ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

The Immigration Act 2016

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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 Act 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.

2. This paper looks first at how provisions of the Immigration Act 2016 are commenced, 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

3. When the Immigration Act 2016 became law on 12 May 2016, only parts of s 61 and the general provisions at the end came into force on that date, with the immigration skills charge provisions coming into effect on 12 July 2016, two months after commencement, although the charge has not yet been imposed. The rest of the Act is commenced by order. Two commencement orders have so far been made[3]. The first brought a number of provisions into force on 31 May 2016 and, catching up with the skills charge, on 12 July 2016. The second commences provisions on a range of dates between 1 November 2016 and 1 December 2016. A set of consequential and a set of transitional provisions regulations have also been made.[4] Information on commencement is included in discussion of the relevant provisions below.

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

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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 (c. 44) at: http://www.legislation.gov.uk/uksi/2016/603/made and the The Immigration Act 2016 (Commencement No. 2 and Transitional Provisions) Regulations 2016 SI 2016 (2016/1037 (c.74().

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

applies throughout the UK (see s 95 *Extent)* with the exception of provisions on transfer of responsibility for children between local authorities (ss 69 to 72), which apply only in England and Wales. Specific 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.
- Sections 69-73 on transfer of responsibility for relevant children enabling the transfer of responsibility for unaccompanied children between local authorities under both a voluntary and compulsory scheme.

5. The use of secondary legislation to implement certain provisions in the devolved administrations 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 can only be declared incompatible. Add to this the question of the borderline between devolved and reserved matters and we can anticipate litigation in the devolved administrations. The UK Government has indicated that it does not consider that legislative consent motions are required for these extensions in Scotland (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).

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

Director of Labour Market Enforcement

6. A new role of Director of Labour Market Enforcement is established by sections 1-9 of the Immigration Act 2016 which came 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.

7. The Director's 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 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. Regulations have been passed placing the Director under a duty to cooperate with the Anti-Slavery Commissioner[5].

8. 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[7]. The Act does, however, create wide

[5] The Modern Slavery Act 2015 (Duty to Co-operate with Commissioner) Regulations 2016 (SI 2016/1043).
[6] Rt Hon Lord Bates, HL Deb, 18 Jan 2016, Col 543 at:
http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160118-0001.htm#16011840000412
[7] Rt Hon Lord Bates, 18 Jan 2016 : Col 544

information gateways to enable the Director to act as an information hub in relation to matters of labour market abuse and exploitation and these enable the Director to disclose information to the Immigration Service among a wide range of specified public bodies.

Gangmasters and Labour Abuse Authority

9. Sections 10 to 13 of the Immigration Act 2016 also came 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.

10. The Authority currently licenses suppliers of workers for the agricultural work and shellfish industries. Its licensing role will be extended to cover other industries, to 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.

Labour Market Enforcement Undertakings and Orders

11. In sections 14-30, into force on 25 November 201, the Act introduces a new regime of labour market enforcement undertakings and orders, backed by a criminal offence for non-compliance, aimed at deterring the exploitation of workers by employers. 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.

12. 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.

13. 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.

14. The Labour Market Enforcement (Code of Practice on Labour Market Enforcement Undertakings and Orders: Appointed Day) Regulations 2016 (SI 2016/1044) appoint 25 November 2016, the day on which they come into force, as the day on which a code of practice giving guidance to enforcement authorities about the exercise of their functions under ss 14 to 23 of the Immigration Act 2016 which deal with labour market enforcement undertakings and orders is brought into force. That code, entitled "Code of Practice on Labour Market Enforcement Undertakings and Orders", issued under section 25(1) of the Immigration Act 2016, was laid in draft before Parliament on 31 October 2016.

Offence of illegal working

15. 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. It inserts a new section 24B into the Immigration Act 1971.

16. Section 24(1) of the Immigration Act 1971 already makes it a criminal offence to fail to observe a condition of leave, and for someone without reasonable excuse to fail to observe a restriction placed upon him, so the power to prosecute those who work without permission was already available.

