ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

THE IMMIGRATION ACT 2016

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INTRODUCTION

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ILPA has, since its inception, worked with parliamentarians of all parties on immigration legislation and worked with parliamentarians of all parties on the passage of the Bill which became the Immigration Act 2016, as well as working closely with the Home Office Bill team.

2. The Immigration Act received Royal Assent on 12 May 2016. The UK Government stated that its purpose in bringing forward this legislation was to tackle illegal immigration by making it harder to live and work in the United Kingdom without permission[1]. The Immigration Act 2016 not only makes changes to immigration law and practice but also extends immigration control into other areas such as housing, social welfare and employment to create the 'hostile environment' envisaged.

COMMENCEMENT

3. 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. One commencement order has so far been made[2] bringing a number of provisions into force on 31 May 2016 and 12 July 2016. A set of consequential and a set of transitional provisions regulations have been made.[3] Information on commencement is included within the discussion of the relevant provisions below. Not all provisions are discussed, just those which may be of particular interest to COSLA.

DEVOLUTION

4. Immigration is a reserved matter but many elements of the "hostile environment" such as support and landlord and tenant provisions pertain to devolved matters. Generally, the Act applies throughout the UK (see s 95 *Extent)* with the exception of provisions on transfer of

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

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

[3] Immigration Act 2016 (Consequential Amendments) Regulations SI 2016/665; Immigration Act 2016 (Transitional Provision) Regulations 2016 SI 2016/712.

responsibility for children between local authorities (ss 69 to 72), which applies only in England and Wales. Specifically, limitations are made in particular sections of the Act to restrict their application to parts of the UK. In particular see

- **Sections 39-42 on residential tenancies**
- **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.

5. We can identify the following approaches to modifications in respect of Scotland in the Act:
   i) The provisions apply without modification.
   ii) The provisions apply with modifications to reflect existing structures and differences. One obvious example is reference to the Sheriff courts, Court of Session etc. Another is section 54: provisions for multiple entry warrants for immigration officers do not extend to Scotland, where such warrants are not permitted to the police. This section typifies the approach: the Act makes provision which reflects the situation in England and then separate provision is made for Scotland, rather than the situation being reviewed across the UK as a whole and a decision take as to which, the English or the Scots' approach, to prefer. Very often the need for a modification for Scotland was only spotted at a late stage and the Act was amended during its passage.
   iii) The provisions extend to Scotland but only in respect of reserved matters (e.g. the requirement that public sector workers in a customer facing role speak "fluent" English set out in part 7).
   iv) Specific provision is made for Scotland (see e.g. s 56 *Detention by immigration officers in Scotland*).
   v) The provisions extend to England (or England and Wales) only but can be extended to Scotland by regulations made by the Westminster parliament. E.g. the extension of the right to rent scheme (contrast the approach to this scheme in the Immigration Act 2014 where the provisions were stated on the face of the Act to apply throughout the UK but in the event were limited to England by regulations).
   vi) The provisions do not apply to Scotland and can only be extended to Scotland by the Scottish parliament (Part 7 on Language requirements for public sector workers in respect of reserved matters).

6. The use of secondary legislation to implement certain provisions in Scotland (see type v. above means that where provisions are found to be incompatible with the Human Rights Act 1998 the regulations could be struck down, whereas provisions of primary legislation could only be declared incompatible. Add to this the question of the borderline between devolved and reserved matters and we can anticipate litigation in Scotland. The UK Government has indicated that it does not consider that legislative consent motions are required for these extensions (see e.g. the Rt Hon James Brokenshire MP's letter of 13 October 2015 to Margaret Bruges MSP, Minister for Housing and Welfare on the right to rent provisions).

