Magistrates' Court. Failure to comply with the Order is a criminal offence, with a maximum sentence in England and Wales of two years imprisonment and/or a fine if convicted on indictment, and one years imprisonment and/or fine on summary conviction.

Offence of illegal working

20. The Immigration Act 2016 introduces a new offence of illegal working in section 34 of the Act which will come into force from 12 July 2016.

21. The offence criminalises an individual who works while knowing, or having reasonable cause to believe, that they are disqualified from working because of their immigration status. The offence applies to those who are working whilst living unlawfully in the UK and to those working in breach of the conditions of their leave in the UK. It includes work under a contract to provide personal labour, goods or services and work under a contract of apprenticeship as well as work under a contract of employment. It is a summary-only offence carrying sentencing powers of 51 weeks in England and Wales.

22. It is already a criminal offence to enter the UK without leave when leave is required, to overstay or to breach a condition of leave (such as working when work is prohibited)[9] so not a single person can be prosecuted under this provision who cannot already be prosecuted under existing immigration offences.

23. The Government argued that a new criminal offence of illegal working was necessary to enable earnings to be seized under the Proceeds of Crime Act 2002 and address an anomaly under which those found working in breach of the conditions of their lawful stay could have earnings seized but those found working whilst living in the UK illegally could not. However, statistics provided by the Government showed that the Proceeds of Crime Act 2002 is not typically used in practice to confiscate earnings from those found to be working in breach of

[8]

[9] Under section 24 of the Immigration Act 1971

conditions[10]. It is also unlikely to be proportionate for prosecutors to seek a confiscation order under the Proceeds of Crime Act 2002 for working illegally in the UK. Crown Prosecution Service Guidance on Proceeds of Crime states that it should prioritise the recovery of assets from serious organised crime and serious economic crime[11].

24. Data on the number of prosecutions brought under the Accession (Immigration and Worker Authorisation) Regulations 2006[12], which created criminal offences for Romanian and Bulgarian nationals working without authorisation in the UK and for those employing them, suggests that the introduction of the new offence of illegal working may lead to the displacement of enforcement activity from employers to employees. Since the regulations came into force on 01 January 2007, there were three prosecutions of employers whilst 491 employees were given a fixed penalty notice for illegal working, offering an alternative to criminal prosecution through the payment of a fixed penalty[13].

25. Transitional provisions are expected to be introduced shortly to deal with an error in the commencement order dealing with this offence which failed to commence a provision ensuring that those on temporary admission who have permission to work are not committing a criminal offence.

Offence of employing an illegal worker

26. From 12 July 2016, the offence of employing an illegal worker[14] will be widened[15] so that in addition to criminalising employers who *knowingly* employ an illegal worker, those who have *reasonable cause to believe* that the person had no right to work will be criminalised. The maximum penalty for the offence is also raised from two to five years imprisonment.

27. The Government stated that this was to capture employers who deliberately do not check a worker's documents so that they can only be liable for a civil penalty for failing to make the checks rather than a criminal penalty for knowingly employing someone without the right to work. The offence, however, puts a much wider group of employers at risk of prosecution.

28. As above, it is expected that transitional provisions will shortly be introduced to deal with an error in the commencement order that would otherwise criminalise those on temporary admission with permission to work.

Other provisions on illegal working

29. It will be a requirement of a personal or premises licence (for the sale of alcohol or for the sale of hot food or drink between 11pm and 5am) that the licensee has the right to work in the UK. The Secretary of State is added to the list of responsible authorities that must be notified before a licence is issued or transferred, allowing her to intervene where there are

[10] Lord Bates, Written Answer HL5290, Home Office Immigration: Proceeds of Crime, 02 February 2016 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-01-20/HL5290/

[11] http://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/

[12] Accession (Immigration and Worker Authorisation) Regulations 2006 SI 2006/3317 regulations 12 and 13 http://www.legislation.gov.uk/uksi/2006/3317/pdfs/uksi_20063317_en.pdf

[13] Rt Hon James Brokenshire MP, Written Answer 12752, Worker Registration Scheme, 21 October 2015 at: http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-10-21/12752

[14] Under section 21 of the Asylum, Nationality and Immigration Act 2006

[15] By operation of section 35 of the Immigration Act 2016

strong grounds for believing that the issue of a licence would give rise to a serious risk of illegal working. Similar provisions are introduced in respect of licensing for taxi and private hire vehicles.

30. The Immigration Act 2016 also gives powers to Chief Immigration Officers to close an employer's premises where satisfied on reasonable grounds that the employer is employing an illegal worker and the employer has been required to pay a civil penalty in the last three years, has an outstanding civil penalty from any date or has previously been convicted of the offence of employing an illegal worker. They do this by issuing an illegal working closure notice which prohibits entry to the premises for a period of up to 48 hours. The immigration officer can then apply to the Magistrates' Court which can extend the period for up to 14 days to decide on an application for an illegal working compliance order which can prohibit or restrict access to the premises for up to two years if the court is satisfied on the balance of probabilities that the order is necessary to prevent the employer employing an illegal worker. Breach of the notice or order is a criminal offence.

31. These provisions are not yet in force and will require regulations to be laid in order to bring them into force.

OVERVIEW: ACCESS TO SERVICES (PART 2)

Renting accommodation

32. Sections 39-42 of the Immigration Act 2016 introduce further measures restricting the right to rent accommodation, additional to those brought in by the Immigration Act 2014, as part of a programme of measures designed to enhance the creation of a 'hostile environment' for people living unlawfully in the UK. The measures have much wider implications in their potential for discrimination and breaches of human rights. They are not yet in force and require regulations to be laid in order to bring them into force in England. The Government has the power to extend the provisions to the devolved nations by way of regulations. The earlier Immigration Act 2014 measures restricting the right to rent have not yet been brought into force in Wales, Scotland and Northern Ireland.