17. Speaking in the House of Commons on 13 June 2016, the Minister for Immigration, the Rt Hon James Brokenshire MP, said:

> *"The Government are committed to tacking illegal working. The Immigration Act 2016 makes illegal working a criminal offence in its own right, which ensures that wages paid to illegal migrants can be seized as the proceeds of crime, and assets may be confiscated on conviction. The Government are prioritising the implementation of that provision, which will take place on 12 July."*

18. 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[8] .

19. 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. Statistics provided by the Government showed that the Proceeds of Crime Act 2002 has not been typically used in practice to confiscate earnings from those found to be working in breach of conditions[9].

20. Transitional provision has been made[10] to ensure that persons seeking asylum who have been granted permission to work by an immigration officer do not commit a criminal offence by so doing pending the coming into effect of provisions on immigration bail.

Offence of employing an illegal worker

21. From 12 July 2016, the offence of employing an illegal worker[11] has been widened[12] so that in addition to criminalising employers who knowingly employ an illegal worker, those who have

[8] Until s.281(5) of the Criminal Justice Act 2003 comes into force, the reference to 51 weeks is to be read as a reference to six months.
[9] 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/
[10] SI 2016/712.
[11] Under s 21 of the Asylum, Nationality and Immigration Act 2006
[12] By operation of s 35 of the Immigration Act 2016

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.

22. 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.

23. See above re transitional provisions.to protect those employing persons on temporary admission with permission to work.

Other provisions on illegal working

24. 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 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: these latter come into force on 1 December 2016. Transitional provision is made while the new immigration bail provisions are not yet in force so that those granted temporary admission or released from detention by an immigration officer do not commit an offence if they have permission to work.

25. 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. These provisions come into force on 1 December 2016. Section 25, which places a duty on the Secretary of State to issue a code of practice giving guidance to enforcing authorities about the exercise of their functions under these provisions brought into force on 12 July 2016. The Labour Market Enforcement (Code of Practice on Labour Market Enforcement Undertakings and Orders: Appointed Day) Regulations 2016 (SI 2016/1044) appoint 25 November 2016 as the day on which a code of practice giving guidance to enforcement authorities about the exercise of their functions which deal with labour market enforcement undertakings and orders is brought into force. That code, entitled "Code of Practice on Labour Market Enforcement Undertakings and Orders", issued under section 25(1) of the Immigration Act 2016, was laid in draft before Parliament on 31 October 2016.

OVERVIEW: ACCESS TO SERVICES (PART 2)

Renting accommodation

26. 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 come into force in England on 1 December 2016.

27. The Immigration (Residential Accommodation) (Termination of Residential Tenancy Agreements) (Guidance etc.) Regulations (SI 2016/1060) also come into force on 1 December. They deal with the reasonable steps a landlord/landlady may take to end a tenancy, thereby providing him/herself with a defence to a charge, under s 39, of renting to a person who does not have a right to rent. The regulations also make provision for the form of the notice that must be given by the landlord/landlady moving to evict under s 33D of the Immigration Act 2014 inserted by s 40 of the Immigration Act 2016. Draft guidance on taking reasonable steps to end a residential tenancy agreement within a reasonable time was laid before parliament on 1 November 2016, stated on the gov.uk website to be 'for the courts' in England in considering the defence of taking steps to end a residential tenancy agreement.

28. 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

29. 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. As persons without leave they have no right to rent unless this is granted specifically.

30. 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[13]. It is the Government's stated intention to extend the scheme to the rest of the UK, which it is empowered to do through regulations, but the scheme has not, so far, been extended to the devolved administrations.

New criminal offences

31. The Immigration Act 2016 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 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

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

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

32. The Act creates new powers for landlords and landladies to evict persons 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.

33. 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.

34. 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.

35. 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.

36. 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'[14]. 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[15].