7. Devolution featured heavily in the report on the Bill by the House of Lords Select Committee on the Constitution [4] and was extensively debated in the Lords, in particular see the debate at 15 March 2016: Column 1754ff where Lord Hope of Craighead proposed amendments to provisions of the Bill dealing with illegal working in licensed premises, residential tenancies and support under Part 5, saying

[4] http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7502.htm

"It is a feature of the Bill that the provisions which apply to England and Wales are set out in full and we are debating them, line by line, as we ordinarily do; but although the Bill applies to Scotland, Wales and Northern Ireland, it does not set out the measures which deal with certain devolved matters relating to those Administrations. That has three consequences. First, this House—or, indeed, this Parliament—is not able to debate the detail of the legislation. …

Secondly, as I understand the purpose of these provisions, it is not intended that the devolved legislatures should legislate on these matters either… Thirdly, the measures which seek to apply these provisions in relation to Wales, Scotland and Northern Ireland are to be contained in a statutory instrument.

…

Here the Minister is proposing to take measures in relation to Scotland with regard to devolved matters. If he was not to seek the consent of the Scottish Parliament, there may be really considerable consequences.

The then Minister, Lord Bates[5], said in reply

I concur with the view that these are very important issues: they are not trivial issues but are very substantial. … In respect of illegal working in licensed premises, to which the noble and learned Lord referred, we have not had time to amend the Bill but have published draft regulations so that our method and intent are clear.

… As with the right-to-rent scheme in the 2014 Act, we believe that the extension of these provisions to the whole of the UK has only consequential impact on devolved legislation and remains for an immigration purpose.

We have not sought to put the residential tenancies provisions for Scotland or Wales in the Bill or to publish draft regulations. This is because both the Scottish Parliament and the Welsh Assembly have been legislating in this space. … With the law in flux in Wales and Scotland, we had to decide whether it was worth amending the law only to need to re-amend it a few months later, and we thought that once was better.

…the dispersal of migrant children is not an area in which Wales, Scotland or Northern Ireland have competence to legislate, and their consent is therefore, in our opinion, not required for the UK Government to legislate in this area"

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

Director of Labour Market Enforcement

8. Provisions for a new Director of Labour Market Enforcement responsibility for assessing the scale and nature of abuse and exploitation (beyond immigration) in the labour market and for developing an annual strategy to tackle this came into force on 12 July 2016. The strategy will co-ordinate the work of the renamed Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate and HMRC's National Minimum Wage team and address matters such as non-compliance with national minimum wage requirements, 'modern slavery' offences, offences committed by employment agencies and breaches of gangmaster license conditions.

[5] Lord Bates resigned to walk across Latin America to raise funds for UNICEF. Donations can be made on his justgiving page at https://www.justgiving.com/Michael-Bates88

9. 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 on matters of labour market abuse and exploitation and these enable the Director to disclose information to the Immigration Services among a wide range of other specified public bodies.

Gangmasters and Labour Abuse Authority

10. Provisions into force on 12 July 2016 expand the functions of the Gangmasters Licensing Authority and rename it the Gangmasters and Labour Abuse Authority to reflect this change. Its licensing role will be extended to cover other industries which will be specified in regulations. While will be given new police-style enforcement powers these powers will not extend to Scotland (s 12 *PACE powers in England and Wales for labour abuse prevention officers)*.

Labour Market Enforcement Undertakings and Orders

11. Not yet in force. 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. A notice may be issued to a person, association, company or partnership believed to be committing or which has committed a 'trigger offence' under specific labour market legislation. The notice invites its recipient to give a formal undertaking to comply with measures to prevent or reduce the risk of non-compliance with legal employment requirements. If the person or company chose not to give an undertaking or breaches their undertaking, the enforcement body could apply to a sheriff for a Labour Market Enforcement Order to be imposed with similar measures and restrictions. A right of appeal to the Sheriff Appeal Court would exist against an order made or refused by the Sheriff. A sentencing court can also impose an order. Failure to comply with the Order is a criminal offence.

Offence of illegal working

12. The Immigration Act 2016 introduces a new offence of illegal working. The offence is aimed at 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. 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.

Offence of employing an illegal worker

[6] Lord Bates, Hansard, 18 Jan 2016, Column 543 at:
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm_h1601184000412
[7] Lord Bates, 18 Jan 2016 : Column 544
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm#1601184000412
[8]

13. From 12 July 2016, the offence of employing an illegal worker[9] has been widened[10] 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.