Immigration Act 2014 measures

33. The Immigration Act 2014 introduced provisions preventing those who cannot prove that they are a British Citizen, an EEA national or a person with leave to enter or remain in the UK from renting property. The 'right to rent' scheme requires landlords and landladies to check immigration status documents and not rent property to those without a right to rent or face a civil penalty of up to £3000 per tenant. The provisions apply to those taking in lodgers as well as those renting property under a formal residential tenancy, provided some form of rent is paid. Some types of accommodation, such as refuges, are excluded from the 'right to rent' scheme. The Secretary of State has the power to grant a right to rent to individuals excluded by the provisions. These may include individual asylum seekers who are not destitute and must therefore pay for private rented accommodation rather than access Home Office support.

34. After the conclusion of the pilot 'right to rent' scheme in the West Midlands, the 'right to rent' scheme was extended to the whole of England on 01 February 2016[16]. It is the Government's intention to extend the scheme to the rest of the UK, which it is empowered

[16] Immigration Act 2014 (Commencement No. 6) Order 2016/11

to do through regulations, but the scheme has not, so far, been extended to the devolved nations.

New criminal offences

35. The Immigration Act 2016 adds further force to the 'right to rent' scheme by creating new criminal offences for landlord, landladies or their agents to rent property to an adult whom they know or have reasonable cause to believe is disqualified from renting as a result of their immigration status. The offences are committed in relation to a person occupying their premises regardless of whether they are named in the tenancy agreement provided the landlord or agent, as applicable, had reasonable cause to believe they were present. The offences carry a maximum prison sentence of five years. There is a defence for a landlord/landlady who has taken reasonable steps to end the tenancy within a reasonable period of time on identifying or being notified that the tenant does not have the right to rent.

New powers of eviction

36. The Act creates new powers for landlords and ladies to evict people who are disqualified from renting property as a result of their immigration status. Landlords and landladies who are notified by the Secretary of State that a person or persons occupying their property are disqualified from renting are given the power to terminate the residential tenancy agreement. Any residential tenancy agreement, whether entered into before or after the provisions come into force, will contain the implied term that the agreement may be terminated where an adult occupant is disqualified from renting. In such circumstances, the residential tenancy agreement is excluded from the safeguards of the Protection of Eviction Act 1977.

37. If all the occupants are disqualified from renting, the residential tenancy agreement may be terminated by giving at least 28 days written notice to the tenants. The notice will be enforceable 'as if it were an order of the High Court' with no need to obtain an order for possession, which is unprecedented in housing law and means a landlord/landlady may use 'self-help' (personally putting occupiers onto the street) to recover possession.

38. In other cases, the service of the notice by the Secretary of State that a person does not have the right to rent acts as a mandatory ground for a landlord/landlady to obtain possession of the property, with courts having no discretion to consider any personal circumstances that might make eviction inappropriate such as having a baby or children in the family, old age, disability or infirmity.

39. Landlords who do not take steps to end the tenancy and evict occupants who do not have the right to rent within a reasonable period of time risk prosecution for renting to disqualified persons.

Increased risks of discrimination and homelessness

40. The Home Office evaluation of the pilot 'right to rent' scheme under the Immigration Act 2014 found that a higher proportion of black and minority ethnic 'mystery shoppers' were asked to provide more information during rental inquiries and that comments from landlords and landladies in focus groups indicated a potential for discrimination, but concluded that there was 'no hard evidence of discrimination'[17]. An evaluation of the scheme conducted by the Joint Council for the Welfare of Immigrants found evidence that landlords and landladies

[17] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf

were prepared to discriminate against those with complicated immigration status who cannot immediately provide documents[18].

41. The increased penalties faced by landlords and landladies under the extended scheme is likely to have an even greater impact, with discrimination in access to housing placing individuals from migrant communities or from black and minority ethnic groups at risk of homelessness and exploitation.

Driving in the UK

42. The Immigration Act 2014 introduced provisions which made leave to enter or remain in the UK a requirement of holding a driving licence and contained powers for the DVLA to revoke a driving licence where a person no longer had to leave to remain. Home Office guidance set out the process under which the Secretary of State notified the DVLA of a change in immigration status and the DVLA issued a notice to the individual recalling the driving licence and providing an opportunity to make representations if an error had been made.

43. The Immigration Act 2016 now introduces wide-ranging powers to permit police, immigration officers and others defined in regulations to search people where there are reasonable grounds for believing that they have a driving licence and are not lawfully resident in the UK. The powers extend to the search of premises that were occupied or controlled by the person occupied and premises where they were encountered. The officer may also seize and retain the driving licence.

44. The Act creates a new criminal offence of driving when unlawfully resident in the UK where the person knows or has reasonable cause to believe they are not lawfully resident in the UK, carrying a maximum penalty on summary conviction in England and Wales of 51 weeks imprisonment and/or a fine. After arrest, the vehicle used in conjunction with the offence may be impounded until a decision is made to charge and whilst criminal proceedings are ongoing. If the car belongs to another person, it is unclear whether the car will be returned during this period as the matter is left to regulations. Police and immigration officers are also empowered to enter premises to detain the vehicle, without a warrant if it is known the vehicle is on the premises or with a warrant if there are reasonable grounds to suspect that is. On conviction, the court may order forfeiture of the vehicle though persons with an interest in the vehicle may make representations.

