

ILPA EVIDENCE TO THE EQUALITIES AND HUMAN RIGHTS COMMITTEE OF THE SCOTTISH PARLIAMENT RE DESTITUTION, ASYLUM AND INSECURE IMMIGRATION STATUS IN SCOTLAND

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 organisations.

ILPA focuses in these submissions on the provisions of the Immigration Act 2016, pertaining to accommodation and support, because we consider it important that the enquiry have regard to the effect those provisions will have when they come into force in Scotland. We also comment briefly on legal advice.

'An insecure immigration status'

The Immigration Act 2016 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 Kingdom¹. 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.

The hostile environment problematises the notion of what it is to have an insecure immigration status. The intention is that hostility be directed at those with no leave. But the effect is that hostility is directed at those who cannot evidence that they have leave, or indeed citizenship. Such persons may find it difficult to rent property, find work or open a bank account and those difficulties are likely to be compounded where they fit the stereotype the person policing their entitlement has of 'the foreigner'.

We have concentrated in this submission on the provisions with the closest nexus to destitution: accommodation and support but those whose immigration status entitles them to work may find that provisions pertaining to employing a person who does not have permission to work, opening a bank account for a person with no leave, or losing a vehicle that has been driven by a person without leave all increase reluctance to employ them or make it more difficult for them to receive their wages.

Devolution and the Immigration Act 2016

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

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

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.

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 have been 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 devolved matters).

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 can 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).

Devolution featured heavily in the report on the Bill by the House of Lords Select Committee on the Constitution² 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

² <http://www.publications.parliament.uk/pa/ld201516/ldselect/ldconst/75/7502.htm>

of the Bill dealing with illegal working in licensed premises, residential tenancies and support under Part 5, saying

“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, the Rt Hon Lord Bates, 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”

ACCESS TO SERVICES

Residential tenancies

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. The measures have wide implications in their potential for discrimination and breaches of human rights. They came into force in England on 1 December 2016, but, like the provisions of the Immigration Act 2014 on which they build, have yet to be extended to Scotland.

Immigration Act 2014

It is necessary to understand this Act to understand the Immigration Act 2016. 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. Short term lets are excluded from the scheme, as are rentals where the property is not the tenant's main home in the UK. 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. While it may be that if a prospective landlord or landlady were to telephone the Home Office then they would be told that the Secretary of State would grant that right, that depends upon the landlord or landlady, perhaps with a queue of other prospective tenants keen to take the accommodation, making the call at all. Ironically, such asylum seekers may find themselves destitute within the Home Office definition (Immigration and Asylum Act 1999 s 95), as persons with no adequate accommodation and no means of obtaining it, not because they lack means but because no one will rent to them.

The 'right to rent' scheme was extended to the whole of England on 01 February 2016³. It is the Government's stated intention to extend the scheme to the rest of the UK, which it has power to do through regulations, but the scheme has not, so far, been extended to the devolved administrations.

The right to rent in the 2016 Act

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 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. The extent to which these will add to the deterrence effect of a £3000 fine on landlords and landladies is difficult to calibrate.

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. The provisions on the face of the Act address the law of England and Wales. 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. 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 provisions for England and Wales are that 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.

³ Immigration Act 2014 (Commencement No. 6) Order 2016/11

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 ground for a landlord/landlady to obtain possession of the property, which is 'mandatory', in the sense that the courts of England and Wales have 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. The court does, however, have a discretion to sever the tenancy and to transfer it to another occupier of the premises who does have a right to rent.

Where the Secretary of State has not issued a notice to the landlord/landlady, but the landlord/landlady becomes aware that a person does not have a right to rent, for example through their periodic checks, then the landlord/landlady can seek possession of the property as they would for any other tenant, as new section 33E inserted into the Immigration Act 2014 makes it an implied term of a residential tenancy agreement that the landlord may terminate a tenancy if the premises are occupied by an adult who is disqualified under a residential tenancy agreement.

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.

These provisions apply in Wales as well as England although Wales has taken a very different approach to homelessness, with a sharp focus on prevention and early intervention.

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'⁴. 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 documents⁵.

