

# LEGAL & POLICY BRIEFING

## Migrant care leavers: Duties of Welsh local authorities under the Social Services and Well-being (Wales) Act 2014

AUTHOR: JONATHAN PRICE

PUBLISHED: AUGUST 2016

## TABLE OF CONTENTS

Introduction.....	3
Status of this briefing.....	3
How is this briefing structured? .....	3
Social Services and Well-Being (Wales) Act 2014 .....	4
Leaving care services under the Social Services and Well-being (Wales) Act: an overview.....	4
Immigration restrictions on leaving care support provided by local authorities in Wales .....	8
Human rights assessments.....	9
Potential implications of the Immigration Act 2016 on the leaving care duties of Welsh local authorities .....	11
Further resources.....	13
Acknowledgments .....	13

## Introduction

This briefing provides information on the duties of local authority social services departments in Wales to migrant children and young people who are leaving care. The briefing considers the eligibility of migrant care leavers with various immigration statuses, including those who have been through/are going through the asylum system, to leaving care services under the Social Services and Well-being (Wales) Act 2014. It also provides information on the leaving care services that are provided by local authorities, the assessment process local authorities are required to undertake when migrant care leavers are excluded from leaving care support by immigration legislation, and additional considerations for local authorities in respect of migrant care leavers over and above those with British citizenship. It is intended for those working in local authorities undertaking assessments of need and/or providing services, and to service users and those providing assistance or advocacy support to service users.

## Status of this briefing

This briefing does not constitute legal advice and does not have statutory status. For advice on individual cases, legal advice should be sought from your organisation's legal services or an independent legal advisor.<sup>1</sup> Rather, this briefing provides general information on the duties of local authorities in Wales to migrant care leavers.

The Statutory Codes of Practice and Guidance for local authorities on the Social Services and Well-being Act Wales 2014 are available at: <http://gov.wales/topics/health/socialcare/act/code-of-practice/?lang=en>. Local authorities must act in accordance with the codes of practice and have regard for guidance contained within it.

This briefing forms part of a series of briefings, which have been produced for the Migration Services in Wales project. This briefing should be read in conjunction with the other briefings, which are listed with weblinks below:

- [Single adult migrants: Destitution, safeguarding and services under the Social Services and Well-being \(Wales\) Act 2014](#) (May 2016)
- [The Employment Rights of Migrants in the Welsh Labour Market](#) (March 2016)
- [Human Trafficking, Modern Slavery and the National Referral Mechanism in Wales](#) (February 2016)
- [Access to Healthcare for Migrants in Wales](#) (February 2016)
- [Migrants' Entitlements to Welfare Benefits in Wales](#) (January 2016)
- [Children and families: Destitution, safeguarding and services under the Children Act 1989 \(up to April 2016\) and Social Services and Well-being \(Wales\) Act 2014](#) (from April 2016) (September 2015)

*Please note: due to the unknown implications of the United Kingdom's withdrawal from the European Union at time of writing, this briefing has been written to reflect the duties of local authorities under EU law as they have been until the time of writing. These affect the duties of local authorities under the Social Services and Well-being (Wales) Act 2014 to mobile EU citizens. These may change in the coming years, therefore please check updates to this briefing for any further information.*

## How is this briefing structured?

This briefing begins by providing an overview of the leaving care services provided by local authorities in Wales under the Social Services and Well-being (Wales) Act 2014 and the different categories of young people leaving care that are specified under the Act. It continues by outlining which groups of migrant children and young people (by immigration status) are eligible for leaving care services and which are not eligible, followed by a description of the assessment process for those young people excluded from leaving care support (the Human Rights Assessment). It concludes by summarising the potential implications of the Immigration Act 2016 for leaving care services provided by local authorities in Wales.

1. Please see the following website to search for legal advice near to you: <http://find-legal-advice.justice.gov.uk>

## Social Services and Well-Being (Wales) Act 2014

The Social Services and Well-Being (Wales) Act 2014<sup>2</sup> received Royal Assent on 1 May 2014 and came into force on 4th April 2016. It replaced a number of Acts governing practice of social services in Wales, including the National Assistance Act 1948, The Chronically Sick and Disabled Persons Act 1970 and parts of the Children Act 1989 (including its leaving care provisions). The Social Services and Well-Being (Wales) Act 2014 leaves Section 117 Mental Health Act 1983 (aftercare services) intact, as well as Parts 4 (care and supervision) and 5 (protection of children) of the Children Act 1989. The Act brings together social care law for adults and children into a single statute, marking a significant contrast to social care legislation and structure to neighbouring England.