45. As existing stop and search powers are already used disproportionately against ethnic minority drivers, the wide powers of stop and search in respect of the driving provisions in the Immigration Act 2016 give rise to concerns about their discriminatory impact and the potential damage to community and race relations. The provisions are not yet in force and require regulations to bring them into force.

Bank accounts

46. The Immigration Act 2014 required banks to undertake status checks and prevent people from opening a current bank account if they fell within a category of person without leave to enter or remain disqualified from opening an account by the Secretary of State. Section 45 and Schedule 7 to the Immigration Act 2016 extend these provisions to require banks to undertake immigration checks of their current account holders and notify the Home Office if

[18] http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99

a customer does not have the correct legal status. They are not yet in force and require regulations to be made for their commencement.

47. The Secretary of State may apply for a freezing order from the High Court to close the account or choose instead to notify the bank that is under a duty to close the account. The bank is permitted to delay action to close the account where the account is withdrawn or whether other persons have a legal interest in the account.

48. The Home Office frequently provides incorrect or out-of-date information about a person's immigration status and the closure of their bank account in error is likely to have an extremely disruptive impact given the need for an account to receive a salary or meet ongoing rent or mortgage payments. Correspondence from the Solicitor General following parliamentary debates on the provisions provide weak assurances that the Home Office will double-check information with mistakes swiftly rectified, that a person will be informed by the bank of the reason why the account has been closed if it is lawful to do so and that the money in the account will be returned to them by their bank[19].

OVERVIEW: ENFORCEMENT (PART 3)

Enforcement powers

49. The powers of immigration officers are extended significantly by the Immigration Act 2016 and include the following powers due to enter into force on 12 July 2016:

- An amendment to the power under paragraph 2 of Schedule 2 to the Immigration Act 1971 to examine persons who have arrived in the UK to include those who have leave to enter or remain that should be curtailed (cancelled)[20]. As a power to detain is attached to those who may be examined, this creates a power to detain people who have leave to enter or remain whilst a decision is made on whether to curtail that leave. Immigration officers are also empowered to search premises for evidence that a person's leave may be curtailed if lawfully on those premises[21];

- Powers allowing immigration officers lawfully on any premises in the exercise of their functions (which are so wide as to encompass most entry onto premises) to search for documents to determine liability for a civil penalty in relation to employing an illegal worker or renting to a disqualified person where there are reasonable grounds[22]; this power of search in relation to a civil penalty previously required a warrant[23].

- Powers to enable immigration officers to seize evidence that the officer has reasonable grounds for believing has been obtained in consequence of an offence or is evidence of an offence whilst they are lawfully on premises[24]; previously they were required to be trained criminal investigators under PACE powers to seize evidence relating to a non-immigration offence.

[19] Letter of Robert Buckland QC MP, Solicitor General to Albert Owen MP, Immigration Bill – Measures on bank accounts, 04 November 2015
[20] By operation of section 46(2), Immigration Act 2016
[21] New paragraph 15A, Schedule 2, Immigration Act 1971, inserted by section 46(3), Immigration Act 2016
[22] Section 47, Immigration Act 2016
[23] Section 28FB, Immigration Act 1971
[24] Section 48, Immigration Act 1971

- Powers for detainee custody officers to conduct strip searches in detention for the purpose of searching for[25] and seizing[26] nationality documents with a new criminal offence for obstructing the officer in the exercise of this power; existing search powers were limited to searches for evidence of nationality of those arrested for offences[27] and searches in detention for the reasons of safety and similar reasons[28].

50. There are also changes to search powers requiring a warrant which are not yet in force, that will allow warrants to be issued for multiple premises, which may not be specified and which may be for an unlimited number of entries over a specified period of time[29].

51. Maritime powers introduced, in section 75 of the Immigration Act 2016 (part 6), to search persons on ships to protect against personal injury and to search persons on ships for nationality documents risk being applied more widely as they are identified as applying 'on the ship or elsewhere'. The Home Office already use their powers to examine people 'who arrive in the UK' beyond their normal application at border control to justify stop and search operations in bus and tube stations. These provisions are not yet in force.

52. In further enforcement measures, in force as of 12 July 2016, all public authorities, with the exception of HMRC, UK and devolved parliaments and persons exercising functions on behalf of these parliaments, are given the power to disclose information to the Secretary of State. A wide range of public bodies, including schools, local authorities, the NHS, Gangmasters and Labour Abuse Authority and marriage registrars are also placed under a duty to provide a person's nationality documents held by them if directed to do so by the Secretary of State.

53. Section 62 of the Immigration Act 2016 also introduces a new power to cancel leave that has been extended under section 3C of the Immigration Act 1971. At present, if a person makes an application for further leave before their leave expires, but the Home Office does not decide it until after that leave expires, their leave continues on the same terms and conditions until the Home Office decision is made and any appeal against or administrative review of that decision is finally determined. Section 62 of the Immigration Act 2016 gives the Home Office power to cancel that leave where the applicant failed to comply with a condition of their leave or has used deception in their application. As there is no right of appeal or administrative review of a decision to cancel leave, the person would be left with no leave until such time as the Home Office made its decision on the substantive decision, the duration of time being a matter over which the person would have no control, rendering them an overstayer, facing all the rigours of the hostile environment, in the meantime. This power has not yet been commenced.

Immigration detention: vulnerable persons

54. The Immigration Act 2016, under section 59 in force from 12 July 2016, places a duty on the Secretary of State to issue guidance on the matters that should be taken into account when deciding whether to detain or maintain the detention of an individual in order to determine whether that person would be particularly vulnerable to harm in detention and, if so, whether detention should be authorised or maintained.