Power to cancel leave

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 came into force on 1 December 2016. Prior to its commencement, if a person made an application for further leave before their leave expired, but the Home Office did not decide it until after that leave expired, 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 fails to comply with a condition of their leave or has used deception in their application. As there is no right of appeal or administrative review of a decision to cancel leave, the person is left with no leave until such time as the Home Office made its decision on any new substantive application, the duration of time being a matter over which the person has no control, rendering them an overstayer, facing all the rigours of the hostile environment, in the meantime.

Immigration bail

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

⁴ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468934/horr83.pdf

⁵ <http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99>

Bail or temporary admission will be replaced by a single new concept of immigration bail.⁶ The language of immigration bail, with its connotations of criminality, is stigmatise those with an insecure immigration status, including persons seeking asylum.

The Schedule contains a power under paragraph 9 enabling the Secretary of State to provide or arrange for the provision of support and accommodation to a person on immigration bail to enable them to meet conditions of bail (such as the restriction as to residence) but only in exceptional circumstances. Following the repeal of s 4 of the Immigration and Asylum Act 1999 (see below), this will be the only provision broad enough to encompass support for destitute persons who have never claimed asylum, and those who have but do not meet eligibility criteria for other forms of support. On its face it is a power broad enough to be used to provide accommodation to anyone is on immigration bail, not just those at the point of release from detention.

PART 5: SUPPORT FOR CERTAIN CATEGORIES OF MIGRANT

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 persons who have never claimed asylum; 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. The government commitment to relocate a number of unaccompanied children from Europe to the UK, following the amendment introduced by Lord Dubs, is also found in this section.

Home Office support and accommodation

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 the Westminster parliament before the changes can come into force.

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.⁷ There will be some transitional protection for a period of time for those currently receiving s 4 support. This marks the end of provision to support single adults and couples who have never claimed asylum.

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 1999,⁸ 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

⁶ Paragraphs 1(1) and 1(3), Schedule 10, Immigration Act 2016

⁷ Paragraph 1, Schedule 11, Immigration and Asylum Act 2016

⁸ By paragraph 3, Schedule 11, Immigration and Asylum Act 2016

permission to bring a judicial review of a decision to reject further submissions as a fresh claim for protection.

Persons seeking asylum 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 2016.⁹ There is a power to provide s 95A support in cash,¹⁰ Ministers stating that it would be provided in cash and at the same level as s 95 support.¹¹ 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.

There is no power in this part 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 eight 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.

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 UK¹² is removed by the Immigration Act 2016.¹³ 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.¹⁴ 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

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

⁹ Paragraph 9, Schedule 11, Immigration and Asylum Act 2016

¹⁰ Section 96(1A) Immigration and Asylum Act 1999, inserted by paragraph 10(3) of Schedule 11 to the Immigration Act 2016

¹¹ House of Lords Committee debate, 03 February 2016, column 1832

¹² Section 94(5) of the Immigration and Asylum Act 1999

¹³ By paragraph 7(5), Schedule 10 to the Immigration Act 2016

¹⁴ 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

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, opening the door to Human Rights Act challenges.

Migrant families with no access to support or accommodation are currently assisted by local authorities under their duties under s 22 of the Children (Scotland) Act 1985 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.

The Immigration Act 2016¹⁵ 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.

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

- they have a pending application for leave to enter/remain of a type that will be specified in regulations¹⁶;
- they could bring a statutory appeal¹⁷ or have a pending statutory appeal¹⁸;
- they have exhausted their appeal rights and are cooperating with removal¹⁹; or
- support is necessary to promote and safeguard the welfare of the child²⁰.

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.

Local authorities retain their powers to support 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 Children Act powers.

¹⁵ By paragraph 6 of Schedule 12

¹⁶ New paragraph 10A(3) of Schedule 3 to the Nationality, Immigration and Asylum Act 2002

¹⁷ New paragraph 10A(4)

¹⁸ New paragraph 10A(5)

¹⁹ New paragraph 10A(6)

²⁰ New paragraph 10A(7)

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

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. 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.

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.²¹

Schedule 12 of the Immigration Act 2016 removes access to leaving care support under the Children Act 1989, the applicable legislation in England, from care leavers who reach 18 years and either do not have leave to enter or remain,²² are not asylum seekers²³ or do not have a pending immigration application that is their first application for leave to enter or remain.²⁴ 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.

