JOINT OPINION OF COUNSEL

for

THE SCOTTISH REFUGEE COUNCIL &
LEGAL SERVICES AGENCY LTD

Introduction

1. We refer to our letter of instruction of 21 December 2016; the consultation which took place on 13 February 2017; and subsequent correspondence, resting in so far as relevant with an email dated 24 April 2017. We are asked, on behalf of the Legal Services Agency; the Scottish Refugee Council; and the Immigration Law Practitioners' Association, for our opinion as to various matters arising out of the changes to the support provided to asylum seekers and their families, and to unaccompanied asylum seeking children, which have been or are to be made by way of the Immigration Act 2016 (the "**2016 Act**"). We understand that those instructing this opinion wish to disseminate its contents for the purposes of providing training on the 2016 Act and its impact on asylum seekers, their families, and unaccompanied children seeking asylum, and further to assist with

the identification of any appropriate legal challenge. Whilst we do not consider it to be possible to formulate any such challenge in the absence of implementing Regulations, we are happy for our opinion, or excerpts therefrom, to be circulated in the manner which those instructing it otherwise suggest. As discussed in outline at the consultation, we would intend to provide a further opinion, speaking more particularly to the possible legal challenges, once the Regulations in question have been made.

2. The particular questions arising from the 2016 Act in respect of which our opinion has been sought are set out in the letter of instruction as follows (original headings):

Constitutional Questions

(1) Is the failure of the Government to engage the Sewel Convention as regards the 2016 Act justiciable? **[§62]**

(2) Is the Government's use of implementing Regulations as regards the 2016 Act justiciable? **[§44]**

Support for Migrant Children and Young People

(3) What impact will the asylum support provisions at section 66 and section 68 of the 2016 Act and its forthcoming implementing Regulations have on existing primary legislation in respect of support for asylum seeking and migrant children and young people (including children within families and separated children)? **[§§33-61]**

(4) What impact will the asylum support provisions at section 66 and section 68 of the 2016 Act and its forthcoming implementing Regulations have on existing primary legislation in respect of support for asylum seeking and migrant young people (including formerly looked-after children)? **[§§33-61]**

(5) Should any negative impacts be identified in respect of points 3 and 4 above, as opposed to the current system, are these justiciable? **[§§45, 47, 49-50, 52, 57-58, 61]**

(6) What legal remedies would be open to asylum seeking and migrant children and young people in respect of challenging negative decisions by the Home Office and/or local authorities regarding rights to access support? **[§63]**

Legal Standing

(7) Should any potential legal challenges be identified in respect of any of the above points, does an individual require to be identified to enable litigation in this area? **[§64-65]**

3. Our opinion in relation to the various matters set out under the foregoing headings is provided at the paragraphs indicated in square brackets. Particularly in light of the 'educational' brief set out in our letter of instruction, some background as to the current system is required in order to put the opinions which we give, particularly regarding the third and fourth questions, into context. That is given after an introduction to the 2016 Act itself.

The 2016 Act

4. The long title of the 2016 Act identifies it as "[a]n Act to make provision about the law on immigration and asylum; to make provision about access to services, facilities, licences and work by reference to immigration status; to make provision about the enforcement of certain legislation relating to the labour market; to make provision about language requirements for public sector workers; to make provision about fees for passports and civil registration; and for connected purposes". The Explanatory Note to the 2016 Act prepared by the Home Office identifies the purpose of the 2016 Act more clearly, as being "to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom"[1].

5. Although immigration is a reserved matter within the meaning of Schedule 5 to the Scotland Act 1998[2], the scope of the 2016 Act means that it directly impacts

[1] 2016 Act, Explanatory Note para 2.

[2] Strictly, "immigration including asylum and the status and capacity of persons in the United Kingdom who are not British citizens": Scotland Act 1998, Sch 5 para B6.

on a number of areas of law which, by virtue of not being reserved, are devolved to the Scottish Parliament—such as the provision of local authority support to children and other persons 'in need'. The 2016 Act further makes significant reforms to the provision of central government administered so-called 'asylum support' to those refused asylum or otherwise denied protection in the United Kingdom. It is the latter two aspects of the 2016 Act—in relation to local authority and central government administered asylum support—which are understood to be of particular interest to those instructing this opinion. Those aspects are accordingly focused on in what follows. Prior to their being considered it is necessary, not least because the relevant amendments are not yet in force, to give an overview of the current system which governs the support available to those seeking asylum or otherwise seeking protection in the United Kingdom—including, where appropriate, their families.

The current (pre-2016 Act) system

6. Asylum seekers (including 'failed' asylum seekers) and other persons claiming or having claimed protection in the United Kingdom—whether directly, or indirectly as a dependant, and whether under international law[3], EU law[4], or the ECHR[5]—are excluded from entitlement to mainstream welfare benefits in the same way as

[3] Alternatively, the grant of refugee status. Claims for asylum in the United Kingdom are determined under reference to the Convention & Protocol Relating to the Status of Refugees (Geneva, 28 July 1951; New York, 16 December 1966) ("**Refugee Convention**"). They are further subject to the requirements of the Qualification Directive (see below) as given effect in the United Kingdom by The Refugee or Person in Need of International Protection (Qualification) Regulations 2006/2525. Grants of refugee status (i.e. asylum) are government by paragraph 334 of the immigration rules.

[4] By way of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (the "**Qualification Directive**"). Protection granted under the Qualification Directive is generally termed 'Humanitarian Protection'. Grants of humanitarian protection are governed by paragraph 339C of the immigration rules.

[5] European Convention on Human Rights and Fundamental Freedoms (Rome, 4 November 1950). Claims will generally though not always be articulated in terms of Article 8 ECHR (right to respect for private and family life) or Article 3 ECHR (prohibition on torture and inhuman or degrading treatment.

all other non-EEA nationals who require but do not have leave to enter or remain in the United Kingdom[6]. There are three relevant categories of benefit claimant for present purposes: the adult asylum seeker; the asylum seeking family[7]; and the unaccompanied chid who is seeking asylum. There is a further sub-category of claimant relevant to all but the latter, being the 'failed' asylum seeker or person who has otherwise been unsuccessful in obtaining protection in the United Kingdom. For simplicity, the terms 'asylum' and 'protection' are used interchangeably in what follows, as the distinctions between the types of protection—although legally highly relevant for the grant of leave to remain—do not materially impact on entitlement to support.

7. Support for the three categories of benefit claimant identified also falls into roughly three categories: central government support under section 95 of the Immigration and Asylum Act 1999 (the "**1999 Act**"); local authority support under either the Children (Scotland) Act 1995 (the "**1995 Act**") or the Social Work (Scotland) Act 1968 (the "**1968 Act**"); and central government support under section 4 of the 1999 Act.

8. The first type of support mentioned is provided to "asylum seekers" (as defined in section 94 of the 1999 Act) whose claims have been recorded by the Secretary of State but not determined, whether by the Secretary of State or by the tribunal on appeal. Such support is available under section 95 of the 1999 Act as given effect to by The Asylum Support Regulations 2000/704 (the "**2000 Regulations**").

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[6] 1999 Act, s 115. The exclusion also applies to those who have such leave subject to a condition of 'no recourse to public funds' or which has been given as a result of a maintenance undertaking. The 'mainstream' benefits referred to are universal credit; income-based jobseeker's allowance; state pension credit; income-related employment and support allowance; personal independence payments; attendance allowance; severe disablement allowance; carer's allowance; disability living allowance; social fund payments; and child benefit.

[7] An asylum claim may be submitted by any person, of any age. Although every person has the right to make an application for asylum on their own behalf, it is common for a claim being made by a family member to be submitted in the name of one of the adults with any children (and any partner) included as dependants on the adult's claim. The term 'asylum seeking family' is used to describe such a scenario.

9. Support under section 95 of the 1999 Act ("**Section 95 Support**") is, in common with the other type of asylum support referred to below, only available where the asylum seeker or the asylum seeker and his or her dependants appear to the Secretary of State to be destitute or likely to become destitute within 14 days[8]. Assessment of whether or not an individual (and his or her dependants) is destitute for the purposes of section 95 of the 1999 Act is to be undertaken by the Secretary of State in accordance with the 2000 Regulations which set out the income and assets which require to be taken into and left out of account[9]. The assessment of destitution is otherwise a matter for the Secretary of State.

10. Section 95 Support—which, other than the provision of accommodation, is payable in cash —is, with one qualification, only available to the sub-category of asylum seekers (with or without children) whose claims have not yet been determined against them. The qualification relates to failed asylum seekers who have dependant children under the age of 18. In that event, such persons continue to receive Section 95 Support for as long as they and their dependant child or children remain in the country[10]. The qualification is, for persons who have failed to cooperate with removal directions issued in respect of them by the Secretary of State, expressly contradicted by paragraph 6 of Schedule 3 to the Nationality, Immigration and Asylum Act 2002 (the "**2002 Act**"). As discussed below, that provision operates to exclude such persons from eligibility for Section 95 Support[11]—notwithstanding that section 94 of the 1999 Act as currently drafted operates to include them. A similar point arises from the terms of paragraph 7A of Schedule 3[12] regarding those certified by the Secretary of State as having failed without reasonable excuse to leave the United Kingdom voluntarily. The foregoing difficulties (the practical consequences of which, if any,

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[8] The prescribed period in s 95(1) 1999 Act. 2000 Regulations, reg 7.

[9] 2000 Regulations, reg 6.

[10] Section 94(5) provides that "[i]f an asylum seeker's household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum seeker while—(a) the child is under 18; and (b) he and the child remain in the United Kingdom".

[11] Being provided under "a provision of the [1999 Act]": Schedule 3, para 1(1)(l).

[12] The terms of paragraph 7A of Schedule 3 refer to a person being treated as an asylum seeker for the purposes of Part VI of the 1999 Act by virtue of section 94(3A). There is no such provision.

are in any event not known[13]) have now been resolved by the 2016 Act, by virtue of section 94(5) of the 1999 Act and paragraph 7A of Schedule 3 being repealed[14].

11. Section 95 Support is available for adult asylum seekers and such persons with families in respect of both accommodation (where no adequate accommodation is otherwise available or obtainable) and "essential living needs". The latter 'needs' are only negatively defined in the 2000 Regulations so as to exclude certain items (e.g. toys and other recreational items, and entertainment expenses). The level of support for essential living needs is set by the 2000 Regulations, which provide that, where the Secretary of State has decided that Section 95 Support should be payable (i.e. the test for destitution has been satisfied), then "[a]s a general rule, asylum support in respect of the essential living needs of that person may be expected to be provided weekly [and for each person] in the form of a cash payment of £36.95"[15]. Additional cash support, to be 'added on' to the relevant £36.95 amount, is payable in respect of pregnant women (the additional sum being £3) and those with children between the ages of 1 and 3 (again, £3) and under the age of 1 (£5)[16]. The level of support payable, and the exclusion of certain items from the definition of "essential living needs", is currently the subject of litigation both in Scotland[17] and in England & Wales[18]. Where in individual cases the level or availability of support is disputed (e.g. because an item was taken into account that ought not to have been taken into account), an applicant for Section 95 Support has a right of appeal to the First-tier Tribunal (Asylum Support)[19] and thereafter the possibility of judicial review.