An in-depth consideration of some of the key principles and core statutory duties of the Social Services and Wellbeing (Wales) Act 2014 is provided in [Single adult migrants: Destitution, safeguarding and services under the Social Services and Well-being \(Wales\) Act 2014](#) (May 2016) and [Children and families: Destitution, safeguarding and services under the Children Act 1989 \(up to April 2016\) and Social Services and Well-being \(Wales\) Act 2014 \(from April 2016\)](#) (September 2015). The key principles and core statutory duties include: well-being; preventative services; information, advice and assistance; voice and control; and safeguarding. These shall be referred in this briefing where relevant to the assessments of need and provision of services to care leavers under the Act.

### Devolved and non-devolved areas of law

Whilst social care is a devolved area of law and policy, immigration and welfare benefits remain the responsibility of the UK government. This means that whilst *restrictions* to services may originate from non-devolved legislation, *entitlements* to services may be enshrined in devolved legislation (more details is given on the interplay between immigration restrictions and social care entitlements, below).

### Leaving care services under the Social Services and Well-being (Wales) Act: an overview

Support provided or arranged by local authorities for young people who are leaving care has the overall aim of supporting young people to transition to adulthood and to independent living, enabling them to achieve their aspirations.

Those who have been looked after by a local authority aged 16 or 17 for a period of 13 weeks (either continuously or in shorter periods cumulatively) will be eligible for a pathway plan to help support their transition to adulthood (subject to certain immigration restrictions outlined in the following section). The duties of local authorities to care leavers apply to young people up to the age of 21, or if in education or training, up to the end of the agreed programme for those aged 25 or under. The local authority that last looked after the young person will be responsible for continued leaving care support to them, however the delivery of support may change depending on the individual circumstances of the young person.

A number of types of support may be provided under the leaving care provisions of the Social Services and Well-Being Act (Wales) 2014, including pathway plans; support in relation to education, training and employment; accommodation; and financial support.

Local authorities have a range of statutory duties to care leavers who are eligible for support, including: a duty to safeguard and promote the well-being of children and young people; a duty to take the views of children and young people into account when planning the transition from care; a duty to make them aware of their entitlement to independent advocacy support and how to access it; and to provide information, advice and assistance to certain categories of care leavers (more detail below). A key principle of the Act in respect of care leavers is joint working, and all agencies involved in their support must work together, and understand each other's roles and responsibilities.

2. <http://www.legislation.gov.uk/anaw/2014/4/contents>

Further detail on the duties of local authorities to care leavers are provided in the Code of Practice on Part 6 of the Social Services and Well-being (Wales) Act 2014, which is available at: <http://gov.wales/docs/phhs/publications/160106pt6en.pdf>.

### Categories of care leavers

There are five categories of care leavers which a young person may fall under depending on their circumstances, as defined under Section 104 Social Services and Well-being (Wales) Act 2014. Different categories of care leaver will be eligible for different types of support offered by local authorities under the Social Services and Well-being (Wales) Act 2014. They are as follows:

Category of young person	Definition	Duties specified under	Summary of support that can be provided (subject to some limitations, specified in the Code of Practice on Part 6 of the Act)
Category 1 young person	A looked after child, aged 16 or 17	Various under Part 6	<ul style="list-style-type: none"> <li>• Provide all services for looked after children</li> <li>• Assess child's needs, including advice, assistance and support needed</li> <li>• Prepare pathway plan</li> <li>• Appoint personal advisor</li> </ul>
Category 2 young person	A care leaver aged 16 or 17	Sections 105, 106, 107 and 109 of the Act	<ul style="list-style-type: none"> <li>• Accommodation</li> <li>• Assistance with education, training or employment</li> <li>• Financial assistance</li> <li>• Prepare pathway plan</li> <li>• Appoint personal advisor</li> </ul>
Category 3 young person	A care leaver aged 18 or over	Sections 105, 106, 107 and 110 of the Act	<ul style="list-style-type: none"> <li>• Assistance with accommodation and/or financial assistance</li> <li>• Assistance with education, training or employment</li> <li>• Keeping in touch</li> <li>• Keeping pathway plan under regular review</li> <li>• Appoint personal advisor</li> <li>• If in higher education, paying higher education bursary</li> </ul>
Category 4 young person	A care leaver aged 18 or over who reconnects to care for education or training purposes	Sections 106, 107 and 112 of the Act	<ul style="list-style-type: none"> <li>• Assistance with accommodation and/or financial assistance</li> <li>• Assistance with education, training or employment</li> <li>• Appoint personal advisor</li> <li>• If in higher education, paying higher education bursary</li> <li>• Prepare pathway plan</li> </ul>
Category 5 young person	A care leaver between the ages of 16 and 21 who left care under a Special Guardianship Order	Section 114 of the Act	<ul style="list-style-type: none"> <li>• Assistance with accommodation and/or financial assistance</li> <li>• Assistance with education, training or employment</li> </ul>
Category 6 young person	A young person between the ages of 16 and 21 who did not qualify as a care leaver	Sections 105 and 115 of the Act	<ul style="list-style-type: none"> <li>• Assistance with accommodation and/or financial assistance</li> <li>• Assistance with education, training or employment</li> </ul>