Driving in the UK

37. 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

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

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.

38. 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.

39. 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.

40. Concerns were expressed during the parliamentary debates that 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

41. 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 a customer does not have the correct legal status. Section 45 of, and Schedule 7 to, the 2016 Act, which deal with these matters, came into force on 1 November 2016 for the purposes of making subordinate legislation. They are not yet in force and require regulations to be made for their commencement.

42. 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.

43. 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[16].

44. The Immigration Act 2014 (Current Accounts) (Compliance &c) Regulations 2016 (SI 2016/1073) 1073 come into effect on 30 November 2017. These regulations prescribe requirements as to information, manner and form and timing for the statutory checks of current accounts. They require immigration checks (as defined) to be carried out by banks and building societies on a quarterly basis, beginning with the quarter that commences in January 2018. They prescribe the information that the Secretary of State must provide to a bank or building society and that a bank or building society must provide to the Secretary of State. A bank or building society is required to inform the Secretary of State of the steps it has taken to comply with its obligations to close or to restrict the operation of an account either during the quarter in which the steps were taken, or during the next quarter if the steps were taken within the final two weeks of a quarter. The regulations further require information to be communicated by means of a website operated by the Secretary of State for that purpose.

45. The Immigration Act 2014 (Current Accounts)(Excluded Accounts and Notification Requirements) Regulations 2016 have been laid in draft. They will prescribe current accounts excluded from the regime, viz. business accounts. The Regulations also make provision in respect of enforcement powers to be exercised by the Financial Conduct Authority by amending the Immigration Act 2014 (Bank Accounts) Regulations 2014 (SI 2014/2085), which provide for enforcement powers for the Financial Conduct Authority in respect of the prohibition imposed by s 40 of the Act, are amended to extend the Authority's enforcement powers to include breaches of the regime introduced by ss 40A to 40H.

OVERVIEW: ENFORCEMENT (PART 3)

Enforcement powers

46. The powers of immigration officers are extended significantly by the Immigration Act 2016 and include the following powers 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)[17]. 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[18];

- 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

[16] Letter of Robert Buckland QC MP, Solicitor General to Albert Owen MP, Immigration Bill – Measures on bank accounts, 04 November 2015
[17] By operation of section 46(2), Immigration Act 2016
[18] New paragraph 15A, Schedule 2, Immigration Act 1971, inserted by section 46(3), Immigration Act 2016

worker or renting to a disqualified person where there are reasonable grounds[19]; this power of search in relation to a civil penalty previously required a warrant[20].

- 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[21]; previously they were required to be trained criminal investigators under Police and Criminal Evidence Act 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[22] and seizing[23] 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[24] and searches in detention for the reasons of safety and similar reasons[25].

47. There are also changes to search powers requiring a warrant which come into force on 1 December 2016. These allow warrants to be issued for multiple premises, the addresses of which do not have to be specified. Such warrants may permit an unlimited number of entries over a specified period of time[26]. These provisions do not apply in Scotland where multiple entry warrants are not permitted.

48. Maritime powers introduced, in s 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 uses its 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.

49. 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 empowered 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.

50. Section 62 of the Immigration Act 2016 introduces a new power to cancel leave that has been extended under section 3C of the Immigration Act 1971. This comes into force on 1 December 2016. Prior to its commencement, if a person made an application for further leave before their leave expires, but the Home Office did not decide it until after that leave expires, the leave continued 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

[19] Section 47, Immigration Act 2016
[20] Section 28FB, Immigration Act 1971
[21] Section 48, Immigration Act 1971
[22] Section 51, Immigration Act 2016
[23] Section 52, Immigration Act 2016
[24] Sections 44-46, UK Borders Act 2007
[25] Para 2, Schedule 11, Immigration and Asylum Act 1999
[26] Section 54 and Schedule 8

cancel leave, the person is 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.