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. 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. He also wrote to the Rt Hon James Brokenshire MP on 8 December 2015 to express the Scottish Government's concern about removing local authority leaving care support from young people who have exhausted their appeal rights²⁵ 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.

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;²⁶

²¹ Applying paragraph 3 of schedule 3 to the Nationality, Immigration and Asylum Act 2002

²² 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.

²³ New paragraph 7B(1)(b)

²⁴ 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.

²⁵ Immigration Act 2016, Schedule 12.

²⁶ 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

- they are destitute and may bring²⁷ or have brought an appeal²⁸ in relation to their application that is not required to be brought from outside the UK;
- they have exhausted their appeal rights and a person identified in regulations is satisfied that support should be provided.²⁹

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

By a new provision, s 1A inserted into schedule 3 of the Nationality, Immigration and Act 2002³⁰, 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.

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.

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

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.³¹

²⁷ New paragraph 10B(3)

²⁸ New paragraph 10B(4)

²⁹ New paragraph 10B(5)

³⁰ By paragraph 3 of Schedule 12 to the Immigration Act 2016

³¹ 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

Under the voluntary scheme, a local authority may make arrangements with another local authority in England to transfer an unaccompanied child and the responsibility for their care. The child then becomes the responsibility of the second local authority and is treated in law as if they had always been cared for by that local authority. The Immigration Act 2016 also makes provision for a compulsory scheme under which the Home Office may order local authorities to take responsibility for children if they do not come forward voluntarily to offer assistance. Local authorities are placed under a duty to provide information to the Home Office if requested to do so, for example about the numbers of available foster carers in their area. The Home Office may direct that the local authority comply with the scheme but must give 14 days written notice during which time the local authority may make representations for the Home Office to change or withdraw its direction. The Government states that its aim is to use the voluntary scheme as far as possible and only to use the compulsory powers if these become necessary.

The Immigration Act 2016 defines 'relevant children' who may be transferred to another local authority under the scheme. They include unaccompanied children who make a claim for asylum or for protection under Articles 2 or 3 of the European Convention on Human Rights (protecting the right to life and prohibiting torture and ill-treatment). The legislation also allows for regulations to be made at a later date permitting the transfer of other unaccompanied children who do not have leave to remain (which could include, for example, trafficked children making other types of application) and the transfer of children who have been granted leave to enter or remain. The Government stated that it included this last category to enable children to be transferred under the scheme where they were brought to the UK under a resettlement scheme. The scheme is currently only applied to unaccompanied children who are seeking asylum seekers.³²

Local authorities in which the numbers of unaccompanied asylum seeking children are higher than 0.07% of the population of children in the area (currently Kent and some London boroughs) will be able to use the transfer scheme to refer children to another local authority. The intention behind the scheme is to make provision for newly arrived children but there are no time limits in the legislation itself to prevent children being transferred at a later stage or to prevent children being left in limbo where delays arise in the process. Statutory guidance on safeguarding and promoting the welfare of children issued by the Department for Education, however, requires local authorities to promote permanence and stability in their care of looked after children and to ensure that changes to a child's placement do not disrupt their education or training.

The Department for Education and the Home Office have issued a protocol giving guidance on the transfer process³³ which states that the transfer decision should be made as soon as practicable, and ideally within 48 hours of the arrival of the child into care, unless it would be in the child's best interests to defer that decision. It also states that where children are settled and established in a local authority area, the local authority may make the decision that it is not in the best interests of the child for them to be moved.

The protocol states that a decision to transfer a child under the scheme must take into account their best interests and provides guidance on assessing the best interests of the child. The assessment includes the need to take into account the child's wishes and feelings in the decision about the transfer to another local authority, and their welfare. Other considerations include

³² Interim Transfer Protocol for Unaccompanied Asylum Seeking Children, Department for Education, Home Office, Department for Communities and Local Government, 01 July 2016
<https://www.gov.uk/government/publications/unaccompanied-asylum-seeking-children-interim-national-transfer-scheme>

³³ *ibid*

matters relating to their personal identity, their care, protection and safety, their health needs and education as well as access to legal representation. The decision on the child's transfer must be recorded in writing. The protocol makes clear that age assessments should not be a routine part of a local authority's assessment of unaccompanied children but, where age is disputed, it is the local authority to which they are transferred that is responsible for the age assessment process.