Other provisions on illegal working

14. In England and Wales it will be a requirement for a grant of a licence that the licensee has the right to work in the UK. These provisions may be extended to Scotland by regulation and such regulations can amend Acts of the Scottish parliament or Acts of the UK parliament (and subordinate legislation made under them. 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 object to its issue, although ultimately the decision rests with the licensing authority. The provisions are not yet in force anywhere in the UK and no regulations to extend them to Scotland have been made. The Rt Hon James Brokenshire MP stated in a letter to Michael Matheson MSP on 9 February 2016 that Scots legislation was complex and also being amended and that this was the reason for using regulations, to allow the UK Government extra time to draft the regulations. He indicated that Scottish government officials and lawyers had commented on draft provisions.

15. Similar provisions are introduced in respect of licensing for private hire vehicles (taxis) but here, following objections, provision is made for Scotland on the face of the statute and is not left to regulations. The provisions, which amend the Civic Government (Scotland) Act 1982, are not yet in force. A person with no leave or whose conditions of leave prohibit work may not be granted a private hire licence and a licence must not be granted for a longer period than that for which a person has leave to remain. A person whose leave would otherwise have expired but has been extended because the Home Office has not yet decided an application for its extension, or because an appeal is pending, can be granted a licence for a maximum of six months.

16. The 2016 Act gives powers, not yet in force, to Chief Immigration Officers to close an employer's premises where satisfied on reasonable grounds that the employer is employing an illegal worker and where 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 Sheriff who 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 satisfied that the order is necessary to prevent the employer employing an illegal worker. Breach of the notice or order is a criminal offence.

OVERVIEW: ACCESS TO SERVICES (PART 2)

Renting accommodation

17. Sections 39-42 of the Act introduce further measures restricting the right to rent accommodation. They are not yet in force . They extend to England but can be extended to Scotland by regulations (see s 42).

[9] Under section 21 of the Asylum, Nationality and Immigration Act 2006
[10] By operation of section 35 of the Immigration Act 2016

Immigration Act 2014 measures

18. 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. These were brought into effect across England on 1 February 2016 but have not yet been brought into effect in Scotland. 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 and asylum support accommodation provided by the Home Office, 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. As persons without leave they have no right to rent unless this is granted specifically.

Criminal offences for landlords and landladies under this Act

19. The 2016 Act creates new criminal offences for landlord, landladies or their agents of renting 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 regardless of whether a person is named in the tenancy agreement provided the landlord or agent, as applicable, had reasonable cause to believe that they are occupying the premises. 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

20. The Act creates new powers for landlords and ladies to evict persons who are disqualified from renting property as a result of their immigration status. These are not yet in force in England, the part of the UK to which they can apply without regulations. Landlords and landladies who are notified by the Secretary of State that a person or persons occupying their property is/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, in England, the residential tenancy agreement is excluded from the safeguards of the Protection of Eviction Act 1977.

21. 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 in England 'as if it were an order of the High Court' with no need to obtain an order for possession, which means a landlord/landlady may use 'self-help' (personally putting occupiers onto the street) to recover possession or employ court officers to do so.

22. 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 in England having no discretion to consider any personal circumstances that might make eviction inappropriate such as having a baby, children in the

family, old age, disability or infirmity. These provisions amend the Housing Act 1988 and Rent Act 1977 in England and thus any extension is likely to amend equivalent legislation in Scotland.

23. Landlords or landladies 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.

24. 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 the Home Office concluded that there was 'no hard evidence of discrimination'[11]. An evaluation of the scheme conducted by the Joint Council for the Welfare of Immigrants found evidence that landlords and landladies were prepared to discriminate against those with complicated immigration status who cannot immediately provide documents.[12] Concerns about discrimination extend beyond persons under immigration national to British citizens whom landlords perceive to be likely to be "foreign" or who have no documents.

Driving in the UK

25. 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.

26. The 2016 Act introduces powers for 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 and premises where they were encountered. The officer may seize and retain the driving licence.

