

# LEGAL & POLICY BRIEFING

## Single Adult Migrants:

Destitution, safeguarding and services under the Social Services and Well-being (Wales) Act 2014

AUTHOR: JONATHAN PRICE

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## Introduction

This briefing provides information on the duties of local authority social services departments in Wales to single adults, with a focus on safeguarding and destitution support for those whose immigration status prohibits them from accessing welfare benefits; and alternative support to destitute single adult migrants who are not eligible for local authority support and services, or other forms of statutory accommodation and financial support. In particular, it considers the implications of the transition in April 2016 for local authorities in Wales from providing services under the National Assistance Act 1948 to single adults with community care and community mental health needs to providing services under the Social Services and Well-being (Wales) Act 2014 to single adults with needs for care and support. The briefing considers the assessment processes and provision of services under the new legislation, as well as linking to further resources. It is intended for those working in local authorities undertaking assessments of need and/or providing services, and to service users/potential services and those providing assistance to single adult migrants seeking statutory support. The briefing also considers the support available in the voluntary and community sector to single adult migrants with no entitlement to statutory accommodation and financial support.

## 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 destitute single adult migrants.

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.

A separate Legal and Policy Briefing focusing on the duties of local authorities to destitute migrant children and families under the Social Services and Well-being (Wales) Act 2014 is available at: <http://migration.wales/migration-information/legal-briefings>. Legal and Policy Briefings on local authority duties to unaccompanied migrant and asylum seeking children and to care leavers under the Social Services and Well-being (Wales) Act 2014 shall follow later in 2016.

## How is this briefing structured?

This briefing begins by considering some of the key principles of the Social Services and Well-being (Wales) Act 2014. It then goes on to consider which single adults (by immigration status) may be in need of care and support under the Social Services and Well-being (Wales) Act 2014 and relevant services under the Mental Health Act 1983, and which of these groups may have entitlement to statutory accommodation and financial support other than through provisions under the Social Services and Well-being (Wales) Act 2014 or Mental Health Act 1983. Following this, the briefing focuses on assessments of need under the Social Services and Well-being (Wales) Act 2014 and assessments of potential human rights breaches, and then considering how assessed or eligible needs can be met under these statutory provisions. It concludes by providing information on the provision of voluntary sector support in Wales to single adults with no entitlement to statutory accommodation and financial support.

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

The Social Services and Well-Being (Wales) Act 2014<sup>2</sup> received royal assent on 1st May 2014 and came into force in 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 Part 3 and Section 17). 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

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

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

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.

### Well-being

A key overarching principle of the Act is that of well-being, creating new duties on local authorities to promote the well-being of people who need care and support and carers who need support. Well-being is defined under Section 2 Social Services and Well-Being Act (Wales) 2014 as:

- (a) physical and mental health and emotional well-being;*
- (b) protection from abuse and neglect;*
- (c) education, training and recreation;*
- (d) domestic, family and personal relationships;*
- (e) contribution made to society;*
- (f) securing rights and entitlements;*
- (g) social and economic well-being;*
- (h) suitability of living accommodation."*

For adults, well-being also includes control over day-to-day life and participation in work.

Anyone exercising functions under the Act must seek to promote the well-being of people who need care and support. Individuals' well-being outcomes must be identified and if these are not achievable other than by the provision of care and support by the local authority, a duty will arise.

### Preventative services

Section 15 Social Services and Well-Being Act (Wales) 2014 requires local authorities to provide a range of preventative services in their area, with a range of intended outcomes, such as preventing or delaying the development of a person's need for care and support and reducing those needs, and helping individuals to live independent lives.

Under Section 14 Social Services and Well-Being Act (Wales) 2014, local authorities and Local Health Boards (LHBs) have a strategic duty to assess the care and support needs of their local population and determine what services will be required to meet those needs.

There is also a duty under Section 16 Social Services and Well-Being Act (Wales) 2014 to promote the development of third sector, co-operative or social enterprise-led preventative services and those providing care and support to eligible persons.

### Information, advice and assistance

Section 17 Social Services and Well-Being Act (Wales) 2014 requires local authorities to provide people with information about the care and support that is available in their area – including support that is provided by third sector organisations – in an accessible format, including information about how to access support in their area and how to raise concerns about the safety or well-being of an adult. The service should be accessible to all people to encourage a preventative approach and to encourage others to seek assistance on behalf of people who have needs for care and support. One resource that may be of use to local authorities in identifying third sector services for migrants in Wales is the Welsh Refugee Council's Refugee and Asylum Seeker Services Directory (available soon on the Migration Services in Wales webpages) (please note: consult directory to ascertain eligibility for these services for single adult migrants outside the asylum system).