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[13] There is a suggestion that paragraph 7A of Schedule 3, though in force as a matter of law, was never in fact put into effect: *Macdonald's Immigration Law and Practice* at p 1348 (n 9).

[14] By paragraph 7(5) of Schedule 11, the 2016 Act. It is arguable that paragraph 6 of Schedule 3 impliedly repealed section 94(5) in so far as it applied to persons who had failed to cooperate with removal directions. The same may not be said for paragraph 7A.

[15] 2000 Regulations, reg 10.

[16] 2000 Regulations, reg 10A.

[17] *OO & NN v Secretary of State for the Home Department (Equality & Human Rights Commission intervening)* (heard 7-10 February 2017; decision awaited from Lady Wolffe).

[18] *R (SG, K, YT & RG) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2016] EWHC 2639 (Admin); on appeal (judgment awaited).

[19] 1999 Act, s 103(1).

12. Section 95 Support is intended to be the principal form of support available to adult asylum seekers and their families whilst the asylum seeker is waiting for the claim to be determined (a temporary form of support, under section 98 of the 1999 Act, is also available whilst the application for Section 95 Support is outstanding, as opposed to the application for asylum). The availability of Section 95 Support does not, however, remove the obligations of local authorities under the Children (Scotland) Act 1995 (the "**1995 Act**") or the Social Work (Scotland) Act 1968 (the "**1968 Act**") to certain children and adults 'in need', respectively.

13. As regards children, section 22 of the 1995 Act imposes a duty on local authorities to promote the welfare of children 'in need' by providing a range and level of services (including, in exceptional circumstances, cash) which are appropriate to the child's or children's needs[20]. The provision of support under section 22 of the 1995 Act, provided it is with a view to safeguarding or promoting the child's welfare, is not limited to the child but may also be made as regards his or her family, or a member of his or her family[21]. In England, the equivalent statutory provision to "section 22 type" support, namely section 17 of the Children Act 1989 (the "**1989 Act**"), has been held not to be available as regards the accommodation of able-bodied asylum seekers and their disabled children (the accommodation of such persons being the responsibility of the Secretary of State) but rather as regards support needs which are additional to the "essential living needs" intended to met by way of Section 95 Support[22]. The role of local authorities is thus residual, even as matters stand, as regards such children indirectly eligible for Section 95 Support, and to be exercised in the more exceptional case.

14. As regards adults, section 12 of the 1968 Act imposes a similar duty on local authorities to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their area, such assistance being able to be given in kind or in cash to, or in respect of, any "relevant person"[23]. Section 13A(1) further provides that, without prejudice to section 12, a

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[20] 1995 Act, s 22(1), (3)(b).

[21] 1995 Act, s 22(3).

[22] *R (Ouji) v Secretary of State for the Home Department* [2002] EWHC 1839 Admin.

[23] Defined in section 12(2) of the 1968 Act as a person being not less than 18 years of age who is in need requiring assistance in kind or, in exceptional circumstances constituting an

local authority shall provide and maintain suitable residential nursing accommodation for persons who appear to them to be in need of such accommodation by reason of e.g. infirmity, illness or disability. Sections 12(2A) and 13A(4) of the 1968 Act provide that support is not available under either section 12(1) or section 13A(1), however, if the need has arisen solely because the person is destitute or because of the physical effects, or anticipated physical effects, of his being destitute—that need being (intended to be) covered by Section 95 Support. The case of *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 confirms that, at least as regards England, this is the case only in respect of the able-bodied asylum seeker. Where there is "destitution plus disability"[24], the responsibility for support falls on the local authority pursuant to, in Scotland, the 1968 Act.

15. It is important to recognise that Section 95 Support is available only where the applicant is over the age of 18[25]. The situation as regards unaccompanied children seeking asylum who are at the stage of applying for support under the age of 18, and the type of support provided, is different. Such children require to be provided for by local authorities under sections 17 and 25 of the 1995 Act as 'looked after' children, to be cared for by local authorities in the same manner as any other child in the care of the state who is not otherwise being provided with suitable accommodation or care[26]—that is, by the local authority safeguarding and promoting the child's welfare, which welfare requires, in the exercise of the local authority's duty to the child, to be their paramount concern[27]. It is of note for reasons which will become apparent that the approach in Scotland in recent years has been to strengthen, not lessen, the responsibilities of local authorities

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emergency, in cash, and where the giving of assistance in either form would avoid the local authority being caused greater expense in the giving of assistance in another form, or where probable aggravation of the person's need would cause greater expense to the local authority on a later occasion.

[24] *R (Westminster City Council) v National Asylum Support Service* [2002] 1 WLR 2956 at p 2962 §17 (Lord Slynn of Hadley).

[25] 1999 Act, s 94(1) (asylum seeker means a person who is not under 18).

[26] 1995 Act, s 25(1).

[27] 1995 Act, s 17(1).

(amongst others) as corporate parents[28], irrespective of the immigration status of the child.

16. Provided a child is accommodated (i.e. looked after)[29] by a local authority prior to the child reaching his or her eighteenth birthday[30], the fact of their being so accommodated will at present, in the ordinary way, trigger a number of care and 'after care' obligations which are imposed on local authorities by way of sections 25 and 29 of the 1995 Act, and (as regards section 29) the implementing regulations. This is the position at least until the effects of the amendments in the 2016 Act are known as regards Scotland, and come into force.

17. Section 25 of the 1995 Act is the principal provision by which local authority support (at least as to accommodation) is to be made available as regards children who are 'looked after' by them. Section 25(1) of the 1995 Act places a duty on local authorities to provide accommodation for any child who, residing or having been found in their area, appears to the local authority to require such provision either because no-one has parental responsibility for the child; the child is lost or abandoned; or the person who has been caring for the child is prevented, whether or not permanently and for whatever reason, from providing him or her with suitable accommodation and care. It goes without saying that an

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[28] See e.g. section 58(1) of the Children and Young People (Scotland) Act 2014 which provides that "[i]t is the duty of every corporate parent, in so far as consistent with the proper exercise of its other functions—(a) to be alert to matters which, or which might, adversely affect the wellbeing of children and young people to whom this Part applies, (b) to assess the needs of those children and young people for services and support it provides, (c) to promote the interests of those children and young people, (d) to seek to provide those children and young people with opportunities to participate in activities designed to promote their wellbeing, (e) to take such action as it considers appropriate to help those children and young people—(i) to access opportunities it provides in pursuance of paragraph (d), and (ii) to make use of services, and access support, which it provides, and (f) to take such other action as it considers appropriate for the purposes of improving the way in which it exercises its functions in relation to those children and young people." 'Corporate parents' are defined in section 56 under reference to Schedule 4, paragraph 2 of which identifies as a corporate parent a local authority.

[29] The only requirement as to duration of accommodation is that it is for a continuous period of more than 24 hours: 1995 Act, s 25(8).

[30] For the definition of 'child' in this context as a person under the age of 18, see: 1995 Act, s 93(2)(a).

unaccompanied child seeking asylum will for one reason or another almost always fall within the terms of this provision. In addition to the duty imposed by section 25(1) of the 1995 Act, a power is provided for in section 25(3), allowing a local authority to provide accommodation for any person within their area who is at least 18 years old but not yet 21 years old, if the local authority considers that to do so would safeguard or promote the child's welfare. The terms of section 17 of the 1995 Act also require to be noted. That section provides that, as regards children looked after by a local authority (i.e. accommodated by them under section 25, whether pursuant to a duty or power to do so[31]), the local authority, in such manner as the Scottish Ministers may prescribe, is to safeguard and promote the child's welfare, which is in the exercise of the local authority's duty to the child to be the local authority's paramount concern. Section 17(2) of the 1995 Act provides that the latter duty includes, without prejudice to its generality, the duty of providing advice and assistance with a view to preparing the child for when he is no longer looked after by a local authority.

18. Section 29 of the 1995 Act makes provision regarding the after care of children who were but are no longer looked after by a local authority. Section 29(1) of the 1995 Act imposes a duty on a local authority, unless satisfied that the child's welfare does not require it, to "advise, guide and assist" any person in their area who is at least 16 but not yet 19 years of age and who was, on his or her sixteenth birthday or at any subsequent time, looked after by a local authority (but is not so looked after any more). Section 29(2) of the 1995 Act provides for an equivalent power as regards persons who are at least 19 but not yet 26 years old and who submit an application to be provided with such support. 'Assistance' is expressly stated for both purposes to include the provision of cash support[32]. As regards either category of formerly looked after child, section 29(5) provides that it is the duty of a local authority to carry out an assessment of the person's needs. Section 29(5A) provides that, where the local authority is satisfied that a person between the ages of 19 and 26 who applies for support has eligible needs which cannot be met other than by the local authority taking action under that section, then the power to provide them becomes a duty to do so. The power to provide for such other needs as are appropriate having regard to the person's

[31] 1995 Act, s 17(6)(a): "Any reference ... to a child who is "*looked after*" by a local authority, is to a child—(a) for whom they are providing accommodation under section 25 of this Act".

[32] 1995 Act, s 29(3).

welfare is maintained[33]. A further power is provided for the local authority to continue to provide advice, guidance and assistance to such a person after the person reaches the age of 26[34]. 'Eligible needs' for the purposes of the power / duty in section 29(5A) are defined in The Aftercare (Eligible Needs) (Scotland) Order 2015/156 as: (1) financial support to meet essential accommodation and maintenance costs; (2) support, in the form of information or advice, to assist the person to access education, training, employment, leisure and skills-related opportunities; and (3) insofar as not covered by (2), support, in the form of information or advice, relating to the person's wellbeing. The regulations implementing the aftercare obligations under section 29 impose various other, largely procedural obligations on a local authority, e.g. requiring the local authority to prepare a 'pathway assessment' to establish a child's needs and thereafter a 'pathway plan', setting out the ways in which those needs are to be met[35].

19. The changes to after care for formerly looked after migrant children is one of the more significant changes which the 2016 Act will bring about.

20. It requires to be noted that, consistent with the fact that support to unaccompanied children seeking asylum is being provided essentially independent of the asylum process, there is no distinction to be drawn as between children whose claims are pending or have been rejected, whether or not a further claim has subsequently been made. To put it another way, there is no such thing for support purposes as a 'failed asylum-seeking child'—although as regards young adults that position is to change. Support for adult 'failed' asylum seekers on the other hand—that is, adults whose claims for asylum or

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[33] 1995 Act, s 29(5A)(b).

[34] 1995 Act, s29(5B)

[35] In *Binomugisha v Southwark London Borough Council* [2006] EWHC 2254, the High Court found there to be a continuing duty to provide a personal adviser and review a pathway plan under the equivalent provisions of the Children Act 1989 on the basis that the provision of such an advisor and the review of such a plan was not the provision of support or assistance for the purposes of paragraph 1(1) of Schedule 3 to the 2002 Act. The Court recognised however that "the functions in each case will be very much truncated because of that restriction on the authority's powers."

other form of protection have been determined against them[36]—has always been different, and until the amendments of the 2016 Act come into force, is provided under section 4 of the 1999 Act, as given effect to by The Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005 (the "**2005 Regulations**") and The Immigration and Asylum (Provision of Services or Facilities) Regulations 2007/3627 (the "**2007 Regulations**").