27. 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. After arrest, the vehicle used in conjunction with the offence, whether or not it belongs to the alleged offender, may be impounded. 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.. The provisions will apply throughout the UK. They are not yet in force and require regulations to bring them into force.

Bank accounts

28. 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. The 2016 Act will extend these provisions to require banks to undertake immigration checks of their current account holders and notify the Home Office if a customer does not have the correct

[11] Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf
[12] http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99

legal status. They are not yet in force and require regulations to be made for their commencement. They will apply throughout the UK.

OVERVIEW: ENFORCEMENT (PART 3 and PART 7)

29. Powers of entry, search seizure and retention by immigration officers are extended by the Act from 12 July 2016. These apply throughout the UK including:

- An extension of the power[13] to examine persons who have arrived in the UK to include those who have leave to enter or remain that should be curtailed (cancelled)[14]. As a power to detain is attached, 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 lawfully on premises are empowered to search premises for evidence that a person's leave may be curtailed[15];
- Powers allowing immigration officers lawfully on any premises in the exercise of their functions to search where there are reasonable grounds for documents to determine liability for a civil penalty for employing an illegal worker or renting to a disqualified person[16]; this power of search in relation to a civil penalty previously required a warrant[17].
- 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[18]; previously they were required to be trained criminal investigators under PACE powers to seize evidence relating to a non-immigration offence.
- Powers for detainee custody officers to conduct strip searches in detention for the purpose of searching for[19] and seizing[20] 'nationality documents' as (broadly) defined with a criminal law penalty 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[21] and searches in detention for the reasons of safety and similar reasons[22].
- Powers in Scotland of detention prior to arrest and arrest without warrant will henceforth apply to all offences in the Immigration Acts or for which an immigration officer has power of arrest (s 56).

30. There are also changes to search powers requiring a warrant which are not yet in force, which 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 (s 54 and Schedule 8). These do not apply in Scotland, where multiple premises warrants are not issued

31. Maritime powers introduced in s 75 of the Act (part 6), extend immigration officers' powers out over the sea. There are separate provisions for the exercise of these powers in Scottish waters. Officers can search persons on ships 'or elsewhere' (i.e. after disembarkation) to

[13] Under paragraph 2 of Schedule 2 to the Immigration Act 1971.
[14] By operation of section 46(2), Immigration Act 2016.
[15] New paragraph 15A, Schedule 2, Immigration Act 1971, inserted by section 46(3), Immigration Act 2016.
[16] Section 47, Immigration Act 2016.
[17] Section 28FB, Immigration Act 1971.
[18] Section 48, Immigration Act 1971.
[19] Section 51, Immigration Act 2016.
[20] Section 52, Immigration Act 2016.
[21] Sections 44-46, UK Borders Act 2007.
[22] Para 2, Schedule 11, Immigration and Asylum Act 1999.

protect against harm and for nationality documents risk being applied more widely as they are identified as applying 'on the ship or elsewhere'. The Home Office already uses powers to examine people 'who arrive in the UK' beyond the port for, e.g., stop and search operations in bus and tube stations. These provisions are not yet in force.

32. In further enforcement measures, in force as of 12 July 2016, all public authorities, with the exception of HMRC, 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.

Immigration detention: 'vulnerable persons'

33. The Act 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. This is the UK Government's response to the *Review into the Welfare in Detention of Vulnerable Persons* by Stephen Shaw.[23] The Home Office has published draft statutory guidance[24]. A separate provision 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. A review of the process of transporting pregnant women to immigration removal centres was promised by the Minister during parliamentary debates.

Immigration bail

34. Section 61 and Schedule 10 to the Immigration Act 2016 introduce provisions on immigration bail. These are largely not yet in force. Bail or temporary admission will be replaced by a single new concept of immigration bail[25]. A person liable to detention under Immigration Act powers may be granted immigration bail by the Secretary of State[26] or, if detained, by the Secretary of State or the First-tier Tribunal[27]. Immigration bail must be granted subject to conditions. Whilst conditions of residence, reporting and restrictions on work are similar to current temporary admission requirements, the restriction on studies is new.