## Voice and control

There is an assumption underpinning the Social Services and Well-Being Act (Wales) 2014 that adults are best placed to make decisions about their own lives and judge their own well-being, based on their values and what matters to them. The statutory code of practice states that people have a right to be heard as individuals and citizens, and should have control over their own lives. They should be actively involved in making decisions about their lives, and care and support services should be arranged in ways that strengthen the voices of those with needs for care and support, including carers. There is a duty under Section 6 (2) Social Services and Well-Being Act (Wales) 2014 to have regard for a person's views, wishes and feelings, their culture, beliefs and languages, and to have regard to the importance of promoting and respecting the dignity of the individual.

## Safeguarding

Safeguarding obligations are central to the Social Services and Well-being (Wales) Act 2014 and are included within the definition of well-being under its Section 2. A need for protection from abuse and neglect can bring a person within eligibility for care and support. Further, where the needs of an adult do not meet the eligibility criteria, there may still be a duty on the local authority to provide care and support to a person to protect them from abuse, neglect or harm, or the risk of abuse, neglect or harm.

'Abuse' is defined as "*physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place)*". 'Neglect' is defined as "*a failure to meet a person's basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person's well-being (for example, an impairment of the person's health...)*" (Section 197 (1) Social Services and Well-Being Act (Wales) 2014). Examples of what constitutes abuse and neglect are provided in the Statutory Guidance on Part 7 of the Act.

The Social Services and Well-Being Act (Wales) 2014 provides a new statutory framework for the protection of adults experiencing, or at risk of experiencing, abuse or neglect. Section 126 Social Services and Well-Being Act (Wales) 2014 creates a duty on local authorities to investigate where it appears an adult with needs for care and support is at risk of abuse or neglect. Such enquiries should be completed within seven days, and comprise a screening (to check general factual accuracy of any referral); an initial evaluation (to collect, review and collate information); and a determination (given the outcome of the screening / initial evaluation what, if anything, should be done. This may include initiating a single or multi-agency investigation). Local authorities and authorised officers are given powers under Section 127 ('adult protection and support orders' (ASPOs)) enabling an authorised person to speak in private with a person suspected to be at risk (including entering premises), in order to determine whether that person is making decisions freely and to assess whether that person is an adult at risk and what should be done as a result. There is also a duty on local authorities and relevant partners<sup>3</sup> to report to a local authority where there is reasonable cause to suspect an adult is at risk of abuse or neglect.

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3. (a) the local policing body and the chief officer of police for a police area any part of which falls within the area of the local authority;
- (b) any other local authority with which the authority agrees that it would be appropriate to co-operate under this section;
- (c) the Secretary of State to the extent that the Secretary of State is discharging functions under sections 2 and 3 of the Offender Management Act 2007 in relation to Wales;
- (d) any provider of probation services that is required by arrangements under section 3(2) of the Offender Management Act 2007 to act as a relevant partner of the authority;
- (e) a Local Health Board for an area any part of which falls within the area of the authority;
- (f) an NHS trust providing services in the area of the authority;
- (g) the Welsh Ministers to the extent that they are discharging functions under Part 2 of the Learning and Skills Act 2000;
- (h) such a person, or a person of such description, as regulations may specify.

## National eligibility framework

The Social Services and Well-Being Act (Wales) 2014 provides a national eligibility framework for care and support, replacing local eligibility frameworks and aims to ensure that there is a consistent approach to the determination of eligibility across Wales.

## How might migrants be affected differently by the provisions of the Act?

Adults who are subject to immigration control (see section immediately below for definition) are to be assessed for care and support in the same way as any other adult, but there will be additional considerations which need to be made, as highlighted in this briefing. Section 46 Social Services and Well-Being Act (Wales) 2014 details exclusions to the provision of care and support under the Act affecting single adults who are subject to immigration control. It states:

*“Section 46: Exception for persons subject to immigration control*

*(1) A local authority may not meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 (“the 1999 Act”) (exclusion from benefits) applies and whose needs for care and support have arisen solely –*

*(a) because the adult is destitute, or*

*(b) because of the physical effects, or anticipated physical effects, of being destitute.”*

This means that for people who are subject to immigration control and are seeking support from local authorities under Section 35 Social Services and Well-Being Act (Wales) 2014, a key consideration within the assessment process (differentiating it from assessments for those who are not subject to immigration control) is whether a person’s need for care and support has arisen from the physical effects of their situation of destitution. In other words, to be eligible, their need for care and support must be independent of the impact on their health and well-being of being destitute or the anticipated effect of being destitute.