21. Support under section 4 of the 1999 Act ("**Section 4 Support**") would appear from the title of the section in question to be provided principally by way of accommodation, but in fact is also able to be made available by way of vouchers[37]—in practice, a pre-paid 'Azure card', credited weekly with the sum of around £35.39. The provision of cash support under section 4 of the 1999 Act is expressly excluded[38], something which has been the subject of considerable criticism[39]. It is notable that as regards the 2016 Act replacement to Section 4 Support (discussed below) this limitation has been removed. As also discussed at §24 below, sums additional to the £35.39 amount may be made available, by way of vouchers, as regards pregnant women and children, and specific legislative provision is made in this regard. No such provision appears, curiously, to have been made for issuing vouchers in the ordinary case—i.e. as regards the Azure card, the weekly value of which is £35.39. The only way in which such provision could be made by way of primary legislation would be if the Azure card amount was included within the meaning of "accommodation". This seems unlikely, given the terms of section 4(10) and (11) of the 1999 Act, which respectively provide that the Secretary of State may make regulations permitting a person who is provided with accommodation to be supplied "*also* with services or facilities of a specified kind" (emphasis added); and such regulations may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services. In so far as this lack of clear legislative basis

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[36] Where a claim is determined in an applicant's favour, they become eligible for mainstream welfare benefits and disentitled to Section 95 Support.

[37] 1999 Act, s 4(11)(a).

[38] 1999 Act, s 4(11)(b).

[39] See e.g. Asylum Support Partnership (The Refugee Council, The Scottish Refugee Council, The Welsh Refugee Council, and the North of England Refugee Service) 'Your inflexible friend: the cost of living without cash' (November 2010); available at: https://www.refugeecouncil.org.uk/assets/0001/7057/ASP_-_azurecard-v4.pdf.

for the Azure card in the ordinary case gives rise to uncertainty, it is one which the amendments of the 2016 Act would resolve.

22. Section 4 Support is available for two broad categories of persons: first, those who have been temporarily admitted to the United Kingdom (as being liable to detention) or released from detention, including on bail; and, second, failed asylum seekers and the dependants of failed asylum seekers[40]. The rationale for Section 4 Support being available to asylum seeking families when provision is also made for Section 95 Support may not be obvious, but is clear when regard is had to the definition of "asylum seeker" in section 94(1) of the 1999 Act. That provision identifies the 'end point' for an asylum claim as being 21 days after an asylum seeker has exhausted all of his or her rights of appeal[41]. Where a child is born to the asylum seeker in question after that 21 day period has expired, the parent is no longer an "asylum seeker" for the purposes of section 95 of the 1999 Act as regards that child and requires to rely instead on Section 4 Support, provided the conditions as to eligibility are satisfied[42].

23. In order to qualify for the provision of accommodation and other facilities under section 4 of the 1999 Act, the applicant requires to be destitute—the 'test' in this regard being the same as under section 95 of the 1999 Act[43]. Further, pursuant to provision made by the 2005 Regulations, the asylum seeker also has to be either taking all reasonable steps to leave the United Kingdom[44]; or to be unable

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[40] 1999 Act, s 4(2), (3).

[41] Section 94(3) provides that "a claim for asylum is determined at the end of such period beginning—(a) on the day on which the Secretary of State notifies the claimant of his decision on the claim, or (b) if the claimant has appealed against the Secretary of State decision, on the day on which the appeal is disposed of, as may be prescribed." The prescribed periods in section 94(3) are 28 days where the claim is accepted, the appeal is allowed, or the claim is refused but leave of some sort is granted, and 21 days in any other case: 2000 Regulations, reg 2(2), (2A).

[42] It should further be noted that the definition of "asylum seeker" in section 94 of the 1999 Act is limited to those claiming asylum 'proper' under the Refugee Convention or under Article 3 ECHR. Claims under Article 8 ECHR for Section 4 Support can be submitted but only under section 4(1)(a)-(c), which requires a grant of temporary admission, or release from immigration detention.

[43] 2005 Regulations, reg 2.

[44] 2005 Regulations, reg 3(2)(a).

to leave the United Kingdom[45]; or to have lodged a petition for judicial review[46]; or the provision of accommodation requires to be necessary for the purpose of avoiding a breach of a person's rights under the ECHR[47]. It is to be noted that the 'person' to which the latter provision is directed is not necessarily the applicant him or herself and could well be a child. Where an application for Section 4 Support is refused (whether for reasons of lack of destitution or otherwise) the applicant currently has a right of appeal to the First-tier Tribunal (Asylum Support)[48] , although this right of appeal is to be removed once the relevant provision of the 2016 Act comes into force.

24. As with Section 95 Support, additional Section 4 Support is available under the 2007 Regulations in respect of pregnant women (the additional sum being the same, £3) and those with children between the ages of 1 and 3 (again the same, £3) and under the age of 1 (again the same, £5)[49]. Further, an additional weekly clothing voucher is available by way of Section 4 Support up until a child's sixteenth birthday[50]. This results in the curious effect of the child of a 'failed' asylum seeker on what is supposedly "last resort" Section 4 Support being better provided for in the sense of being given a greater amount of support than the child of an asylum seeker whose claim has not yet been determined and may well be granted. The oddity of this has been recognised by the Home Office[51] but it is not known what, if any, corrective provision—other than repealing section 4 of the 1999 Act—is intended to be made.

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[45] Whether by reason of a physical impediment to travel or for some other medical reason, or because in the opinion of the Secretary of State there is currently no viable route of return available: 2005 Regulations, reg 3(2)(b), (c).

[46] 2005 Regulations, reg 3(2)(d). The 2005 Regulations have not yet been amended to reflect the fact that a petition for judicial review in Scotland now requires permission to proceed: Court of Session Act 1988, s 27B(1).

[47] 2005 Regulations, reg 3(2)(e).

[48] 1999 Act, s 103(2A)

[49] 2007 Regulations, reg 7. See also regulation 6 (one-off supply of vouchers for pregnant women and new mothers).

[50] 2007 Regulations, reg 8.

[51] In the course of the Scottish proceedings referred to above (n 17).

25. It will be appreciated that the category of person who was (but is no longer) an asylum seeker, and whose claim for asylum has been rejected, may well encompass an individual who has been refused asylum or protection but has subsequently submitted further representations with a view to having those representations treated by the Home Office as a 'fresh claim'. The position of the Home Office is that such persons are eligible for Section 4 Support until such time as the further submissions are accepted as a 'fresh claim', at which point the asylum seeker again becomes eligible for Section 95 Support. Essentially this is on the basis that the fact of their representations having been submitted makes the point that it would not be reasonable for them to leave the United Kingdom[52] (that being one of the criteria for eligibility under the 2005 Regulations). It is notable, however, that the terms of section 4 of the 1999 Act do not appear to encompass an individual whose asylum claim has been withdrawn (e.g. on the basis that they have resumed a relationship with an abusive partner, on whose immigration status they are once again able to rely) as opposed to having been refused, unless the individual in question has expressly been granted temporary admission. At least one example can be identified by those writing this opinion of a situation such as that given by way of example in parentheses, in which an individual who had not been granted temporary admission, was nonetheless encouraged to apply for Section 4 Support. The present system thus lacks clarity and may well in that case, if support was granted, have been operating without a proper basis in law[53].

26. Beyond Section 4 Support and Section 95 Support, a final additional form of support requires to be noted, and that is the support available by way of section 96(2) of the 1999 Act. That provision allows for additional support to be provided to an applicant already in receipt of Section 95 Support in exceptional circumstances, with both the exceptionality of the circumstances and the nature of the support being matters for the Secretary of State's discretion. Until recently,

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[52] UK Visas and Immigration, 'Asylum support, section 4 policy and process' (Version 7) (March 2016) at §1.15; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/513619/Asylum_Support_Section_4_Policy_and_Process.pdf.

[53] Section 95 Support in the circumstances of the case mentioned would not have been available on the basis that no 'determination' of the withdrawn claim had ever been made, and the Home Office refused to reinstate it.

no policy guidance was available from the Home Office setting out the circumstances in which section 96 of the 1999 Act might be engaged and so exceptional support might be made available. That lacuna has recently been filled, although the bar for qualification for support is set high—one of the examples given being that of existing possessions having been lost in a fire[54]. Similar provision for 'exceptional specific needs' is made as regards Section 4 Support by way of the 2007 Regulations, regulation 9—under reference back to the 2000 Regulations. Both sets of provision reinforce the suggestion that Section 95 Support or Section 4 Support (as the case may be) is intended to be the first and last port of call for the vast majority of those seeking protection, and financial support, in the United Kingdom—although the situation is different as regards children, for whom one requires to look first to the statutory obligations of the local authority. The changes brought about to the regime of support for such persons as a result of the 2016 Act are considered shortly.

27. One final aspect of the current system requires to be considered, and that is concerned with the circumstances in which all of the forms of support already referred to might, on the basis of the applicant in question falling into a certain 'class' of migrant, be withheld.

28. Schedule 3 to the 2002 Act ("**Schedule 3**") is headed "withholding and withdrawal of support". Paragraph 1 of Schedule 3 sets out the types of support which might by virtue of Schedule 3 be excluded. That paragraph provides that a person to whom paragraph 1 applies shall not be eligible for "support or assistance" under a number of different statutory provisions, including: (1) in subparagraph (1)(c), section 12 or 13A of the 1968 Act; (2) in subparagraph (1)(i), sections 22, 29 and 30 of the 1995 Act, followed by the wording in parenthesis "provisions analogous to those mentioned in paragraph (g)"; and (3) in subparagraph (1)(l), "a provision of the 1999 Act". The analogous provisions in subparagraph (1)(g) are "sections 17, 23C, 24A or 24B of the 1989 Act ... (welfare and other powers which can be exercised in relation to adults)". Adults are persons over the age of 18. . Paragraph 1(2) of Schedule 3 confirms that a power or duty under any of the provisions listed in paragraph 1(1) (including

[54] Home Office, 'Applications for additional support' (16 March 2017) at p 5; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598944/Applications-for-additional-support-v1_0.pdf.

those listed immediately above) "may not be exercised or performed in respect of a person to whom this paragraph applies (whether or not the person has previously been in receipt of support or assistance under the provision)".

29. Sections 22 and 25 of the 1995 Act, and sections 12 and 13A of the 1968 Act, have already been considered above. It is necessary also to consider section 30 of the 1995 Act, which provides that, without prejudice to section 12 of the 1968 Act, a local authority may make grants to formerly looked after children within their area in order to enable such children (in fact, persons from the age of 16 up to the age of 26[55]) to meet expenses connected with his or her receiving education or training, and may make contributions to the accommodation and maintenance of such persons in any place near where that person is employed or seeking employment, or receiving education or training[56].