### Pathway plans

Under Section 107 Social Services and Well-being (Wales) Act 2014, there is a duty to prepare a pathway plan for young people in categories 1-4. The pathway plan must include the Part 6 care and support plan and set out the actions that will be taken by the local authority, by the care leaver, where applicable their parents or carers, and all

the agencies involved. It must specify which services will be provided and be based on an up-to-date and thorough assessment of the young person's needs, taking into account their health and development; their aspirations in relation to education, training and employment; their contact with parents, family and friends; their accommodation needs and the suitability of accommodation; and their financial capabilities. The views of the young person must be taken into account and incorporated into the pathway plan and a copy of the plan must be provided to them.

Local authorities have a statutory duty to provide Personal Advisors to young people in categories 1-4, however there is no longer a statutory duty to provide a social worker to plan and coordinate their support. The statutory Part 6 Code of Practice recommends that local authorities employ a range of Personal Advisors, taking into consideration their gender and ethnicity. The duties of Personal Advisors are set out under Part 3 [Care Leavers \(Wales\) Regulations 2015](#). They include maintaining regular face to face contact with the care leaver; providing advice and support about accommodation, education, training and employment; participating in assessments, preparing the pathway plan, reviewing the plan and coordinating their support; liaising with the local authority in respect of their pathway plan; and to keep informed about their progress and well-being.

As a young person matures and develops, it is expected that they take more control over their pathway plan. The statutory Part 6 Code of Practice notes that for unaccompanied asylum seeking children, pathway plans should include any considerations that arise as a result of a young person's immigration status including scenarios where they are required to leave and those where they are permitted to remain (see below section for more information on immigration restrictions).

### **Education, training and employment**

A young person's career aspirations and their plans for education and training should form part of their pathway plan. The statutory Part 6 Code of Practice recommends that local authorities develop a policy regarding the financial support and assistance with accommodation care leavers can expect when attending an educational institution.

Under Section 116 Social Services and Well-being (Wales) Act 2014, there is a power for local authorities to pay a one-off bursary for young people who pursue a higher education course that is included in their pathway plan.

### **Accommodation and financial support**

Local authorities must ensure category 2 care leavers' accommodation is 'suitable' to their needs. 'Suitable accommodation' is defined under Regulation 9 (2) Care Leavers (Wales) Regulations 2015 as *"accommodation which so far as reasonably practicable is suitable for the category 2 young person in the light of their needs, including any health needs and any needs arising from any disability; in respect of which the responsible local authority has satisfied itself as to the character and suitability of the landlord or other provider; and in respect of which the responsible local authority has, so far as reasonably practicable, taken into account the category 2 young person's wishes and feelings, and education, training and employment needs."* A checklist of matters to be considered in determining the suitability of accommodation is provided in Schedule 3 to the Regulations, which are: facilities and services provided; state of repair; safety; location; support; tenancy status; the financial commitments involved for the category 2 young person and their affordability; their views of the accommodation; understanding of their rights and responsibilities in relation to the accommodation; and understanding of funding arrangements.

It is good practice for local authorities to commission a range of accommodation options for care leavers to meet diverse needs, such as tenancies in the private rented sector (PRS) and social sector, and supported accommodation.

For care leavers aged 18 or over, social services departments should work with their local authority housing department to meet their accommodation needs under housing legislation. Housing Benefit helps towards rent payments for people on low incomes; homelessness assistance usually comprises the provision of emergency

accommodation for those that are assessed by the local authority as being homeless (under Housing (Wales) Act 2014); social housing may be allocated to those with longer-term housing needs either within council-provided or housing association-provided accommodation (under Part 6 Housing Act 1996).