[25] Section 51, Immigration Act 2016
[26] Section 52, Immigration Act 2016
[27] Sections 44-46, UK Borders Act 2007
[28] Para 2, Schedule 11, Immigration and Asylum Act 1999
[29] Section 54 and Schedule 8

55. This is the Government's response to the Review into the Welfare in Detention of Vulnerable Persons by Stephen Shaw[30] who identified the need to reduce the use of detention which incontrovertibly undermines the welfare of persons and contributes to vulnerability in and of itself. In order to mitigate its impact in the meantime, Stephen Shaw recommended that in addition to existing groups identified within current Home Office guidance on those unsuitable for detention, there should be an absolute exclusion from detention for pregnant women, an upper age limit for the detention of the elderly, as well as a presumption against detention for victims of rape and other sexual or gender-based violence including FGM; people suffering from serious mental illness, people with Post Traumatic Stress Disorder, people with learning difficulties, transsexual individuals and others identified as being sufficiently vulnerable that their continued detention would harm their welfare, recognising the dynamic nature of vulnerability.

56. The Home Office has published its draft statutory guidance on 'adults at risk in immigration detention', inviting comments on the document but undertaking no formal consultation. The draft guidance describes the above categories of persons at risk identified by Shaw and outlines three levels of evidence of that risk. Pregnant women will automatically be classified at the highest level. Otherwise, a person's own testimony only provides the first level of evidence of risk. Professional evidence that a person may be an adult at risk, including it seems a report under rule 35 of the Detention Rules by a doctor within the immigration removal centre, amounts to evidence at the second level and professional evidence that the person is at risk and that detention will cause harm gets a person to the third and highest level of evidence of risk. The draft guidance states that immigration factors such as length of time in detention, public protection and 'compliance history' will be weighed against that risk and that detention will only become appropriate at the point at which immigration control considerations outweigh the presumption against detaining a vulnerable person. Without further guidance on how the factors are to be weighed, the policy may be less protective in its approach than current guidance which permits the detention of vulnerable persons only in exceptional circumstances. The guidance does not address the protection of victims of trafficking and modern slavery who are to be considered under separate guidance.

Limitation on the detention of pregnant women

57. A separate provision, section 60 of the Immigration Act 2016, not yet in force, places a limitation on the detention of pregnant women but not an absolute ban as recommended by Stephen Shaw. Pregnant women may only be detained in exceptional circumstances and for no longer than 72 hours (or seven days with ministerial authorisation) from when the Secretary of State is satisfied that the woman is pregnant or the date her detention begins, whichever is the later. Pregnant women are not prevented, however, from being detained again under the provisions.

58. The limitation on the detention of pregnant women is a significant improvement on the current situation in which pregnant women may be held in immigration detention indefinitely but it remains unsatisfactory. The absence of provisions providing pregnant women with notice of removal give rise to the risk of their being whisked into detention without notice, disrupting their medical care and causing high levels of distress to the woman and her unborn child. The disruption to their maternity care, the difficult and lengthy journeys experienced by

30 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf

pregnant women during removal to detention centres and the lack of appropriate provision when they arrive mean the harmful impact of detention on pregnant women is not avoided.

59. A review of the process of transporting pregnant women to immigration removal centres was promised by the Minister during parliamentary debates.

Immigration bail

60. Section 61 and Schedule 10 to the Immigration Act 2016 introduce provisions on immigration bail. These are not yet in force, with one exception identified below.

61. Bail or temporary admission will be replaced by a single new concept of immigration bail[31]. The language of immigration bail, with its connotations of criminality, is likely to feel stigmatising for asylum applicants seeking protection in the UK. A person liable to detention under Immigration Act powers may be granted immigration bail by the Secretary of State[32] or, if detained, by the Secretary of State or the First-tier Tribunal[33]. Immigration bail must be granted subject to one or more of the following conditions:

- appearance before the Secretary of State or First-tier Tribunal at a specified date and place;
- restriction as to work, occupation or studies;
- restriction as to residence;
- reporting requirements (to the Secretary of State or another person);
- electronic monitoring ('tagging'); or
- any other conditions that the person granting bail thinks fit[34].

62. A recognisance or surety may also be required as a condition of granting immigration bail[35]. Whilst conditions of residence, reporting and restrictions on work are similar to current temporary admission requirements, the restriction on studies is new. During debates on the Immigration Bill, the Minister in the House of Lords stated: *"I emphasise that this is an existing power used only in the most exceptional circumstances pertaining to terrorism."*[36]

63. The Schedule contains a power under paragraph 9 enabling the Secretary of State to provide or arrange for the provision of support and accommodation to a person on immigration bail to enable them to meet conditions of bail (such as the restriction as to residence) but only in exceptional circumstances. This provision will be necessary, following the repeal of section 4 of the Immigration and Asylum Act 1999 (see below), to ensure that destitute migrants who do not qualify for other forms of support are able to access accommodation to secure their right to liberty but it is unclear how this power will be applied.