30. Paragraph 1 of Schedule 3 sets out the general rule as to the types of support which are potentially excluded. Paragraph 2 sets out the exceptions to that rule, paragraph 2(1) of Schedule 3 providing, *inter alia,* that paragraph 1 does not prevent the provision of support or assistance to a British citizen or "a child"[57]— the latter phrase being defined in paragraph 17 as a person under the age of 18. Although paragraph 1 specifies as potentially excluded forms of support those which are available under provisions such as section 22 of the 1995 Act, the exclusion is aimed only at those provisions in so far as they confer powers which may be exercised in relation to adults (it will be recalled that, not only do certain of the 1995 and 1989 Act provisions apply to young adults, but section 22 of the 1995 Act also allows, where it is necessary to safeguard and promote the child's welfare, the provision of support to their (adult) parent). At least until the amendments of the 2016 Act, Schedule 3 has not affected the obligations of local authorities as regards migrant children under the age of 18 at all.

31. A further exception to paragraph 1 is set out in paragraph 3 of Schedule 3, which provides that the former paragraph does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is

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[55] 1995 Act, s 30(2)(a).

[56] 1995 Act, s 30(1)(a), (b).

[57] Although paragraph 2(c)-(e) provide for the possibility of further exceptions being made by regulations, no such regulations have been made.

necessary for the purpose of avoiding a breach of a person's rights under the ECHR or the EU Treaties. Although it could be argued that this is the 'safety valve' which allows support to be provided to children, we prefer the argument outlined at §30 above. This provision is, accordingly, directed as we see it at the circumstances in which a local authority may be required to provide support to a person who is over the age of 18—young adults, or the parents of children. In considering the possible uses of this provision, it is important to recognise that there is no limitation in paragraph 3 of Schedule 3 as to the ECHR rights in question. Those rights include not only the right to respect for private and family life (Article 8 ECHR) and the prohibition of inhuman and degrading treatment (Article 3 ECHR), but the right to education (Article 2 of the First Protocol) together with the right to non-discrimination in the enjoyment of such rights (Article 14 ECHR)—including discrimination on grounds of immigration status[58]. Where it could be established in an individual case that refusing or withdrawing support interfered with any of those or any other rights under the ECHR, there would be a good argument that Schedule 3 does not afford a local authority which is refusing or withdrawing the support any protection.

32. Paragraph 1 having set out the general rule as to the types of support which might be excluded by Schedule 3, and paragraphs 2 and 3 having set out the exceptions to that general rule, paragraphs 4 to 7A set out the classes of persons to whom the exclusionary rule in paragraph 1 applies. Those classes of person are, pending the amendments of the 2016 Act having taken effect, as follows: (1) persons with refugee status abroad and the dependants of such persons; (2) EEA nationals and their dependants[59]; (3) failed asylum seekers who fail to cooperate with removal directions and the dependants of such persons (i.e. families); (4) non-asylum seeking persons in the United Kingdom in breach of the immigration laws; and (5) failed asylum seekers and the dependants of such persons (i.e. families) where the Secretary of State has certified that the asylum seeker has failed without reasonable excuse to take reasonable steps to leave

[58] *Hode v United Kingdom* (2013) 56 EHRR 27 at p 973 §47; *Bah v United Kingdom* (2012) 54 EHRR 21 at pp 789-790 §§44-46.

[59] It is worth repeating that the exception in paragraph 3 applies not only to the ECHR but also to rights flowing from the EU Treaties. Thus, where there is such a right to a benefit of a particular type, then paragraph 5 of Schedule 3 does not have any effect.

the United Kingdom voluntarily or to place himself in a position to do so[60]. As noted above at §10, the terms of Schedule 3 thus to an extent contradict those of section 95 of the 1999 Act which provides for continued Section 95 Support notwithstanding a claim for asylum has been rejected. As also noted above, however, those contradictions have been resolved by the amendments of the 2016 Act by virtue of the availability of Section 95 Support in such circumstances being removed (and one of the offending provisions in question being repealed). Those and other amendments of the 2016 Act are now considered below.

The changes brought about by the 2016 Act

33. As already noted in the introductory section of this opinion, the stated purpose or aim of the 2016 Act is "to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom". One of the ways in which the 2016 Act seeks to achieve that aim is by restricting the provision of central government administered asylum support to 'failed' asylum seekers, including those with families, and by further restricting the provision of support to such persons, families, and former unaccompanied children seeking asylum, by local authorities.

34. Provision as to both types of support—by way of central government on the one hand, and local authorities on the other—is made in Part 5 of the 2016 Act. That Part is short, comprising three brief sections, and is of note only in so far as it gives effect, by way of sections 66 and 68 of the 2016 Act, to Schedules 11 and 12 thereto. Schedule 11 to the 2016 Act ("**Schedule 11**") and Schedule 12 to the 2016 Act ("**Schedule 12**") make provision in relation to the two forms of support in question by respectively amending the 1999 Act and the 2002 Act. The changes being made by Schedule 11, by way of amendments to the 1999 Act, and which are of relevance to central government administered 'asylum support', are considered first.

[60] Schedule 3 para 7A.

Schedule 11 & the 1999 Act

35. The 'headline' impact of Schedule 11 is to repeal section 4 of the 1999 Act (together with the appeal rights under that provision) and so to abolish Section 4 Support. In its place, paragraph 9 of Schedule 11 will, when brought into force, insert a new section 95A into the 1999 Act, providing for a new form of support ("**Section 95A Support**") to be provided, for such period or periods as may be prescribed, if the person in question is a failed asylum seeker, or a dependant of a failed asylum seeker and certain other criteria are satisfied. "Failed asylum seeker" is to be defined in a new subsection (2D of the interpretation provision, section 94 of the 1999 Act, as a person who is at least 18; who was, or would have been an asylum-seeker at any time if the person had been at least 18 years old at that time; whose protection claim (for asylum or otherwise) has been rejected; and who is not now an asylum-seeker. It is not obvious from the wording of the provision, but the new definition given to 'failed asylum seeker' is understood to be aimed at young people who turn 18 as failed asylum seekers, although they did not previously meet the definition because they were under 18.

36. In addition to meeting the new definition of failed asylum seeker, an applicant for Section 95A Support requires to meet certain other conditions. First, the application requires to meet prescribed requirements, the prescription to be by way of regulations. Although no guidance is given, it seems as likely as not that the requirement will be to submit the application on a particular form and to a particular place (there being little else to prescribe)—although it may also be that the application requires to be submitted within a particular time frame[61]. As to the latter point, we understand that the government's stated proposal is to require individuals to apply for Section 95A Support within the 'grace' period of Second

[61] The authors of *Macdonald's Immigration Law and Practice* (1st supp to 9th edn) describe the most "radical and restrictive" element of section 95A support as being "that it will only be possible to apply for it within a 'grace period' after appeal rights become exhausted. For single people this will be 21 days, for those with children it will be 90 days. In practice, this means that most people who have a genuine obstacle to leaving the UK will be made destitute, since this obstacle is unlikely to occur and be evidenced within the grace period. As an example, according to the Asylum Support Appeals Project, of the 105 applications for support made in 2015 for 'genuine obstacle' reasons (ie medical or voluntary return), only six were made in the grace period": ibid at p 280 §14.174T.

95 Support ending, thus excluding from the former type of support anyone who has applied after 21 days of protection being refused—95% of applications made at this stage of the asylum process currently falling into this category. Second, before support can be granted, it appears to the Secretary of State that the person is destitute, or is likely to become destitute within such period as may be prescribed. That period is suggested to be likely to be 14 days, following the Section 95 Support model. Third, the person requires to face a genuine obstacle to leaving the United Kingdom. Regulations, to be made under the new section 94A(3) of the 1999 Act, may make provision for determining what is, or is not, to be regarded as a genuine obstacle in this respect. It is suggested to be likely that a similar approach as to Section 4 Support will be taken, such that the obstacles will require to be of the nature of a physical or other medical impediment to travel or because in the opinion of the Secretary of State there is currently no viable route of return[62]. The Explanatory Note gives as an example "the inability to access the requisite documentation in order to travel". [63] Once the new requirements (whatever they are) have been met, an individual in receipt of Section 95A Support will be able to be provided with support in the form of vouchers, as previously, but also in the form of cash[64]. To this extent, Section 95A Support might be thought to be an improvement on Section 4 Support. But given the purpose of the legislation, it is perhaps worth being realistic as to the level of the support which will ultimately be provided. It seems likely, for example, that the £5 per week clothing allowance for children up to the age of 16, which is currently available under the 2007 Regulations and which has the effect of making the support for failed asylum seekers more, not less, generous, will be discontinued.

37. The other main impact of the Schedule 11 amendments is to remove the availability of Section 95 Support to asylum seeking families after the point at which the asylum claim on which the support is based has been determined and the asylum seeker in question has exhausted all rights of appeal. Paragraph 7(5) of Schedule 11 gives effect to this removal of support by omitting section 95(5) of the 1999 Act which, as discussed above, provides for the continued availability of

[62] See: 2005 Regulations, reg 3(2)(b), (c).

[63] Para 548

[64] Schedule 11 para 10(3), inserting a new subsection (1A) into section 96 of the 1999 Act (ways in which support may be provided).

Section 95 Support based simply on a person's presence in the United Kingdom. Once Schedule 11 has been brought into force, failed asylum seekers and their families will instead require to apply for Section 95A Support, which will require (amongst other things) there to be a genuine obstacle to the family leaving the United Kingdom. It should be noted that, as far as Section 4 Support is concerned, a variant of the 'genuine obstacle' test is / was already imposed.

38. The final provisions of Schedule 11 of relevance for present purposes relate to the new form of temporary support for failed asylum seekers and the transitional and saving provisions of that Schedule. As to the first of these, and temporary support, paragraph 13 inserts a new section 98A into the 1999 Act which makes provision for such support ("**Section 98A Support**") pending the determination of an application for Section 95A Support 'proper'. The terms of the new section 98A of the 1999 Act are similar to the existing section 98 of the 1999 Act, which makes provision for temporary support pending the determination of an application for Section 95 Support. In addition to assessing whether or not an individual applying for Section 98A Support may be destitute, however (this also being the test under section 98), section 98A of the 1999 requires the Secretary of State to also assess whether or not the applicant may face a genuine obstacle to leaving the United Kingdom. Although historically applications for temporary support have been stated to receive a "cursory determination"[65] as to whether or not the test for provision of such support has been satisfied, there is still a burden on the applicant to prove entitlement even if to a lesser standard, and it may be harder to discharge that burden where the issue is as to the genuineness of the obstacle to departure rather than the more obviously objective one of destitution. It remains to be seen as to how such assessments will be approached.