The local authority's policy regarding the provision of accommodation and financial support to migrant care leavers should specify how differing immigration statuses may impact entitlements to accommodation and financial support.

Those with recourse to public funds, including refugees, people granted Discretionary Leave to Remain (DLR), Humanitarian Protection, Indefinite Leave to Remain (ILR), Limited Leave to Remain (LLR) with recourse to public funds and mobile EU citizen workers/self-employed people (and their family members), including those with retained worker status, are entitled to claim Housing Benefit and will need to meet the specific eligibility requirements of this means-tested welfare benefit.

People who are entitled to be allocated social housing are detailed in Regulation 3 of the Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2014 and include people with refugee status or humanitarian protection, people with leave to enter or remain that is not subject to the 'no recourse to public funds' condition, people with Indefinite Leave to Remain (ILR) or permanent residence that are habitually resident, and people with an EU right to reside as workers/self-employed people (and their family members).

Homeless people who are entitled to claim Homelessness Assistance are detailed under Regulation 3 of the Allocation of Housing and Homelessness (Eligibility) (Wales) Regulations 2014 and include people with refugee status or humanitarian protection, people with leave to enter or remain that is not subject to the 'no recourse to public funds' condition, people with Indefinite Leave to Remain (ILR) or permanent residence that are habitually resident, asylum seekers who applied for asylum before 3 April 2000, and people with an EU right to reside as workers/self-employed people (and their family members).

Care leavers aged 18 or over may be entitled to welfare benefits, including income-based jobseeker's allowance or income support. Personal advisors and other professionals working with care leavers should be aware of the financial support that is available to young people. Further, local authorities should support care leavers to develop financial literacy skills and to take responsibility for their own finances. Additional financial support may be provided to a young person by a local authority to the extent that their well-being, and educational and training needs require it. Each local authority must have a policy setting out the financial support that will be provided to care leavers depending on their circumstances. The financial support provided to each care leaver should be specified in their pathway plan, including the amount, frequency, method and review of payments.

### **Care leavers with 'no recourse to public funds' (NRPF)**

Care leavers aged 18 and over who have 'no recourse to public funds' (NRPF) as a condition of their leave to enter or remain in the UK, will not be entitled to the above forms of local authority housing support or most welfare benefits (as listed under Paragraph 6 of the Immigration Rules) because these are considered 'public funds.' Further information on groups of migrants who have NRPF as a condition of their leave to enter or remain in the UK can be found in [Single adult migrants: Destitution, safeguarding and services under the Social Services and Well-being \(Wales\) Act 2014](#). For care leavers with NRPF to whom local authorities in Wales owe leaving care duties, support may be needed with accommodation and finance to the extent that their well-being and educational and training needs require it.

Asylum seekers are excluded from welfare benefits by their individual eligibility conditions and therefore care leavers with pending asylum claims or appeals will generally not be able to claim welfare benefits unless they have been granted an extended period of Discretionary Leave to Remain (DLR)/UASC leave. A limited amount of funding is



available to local authorities from the Home Office for unaccompanied asylum seeking children who are leaving care, subject to some limitations. Local authorities that have supported more than 25 care leavers within a financial year will be entitled to claim reimbursement of £150 per week for each care leaver over the threshold of 25, if the young people meet eligibility criteria detailed in the [Home Office funding instructions](#). This includes those with pending asylum claims (including those awaiting the outcome of an appeal).<sup>3</sup>

### Immigration restrictions on leaving care support provided by local authorities in Wales

Migrant care leavers may have a range of immigration statuses, usually assigned to them by the Home Office or by virtue of their nationality. These may be a short-term status (e.g. asylum seeker) or longer-term status (e.g. refugee status or being a mobile EU citizen).

Many of the migrant children and young people that have been looked after by a local authority have been through the asylum system. Unaccompanied asylum seeking children are frequently granted UASC leave for 30 months or until they are 17.5 years old, however some may have been granted Discretionary Leave to Remain before this shift in policy. A young person can apply for their leave to be extended beyond the time allocated or at age 17.5, and when they are aged 18 and over they will be able to apply for welfare benefits and local authority housing support. As noted above, some groups of migrants cannot apply for welfare benefits or local authority housing support on account of the 'no recourse to public funds' condition on their leave to enter or remain in the UK, on account of being an asylum seeker (that has not been granted a limited period of leave) or because they are a mobile EU citizen that is not a qualified person under the Immigration (European Economic Area) Regulations 2006. The 'no recourse to public funds' condition only affects entitlement to a specific list of welfare benefits and housing services listed under Paragraph 6 of the Immigration Rules; it **does not affect** entitlement to support provided under Sections 105-116 Social Services and Well-being (Wales) Act 2014 because this support does not count as a 'public fund'.