64. Subsections 61(3) to (5) of the Immigration Act 2016 came into force on the day the Act received Royal Assent. These provide, with retrospective effect, that a person may be released and remain on bail even if the person can no longer be detained under a provision of the Immigration Acts under which they are liable to be detained (for example if there is no prospect of removal). The case of *R(B) v Secretary of State for the Home Department (No.2)* [2015] EWCA Civ 445, currently pending before the Supreme Court, had held that bail

[31] Paragraphs 1(1) and 1(3), Schedule 10, Immigration Act 2016
[32] Paragraph 1(1), Schedule 10, Immigration Act 2016
[33] Paragraph 1(3), Schedule 10, Immigration Act 2016
[34] Paragraph 2(1), Schedule 10, Immigration Act 2016
[35] Paragraph 2(4), Schedule 10, Immigration Act 2016
[36] Lord Keen of Elie, Immigration Bill, House of Lords Committee, Hansard, 01 Feb 2016, Column 1658

conditions could only be extended to people who are or could be lawfully subjected to detention.

Automatic bail hearings

65. The Immigration Act 2016 introduces a provision in paragraph 11 of Schedule 12 that places an ongoing duty on the Secretary of State to arrange a bail hearing before the Tribunal for a detainee four months after the date of their detention or after the date of their last automatic or elective bail hearing, whichever is later. Individuals who are detained pending deportation may not benefit from this safeguard which gives cause for concern since this group of immigration detainees experience the longest forms of indefinite detention without judicial oversight.

Electronic monitoring conditions

66. The Government made a commitment in its election manifesto to tag all foreign national offenders who were not detained. It originally sought to achieve this in the Bill through the inclusion of a power to overrule a court or tribunal that decided not to impose an electronic monitoring condition on an individual. This naturally raised concerns about the compatibility of the provision with the rule of law.

67. The Government instead brought forward a provision stating that a person detained or liable to detention pending deportation must be subject to an electronic monitoring condition as a condition of granting immigration bail unless the Secretary of State considers it impractical or contrary to the person's rights under the European Convention on Human Rights to do so[37]. This has the effect of binding the Tribunal which is further prevented from varying an electronic monitoring condition[38]. This may conflict with the duty on the Tribunal as a public authority not to act in a way that is incompatible with a Convention right[39] where it considers that an electronic monitoring condition would breach an individual's human rights. Similarly, the determination by the Secretary of State's that an electronic monitoring condition was impractical may prevent the release of an individual in accordance with their right to liberty.

OVERVIEW: APPEALS (PART 4)

68. The Immigration Act 2016 provides for the Secretary of State to certify certain human rights claims with the effect that the claimant may only bring an appeal against a negative decision on their application from outside the UK unless the requirement to leave the UK to bring their appeal would breach their rights under the European Convention on Human Rights or lead to 'serious irreversible harm'. This extends to all individuals provisions currently applied to foreign national offenders liable to deportation which permit the certification of human rights claims brought on certain grounds[40].

69. The provision to certify human rights claims would not affect asylum claims or protection claims brought under Articles 2 or 3 of the European Convention on Human Rights. It could, however, be applied to those bringing claims under Article 8 of the European Convention on

[37] Paragraph 7, Schedule 10, Immigration Act 2016
[38] Paragraph 8(4), Schedule 10, Immigration Act 2016
[39] Section 6(1) of the Human Rights Act 1998
[40] Under section 94B of the Nationality, Immigration and Asylum Act 2002, inserted by section 17(3) of the Immigration Act 2014

Human Rights protecting the right to private and family life or Article 4 prohibiting forced labour and servitude.

70. The Government declined to accept amendments that would have exempted specific vulnerable groups from the provisions or ensured an independent multi-agency best interests assessment of the impact of any decision to remove on the welfare of the child was undertaken[41]. The Government stated instead that reasons why the power should not be applied in particular cases would be fully considered on an individual basis[42]. and that consideration would be given to the impact on children in cases where they are affected in line with its duty under section 55 of the Borders, Immigration and Citizenship Act 2009[43].

71. The certification of the human rights claim will be challengeable by judicial review. In determining whether removal to bring an appeal from outside the UK would breach the European Convention on Human Rights, the Secretary of State will be required to consider the proportionality of any such decision which involve a different balance from that in the case of foreign national offenders subject to the certification of their human rights claim.

OVERVIEW: SUPPORT FOR CERTAIN CATEGORIES OF MIGRANT

72. This part of the Immigration Act 2016 makes significant changes to access to Home Office support and accommodation for asylum seekers and other migrants, as well as to the availability of local authority support, affecting families with children and young people leaving care. It also sets out a scheme for the transfer of responsibility for unaccompanied children between local authorities so that responsibilities arising from the refugee crisis are shared more evenly shared across the country. The government commitment to relocate a number of unaccompanied children from Europe to the UK is also found in this section.

Home Office support and accommodation

73. Section 66 and Schedule 11 of the Immigration Act 2016 make significant changes to the criteria for accessing support and accommodation from the Home Office. Much of the detail of the provisions is left to regulations which will have to be drafted and laid before parliament before the changes can come into force, most likely in April 2017.

74. Section 4 of the Immigration and Asylum Act 1999, under which destitute asylum seekers at the end of the process and other migrants may qualify for Home Office support, will be repealed[44]. There will be some transitional protection for a period of time for those currently receiving section 4 support.

75. People who make 'further qualifying submissions' on protection grounds will be supported under section 95 of the Immigration and Asylum Act 1999 in the same way as asylum applicants making an initial claim. Currently those making further submissions are supported under section 4 of the Immigration and Asylum Act 1999 and may only access support under section 95 if their submissions are accepted as a fresh claim. This is achieved through an amendment to the definition of an asylum seeker for the purpose of support in section 94 of

[41] Lord Keen of Elie, House of Lords, Hansard, 15 March 2015 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/lhan126.pdf
[42] Robert Buckland MP, Solicitor General, House of Commons Public Bill Committee, Hansard, column 382 at: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151105/am/151105s01.htm
[43] Lord Keen of Elie, House of Lords, Hansard, 15 March 2016, Column 1829 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/lhan126.pdf
[44] Paragraph 1, Schedule 11, Immigration and Asylum Act 2016

the Immigration and Asylum Act 1999[45], which will include those who make further qualifying submissions that removal would breach the UK's obligations under the Refugee Convention or its obligations in relation to persons eligible for a grant of humanitarian protection. It will also include those granted permission to bring a judicial review of a decision to reject further submissions as a fresh claim for protection.