Immigration detention: 'vulnerable persons'

51. The Immigration Act 2016, s 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.

52. During the passage of the Act, the government published a sketch of what the guidance has to cover in the form of a draft "adults at risk" policy. Guidance was published as *Adults at risk in immigration detention: draft policy* on 26 May 2016. A revised version of the same title was laid before parliament on 21 July 2016, see https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention. Regulations brought it into effect on 12 September 2016. It is stated in the guidance that it is intended to achieve a reduction in the number of "vulnerable" people held in detention and in the time for which they can be held.

53. Ministerial statements made at the time of the publication of the Shaw review on 14 January 2016 indicated that the government intended to balance the indicators of 'vulnerability' with the risk of immigration offending etc. Cynics might say "but that is what paragraph 55.10 of the Enforcement Instructions and Guidance (now removed) tried to do.

54. The new guidance points to a much more schematised approach to the decision although there is little indication that the evidence informing it will be any better or that there are new tools with which to perform the desired balancing act. For the decision is very much thought of as a balancing act. We can detect a shift away from whether a person's account of torture or ill-treatment is believed to the question of whether, even if it is, the person should be released. The guidance states:

> *The clear presumption is that detention will not be appropriate if a person is considered to be "at risk". However, it will not mean that no one at risk will ever be detained. Instead, detention will only become appropriate at the point at which immigration control considerations outweigh this presumption. Within this context it will remain appropriate to detain individuals at risk if it is necessary in order to remove them. This builds on the existing policy and sits alongside the general presumption of liberty.*

55. This is arguably less protective in its approach than the Enforcement Guidance and Instructions Chapter 55.10 which referred to 'very exceptional' circumstances.

56. There are three levels of evidence of risk. Pregnant women are automatically be classified at the highest level. Otherwise, a person's own testimony only gets them to the first level. Professional evidence that a person may be an adult at risk gets a person to the second level. Professional evidence that the person is at risk and that detention is likely to cause harm gets a person to the highest level. A rule 35 report would appear to fall at level 2. The indicators of risk are those identified by Shaw. Being female, gay or lesbian is not regarded as an indicator of risk although being transsexual or intersex is. A "more serious" learning difficulty, psychiatric illness or clinical depression "depending on the nature and seriousness of the condition is an indicator of risk, as is a "serious" physical disability or health condition. As to

age, Shaw's recommendation of an upper age limit is not followed but being over 70 is an indicator of risk.

57. The policy states:

> *"The presumption will be that, once an individual is regarded as being at risk in the terms of this policy, they should not be detained. However, the risk factors for the individual, and the evidential weight that has been afforded to them, will then need to be balanced against any immigration control factors in deciding whether they should be detained."*

58. As to the immigration factors to be weighed against risk: length of time in detention, public protection and, ominously, "compliance issues" (rather than something more focused such as a risk of absconding) are identified as the factors.

59. Decisions on those with a positive "reasonable grounds" decision that they are a potential victim of trafficking, pending a conclusive decision, are dealt with on the basis of the Modern Slavery policy and not this guidance at all. The guidance does not address the protection of trafficked and enslaved persons who are to be considered under separate guidance.

60. What the guidance does not do, although it purports to do it, is to provide any guidance as to how to weigh evidence of risk against immigration factors.

61. The guidance must be taken into account by those to whom it is issued.

Limitation on the detention of pregnant women

62. A separate provision, section 60 of the Immigration Act 2016, in force from 12 July 2016, 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.

63. 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 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.

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

Immigration bail

65. Section 61 and Schedule 10 to the Immigration Act 2016 introduce provisions on immigration bail. These are largely not yet in force.

66. Bail or temporary admission will be replaced by a single new concept of immigration bail[27]. 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[28] or, if detained, by the Secretary of State or the First-tier Tribunal[29]. 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 fit30.