Some groups of migrants, however, are excluded from receiving support under Sections 105-116 (leaving care) Social Services and Well-being (Wales) Act 2014 by **Schedule 3 Nationality, Immigration and Asylum Act 2002 (NIAA)**. These five groups are:

- nationals of EEA countries;
- people granted refugee status in other EEA countries;
- refused asylum seekers who have failed to comply with removal directions;
- people unlawfully in the UK (including visa overstayers and illegal entrants); and
- refused asylum seeker families that have not taken reasonable steps to leave the UK voluntarily.

These exclusions apply only to adults aged 18 or over and **do not apply to children**. Leaving care services provided to those up to the age of 18 under the Social Services and Well-being (Wales) Act 2014 are unaffected by Schedule 3 Nationality, Immigration and Asylum Act 2002 (NIAA). However, once a young person turns 18 and they fall into one of the five excluded groups listed under Schedule 3 NIAA, they will be excluded from leaving care services under Social Services and Well-being (Wales) Act 2014, and local authorities in Wales in such circumstances will have a statutory duty to assess whether the provision of leaving care services is necessary to prevent a breach of their rights under the European Convention on Human Rights and under EU law, if they are nationals of an EEA country.

For migrant care leavers who do not fall into one of the excluded groups under Schedule 3 NIAA their entitlement to leaving care services under Sections 105-115 Social Services and Well-being (Wales) Act 2014 is not affected by their immigration status, even if they are aged 18 or over. Migrant groups **not** affected by Schedule 3 NIAA include: asylum seekers, refugees, those granted Humanitarian Protection, Discretionary Leave to Remain (DLR), Indefinite

3. The funding arrangement may change in months following publication of this briefing and readers should check updates to the Home Office's guidance for up-to-date information.



Leave to Remain (ILR), Limited Leave to Remain (LLR) and Zambrano carers. There are additional circumstances where a care leaver would not be restricted from leaving care support by Schedule 3 NIAA, including when they are an all appeal rights-exhausted refused asylum seeker who was never granted DLR/UASC leave and applied for asylum at port-of-entry. We shall also see below that some groups may be excluded from leaving care support by Schedule 3 NIAA because of their immigration status, however their circumstances prevent them from leaving the UK and so they would continue to be eligible for leaving care services in Wales; this includes where a young person has submitted fresh representations on their asylum or immigration claim or they face practical obstacles to leaving the UK.

## Human rights assessments

Where Schedule 3 NIAA applies because a care leaver falls into one of the five excluded groups and the question of their entitlement to leaving care support under the Social Services and Well-being (Wales) Act 2014 arises, local authorities must assess whether the withdrawal of support would constitute a breach of ECHR and EU rights, as appropriate. If ECHR and/or EU rights would be breached should services be withdrawn, then a local authority will continue to owe leaving care duties. If human rights and/or EU rights would **not** be breached should services be withdrawn, then a local authority will not owe leaving care duties to the young person.

Many local authorities use the NRPF Network's Human Rights Assessment template, which is downloadable from the following webpage: <http://www.nrpfnetwork.org.uk/guidance/Documents/Human%20Rights%20Assessment%202012.doc>.

Human Rights Assessments should be fact-specific, gathering evidence to assess whether the provision of leaving care services under the Social Services and Well-being (Wales) Act 2014 support is necessary to prevent a breach of human rights and, where applicable, rights under EU law. The facts of a young person's circumstances should be presented in the assessment in the context of key test cases (detailed below) in order to formulate a series of recommendations for how the local authority plans to proceed. Evidence available to local authorities and to young people and their advocates in this process can be found from a number of authoritative sources, including:

- Home Office Country Information and Guidance reports: <https://www.gov.uk/government/collections/country-information-and-guidance>
- Amnesty International Country information: <https://www.amnesty.org/en/countries/>

There are two broad scenarios in which a Human Rights Assessment may be carried out: firstly, where there is a legal or practical barrier for the young person to return to their country of origin, in which case the local authority should revert to its leaving care duties to the young person under the Social Services and Well-being (Wales) Act 2014. Secondly, where no such legal or practical obstacles are identified, the purpose of the assessment is to assess how the local authority might lawfully discharge its duties: through the provision of leaving care services in Wales under the Social Services and Well-being (Wales) Act 2014 or through assistance to the young person in returning to their country of origin.