## 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). One important exception is that aftercare services under Section 117 Mental Health Act 1983 are *not* repealed in Wales by Social Services and Well-Being Act (Wales) 2014.

## Destitution and welfare exclusions

Welfare benefit exclusions affect certain migrants who have no recourse to public funds (NRPF). Section 115 Immigration and Asylum Act 1999 states that certain groups of people that are ‘subject to immigration control’ will have ‘no recourse to public funds’, affecting their entitlement to claim public funds as listed in the Immigration Rules.<sup>4</sup> Public funds is a term for a list of welfare benefits and housing-related services that are listed under Paragraph 6 of the Immigration Rules and includes Housing Benefit, Income-based Jobseekers Allowance, Child Benefit and Tax Credits.

Publicly-funded services such as the NHS, education and legal aid (to name but a few) do not count as public funds and therefore having NRPF does not preclude people from accessing those services. However, separate eligibility processes apply. **Support under Social Services and Well-being (Wales) Act 2014 is not a public fund** and having NRPF as a condition of a person’s leave to enter or remain in the UK does not exclude people from support under the Act’s provisions.

4. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/434528/20150424\\_immigration\\_rules\\_introduction.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/434528/20150424_immigration_rules_introduction.pdf).

**Who has NRPF?**

Groups of people that are subject to immigration control and have no recourse to public funds are: people who require leave to enter or remain in the UK but do not have it (e.g. visa overstayers, illegal entrants, refused asylum seekers); those who have leave to enter or remain in the UK on the condition of having NRPF (e.g. certain people on visas, people granted Limited Leave to Remain (LLR) under certain immigration routes (more information below)); or people who have leave to enter or remain in the United Kingdom given as a result of a maintenance undertaking (meaning a written undertaking given by another person to be responsible for that person's maintenance and accommodation).

Citizens of European Economic Area (EEA) countries (referred to in this Briefing as 'mobile EU citizens') are not subject to immigration control and do not have NRPF. EU law outlines the circumstances in which mobile EU citizens can and cannot access certain welfare benefits, and these are codified into UK law under the Immigration (European Economic Area) Regulations 2006 and its many amendments. A detailed consideration of these entitlements and restrictions applying to mobile EU citizens living in Wales is provided in another Legal and Policy Briefing in this Migration Services in Wales series: *Migrants' Entitlements to Welfare Benefits in Wales*, available at: <http://migration.wales/migration-information/legal-briefings>. Where mobile EU citizens are not entitled to welfare benefits, they may be eligible for alternative accommodation and financial support under the Social Services and Well-Being Act (Wales) 2014 and to other services to meet eligible needs for care and support under the Act, according to the assessment process detailed in this Briefing.

**Asylum seekers and refused asylum seekers**

Asylum seekers and refused asylum seekers are excluded from welfare benefits and housing services by the individual eligibility conditions of these benefits and services. Asylum seekers who are destitute are instead eligible for accommodation and financial support provided by the Home Office under Section 95 Immigration and Asylum Act 1999 ('asylum support') when their asylum claim (including claims under Article 3 ECHR) and any appeals are outstanding. This support is generally provided in dispersal areas across the UK, including in Wales, via contractors. Asylum support under Section 95 Immigration and Asylum Act 1999 ceases 28 days after a person's claim is all appeal rights-exhausted (ARE).

Under current arrangements, refused asylum seekers who are destitute are eligible for support under Section 4 Immigration and Asylum Act 1999 if they meet certain conditions, including that they are taking all reasonable steps to leave the UK, however subsistence payments are at a lower rate than under Section 95 Immigration and Asylum Act 1999 and are provided on a prepaid card. Information on the eligibility process for asylum support and the provision of services for asylum seekers and refused asylum seekers is available at: <https://www.gov.uk/asylum-support/overview>.

The Immigration Bill 2015 proposes the repeal of Section 4 Immigration and Asylum Act 1999. If the Bill is passed, support to refused asylum seekers will only be provided in exceptional circumstances, under a new power: Section 95A Immigration and Asylum Act 1999. The detail of what constitutes exceptional circumstances, including those who have a 'genuine barrier to leaving the UK' will be detailed in forthcoming regulations.