76. Asylum seekers who reach the end of the process but face a 'genuine obstacle' to leaving the UK may be supported under a new provision, section 95A of the Immigration and Asylum Act 1999, inserted by the Immigration Act 2016[46]. There is a power to provide section 95A support in cash[47], Ministers stating that it would be provided in cash and at the same level as section 95 support[48]. Regulations will define when a genuine obstacle to departure will be considered to exist but, according to statements in parliament, will include where a person is unfit to travel or where they lack the necessary documentation to leave the UK but is taking reasonable steps to obtain this. Of significant concern was the indication during parliamentary debates that regulations under this provision will place a time limit on applying for support under this provision. Those who do not apply for section 95A within 21 days of the final decision on their asylum claim would not qualify for support unless there was a reason outside their control, such as illness, that prevented them. This would exclude most people currently accessing section 4 support due to a genuine obstacle to return. There will also be no right of appeal to the Asylum Support Tribunal against decisions to refuse or discontinue support under section 95A of the Immigration and Asylum Act 1999 leaving judicial review as the only available remedy for wrongful decision-making.

77. There is no power in this section of the Immigration Act 2016 to support individuals making further qualifying submissions on grounds that do not engage protection issues, so those making further submissions on the basis that removal would breach article 8 of the European Convention on Human Rights protecting the right to private and family life, for example, would be excluded from support. Individuals who have never made an asylum claim but are stateless or cannot leave the UK are similarly excluded. There is a separate power under paragraph 9 of Schedule 10 dealing with bail which allows the Secretary of State to provide support and accommodation to a person on immigration bail to enable them to meet conditions of bail if there are exceptional circumstances to justify this. As all those currently on temporary admission will be deemed to be on immigration bail under the Act, this provides a general power of support and accommodation, but one that the Home Office may seek to limit in guidance.

78. The provision which enables asylum-seeking families with children to remain supported under section 95 of the Immigration and Asylum Act 1999 until they leave the UK[49] is removed by the Immigration Act 2016[50]. Families who reach the end of the asylum process must instead qualify for support under new section 95A of the Immigration and Asylum Act 1999 and, if they do not, they may qualify for support from their local authority under new provisions introduced by Schedule 12 of the Immigration Act 2016 (see below). Regulations will provide for section 95 support to be discontinued after a grace period of 90 days for families whose

[45] By paragraph 3, Schedule 11, Immigration and Asylum Act 2016
[46] Paragraph 9, Schedule 11, Immigration and Asylum Act 2016
[47] Section 96(1A) Immigration and Asylum Act 1999, inserted by paragraph 10(3) of Schedule 11 to the Immigration Act 2016
[48] House of Lords Committee debate, 03 February 2016, column 1832
[49] Section 94(5) of the Immigration and Asylum Act 1999
[50] By paragraph 7(5), Schedule 10 to the Immigration Act 2016

asylum claim is finally determined and rejected[51]. During this time there will be a managed process of engagement by the Home Office, in tandem with the local authority, to encourage a voluntary return or take the family through the family returns process.

Local authority support: families with children

79. Section 68 and Schedule 12 to the Immigration Act 2016 create a new Home Office regulated framework for local authority support to families with children as a response to concerns that the removal of support under section 95 of the Immigration and Asylum Act 1999 from families at the end of the process would displace responsibility for families to local authorities. As above, regulations on the detail of the provisions will need to be laid before parliament as will an order commencing the provisions before they can come into force. The measures are most likely to come into force alongside the changes to Home Office support and accommodation in April 2017. The provisions are drafted for England, with power given to the Secretary of State to extend them to Wales, Scotland and Northern Ireland through secondary legislation.

80. Migrant families with no access to support or accommodation are currently assisted by local authorities under their duties under section 17 of the Children Act 1989 to promote and safeguard the welfare of children. Whilst such families would normally be excluded from local authority services under Schedule 3 to the Nationality, Immigration and Asylum Act 2002, local authorities are allowed to exercise their powers or duties to prevent breaches of the European Convention on Human Rights under an exception created by paragraph 3 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.

81. The Immigration Act 2016[52] introduces new paragraph 3A to Schedule 3 of the Nationality, Immigration and Asylum Act 2002 preventing a local authority from providing support or assistance to a family if they would qualify for support under the new Home Office regulated framework established under new paragraph 10A to Schedule 3 of that Act. This new framework for support is not limited to failed asylum seekers with children but encompasses migrant families who do not qualify for mainstream support provision and *Zambrano* carers.

82. Under new paragraph 10A, the Home Office may make regulations providing for support to a person who is destitute, has a dependent child and does not meet the criteria for Home Office support under new section 95A of the Immigration and Asylum Act 1999. If the family does not qualify for support under section 95A because they do not have a genuine obstacle to return to their country or because they were not previously an asylum seeker, they may access support under paragraph 10A provided they meet one of the following conditions:

- they have a pending application for leave to enter/remain of a type that will be specified in regulations[53];
- they could bring a statutory appeal[54] or have a pending statutory appeal[55];
- they have exhausted their appeal rights and are cooperating with removal[56]; or
- support is necessary to promote and safeguard the welfare of the child[57].