67. A recognisance or surety may also be required as a condition of granting immigration bail[31]. 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."*[32]

68. The provisions codify in statute significant parts of what was previously guidance. Whilst unlawful detention claims have spiralled (almost £10 million in 2011-13 in compensation)[33] public law challenges to that guidance had largely dried up. The fact that more aspects governing detention and release from detention have been codified is likely to affect the nature of challenges brought against detention.

69. It is hard to see the logic of further codification, especially when the drafters of immigration legislation are heavily criticised, for example in *R (Iqbal) v SSHD* [2015] EWCA Civ 838 where Elias LJ said:

> *"I cannot, however, leave this judgment without observing how abstruse the law has become in this area. That is always a weakness but particularly so when so many immigrants are litigants in person with precious little, if any, understanding of English law. It is telling that in this case the Secretary of State had changed her view as to the proper interpretation of section 3C, an important provision which affects the legal rights of immigrants in numerous ways. Also it is difficult to identify precisely which laws were in force at any particular time. ….. firefighting is not the way to produce a rational or consistent set of rules; and the process does not sit easily with the rule of law, and in particular the principle that litigants should be able to discover the laws applicable to their circumstances. There is an overwhelming need for a rationalisation and simplification of this area of law."*

70. 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

[27] Paragraphs 1(1) and 1(3), Schedule 10, Immigration Act 2016
[28] Paragraph 1(1), Schedule 10, Immigration Act 2016
[29] Paragraph 1(3), Schedule 10, Immigration Act 2016
[30] Paragraph 2(1), Schedule 10, Immigration Act 2016
[31] Paragraph 2(4), Schedule 10, Immigration Act 2016
[32] Lord Keen of Elie, Immigration Bill, House of Lords Committee, Hansard, 01 Feb 2016, Column 1658
[33] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib16.htm

exceptional circumstances. This provision will be necessary, following the repeal of s 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 but it is unclear how this power will be applied.

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

Automatic bail hearings

72. 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. These provisions may affect how challenges to instances of lengthy detention are brought

Electronic monitoring conditions

73. 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.

74. 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[34]. This has the effect of binding the Tribunal which is further prevented from varying an electronic monitoring condition[35]. 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[36] 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)

[34] Paragraph 7, Schedule 10, Immigration Act 2016
[35] Paragraph 8(4), Schedule 10, Immigration Act 2016
[36] Section 6(1) of the Human Rights Act 1998

75. 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[37]. The provisions come into force on 1 December 2016.

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

77. The Government stated that reasons why the power should not be applied in particular cases would be fully considered on an individual basis[38]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[39].

78. The certification of the human rights claim can be challenged 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

79. 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

80. 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.

81. 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

[37] Under section 94B of the Nationality, Immigration and Asylum Act 2002, inserted by section 17(3) of the Immigration Act 2014
[38] 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
[39] Lord Keen of Elie, House of Lords, Hansard, 15 March 2016, Column 1829 at: http://www.publications.parliament.uk/pa/ld201516/ldhansrd/lhan126.pdf

repealed[40]. There will be some transitional protection for a period of time for those currently receiving s 4 support.

82. 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 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 the Immigration and Asylum Act 1999[41], 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.

83. 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, s 95A of the Immigration and Asylum Act 1999, inserted by the Immigration Act 2016[42]. There is a power to provide s 95A support in cash[43], Ministers stating that it would be provided in cash and at the same level as s 95 support[44]. 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. It was indicated 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 s 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 s 95A of the Immigration and Asylum Act 1999 leaving judicial review as the only available remedy for wrongful decision-making.

84. 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.

[40] Paragraph 1, Schedule 11, Immigration and Asylum Act 2016
[41] By paragraph 3, Schedule 11, Immigration and Asylum Act 2016
[42] Paragraph 9, Schedule 11, Immigration and Asylum Act 2016
[43] Section 96(1A) Immigration and Asylum Act 1999, inserted by paragraph 10(3) of Schedule 11 to the Immigration Act 2016
[44] House of Lords Committee debate, 03 February 2016, column 1832

85. 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[45] is removed by the Immigration Act 2016[46]. 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 s 95 support to be discontinued after a grace period of 90 days for families whose asylum claim is finally determined and rejected[47]. During this time the Home Office and local authority will encourage a voluntary return or take the family through the family returns process.