LEGAL ADVICE

Persons at risk of destitution need legal advice on their rights and entitlements. If they will obtain no support unless they cooperate in their departure from the UK, this is most likely to be heard if explained to them by an independent person who puts their interests first and acts on their instructions. If they are entitled to support, for example because to deny it them would breach their human rights, they need skilled advice and representation.

Persons with limited leave may need advice: the limits on their leave may affect their rights and entitlements, or they may need to consider their immigration status. For example resettled Syrians given two years' humanitarian protection need advice on whether to submit an application for recognition as a refugee.

There are challenges when persons seeking asylum, those granted leave or persons with an insecure status are spread throughout Scotland. Legal advice on immigration is very much concentrated Glasgow and Edinburgh (with some private immigration law advice concentrated around Aberdeen but for a very different client group from the destitute). There are also challenges where there is a lack of interpreters in the area where the person lives.

This will only be tackled by providing experienced lawyers with clear incentives to provide surgeries and in some cases ultimately develop a presence in new areas. It is simply more economically viable to sit in an office in a big city with clients coming through the door than to put in the time travelling and waiting. The market will not lure lawyers to these new areas. If interpreter travel costs and time are not properly remunerated, they will not travel. It is vital that the question of whether there is adequate legal provision be addressed before persons are dispersed, not afterwards.

EFFECT OF LEAVING THE EUROPEAN UNION

Leaving the European Union will affect both EEA nationals and third country nationals to whom European legislation applies: in the case of the UK persons seeking asylum and the trafficked, because the UK is not part of the Common Immigration System and therefore EU level guarantees do not apply to other persons with an insecure immigration status.

The "reception directive" (original not recast: 2003/3/EC) provides important minimum standards for the treatment of persons seeking asylum just as Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims does for trafficked persons. Directive 2004/83/EC, the "Qualification Directive" provides minimum standards for refugees and others granted international protection.

Governments will have to decide how much of these instruments to preserve on Brexit and how to phase them out subsequently. They will also have to address the rights and entitlements of EU nationals if no special status is conferred on them. Some risk being regarded as having an insecure immigration status, for example the 'self-sufficient' such as partners of British nationals who do not themselves work but are held by the Home Office to lack the 'comprehensive sickness insurance'

they require to be treated as self-sufficient under EU law, because the Home Office does not regard access to the National Health Service as meeting that requirement.

Access to services in Scotland could be protected by clarifying which matters are within the competence of the Scottish parliament or require the legislative consent of the Scottish Parliament prior to enactment. Ongoing political and inter-governmental cooperation between Holyrood and Westminster would be needed to achieve this.³⁴

Many matters affecting the rights and entitlements of EEA and third country nationals, for example in housing law, are devolved. Further devolution could bring aspects of the rights of EU/EEA and third country nationals within the legislative competence of the Government in Scotland, allowing it to reach its own settlement. There is a potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations.³⁵

Where a matter is devolved, but parts of it are held to be reserved because of their immigration character, we suggest that it might well be less of a drain on the capacity and resources of the devolved administrations to have control of these matters, rather than have to accommodate an immigration regime that, for example in respect of housing in Scotland, runs counter to the its approach.

Many of the exchanges on the 2014 and 2016 Act, setting out the positions of the Government and the devolved administrations, are contained in letters.³⁶ These are not always easy to find and we do not consider that intergovernmental and interparliamentary dialogue between Whitehall, Westminster and the devolved jurisdictions on these matters is transparent or accessible.

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³⁴ See further *The implications for Scotland of a vote in the EU referendum for the UK to leave the EU*, Maria Fletcher, Nina Miller Westoby and Sarah Craig, University of Glasgow 1 June 2016. Available at <http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the>

³⁵ See for example the discussion in George Kerevan's *It's complicated, but Scotland can stay in the single market, here's how* 31 October 2016, available at <http://www.thenational.scot/comment/george-kerevan-its-complicated-but-scotland-can-stay-in-the-single-market-heres-how.24207>

³⁶ See, above. *Inter alia*, Rt Hon James Brokenshire MP to Michael Matheson MSP on 9 February 2016; Alex Neil MSP, Cabinet Secretary for Social Justice, Communities and Pensioners' Rights wrote to the Rt Hon James Brokenshire MP on 8 December 2015.