35. The Schedule contains a power (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 persons who do not qualify for other forms of support are able to access accommodation to secure their right to liberty. It is unclear how this power will be applied.

[23] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf
[24] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/526263/Adults_at_risk_policy_26_May_2016.pdf
[25] Paragraphs 1(1) and 1(3), Schedule 10, Immigration Act 2016.
[26] Paragraph 1(1), Schedule 10, Immigration Act 2016.
[27] Paragraph 1(3), Schedule 10, Immigration Act 2016.

36. The Act makes provision, not yet in force, for 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 bail hearing. Individuals who are detained pending deportation will not benefit from this safeguard.

37. The Conservative party made a commitment in its election manifesto to tag all foreign national offenders who were not detained. After much debate as to its legality, led by Lord Mackay of Clashfern, this has become a provision stating that a person detained or liable to detention pending deportation must be made subject by the Secretary of State or the Tribunal to an electronic monitoring condition as a condition of 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[28]. This potentially conflicts with the duty on the Tribunal as a public authority not to act in a way that is incompatible with a Convention right[29] where it considers that an electronic monitoring condition would breach an individual's human rights.

APPEALS (PART 4)

38. The Immigration Act 2016 provides for the Secretary of State to certify human rights claims (those not involving claims of breaches of the right to life, or the prohibition on torture, inhuman or degrading treatment or punishment) by foreign national ex-offenders liable to deportation with the effect that the person 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. Claims most likely to be affected are those relying on Article 8 of the European Convention on Human Rights protecting the right to private and family life, although there is no prohibition on using it for claims relying on Article 4 prohibiting forced labour and servitude. This Act extends the provisions to all extends to all human rights claims.[30]

SUPPORT FOR CERTAIN CATEGORIES OF MIGRANT (PART 5)

39. This part of the Act 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. The provisions will apply throughout the UK. They are not yet in force; the best estimate at the moment is that they will come into force in April 2017. Much of the detail is left to regulations.

40. The Act also sets out a scheme for the transfer of responsibility for unaccompanied children between local authorities. This applies to England only but power is taken in section 73 to make regulations subject to the affirmative procedure to extend it to Scotland. Scotland is involved in voluntary transfers and the Rt Hon James Brokenshire MP wrote to Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' rights on 1 February 2016 that he had asked his officials to work with Mr Neil's officials on how best to approach local authorities in Scotland about this. The commitment to relocate a number of unaccompanied children from Europe to the UK is also found in this section.

[28] Paragraph 7, Schedule 10, Immigration Act 2016.
[29] Section 6(1) of the Human Rights Act 1998.
[30] Under s 94B of the Nationality, Immigration and Asylum Act 2002, inserted by s 17(3) of the Immigration Act 2014.

41. The then Minister, the Rt Hon James Brokenshire MP, wrote to the Rt Hon Nicola Sturgeon MSP giving her notice of that the Immigration Bill was coming on 13 August 2015. He said in that letter that

> *…we remain conscious of our commitment to discuss ways of enabling different powers in Scotland in relation to the provision of support and advice for asylum seekers, as agreed by the Smith Commission. We will take forward those discussions separately.*

Home Office support and accommodation: Section 66 and Schedule 11

42. Section 66 and Schedule 11 make significant changes to the criteria for accessing support and accommodation from the Home Office.

43. 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[31]. There will be some transitional protection for those currently receiving s 4 support.

44. People who make 'further qualifying submissions' on protection grounds will be supported under s 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 s 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 the Immigration and Asylum Act 1999[32], 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.

45. 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, new s 95A of the Immigration and Asylum Act 1999.[33] There is a power to provide section 95A support in cash,[34] Ministers stating that it would be provided in cash and at the same level as s 95 support.[35] 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 is the indication during parliamentary debates that regulations under this provision will place a time limit on applying for support under this provision. It is intended that 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. Thus if a person were receiving support from a friend at the time when they were refused and the friend threw them out , after six months (i.e. more than 28 days), or they started to need support, for example because of advanced pregnancy which meant

[31] Paragraph 1, Schedule 11, Immigration and Asylum Act 2016.
[32] By paragraph 3, Schedule 11, Immigration and Asylum Act 2016.
[33] Paragraph 9, Schedule 11, Immigration and Asylum Act 2016.
[34] Section 96(1A) Immigration and Asylum Act 1999, inserted by paragraph 10(3) of Schedule 11 to the Immigration Act 2016.
[35] House of Lords Committee debate, 03 February 2016, column 1832.

they could not fly, after more than 21 days, they would not be entitled to any support under s 95A.