## Legal and practical barriers to return

Case law has established that where there is no legal or practical barrier to a person returning to their country of origin, local authorities would not breach human rights should social services support be withheld or withdrawn (*AW and others v Croydon LBC and others [2005] EWCA Civ 266*). Examples of legal barriers to return include human rights applications to the Home Office (some immigration applications will not constitute a legal barrier to return if they can be made from outside of the UK). Practical barriers to return include health issues that prevent travel or a lack of travel documents, although these may be temporary barriers.

Where a legal or practical barrier prevents a person from returning to their country of origin, local authorities should assess what leaving care duties are owed to the young person in Wales.

## Substantive Human Rights Assessment

If no legal or practical obstacles to return are identified, local authorities must proceed by undertaking a substantive Human Rights Assessment. If a human rights breach is identified and a young person cannot be expected to return to their country of origin, then the local authority must determine which leaving care services the young person is entitled to in Wales. If human rights concerns that have not been presented to the Home Office are raised, legal advice can be sought to explore whether claimants have any enforceable rights to remain in the UK. For young people that have received a decision on their immigration claim, human rights and related considerations may have been considered by the Home Office/Immigration and Asylum Tribunal and can be used by local authorities as evidence in the Human Rights Assessment. Indeed local authorities have no powers to come to different conclusions, unless the young person's circumstances or the circumstances in their country of origin have changed since the decision was issued. In such situations, the local authority can advise a person to seek immigration advice.

The purpose of the Human Rights Assessment is to assess whether the provision of leaving care services under the Social Services and Well-being (Wales) Act 2014 in Wales is necessary to prevent a breach of ECHR rights and EU rights, as appropriate. As leaving care services under Sections 105-115 Social Services and Well-being (Wales) Act 2014 are excluded by Schedule 3 NIAA for the five groups of people detailed above, the provision of this support is not necessary if no ECHR breach would occur should the person return, and as such, a key principle underpinning the assessment is that of 'returnability.' Information about voluntary return services (arranged via the Home Office) is available at: <https://www.gov.uk/return-home-voluntarily/who-can-get-help>.

The Human Rights Assessment for care leavers is, in effect, comprised of three components (the third only relating to mobile EU citizens). The first two components may have been considered in immigration applications and provide strong evidence for local authorities in developing their analysis:

### *I. Article 3 ECHR – No one shall be subjected to torture or to inhumane or degrading treatment*

The local authority must consider whether return would cause a breach of Article 3 ECHR. The threshold for engaging Article 3 ECHR is high. The case of *N v SSHD [2005] UKHL 31* provides a guide for assessing whether this threshold might be met on medical grounds because return to country of origin would subject them to torture or inhumane or degrading treatment. The test to be applied is whether the young person is dying and whether they would die with dignity on return.

### *II. Article 8 ECHR – the right to private and family life*

Article 8 ECHR is not an absolute right and can be enjoyed in a person's country of origin. The rights of the young person being assessed as well as their family members must be considered, with a focus on which relationships would be affected if the young person were to return. The strength of those relationships should be considered along with how those relationships could be maintained other than through the provision of leaving care services under Social Services and Well-being (Wales) Act 2014 e.g. through visits, telephone or Skype contact.

### *III. Rights under EU law<sup>4</sup>*

An assessment of potential breaches of EU rights should form part of the Human Rights Assessment where the question of a mobile EU citizen's eligibility for leaving care support arises. Mobile EU citizens exercise their rights under EU law by being a qualified person under the Immigration (European Economic Area) Regulations 2006, rights that derive from the 'free movement' or 'citizens' directive. In order to be a qualified person, mobile EU citizens must be workers, self-employed, self-sufficient, students or jobseekers. Direct ascendant and descendant family members can derive their EU right to reside from a qualified person.

4. As noted earlier in this briefing, the future implications of the UK's exit from the EU are unknown. Here we detail the position at time of writing prior to negotiations taking place. Please check updates to this briefing for any developments.