39. Transitional and saving provision is made in paragraphs 46 and 47 of Schedule 11. Paragraph 46(1) provides that the repeals made by paragraphs 1 and 2 (i.e. the abolition of Section 4 Support and consequential amendments, including as to rights of appeal) do not apply in relation to persons and dependants currently in receipt of or having applied for Section 4 Support prior to the day on which those paragraphs come into force, nor to a person and dependants having

[65] National Asylum Support Service, 'NASS Policy Bulletin 53: Temporary support for NASS eligible disbenefited singles (or childless couples)'; available at: http://www.rightsnet.org.uk/pdfs/nass53.doc.

appealed against a decision to refuse such support where the appeal has not been withdrawn or determined before that day. Paragraph 46(2), however, provides that the repeals do affect those persons refused Section 4 Support where the decision to refuse it was taken on or after the day on which paragraph 2(d) comes into force. The right of appeal which would otherwise have accrued to such an application is removed—with the only remedy in such a scenario being judicial review. Paragraph 46(3) does remove the restriction which has historically prevented the Secretary of State from providing existing or future recipients of Section 4 Support with money, as opposed to vouchers. But for the amendment to have effect will require amendment of the existing or similar future regulations, as the regulations currently make provision for the issuing of vouchers (albeit not expressly in relation to ordinary living needs) alone.

40. Paragraph 48 of Schedule 11 makes similar transitional and saving provision as regards Section 95 (rather than Section 4) Support. Paragraph 48(1) of Schedule 11 accordingly provides that the repeal of section 95(5), which allows failed asylum seeking families to continue to receive Section 95 Support for as long as they remain in the United Kingdom, does not apply in relation to those already provided with or having applied for Section 95 Support prior to the day on which paragraph 7(5) of Schedule 11 comes into force, nor to those having appealed against a decision to refuse such support where the appeal has not been withdrawn or determined before that day. As with Section 4 Support, paragraph 48(2) of Schedule 11 provides, however, that the repeals do affect persons refused Section 95 Support where the decision to refuse such support was taken on or after the day on which paragraph 7(5) of Schedule 11 comes into force, so that the right of appeal which would otherwise have accrued to their application is removed—again, the only remedy in such circumstances would be judicial review.

41. The final provision of Schedule 11 of relevance (paragraph 48) amends the 2002 Act rather than the 1999 Act. It is considered in the context of Schedule 12 and the 2002 Act, below.

Schedule 12 & the 2002 Act

42. Schedule 12 makes provision in relation to the availability of local authority support to those seeking asylum or otherwise seeking protection in the United

Kingdom. It does so by amending Schedule 3 to the 2002 Act, which as noted above makes provision in relation to the circumstances in which support to asylum seekers (whether by central government or local authorities, but largely in relation to the latter) may be withheld or withdrawn. Paragraph 1 of Schedule 3 will be recalled as the provision which (already) defines the types of support to which the exclusions in Schedule 3 potentially apply. The amendments of the 2016 Act are not only to the types of support which are so excluded, but also the 'types' of person who are ineligible to receive such support (the 'classes of ineligible person'), and the circumstances in which a local authority might otherwise be exempted from being required to provide it.

43. It is important to recognise that the amendments to the 2002 Act which are made by way of Schedule 12 only currently impact upon England (and even then are not yet in force). For whatever reason, the equivalent provision which may reasonably be assumed to be sought to be made as regards Scotland and the other devolved jurisdictions will be made by way of regulations under section 73 of the 2016 Act instead. Although this is referred to in our letter of instruction as a 'Henry VIII'[66] provision, on one view that is not strictly correct: what section 73 of the 2016 Act allows the Secretary of State to do is make secondary legislation which applies the 2016 Act (primary legislation) and which amends the devolution statutes, which are, in strict Parliamentary terms, secondary legislation[67] (despite being defined as 'primary legislation' in the 2016 Act itself).

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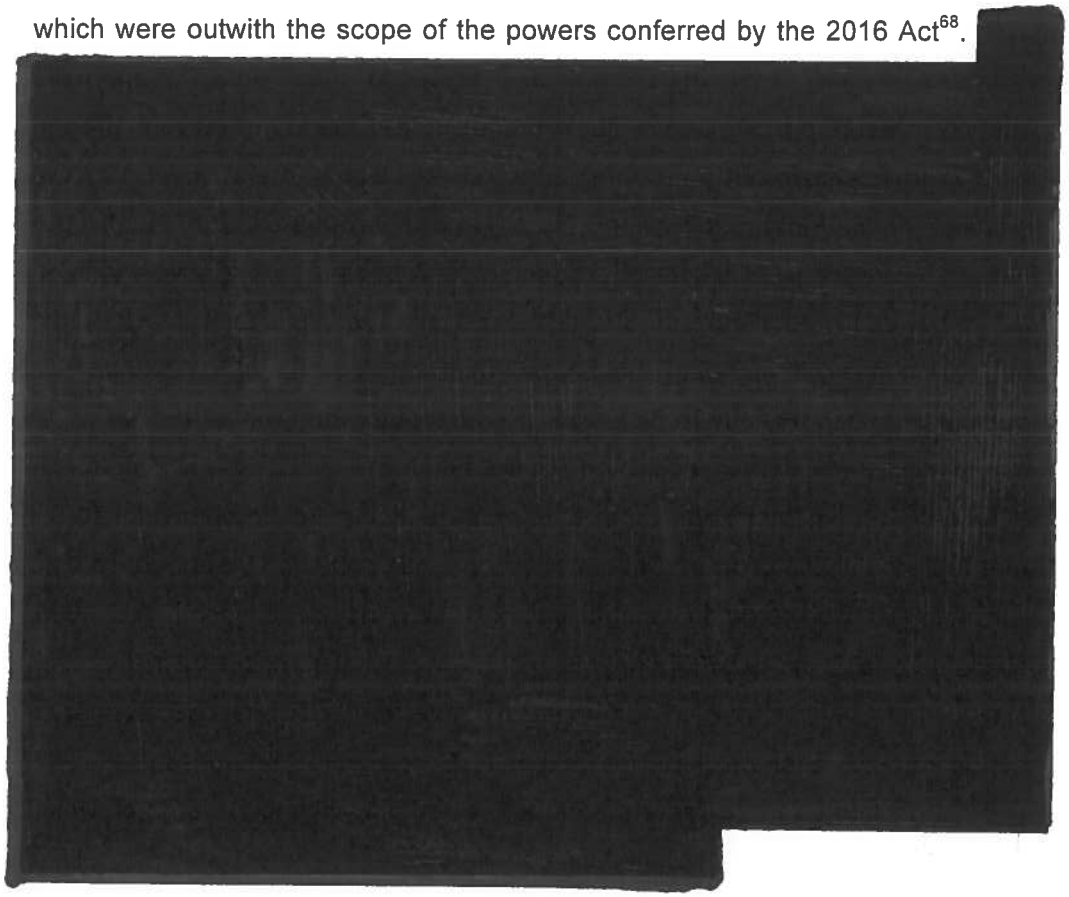
[66] See: *Craies on Legislation* (11th edn) at p 18 §1.3.9 ("The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation").

[67] As noted by Lord Hope of Craighead in *AXA General Insurance Company Ltd v Lord Advocate*, 2012 SC (UKSC) 122 at §46, "The Scottish Parliament takes its place under our constitutional arrangements as a self-standing democratically elected legislature. Its democratic mandate to make laws for the people of Scotland is beyond question. Acts that the Scottish Parliament enacts which are within its legislative competence enjoy, in that respect, the highest legal authority. The UK Parliament has vested in the Scottish Parliament the authority to make laws that are within its devolved competence. It is nevertheless a body to which decision-making powers have been delegated. And it does not enjoy the sovereignty of the Crown in Parliament that, as Lord Bingham said in *R (Jackson and ors) v Attorney-General* (para 9), is the bedrock of the British constitution. Sovereignty remains with the UK Parliament. The Scottish Parliament's power to legislate is not unconstrained. It cannot make or unmake any law it wishes. Section 29(1) declares that an Act of the Scottish Parliament is not law so far as any

44. The short point for present purposes is that although section 73 of the 2016 Act (however it is described) is a wide-ranging and constitutionally (as well as politically)-controversial provision, it is one which is ultimately wholly within the power of the Westminster Parliament, subject to the following qualification. That qualification, and the only circumstance in which the *vires* (lawfulness) of a statutory instrument promulgated under section 73 of the 2016 Act could be challenged, would be where the instrument sought to legislate regarding matters which were outwith the scope of the powers conferred by the 2016 Act[68].



provision of the Act is outside the legislative competence of the Parliament. Then there is the role which has been conferred upon this court by the statute, if called upon to do so, to judge whether or not Acts of the Parliament are within its legislative competence ...". It is to be noted, however, that Acts of the Scottish Parliament are described as primary legislation in section 93(3) of the 2016 Act.

[68] See e.g. the recent case of *R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)* [2016] AC 1531, in which the Supreme Court held that regulations made by the Lord Chancellor under a 'Henry VIII' provision which sought to amend a Schedule to the Legal Aid, Sentencing and Punishment of Offenders Act 2012, by introducing a residence requirement for legal aid, were *ultra vires* on the basis that they sought to introduce "a wholly different sort of criterion" from those which the Act in question otherwise embodied.

45. The first amendment of significance which is brought about by Schedule 12 is made by paragraph 2, which inserts a new subsection (1)(ga) into paragraph 1 of Schedule 3 to further extend the application of that paragraph to certain additional types of local authority 'after care' support provided to children who, in Scotland, would be described as "formerly looked after". The specific types of support which are to be excluded by the new paragraph 1(1)(ga) of Schedule 3 are those allowing formerly fostered children to continue living with their former foster parents, and the appointment of a personal advisor[69]. There are no direct equivalent provisions in the 1995 Act or other Scottish legislation of which we are aware. The closest thing to a personal advisor is a "pathway coordinator", alone or combined with a "young person's supporter"[70], both of which roles are provided for in The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003/608 (the "**2003 Regulations**"). If near identical provision is sought to be made in Scotland, it is those aspects of the 2003 Regulations which are likely to be disapplied. Such an amendment would potentially be susceptible to challenge on the basis that it discriminates against migrant children on grounds of immigration status, contrary to Article 14 ECHR when read with Article 8 ECHR, and is further unlawful having regard to section 55 of the Borders, Citizenship and Immigration Act 2009 (the "**2009 Act**") (which is protected by section 90 of the 2016 Act from implied repeal). Section 55 of the 2009 Act imposes a duty on the Secretary of State to discharge certain functions (including any function of the Secretary of State in relation to immigration, asylum or nationality) having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and to ensure that any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of such a function are provided having regard to that need[71]. [redacted]

[69] For the duties of a personal advisor see: The Care Planning, Placement and Case Review (England) Regulations 2010/959, reg 44.

[70] The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003/608, reg 5.

[71] 2009 Act, s 55(1)(a), (b).