[51] Home Office (2016) *Reforming support for migrants without immigration status: the new system contained in Schedules 8 and 9 to the Immigration Bill*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494240/Support.pdf, para 26
[52] By paragraph 6 of Schedule 12
[53] New paragraph 10A(3) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002
[54] New paragraph 10A(4)
[55] New paragraph 10A(5)
[56] New paragraph 10A(6)

83. The Government has stated that the intention is that local authorities provide support under these provisions though this is not on the face of the legislation. The Secretary of State is empowered to make regulations on the support that is required to promote and safeguard the welfare of the child and the matters that the local authority may take into account when doing so despite local authorities having the specialist expertise in this area.

84. Local authorities retain their powers to support under section 17 of the Children Act 1989 families who do not qualify for support under the new framework. It is also intended that local authorities provide for any other needs of children additional to support and accommodation under section 17 of the Children Act 1989.

85. Given the complexity of the different provisions for support and accommodation to families, there is a real risk of families with children falling through the gaps between the various systems.

Local authority support: young people leaving care

86. Section 68 and Schedule 12 to the Immigration and Asylum Act 2016 also excludes certain groups of young people (mostly at the end of the asylum/immigration process) who reach 18 years from accessing to mainstream leaving care support provided by local authorities under the Children Act 1989. As above, the provisions are drafted as applicable to England with the power to extend these to Wales, Scotland and Northern Ireland by secondary legislation and are likely to be commenced in April 2017.

87. Under the Children Act 1989, young people leaving the care of the local authority are able to access assistance from the local authority in the form of advice, support, accommodation, education, training, employment and the ability to remain in their foster placement until the age of 21 years or until the age of 25 years if they are in full-time education[58]. Children at the end of the asylum process may be supported by local authorities where it would breach their rights under the European Convention on Human Rights to remove support[59] and this support should be provided under the local authority's leaving care duties[60].

88. Schedule 12 of the Immigration Act 2016 removes access to leaving care support under the Children Act 1989 from care leavers who reach 18 years and either do not have leave to enter or remain[61], are not asylum seekers[62] or do not have a pending immigration application that is their first application for leave to enter or remain[63]. The definition of an asylum seeker is the same used for access to Home Office support and accommodation and includes young people making further submissions on protection grounds.

89. The Government's intention is to remove local authority leaving care support from young people who have exhausted their appeal rights in the UK. The provisions also have the effect of removing access to this support from other groups including those who have not been

[57] New paragraph 10A(7)
[58] Sections 23C, 23CA, 23CZA, 23D 24A and 24B Children Act 1989
[59] Applying paragraph 3 of schedule 3 to the Nationality, Immigration and Asylum Act 2002
[60] R (SO) v London Borough of *Barking* & *Dagenham* [2010]. EWCA Civ 1101
[61] New paragraph 7B(1)(a) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 inserted by paragraph 9 of Schedule 12 to the Immigration Act 2016.
[62] New paragraph 7B(1)(b)
[63] New paragraph 2A of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 inserted by paragraph 5 of Schedule 12 to the Immigration and Asylum Act 2016.

supported by their local authority to regularise their status and have no leave when they reach the age of 18 years as result; young people with a pending immigration application (or appeal arising from this) which is not their first application for leave to enter or remain; young people with an outstanding application to register as a British citizen; and young people who cannot return to their country due to a genuine obstacle to removal.

90. Young people who fall outside the protection of local authority leaving care provisions may qualify for support under new paragraph 10B inserted into Schedule 3 of the Nationality, Immigration and Asylum Act 2002 provided that they meet certain conditions:

- they are destitute and have a pending application for leave to enter or remain, of a kind that will be specified in regulations[64];
- they are destitute and may bring[65] or have brought an appeal[66] in relation to their application that is not required to be brought from outside the UK;
- they have exhausted their appeal rights and a person identified in regulations is satisfied that support should be provided[67].

91. During parliamentary debates, Ministers stated that local authorities would be able to continue supporting young people where they considered this appropriate on the basis of their needs. However, in the absence of a clear duty and funding of provision, local authorities are likely to be unable to provide the additional support that vulnerable young people leaving care will require when making the transition to adulthood. The Government also envisages that, after a period of transition, young people who qualify for support under section 95A of the Immigration and Asylum Act 1999 are transferred to adult accommodation under this provision so they risk being dispersed away from the local authority and their existing support networks.

92. Child welfare legislation has made specific provision for children leaving care in recognition of their particular needs and vulnerability. The removal of groups of young people from its protection based on their immigration status is both discriminatory and undermines the Government commitment to ensuring that care leavers receive the same level of care and support that other young people receive from their parent/s. As above, much of the detail of the new provisions is left to regulations and has not been fully thought through heightening the risks to vulnerable young people.

Local authority support: higher education tuition fees

93. By a new provision, section 1A inserted into schedule 3 of the Nationality, Immigration and Act 2002[68], local authorities will be prohibited from providing funding to facilitate access to higher education to care leavers aged 18 years or over if they do not have permanent leave to remain in the UK. This affects a wider category of young people than those discussed above as it includes young people with pending applications as well as young people who have limited leave to remain. Young people with Refugee Status will not be affected in practice as they qualify for student loans immediately on grant of status but other young people will face difficulty accessing funding for higher education.