Local authority support: families with children

86. 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 s 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.

87. Migrant families with no access to support or accommodation are currently assisted by local authorities under their duties under 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.

88. The Immigration Act 2016[48] 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.

89. 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:

[45] Section 94(5) of the Immigration and Asylum Act 1999
[46] By paragraph 7(5), Schedule 10 to the Immigration Act 2016
[47] 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
[48] By paragraph 6 of Schedule 12

- they have a pending application for leave to enter/remain of a type that will be specified in regulations49;
- they could bring a statutory appeal50 or have a pending statutory appeal51;
- they have exhausted their appeal rights and are cooperating with removal52; or
- support is necessary to promote and safeguard the welfare of the child53.

90. 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.

91. 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.

92. 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

93. 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.

94. 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[54]. 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[55] and this support should be provided under the local authority's leaving care duties[56].

95. 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[57], are not asylum seekers[58] or do not have a pending immigration application

[49] New paragraph 10A(3) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002
[50] New paragraph 10A(4)
[51] New paragraph 10A(5)
[52] New paragraph 10A(6)
[53] New paragraph 10A(7)
[54] Sections 23C, 23CA, 23CZA, 23D 24A and 24B Children Act 1989
[55] Applying paragraph 3 of schedule 3 to the Nationality, Immigration and Asylum Act 2002
[56] R (SO) v London Borough of *Barking & Dagenham* [2010]. EWCA Civ 1101
[57] 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.
[58] New paragraph 7B(1)(b)

that is their first application for leave to enter or remain[59]. 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.

96. 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 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.

97. 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 regulations60;
- they are destitute and may bring61 or have brought an appeal62 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 provided63.

98. 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, local authorities are likely to be unable to provide the additional support. 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. As above, much of the detail of the new provisions is left to regulations.

Local authority support: higher education tuition fees

99. By a new provision, section 1A inserted into schedule 3 of the Nationality, Immigration and Act 2002[64], 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.

[59] 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.
[60] 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
[61] New paragraph 10B(3)
[62] New paragraph 10B(4)
[63] New paragraph 10B(5)
[64] By paragraph 3 of Schedule 12 to the Immigration Act 2016

100. 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.

101. 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

102. Sections 69 to 73 of the Immigration Act 2016 came into force on 31 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[65].

103. 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.

104. ILPA took the view that if a child needs to be moved to a different local authority then responsibility should be transferred with the child, but that a child should only ever be moved where this is in their best interests and that the stage at which the child is moved to another local authority is very relevant to whether this is in their best interests. 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.

Unaccompanied refugee children: relocation and support

105. The Secretary of State is required by s 67 of the Immigration Act 2016, in force since 31 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.

106. 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 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.

[65] 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

107. The government has announced a few details of the resettlement of unaccompanied refugee children, stating that "this scheme will apply to children in Italy, Greece and France, who were registered in those countries prior to 20 March 2016. The government will be working with local authorities to form details of the scheme"[66]. So far all cases of children coming from elsewhere in Europe to the UK have been Dublin cases. The government's alleged failure to give effect to s 67 is now the subject of a challenge in the High Court, which has been granted permission.

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

108. Section 77 of the Immigration Act 2016, into force from 21 November 2016, 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.

109. 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.

110. Risks have been identified of discriminatory behaviour or vexatious complaints towards black and minority ethnic or disabled people made on the basis of accent, race or speech impediment. 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)

111. 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[67]. The charge will not apply to PhD level jobs or international students switching.

[66] https://www.gov.uk/government/news/unaccompanied-asylum-seeking-children-to-be-resettled-from-europe
[67] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-03-24/HCWS660/