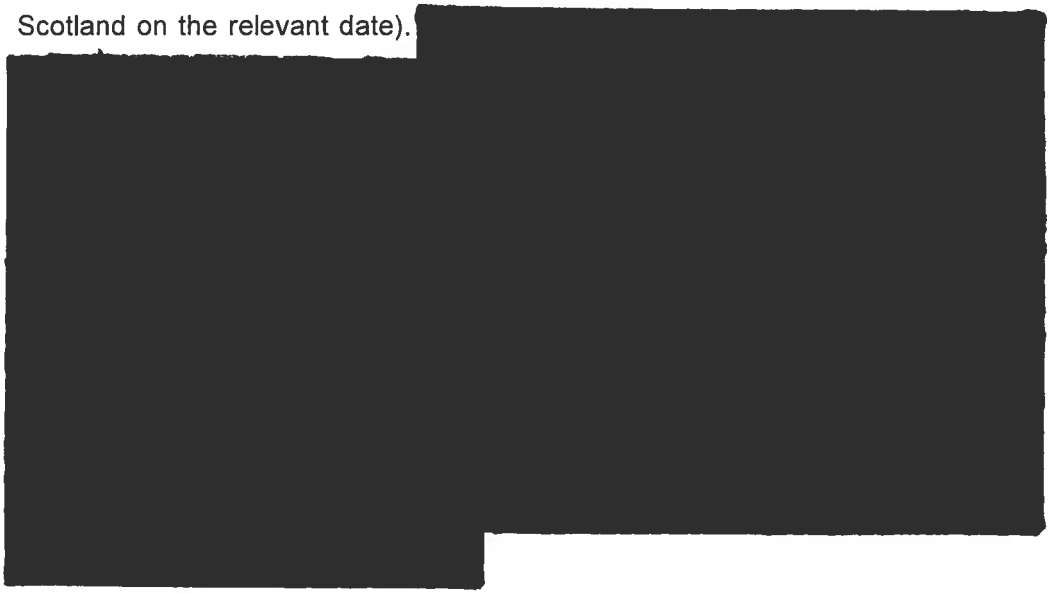
46. The second amendment of significance (as regards England) is made by paragraph 3 of Schedule 12, which inserts a new paragraph 1A into Schedule 3 to create a further 'type' of excluded support beyond those already identified by paragraph 1—being grants to meet expenses connected with education or training, specifically to enable a person to meet all or part of his or her tuition fees. Paragraph 1A(3) of Schedule 3 will provide that the exclusion in paragraph 1A(1) applies to a person in England who is over 18; has leave to enter or remain which has been granted for a limited period; is an asylum seeker; or has made an application for leave to enter or remain which has not been withdrawn or determined. It is assumed that the intention is to catch persons who have leave or are seeking leave but are not sufficiently 'connected' with England in terms of ordinary residence.

47. The equivalent provision in Scotland—section 30 of the 1995 Act—is already included in Schedule 3 and has already been discussed. It is worth noting, however, that the system for student support in Scotland is substantially different from that in England & Wales. Most significantly, tuition fees have not been imposed in Scotland as regards those with a relevant connection to Scotland since the academic year 2011/2012[73]. It is of particular note, having regard to the terms of paragraph 1A of Schedule 3, that one category of individual with a deemed relevant connection to Scotland by virtue of the relevant regulations is a

[72] It is notable in this regard that section 55(3) of the 2009 Act requires a person exercising any of the functions of the Secretary of State to have regard to guidance issued by the Secretary of State, that guidance ('Every Child Matters: Change for Children' (November 2009)) expressly recognises the need for ensuring equality of opportunity, defining the latter as meaning "that all children have the opportunity to achieve the best possible development. Some children may have been deprived of opportunities and assistance in early life and will, as a result, require services to meet their health and educational needs, to promote their immediate welfare so that they can achieve their potential *into adulthood*": §§1.16, 1.17 (emphasis added).

[73] The Education (Fees and Awards) (Scotland) Regulations 2007/152, reg 3A, as inserted by The Education (Fees) (Scotland) Regulations 2011/389, reg 6.

person who has applied for refugee status but been refused, and has instead been "granted leave to enter or remain"—with no qualification in the relevant regulations as to the duration or type of leave, and the individual qualifying for a fee exemption provided that they have been ordinarily resident in the United Kingdom and Islands at all times since first being granted such leave to enter or remain and are now ordinarily resident in Scotland (or they are the spouse, civil partner or child of a person of the kind so described who is ordinarily resident in Scotland on the relevant date).

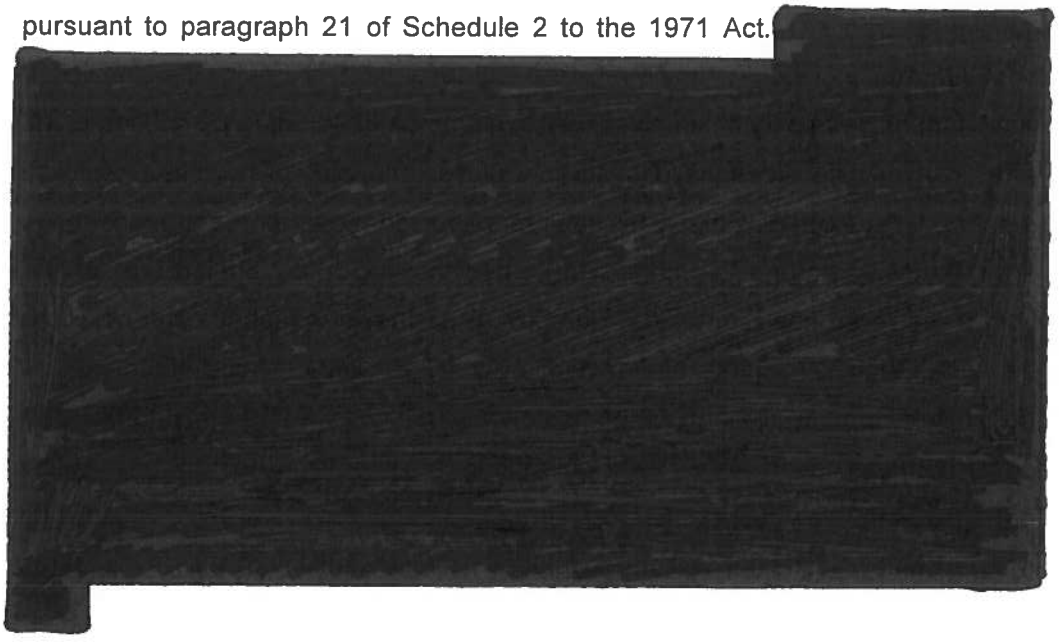


48. The remaining amendments to Schedule 3 of significance relate not to the type of support which is sought to be excluded, but to the classes of persons ineligible for such support; the additional exceptions to the general rule; and the circumstances in and method by which local authority support to asylum seekers might be made available. As to the first of these, one of the effects of the 2016 Act which has already been noted[74] is the repeal of paragraph 7A of Schedule 3 of the 2002 Act which rendered ineligible for support asylum seeking families where the asylum seeker had been certified as having failed to take reasonable steps to leave the United Kingdom. In addition to removing this class, the 2016 Act curiously limits the scope of paragraph 6 of Schedule 3 (failed asylum seeker) to a person in Wales, Scotland, or Northern Ireland[75], and inserts two new classes of ineligible person. The first such category is a person in England without leave to enter or remain (new paragraph 7B of Schedule 3); the second is a primary carer without leave to enter or remain (new paragraph 7C).

[74] Para 9

[75] Schedule 12 para 7.

49. As to the first (new paragraph 7B), this category is identified in the Explanatory Notes as being intended "to provide a new simplified definition in England of a person without immigration status"[76], presumably to operate alongside (as regards Scotland and Wales) the existing 'fourth class of ineligible person', being a person unlawfully in the United Kingdom. It is not clear whether equivalent 'simplifying' provision will be sought to be made as regards Scotland. If it is, it may well be challengeable on the basis that it is not in fact 'simpler' but different as a matter of substantive law, for the following reasons. An individual with temporary admission in the United Kingdom does not have leave to enter or to remain, as they are deemed not to have entered the country at all[77]. It does not follow, however, that they are able to be characterised as being in the United Kingdom in breach of the immigration laws—indeed, section 50A of the British Nationality Act 1981, which is used in paragraph 7 of Schedule 3 to define "being in breach of the immigration laws", expressly subjects itself to the provision of the Immigration Act 1971 (the "**1971 Act**") which provides for temporary admission not to result in entry. Further, and in any event, temporary admission is granted pursuant to, not in breach of the immigration laws, in the sense that it is granted pursuant to paragraph 21 of Schedule 2 to the 1971 Act.



50. The second new class of ineligible person (new paragraph 7C) is of some potential significance for the purposes of challenging any regulations as are made regarding Scotland. As recognised by the Explanatory Note to the 2016

[76] Para 557

[77] 1971 Act, s 11(1).

Act[78], the paragraph 7C category ("primary carer without leave to enter or remain") is intended to catch non-EEA nationals whose right to reside in the United Kingdom derives from EU law, and specifically the decision of the Court of Justice of the European Union in the case of *Ruiz Zambrano v Office national de l'emploi* [2012] QB 265 ("***Zambrano***"). Such persons are referred to (including in the Explanatory Note) as '*Zambrano* carers' in recognition of their right to reside arising from their status as the primary carer of a dependant EEA national who is resident in the United Kingdom and would be unable to continue residing in the United Kingdom if the carer was required to leave. *Zambrano* carers, although granted a derivative right of residence in the United Kingdom under the relevant regulations[79], are expressly and intentionally denied access to a range of income-replacement welfare benefits[80]. This denial of access is currently the subject of an appeal to the Supreme Court in the case of *HC v Secretary of State for Work and Pensions* (UKSC 2015/0215). The grounds of appeal in the latter case are understood to proceed on the basis that the blanket denial of welfare benefits to *Zambrano* carers is contrary to EU law and Article 14 ECHR when read with Article 8 ECHR as constituting unlawful discrimination on grounds of nationality. A hearing on the appeal has been fixed for 21 June 2017 and the following day. Whilst it would not be a worthwhile exercise to speculate as to the terms of the decision which will follow, it is worthwhile noting that, in the Court of Appeal, the argument of the Secretary of State in support of the blanket exclusion was that 'section 17 support' was available under the 1989 Act; this was, further, one of the grounds on which the Court of Appeal rejected the argument advanced under reference to Article 14 ECHR[81]. [redacted]

[78] Para 558.

[79] The Immigration (European Economic Area) Regulations 2016/1052, reg 16.

[80] See: The Child Benefit and Child Tax Credit (Miscellaneous Amendments) Regulations 2012/2612, and The Social Security (Habitual Residence) (Amendment) Regulations 2012/2587 (which amend The Income Support (General) Regulations 1987/1967; The Jobseeker's Allowance Regulations 1996/207; The State Pension Credit Regulations 2002/1792; The Housing Benefit Regulations 2006/213; The Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/214; The Council Tax Benefit Regulations 2006/215; The Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006/216; The Employment and Support Allowance Regulations 2008/794).

[81] *Sanneh v Secretary of State for Work and Pensions (AIRE Centre and another intervening)*, [2015] EWCA Civ 49, [2016] QB 455 at p 492 §115 (Lady Arden): "In order to show that the

51. The final amendments to Schedule 3 of relevance for present purposes relate to the additional exceptions to the general rule in paragraph 1, and the circumstances in and method by which local authority support to asylum seekers might be made available. The latter is effected by the establishment of two new forms of support which are intended to displace the care and after care provisions of the 1989 Act, and to some degree replace section 17 of the 1989 Act. Those new forms of support are considered after the following additional exception to the paragraph 1 general rule.