[64] New paragraph 10B(2) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 inserted by paragraph 10 of Schedule 12 to the Immigration Act 2016
[65] New paragraph 10B(3)
[66] New paragraph 10B(4)
[67] New paragraph 10B(5)
[68] By paragraph 3 of Schedule 12 to the Immigration Act 2016

94. In *R (on the application of Kebede) v Newcastle* City Council [2013] EWHC 355 (Admin), a case brought after the Department of Business, Innovation and Skills changed the student finance regulations to prevent access to student loans to young people with limited leave to remain in 2012, it was held that there was a duty on a local authority to make a grant in relation to educational expenses as part of its leaving care support to a child who had been looked after by the local authority. This will no longer be the case under the new statutory provisions.

95. The provisions are not yet in force and, as drafted, are currently only applicable in England, with the power to extend provisions to Wales, Scotland and Ireland by secondary legislation.

Transfer of responsibility for relevant children

96. Sections 69 to 73 of the Immigration Act 2016 came into force on 31st May 2016 and create a mechanism in England under which responsibility for unaccompanied children may be transferred from one local authority to another, either on a voluntary basis or under an enforced scheme. The Secretary of State may extend the scheme to Wales, Scotland and Northern Ireland by regulations. The measures support and extend the voluntary scheme in place since summer 2015 to manage increased numbers of unaccompanied asylum seeking children arriving in Kent in need of protection following the refugee crisis[69].

97. The scheme is intended to enable more local authorities to take responsibility for newly arrived children who have sought asylum or been relocated to the UK under a resettlement scheme, however the legislation is so widely drafted that it would allow any unaccompanied child, whether they are an asylum seeker or have limited leave to remain, to be transferred to another local authority at any point in time during their care.

98. Whilst it is appropriate that if a child needs to be moved to a different local authority then responsibility should be transferred with the child, a child should only ever be moved where this is in their best interests. The stage at which the child is moved to another local authority will be very relevant to whether this is in their best interests and, given the importance of continuity of care, it would not normally be in a child's best interests to move them once they had spent time and developed relationships in the first local authority.

99. The absence of time limits within the provisions for the transfer of responsibility for a child also allows for delay or 'drift' in establishing appropriate arrangements, which is not in the child's best interests either. The voluntary transfer protocol developed during the summer by the Department of Education envisaged that transfers of unaccompanied asylum seeking minors to a second authority would take place after three days of the child arriving. ILPA is pressing for similar guidance to be put in place under the new scheme. It will be important to monitor the operation of these provisions to ensure that unaccompanied asylum seeking children are not subject to inappropriate transfers.

Unaccompanied refugee children: relocation and support

100. The Secretary of State is required by section 67 of the Immigration Act 2016, in force since 31st May 2016, to make arrangements to relocate to the UK and support a specified number of unaccompanied refugee children from Europe in consultation with local authorities.

[69] Letter of James Brokenshire MP Immigration Minister to Sir Keir Starmer MP, 25 November 2015, available at: http://data.parliament.uk/DepositedPapers/Files/DEP2015-0916/2015-11-25_JB_to_Keir_Starmer_-_support_amendments.pdf

101. This is the compromise adopted by the Government after it refused to accept the parliamentary vote in favour of Lords Dubs' amendment to the Immigration Act 2016 seeking to relocate 3000 children to the UK. The Government would not commit to a specific number of children who would be relocated but accepted the need to relocate unaccompanied children from Europe, where 10,000 children have gone missing to date, and that these young people would be granted leave to remain on entry to the UK. The Government also stated that it would make efforts to speed up the process under the Dublin Convention which enables children claiming asylum in Europe to join family members in the UK for their claim to be considered here.

OVERVIEW: LANGUAGE REQUIREMENTS FOR PUBLIC SECTOR WORKERS (PART 7)

102. Section 77 of the Immigration Act 2016, not yet in force, places a duty on public authorities to ensure that each person who works for it in a 'customer-facing' role speaks fluent English, defined as a command of spoken English sufficient to enable effective performance of their role. Public authorities in Wales, Scotland and Northern Ireland will only be under the duty insofar as reserved matters are concerned (which may prove problematic where competence is shared) and the duty allows fluent English or Welsh in Wales.

103. Public authorities encompassed by the provision are defined as authorities exercising public functions but not those exercising functions on behalf of a public authority. The Secretary of State may, by regulations, expand the definition to include those working for contractor agencies providing public services for a public authority. Public authorities are required to operate a complaints system under which members of the public may alert the authority to a potential breach of their duty. The Secretary of State is required to issue a code of practice on the action public authorities should take in relation to employees who do not meet the required standard of English and how they should comply with their duties under the Equality Act 2010 alongside their duties under this provision.

104. Risks have been identified of discriminatory behaviour or vexatious complaints towards Black and Minority Ethnic or disabled people made on the basis of accent, speech impediment or other communicative disability or national or racial identity. It will useful to remember in this context that whilst employment law is generally out of scope of legal aid, discrimination cases remain within scope: para 43(1), Part , Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

OVERVIEW: IMMIGRATION SKILLS CHARGE (PART 8)

105. Section 85 of the Immigration Act 2016 makes provision for an immigration skills charge to be levied on those hiring third country nationals as skilled workers. This will come into force on 12 July 2016. Employers sponsoring a skilled worker from outside the European Economic Area under the Points Based System will be required to pay an additional charge which may then be used by the Government to fund apprenticeships, although not with the same employer. On 24 March 2016, the Rt Hon James Brokenshire MP confirmed that the Immigration Skills Charge would be introduced in April 2017 and set at £1000 per employee per year with a reduced rate of £364 for small or charitable organisations, including universities[70]. The charge will not apply to PhD level jobs or international students switching.

[70] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-03-24/HCWS660/