46. There will be no right of appeal to the Asylum Support Tribunal against decisions to refuse or discontinue support under s 95A leaving judicial review as the only available remedy for wrongful decision-making.

47. There is no power in this part of the 2016 Act to support individuals making further qualifying submissions on grounds other than protection, for example that removal would breach article 8 of the European Convention on Human Rights protecting the right to private and family life. Individuals who have never made an asylum claim but are stateless or cannot leave the UK are similarly excluded. The power to support those on immigration bail, discussed above, may be able to be used to fill the gap as it appears to general power of support and accommodation. The Home Office may seek to limit this in guidance, but may be under pressure from the local authorities who would otherwise have to provide support, not to do so.

48. The provision which enables asylum-seeking families with children to remain supported under s 95 of the Immigration and Asylum Act 1999 until they leave the UK[36] is removed by the Act.[37] Families who reach the end of the asylum process must instead qualify for support under new s 95A of the Immigration and Asylum Act 1999. 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). It has been stated that regulations will provide for s 95 support to be discontinued after a grace period of 90 days for families whose asylum claim is finally determined and rejected[38]. 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, is proposed for this period. Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' Rights wrote to the Rt Hon James Brokenshire MP on 8 December 2015 to express the Scottish Government's concern about these provisions.

Availability of local authority support: Section 68 and Schedule 12

49. 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. And a framework for care leavers because section 68 and Schedule 12 to the Act exclude certain groups of young people (mostly at the end of the asylum/immigration process) who reach 18 from accessing to mainstream leaving care support provided by local authorities.

50. 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.[39]

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[36] Section 94(5) of the Immigration and Asylum Act 1999.
[37] By paragraph 7(5), Schedule 10 to the Immigration Act 2016
[38] 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
[39] Schedule 12, paragraph 14, amending paragraph 15 of Schedule 3 to the 2002 Act).

51. The UK 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. If local authorities do provide support, this will be on terms established by the legislation (including regulations) rather than their general powers.

Families

52. Migrant families with no access to support or accommodation are currently assisted by local authorities (the provisions for England are concerned with s 17 of the Children Act 1989). 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 human rights.[40]

53. The new framework is a response to concerns that the removal of support under s 95 of the Immigration and Asylum Act 1999 from families and care leavers at the end of the process would displace responsibility for families to local authorities.

54. The Immigration Act 2016[41] amends Schedule 3 to the 2002 Act to prevent a local authority from providing support or assistance to a family if it would qualify for support under the new Home Office regulated framework established under new paragraph 10A to Schedule 3 of that Act. The new framework is a response to concerns that the removal of support under s 95 of the Immigration and Asylum Act 1999 from families and care leavers at the end of the process would displace responsibility for families to local authorities.

55. 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 non EEA nationals lawfully present in the UK as carers of EEA national children (known as *Zambrano* carers after the case that established their right to stay in the country).

56. 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 s 95A of the 1999 Act. If the family does not qualify for support under s 95A because the person does not have a genuine obstacle to return or because they never made a claim for asylum, the family may access support under paragraph 10A provided one of the following conditions is met:
    - The family has a pending application for leave to enter/remain of a type to be specified in regulations;[42]
    - an appeal has been brought[43] or is pending;[44]
    - appeal rights have been exhausted and the family is cooperating with removal;[45] or
    - support is necessary to promote and safeguard the welfare of a child[46].

57. 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.

[40] Under an exception created by paragraph 3 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002.
[41] By paragraph 6 of Schedule 12
[42] New paragraph 10A(3) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002
[43] New paragraph 10A(4)
[44] New paragraph 10A(5)
[45] New paragraph 10A(6)
[46] New paragraph 10A(7).