52. Paragraph 5 of Schedule 12 inserts a new paragraph 2A into Schedule 3. It provides that the exclusion effected by paragraph 1(1)(g) and (ga) (regarding certain care and after care provisions of the 1989 Act) does not prevent the provision of support or assistance by a local authority under a relevant provision if two sets of conditions are satisfied. The first set of conditions ('Condition A' and 'Condition B') are cumulative. They require the applicant to have made an application for leave to enter or remain in the United Kingdom which application is, where prescribed by regulations, of a prescribed kind[83]; and further require that application to have been the first application for leave to enter or remain in the United Kingdom which that person has made, or—where regulations have required the application to be of a specified kind—that the application is the first

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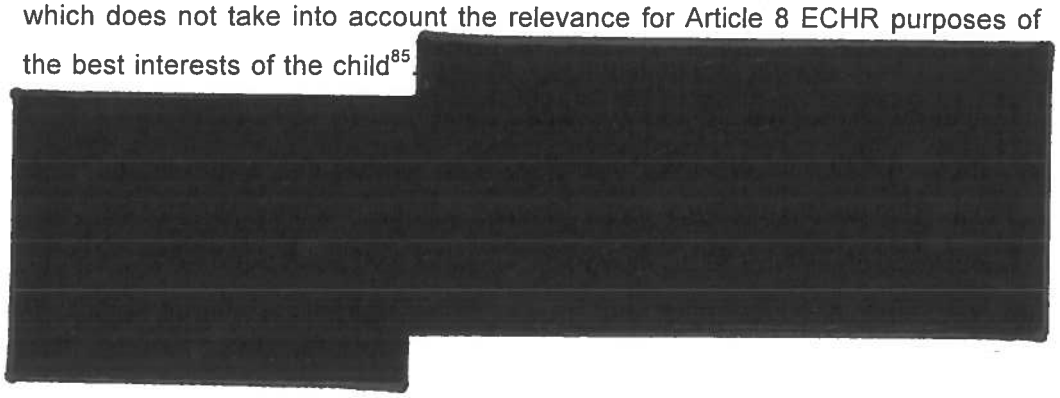
discrimination violates the Convention, Mr Drabble would have to show that the legislative policy was manifestly without foundation (see Bah v UK (2012) EHRR 21 at [37]). In my judgment he cannot show this for the following reasons. First, the differentiation does not leave the Zambrano carer and the EU citizen child destitute. They can have recourse to assistance under section 17 of the Children Act 1989 ...".

[82] Ibid at p 490 §105.

[83] Schedule 3 para 2A(3)(a), (b) (as inserted by Schedule 12, para 5).

application made of the kind specified[84]. It is understood that the intention with this provision is to target applications made under reference to Article 8 ECHR, no doubt on the basis that such private and family life as has been positively created after a first application has been submitted and refused has been so created at a time when the individual's immigration status is "precarious". That is suggested to be an overly narrow understanding of Article 8 ECHR and one which does not take into account the relevance for Article 8 ECHR purposes of the best interests of the child[85].



53. The second set of conditions which require to be satisfied in order for support under the relevant provisions of the 1989 Act to be available ('Condition C', 'Condition D', and 'Condition E') are alternatives—i.e. only one of the conditions has to be met. They are that the application in question has not been determined or withdrawn[87]; or that although the application has been refused, it is able to be appealed in-time from within the United Kingdom[88]; or that it has been appealed, is pending, and does not require to be continued from outside the United Kingdom[89]. Where one of those conditions is satisfied, and both Condition A and Condition B are satisfied, the individual in question will be able to be provided with support. This provision appears to be intended to ensure that an individual who is in the process of regularising their immigration status is not prejudiced pending a determination on their application being made. It is worth noting in this regard that paragraph 2A(8) will allow the Secretary of State to make regulations

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[84] Schedule 3 para 2A(4)(a), (b) (as inserted by Schedule 12, para 5).

[85] See: Zoumbas v Secretary of State for the Home Department, 2014 SC (UKSC) 75 at p 11 §79.

[86] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166 at p 179 §24 (Baroness Hale of Richmond).

[87] Schedule 3 para 2A(4)(a), (b) (as inserted by Schedule 12, para 5).

[88] Schedule 3 para 2A(6)(a)-(c) (as inserted by Schedule 12, para 5).

[89] Schedule 3 para 2A(7)(a)-(d) (as inserted by Schedule 12, para 5).

providing for the circumstances in which a person is to be treated as having made an application despite not having made one, and the circumstances in which a person will be treated as not having made such an application "where the Secretary of State is satisfied that the application is vexatious or wholly without merit". The latter provision has obviously been included because the lodging of an application is required in order for the power to provide support under this provision to be triggered. It is less obvious why the former provision has been included, but it could be that this is aimed at a child who has been included as a dependant on an application made by a parent, to avoid such a child being prejudiced simply by virtue of not having been the person in whose name the application was submitted.

54. The next and final set of relevant amendments to Schedule 3 concern the circumstances in and method by which local authority support to asylum seekers might be made available. The amendments first set out three categories of applicant who are to be provided with one of two new forms of support. Secondly, the amendments establish those very forms of alternative support, and are accordingly considered first.

55. The new forms of support are both provided for by paragraph 10 of Schedule 12, which inserts new paragraphs 10A and 10B into Schedule 3. The he Secretary of State is empowered to make regulations providing for arrangements to be made (it is assumed by local authorities) for support to be provided to the following two categories of person, to whom paragraph 1 otherwise applies.

56. The first category of person (otherwise ineligible under paragraph 1) is provided for in the new paragraph 10A of Schedule 3. That provision empowers the Secretary of State to make regulations providing for arrangements for support ("**Paragraph 10A Support**")[90] to a person to whom paragraph 1 applies by virtue of paragraph 7B or 7C—i.e. to persons without immigration status, or *Zambrano* carers. Paragraph 10A(1) imposes the following eligibility requirements: the

[90] It should be noted that provision is made in paragraph 10A(9) for a temporary form of Paragraph 10A Support. Further, paragraph 10A(11) provides that Paragraph 10A Support (temporary or otherwise) may take the form of accommodation, subsistence in kind, in cash, or vouchers.

individual requires to be destitute (within the meaning of section 95 of the 1999 Act[91]); to have with him or her a dependent child; is not a 'relevant failed asylum seeker' and to not be in receipt of or have applied for Section 95A Support (and for there not to be reasonable grounds for believing such support would be provided if applied for); and to satisfy one of five alternative conditions.

57. The first three of the alternative conditions in paragraph 10A of Schedule 3 require that an application for leave to remain of a specified kind has been submitted (or deemed to have been submitted or not submitted[92]) but not determined[93] ('Condition A'); or has been refused but appealed in-country ('Condition B')[94]; or is capable of such an appeal ('Condition C')[95]. Those conditions thus protect the individual who is seeking to regularise their immigration status pending a decision being taken on their claim. The fourth alternative condition ('Condition D') requires that, where a person's appeal rights are exhausted, he or she is not failing to cooperate with arrangements that would enable him to leave the United Kingdom[96]. That condition thus protects the individual who is not taking advantage of the fact that they have not been forcibly removed from the United Kingdom. The fifth alternative condition ('Condition E') requires that a person specified in regulations (to be) made under that paragraph is satisfied that the provision of support is necessary to safeguard and promote the welfare of a dependent child[97]. That condition thus provides a 'safety valve' to (try to) ensure that the child of a person who is not seeking to regularise their status and who is unfairly taking advantage of the fact that they have not been forcibly removed is not prejudiced by either factor. It will be noted, however, that the 'safety valve' is not simply that support is necessary to safeguard and promote the welfare of a dependant child, but that a person specified in regulations is satisfied of that fact. Further, paragraph 10A(8) of Schedule 3

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[91] Schedule 3 para 10A(12) (as inserted by Schedule 12 para 10).

[92] Schedule 3 para 10A(13) (as inserted by Schedule 12 para 10). The circumstances in which an application is to be deemed to have been made or not (on the basis that it is vexatious or wholly without merit) are to be provided for in regulations.

[93] Schedule 3 para 10A(3) (as inserted by Schedule 12 para 10).

[94] Schedule 3 para 10A(4) (as inserted by Schedule 12 para 10).

[95] Schedule 3 para 10A(5) (as inserted by Schedule 12 para 10).

[96] Schedule 3 para 10A(6) (as inserted by Schedule 12 para 10).

[97] Schedule 3 para 10A(7) (as inserted by Schedule 12 para 10).

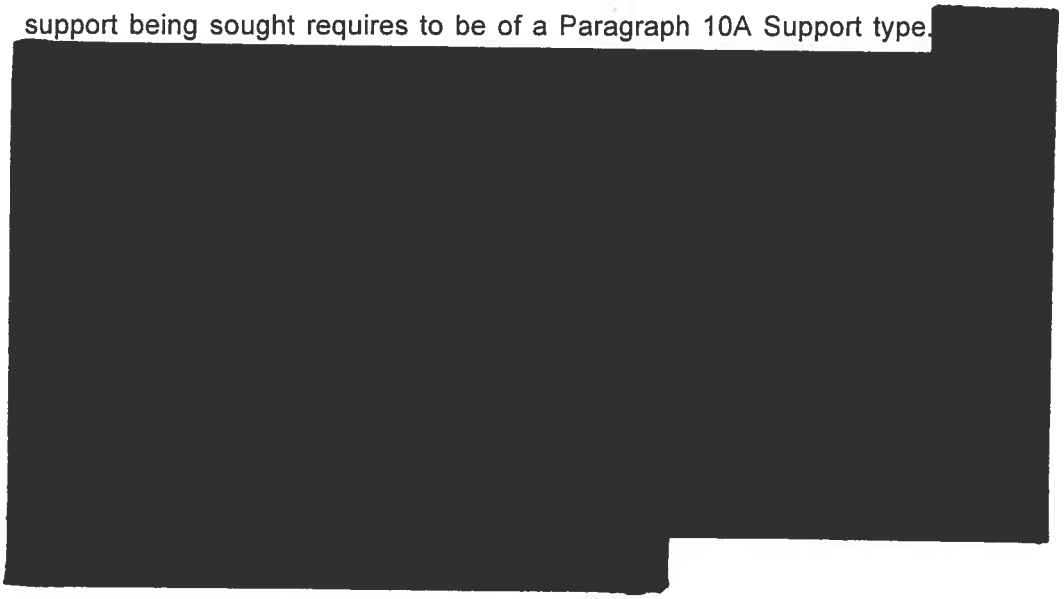
provides that such regulations may specify factors which a person so specified may or must take into account in making a determination as to whether the provision of support is necessary, and factors which such a person must not take into account. [redacted]

58. The second category of person (otherwise ineligible under paragraph 1) is provided for in the new paragraph 10B of Schedule 3. That provision empowers the Secretary of State to make regulations providing for arrangements to be made for support ("**Paragraph 10B Support**") to be provided to a person to whom paragraph 1 applies by virtue of paragraph 7B (i.e. persons without immigration status) and who would otherwise be eligible for after care support under sections 23C, 23CZA or 23CA of the 1989 Act, and in relation to whom one of four alternative conditions is satisfied. This provision is thus directly aimed at the formerly looked after child. The four conditions referred to (Conditions A-D) are the same as the first four conditions set out in paragraph 10A, above, with one qualification: as regards the 'appeal rights exhausted' condition, the requirement is not that the individual is not failing to cooperate with arrangements that would enable him to leave the United Kingdom, but rather a requirement similar to 'Condition E' in paragraph 10A: that a person specified in regulations under paragraph 10B is satisfied that support needs to be provided. As with paragraph 10A, it is not possible to know whether or not the inclusion or exclusion of any such factors will be challengeable unless and until the regulations have been made. But it is at least potentially arguable that such restrictions as they seek to place on the welfare assessment will be able to be challenged as *ultra vires* either Article 8 ECHR or section 55 of the 2009 Act.