In the absence of case law dealing directly with the question of potential breaches of EU rights in the context of social services duties, local authorities must assess whether the provision of leaving care services under the Social Services and Well-being (Wales) Act 2014 is *necessary* to prevent a breach of EU rights. A breach of EU law may more clearly occur where the withholding or withdrawal of support would result in a mobile EU citizen being required to stop working; the withdrawal of support to the person where a person is exercising rights as a jobseeker would less likely result in such a breach. If no EU rights are being exercised, then no breach would occur.

A Human Rights Assessment should conclude by providing recommendations for how the local authority will proceed in light of the evidence presented and analysis of the young person's circumstances. If it is the local authority's opinion that a breach of the young person's human rights/EU rights would occur should they return to their country of origin, they should proceed with an assessment of which leaving care services will be provided under Social Services and Well-being (Wales) Act 2014. If it is the local authority's opinion that a breach of the person's human rights/EU rights would not occur should a person return to their country of origin, they may offer assistance to the young person in arranging return, provide temporary assistance or enable friends/family to provide support, as appropriate.

## Potential implications of the Immigration Act 2016 on the leaving care duties of Welsh local authorities

The Immigration Act 2016 received Royal Assent on 12 May 2016 and some of its provisions have since come into force. The Act makes significant changes to the asylum support system and the duties of local authorities in England to care leavers under the Children Act 1989. Whilst the amendments are not currently set to apply in Wales under the Social Services and Well-being (Wales) Act 2014, the Immigration Act 2016 allows for regulations to be made to extend the amendments to Wales. Amendments to the asylum support system, however, will take effect in Wales. In this section, amendments to the Children Act 1989 in respect of migrant care leavers' access to local authority services are detailed, and these may reflect future changes to the Social Services and Well-being (Wales) Act 2014 should regulations be made to extend the measures to Wales. It is likely that amendments to the Children Act 1989 will come into force in England, and to the asylum support system across the UK, from Spring 2017.

### What are the amendments?

The Immigration Act 2016 amends Schedule 3 Nationality, Immigration and Asylum Act 2002 such that all leaving care support under the Children Act 1989 will be excluded for care leavers that have no immigration permission (including refused asylum seekers and those unlawfully in the UK). Mobile EU citizens and refugees whose status was granted by another EEA state will continue to be excluded by Schedule 3 NIAA unless withdrawing support would constitute a breach of their rights under the ECHR and/or under EU law. Leaving care support that will be excluded includes: accommodation, financial support, contact, a personal adviser, a pathway plan, and assistance with education and training.

Additionally, the Immigration Act 2016 repeals Section 4 Immigration and Asylum Act 1999, 'hard case' asylum support for refused asylum seekers. Instead, support for destitute, refused asylum seekers with a 'genuine obstacle to leaving the UK' will be provided under a new legislative provision: Section 95A Immigration and Asylum Act 1999. The circumstances that constitute 'genuine obstacles to leaving the UK' will be detailed in forthcoming regulations. Changes to asylum support will take effect in Wales at the same time as they do in England because immigration legislation, under which this support is provided, is not devolved.

Furthermore, a new power will be given to local authorities to provide accommodation, financial and 'welfare' support to certain care leavers under Paragraph 10B Schedule 3 NIAA who are not eligible for Section 95A Immigration and Asylum Act 1999 support. This support may be available when a care leaver is destitute and either: has a pending non-asylum immigration application; has a pending non-asylum in-country appeal; or is in time to bring a pending non-asylum in-country appeal. It will also be available to those who are appeal rights-exhausted and the local authority is 'satisfied that support needs to be provided.'

**What kind of support will migrant care leavers be eligible for when the amendments come into force?**

Asylum seekers, those with refugee status, those granted humanitarian protection, DLR, ILR or LLR, will continue to be eligible for leaving care support under the Children Act 1989.

Refused asylum seekers will not be entitled to leaving care support under the Children Act 1989. Refused asylum seeker care leavers will be able to access Section 95A Immigration and Asylum Act 1999 support if they are destitute, if they apply for this support within a limited time frame and there is a genuine obstacle to them leaving the UK (to be detailed in forthcoming regulations). Refused asylum seekers for whom no genuine obstacle to them leaving the UK is established will be eligible for support under Paragraph 10B Nationality, Immigration and Asylum Act 2002 from the local authority if they are destitute and either: have a pending non-asylum immigration application; have a pending non-asylum in-country appeal; or are in time to bring a pending non-asylum in-country appeal. It will also be available to those who are appeal rights-exhausted and the local authority is 'satisfied that support needs to be provided'. Forthcoming regulations will outline the considerations local authorities will need to have in determining eligibility for this support.