58. Local authorities retain their existing powers to support families who do not qualify under the new framework. It is also intended that local authorities provide for other needs of children additional to support and accommodation under those powers.

Care leavers

59. At the moment, 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.[47] Courts in England and Wales have held that this support should be provided under the local authority's leaving care duties.[48] The UK Government's intention is to remove local authority leaving care support from young people who have exhausted their appeal rights. It is understood that this was done to make the scheme for the transfer of children more palatable. Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' Rights wrote to the Rt Hon James Brokenshire MP on 8 December 2015 to express the Scottish Government's concern about these provisions saying

> *…to cut off their support at a time, when they are at their most vulnerable is both morally wrong and also places them at serious risk of harm.*

He wrote that he understood that Home Office officials had been in touch with COSLA for their views on these proposals.

60. The provisions have the potential (depending upon the content of any regulations) to remove access to this support from other groups including those who have never regularized their status and have no leave when they reach the age of 18 years as result; young people with a pending immigration (not asylum) application (or appeal arising from this) which is not their first application for leave to enter or remain.

61. Those who will not be affected are
    - Young people with leave to enter or remain
    - Young people who are asylum seekers
    - Young people who make further qualifying submissions on asylum or protection grounds that have not been determined or whose submissions have been accepted as a fresh asylum or protection claim.[49]
    - Young people with a pending immigration application that is their first application for leave to enter or remain.[50]

62. Schedule 12 removes access to leaving care support under the Children Act 1989 from care leavers in England who reach 18 years and either do not have leave to enter or remain,[51] are not asylum seekers[52] or do not have a pending immigration application that is their first

[47] Applying paragraph 3 of schedule 3 to the Nationality, Immigration and Asylum Act 2002.
[48] *R (SO) v London Borough of Barking & Dagenham* [2010]. EWCA Civ 1101
[49] See the definition of 'asylum seeker' in s 83 of the Nationality, Immigration and Asylum Act 2002, amended by paragraph 30 of Schedule 10 to the Immigration Act 2016. The definition of an asylum seeker is the same used for access to Home Office support and accommodation.
[50] Condition B, in Schedule 12 paragraph 2A(4).
[51] 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.
[52] New paragraph 7B(1)(b)

application for leave to enter or remain[53]. and includes young people making further submissions on protection grounds.

63. 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;[54]
    - they are destitute and may bring[55] or have brought an appeal[56] in the UK;
    - they have exhausted their appeal rights and a person identified in regulations is satisfied that support should be provided.[57]

64. 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. In the absence of a clear duty and funding of provision, however, there is concern as to whether the additional support will be provided. The UK Government also envisages that, after a period of transition, young people who qualify for support under s 95A of the Immigration and Asylum Act 1999 are transferred to adult accommodation under this provision.

Local authority support: higher education tuition fees

65. By a new provision,[58] 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.

66. The provision will reverse the effect of *R (on the application of Kebede) v Newcastle* City Council [2013] EWHC 355 (Admin) in which the courts of England and Wales 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.

67. 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

68. 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

[53] 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.
[54] 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.
[55] New paragraph 10B(3).
[56] New paragraph 10B(4).
[57] New paragraph 10B(5).
[58] Section 1A inserted into schedule 3 to the Nationality, Immigration and Act 2002By paragraph 3 of Schedule 12 to the Immigration Act 2016.

Northern Ireland by regulations. The measures support and extend the voluntary scheme in place since summer 2015.[59]

Unaccompanied refugee children: relocation and support

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

70. This is the compromise adopted by the UK 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 UK Government would not commit to a specific number of children who would be relocated but accepted the need to relocate unaccompanied children from within Europe and that these young people would be granted leave to remain on entry to the UK. The UK 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.

71. The UK Government has said that the scheme will apply to children in Italy, Greece and France, who were registered in those countries prior to 20 March 2016.[60] The Minister suggested in debates that the requirement for registration would not be overly bureaucratic and that the emphasis would be on children identified as in Europe and unaccompanied before 20 March.