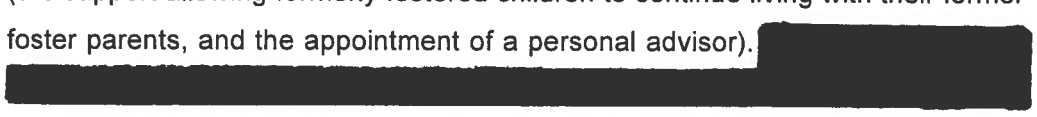
59. The final amendments to Schedule 3 of significance are made by paragraph 6 of Schedule 12, which inserts new paragraphs 3A, 3B and 3C into Schedule 3 in consequence of the availability of Paragraph 10A and 10B Support, discussed above.

60. The effect of the new paragraph 3A is, "notwithstanding paragraph 3" (the breach

of ECHR provision), to exclude the provision of support by local authorities in England under section 17 of the 1989 to a person in respect of a child where the support or assistance is of a type which could be provided to the person by virtue of paragraph 10A, and support is either being provided pursuant to that provision or there are reasonable grounds for believing that Paragraph 10A Support will be provided by virtue of that paragraph. In order for this exclusion to 'bite', the support being sought requires to be of a Paragraph 10A Support type.



61. The new paragraph 3B of Schedule 3 further prevents a local authority in England from providing support or assistance under section 23C, 23CA, 24A or 24B of the 1989 Act to a person (in effect, a formerly looked after child and young adult) if either Paragraph 10B or Section 95A Support is being provided, or there are reasonable grounds for believing that support will be provided to the person by virtue of either paragraph or section. It will be noted that, unlike paragraph 3A, the support in question does not have to be 'of a type' which could be provided by virtue of paragraph 10B of Schedule 3 or section 95A of the 1999 Act. The mere fact of either Paragraph 10B or Section 95A Support being available (or there being reasonable grounds for believing it will be provided) is enough to absolutely exclude a formerly looked after child, now young adult, from being provided with after care by a local authority in exercise of its corporate parenting responsibilities, notwithstanding the possibility in paragraph 3 of avoiding a breach of the ECHR. The new paragraph 3C makes identical provision as regards the support provided for in the provisions mentioned in paragraph 1(ga) (the support allowing formerly fostered children to continue living with their former foster parents, and the appointment of a personal advisor).



[redacted]

Constitutional aspects

62. The possibility of a 'constitutional' challenge to the use of regulations to implement the 2016 Act amendments as regards Scotland has already been discussed above. It remains to be considered, having regard to the first of the questions posed in our letter of instruction, whether there is any scope for a constitutional challenge to the failure of the United Kingdom Government to engage the Sewel Convention prior to the 2016 Act being passed by the Westminster Parliament. The short answer to this question is 'No'. A longer answer is provided by the following excerpt from *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583:

> "141 Before addressing the more recent legislative recognition of the [Sewel] convention [by way of the amendments of the Scotland Act 2016], it is necessary to consider the role of the courts in relation to constitutional conventions. It is well established that the courts of law cannot enforce a political convention ... the political nature of the Sewel Convention was recognised by Lord Reed in ... *Imperial Tobacco Ltd v Lord Advocate* 2012 SC 297 ... While the UK government and the devolved executives have agreed the mechanisms for implementing the convention in the Memorandum of Understanding, the convention operates as a political restriction on the activity of the UK Parliament. Article 9 of the Bill of Rights, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament", provides a further reason why the courts cannot adjudicate on the operation of this convention.
>
> ...
>
> 146 Judges therefore are neither the parents nor the guardians of political conventions; they are merely observers. As such, they can recognise the operation of a political convention in the context of deciding a legal question ... but they cannot give legal rulings on its operation or scope, because those matters are determined within the political world ...
>
> ...

148 As the Advocate General submitted, by [section 2 of the Scotland Act 2016], the UK Parliament is not seeking to convert the Sewel Convention into a rule which can be interpreted, let alone enforced, by the courts; rather, it is recognising the convention for what it is, namely a political convention, and is effectively declaring that it is a permanent feature of the relevant devolution settlement. That follows from the nature of the content, and is acknowledged by the words ("it is recognised" and "will not normally"), of the relevant subsection. ***We would have expected UK Parliament to have used other words if it were seeking to convert a convention into a legal rule justiciable by the courts***.

...

151 In reaching this conclusion we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. ***The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.***" (emphasis added)

Legal remedies & standing

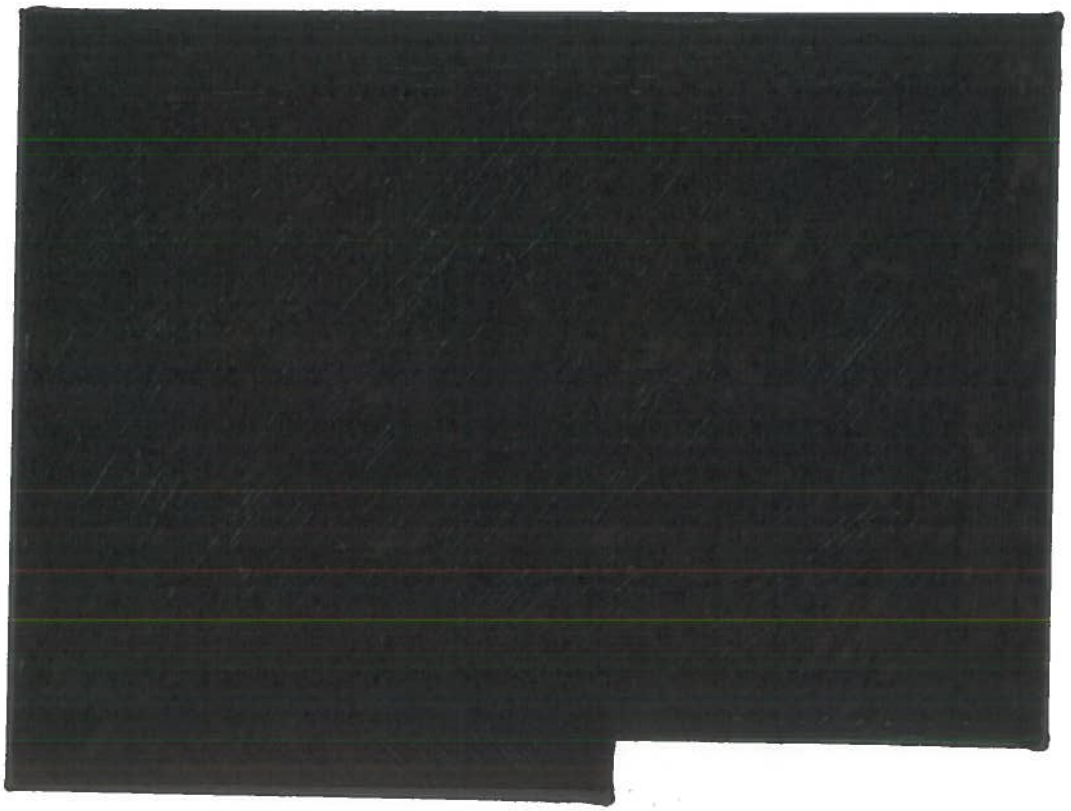
63. The final part of this opinion seeks to answer the sixth and seventh questions posed in our letter of instruction regarding legal remedies and standing. As to legal remedies, we are asked to advise as to the remedies which would be open to asylum seeking and migrant children and young people to challenge negative decisions by the Home Office and / or local authorities regarding rights to access support. The answer, in terms of procedure, depends on the body which has taken the decision in question. If it is taken by the Home Office, then depending on the facts of the case it could potentially be challenged on the basis of section 6 of the 1998 Act as being contrary to the best interests of the child as protected by Article 8 ECHR (or as being contrary to one of the other rights protected by the ECHR—such as the right to non-discrimination in Article 14 ECHR), or on the basis of section 55 of the 2009 Act. A declarator to that effect could be sought and, in light of their status as secondary legislation, the regulations could be sought to be reduced (i.e. 'struck down'). If the decision in question is taken by a local authority, it could also be challenged on the basis of the 1998 Act and on

the basis that it is contrary to either section 22 of the 1995 Act or, as regards looked after and formerly looked after children, sections 17 and 29. The same remedies would, in principle, be available.

64. As to seventh and final question, we are asked, in the event that any potential legal challenges are able to be identified, whether an individual requires to be identified to enable proceedings to be brought. It is now settled that the bringing of public law challenges in Scotland is governed by 'standing' rather than title and interest to sue. Accordingly, whilst an individual requires to show that he or she is affected by an issue raised by the petition which is sought to be brought, as was noted by Lord Hope in *AXA General Insurance Company Ltd v Lord Advocate*, [2011] UKSC 46, 2012 SC (UKSC) 122: "[a] personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent"[98].

65. A separate question arises, however, as regards challenges under the ECHR, which requires 'victim status' to be established. Section 7(1) of the 1998 Act provides that a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the 1998 Act may bring proceedings against the authority under the 1998 Act in the appropriate court or tribunal, or rely on the ECHR right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act. Section 7(4) of the 1998 Act, although using the 'old' terminology, expressly provides that, if the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act—which section 7(7) identifies as being 'victim' within the meaning of Article 34 ECHR. Article 34 ECHR requires an individual to be "directly affected" by the measure or act in question. The wording of the test under Article 34 ECHR and so section 7 of the 1998 Act is thus in part identical to that applied historically at common law. But the approach is not the same, and a more direct link is required as between the act in question and the ECHR rights of the individual in whose name the challenge is brought. [redacted]

[98] *AXA General Insurance Company Ltd v Lord Advocate*, [2011] UKSC 46, 2012 SC (UKSC) 122 at p 148 §63 (Lord Hope of Craighead).



66. We are happy to discuss further this or any other matter arising out of this opinion.

Ruth Crawford QC
Lesley Irvine, Advocate
May 2017 (Revised August 2017)