Care leavers with no immigration permission will only be eligible for leaving care support under the Children Act 1989 if they have a pending first non-asylum application for leave to enter or remain in the UK. Those with no immigration permission and who have a pending non-asylum application or appeal will be eligible for support under Paragraph 10B Nationality, Immigration and Asylum Act 2002 from the local authority. Those with no immigration permission and who have no application or appeal pending will only be eligible for Paragraph 10B Nationality, Immigration and Asylum Act 2002 support from the local authority if it is 'satisfied that support needs to be provided.' The local authority will not be required to undertake a human rights assessment in order to withdraw support.

Mobile EU citizens and those granted refugee status in other EEA countries will only be eligible for leaving care support under the Children Act 1989 if withdrawing that support would constitute a breach of rights under the ECHR and under EU law. A human rights assessment will be required in such circumstances. They will not be eligible for support from a local authority under Paragraph 10B Nationality, Immigration and Asylum Act 2002.

## Further resources

Welsh Government Social Services and Well-being (Wales) Act 2014 homepage

<http://gov.wales/topics/health/socialcare/act/?lang=en>

## Key legislation

- [Social Services and Well-being \(Wales\) Act 2014](#)
- [Care Leavers \(Wales\) Regulations 2015](#)
- [Immigration Act 2016](#)
- [Immigration and Asylum Act 1999](#)
- [Nationality, Immigration and Asylum Act 2002](#)
- [Human Rights Act 1998](#)

## Codes of Practice and Statutory guidance

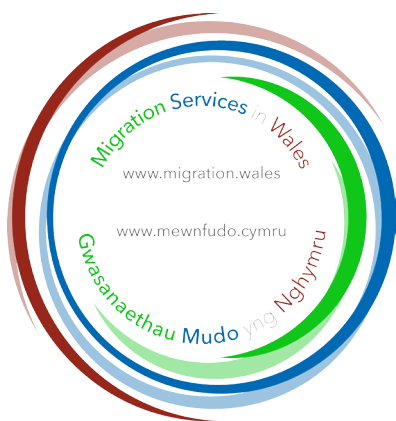
- [Part 2 Code of Practice \(General Functions\)](#)
- [Part 3 Code of Practice \(Assessing the Needs of Individuals\)](#)
- [Part 4 Code of Practice \(Meeting Needs\)](#)
- [Part 4 and 5 Code of Practice \(Charging and Financial Assessment\)](#)
- [Part 7 Guidance \(Safeguarding\)](#)
- [Part 10 Code of Practice \(Advocacy\)](#)
- [Part 11 Code of Practice \(Miscellaneous and General\)](#)
- [Code of Practice on Measuring Social Services Performance](#)

## Useful resources

[Care Council for Wales – Social Services and Well-being \(Wales\) Act 2014 Learning Hub](#)

## Acknowledgments

I am very grateful to Stewart Greenwell, Strategic Development Specialist, ADSS Cymru, Catherine Houlcroft, Project Officer No Recourse to Public Funds (NRPF) Network and Anne Hubbard, Director, Wales Strategic Migration Partnership, for their expert comments and suggestions on this Briefing.



### Migration Services in Wales

Funded by Welsh Government, Migration Services in Wales is a project led by the Welsh Refugee Council in partnership with COMPAS that aims to increase understanding of migration policy and practice in Wales, and to support and facilitate the development of a ‘strategic approach’ to migration in Wales, one that will ensure relevant stakeholders are able to access detailed and up-to-date information.



### The Migration Observatory

Based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford, the Migration Observatory provides independent, authoritative, evidence-based analysis of data on migration and migrants in the UK, to inform media, public and policy debates, and to generate high quality research on international migration and public policy issues. The Observatory’s analysis involves experts from a wide range of disciplines and departments at the University of Oxford.



### COMPAS

The Migration Observatory is based at the Centre on Migration, Policy and Society (COMPAS) at the University of Oxford. The mission of COMPAS is to conduct high quality research in order to develop theory and knowledge, inform policy-making and public debate, and engage users of research within the field of migration.

[www.compas.ox.ac.uk](http://www.compas.ox.ac.uk)



### Welsh Refugee Council

The Welsh Refugee Council has over 25 years’ experience working with refugees and asylum seekers in Wales. It aims to ensure that Wales is a place of welcome through the delivery of specialist services in Cardiff, Wrexham, Newport and Swansea and by influencing policy and practice to improve the lives of migrants across Wales.