72. On 25 July 2016, in response to media enquiries, Home Office spokesperson stated that more than 20 children had been accepted for transfer to the UK since the Act was given Royal Assent and that the majority of these have already arrived. The UK Government said that it was in discussion with UNHCR and the Italian, Greek and French governments to strengthen and speed up mechanisms to identify, assess and transfer children to the UK and ensure this in their best interests. The spokesperson said that the Home office would prioritise cases with family links to the UK and where possible work within existing frameworks to ensure swift action to assist these children. Thus the statement does not make clear whether the 20 children were using existing routes, or new routes opened up by the amendment.

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

73. 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. Writing to the Rt Hon Nicola Sturgeon MSP on 13 August 2015, the then Minister, the Rt Hon James Brokenshire MP said

[59] 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

[60] https://www.gov.uk/government/news/unaccompanied-asylum-seeking-children-to-be-resettled-from-europe

…while implementation of this commitment is a reserved matter in relation to bodies carrying out functions which are reserved to the UK parliament, beyond that legislative consent from the Scottish Parliament may be required in respect of those bodies whose functions are not reserved to Westminster.

74. Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' Rights wrote to the Rt Hon Matthew Hancock MP, to say that the Scottish government would not support a legislative consent motion to extend these provisions "at this time" as he is not aware of any evidence of difficulties in the use of English in Scotland's public services. He wrote

    This legislation has the potential to fuel misconceptions about migrants and those of migrant heritage who play valuable roles in our public services…

75. 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.

OVERVIEW: IMMIGRATION SKILLS CHARGE (PART 8)

76. The Act makes provision for an immigration skills charge to be levied on those hiring third country nationals as skilled workers. The enabling provisions came into force on 12 July 2016 but it is intended that the charge will be levied from April 2017. 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 UK Government to fund apprenticeships, although not with the same employer who will experience the charge simply as a fee increase of £1000 per employee per year with a reduced rate of £364 for small or charitable organisations, including universities[61]. The charge will not apply to PhD level jobs or international students switching into Tier 2.

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

MINISTERIAL CORRESPONDENCE IMMIGRATION BILL

15.08.13 Rt Hon James Brokenshire MP to Rt Hon Nicola Sturgeon MSP- Advance notice of introduction of Immigration Bill & summary
15.09.16 Rt Hon James Brokenshire MP to Rt Hon Nicola Sturgeon MSP Notice of introduction of language requirement, information sharing, asylum support
15.09.16 Rt Hon Matthew Hancock MP to Rt Hon Humza Yousef MSP Language provision for public sector workers, code of practice, request for support of legislative consent motion
15.09.24 Margaret Burgess MSP to Rt Hon James Brokenshire MP concerns on right to rent, Scottish constitutional principles, tenant discrimination
15.10.13 Rt Hon James Brokenshire MP to Margaret Burgess MSP right to rent, immigration as reserved and no need for legislative consent
15.11.03 Alex Neil MSP to Rt Hon Matthew Hancock MP- English language, no support for legislative consent motion
15.11.06 Rt Hon James Brokenshire MP JB to Michael Matheson, Cabinet Secretary for Justice - notice of amendment tabled taxis & private hire licensing
15.12.08 Alex Neil MSP to Rt Hon James Brokenshire MP - asylum support, care leavers, child safeguarding
15.12.16 Alex Neil MSP to Rt Hon James Brokenshire MP - widening dispersal of unaccompanied asylum seeking children, student support
16.01.06 Michael Matheson, Cabinet Secretary for Justice, to Rt Hon James Brokenshire MP - concerns on value of reducing migration, licensing regimes
16.02.01 Rt Hon James Brokenshire MP JB to Alex Neil MSP - notice of new amendments on asylum support and news on widening of dispersal of unaccompanied children
16.02.09 Rt Hon James Brokenshire MP to Michael Matheson MSP - taxi and privaye hire vehicle Licensing
16.03.21 Lord Bates to Lord Hope - Immigration Bill Lords Report Second Day –
Scotland bill, Sewell convention