**People fleeing domestic violence**

People in the UK on spouse visas are subject to immigration control and, generally speaking, have NRPF. However, special arrangements are in place for those on spouse visas whose relationship permanently breaks down due to domestic violence and want to settle in the UK. In such circumstances, applications to the Home Office can be made under the Domestic Violence Rule (DVR) for Indefinite Leave to Remain (ILR), and in the period this application is being prepared by the applicant and considered by the Home Office, applicants can apply for a specific form of leave that will give them temporary access to welfare benefits, under a scheme called the Destitution Domestic Violence (DDV) Concession.



To apply for the DDV Concession, applicants are required to notify the Home Office of their request to access public funds by completing and returning the DDV Concession application form: <https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence>. A range of organisations in Wales, such as BAWSO, the Welsh Refugee Council, or a legal representative can provide assistance to applicants.

People fleeing domestic violence who are not mobile EU citizens, who have NRPF and do not have leave to enter the UK on a spouse visa may be entitled to accommodation and financial support under Section 35 Social Services and Well-being (Wales) Act 2014 if they have eligible needs for care and support. Those who do not have eligible needs for care and support and do not have dependent children, will be ineligible for support under the Social Services and Well-being (Wales) Act 2014.

### **People granted Limited Leave to Remain (LLR) under certain immigration routes**

People granted Limited Leave to Remain (LLR) under certain immigration routes (the long residence rules; parent and partner 10 year routes to settlement; and outside the rules on the basis of their family or private life) may have the NRPF condition attached to their leave, potentially up to the point that they are granted Indefinite Leave to Remain (ILR). However, in exceptional circumstances, leave may be granted with access to public funds, including where a family is currently supported by a local authority and the Home Office believes them to be destitute.

### **Zambrano carers**

Carers of people who have nationality of a European Economic Area (EEA) country and are from outside the EEA may derive an EU right of residence if they are the primary carer of that person, following the European Court of Justice case of *Zambrano [2011] EUECJ C-34/09*. People deriving their EU right of residence under the Zambrano ruling have the right to work but have NRPF. Local authorities must be able to recognise when someone is a Zambrano carer as there is no requirement for them to have documentation from the Home Office to confirm this. Zambrano carers may wish however to seek advice in order to document their status.

### **Migrants not excluded from accessing welfare benefits**

Migrants with certain administrative statuses are not excluded from accessing welfare benefits by the NRPF policy and may be entitled depending on the eligibility processes of individual welfare benefits. These include people with refugee status, humanitarian protection, people with Indefinite Leave to Remain (ILR) or permanent residence in the UK and people resettled to the UK on a resettlement programme. Whilst those with NRPF may seek care and support from local authorities under Section 35 Social Services and Well-being (Wales) Act 2014 on account of having needs for care and support, their accommodation (if not arranged and funded privately) could be met through mainstream housing-related services, rather than through the provision of accommodation (and financial support) under Section 35 Social Services and Well-being (Wales) Act 2014. Indeed, under Section 48 Social Services and Well-being (Wales) Act 2014, local authorities in Wales do not have powers under the Act to provide services that would otherwise be available through mainstream housing services (under the Housing Act 1996).

### **Assessments of need under Social Services and Well-Being Act (Wales) 2014**

Assessments of need for care and support for adults are undertaken under Section 19 Social Services and Well-being (Wales) Act 2014. Assessments are triggered where it appears to the local authority that a person has a need for care and support, regardless of their financial resources or presumed *level* of need. Individuals do not need to request an assessment, however they can refuse one, unless they lack capacity. There may however be an authorised person that is able to make that decision on their behalf, or if they do not, the local authority may decide that it is in the person's best interest to undertake an assessment or because they suspect that they are experiencing or at risk of experiencing abuse or neglect.

Regulation 3 Care and Support (Assessment) (Wales) Regulations 2015 requires assessors to have the necessary skills, knowledge and competence to carry out assessments, and to have received appropriate training (including the



additional requirements of the assessment process in respect of migrants). Each assessment must have a named assessor and the assessment must be shared with the person (and their carer, where appropriate). An assessment must be reviewed when significant changes in circumstances take place.

Section 19 Social Services and Well-being (Wales) Act 2014 requires local authorities to assess adults who are 'ordinarily resident' in their area who may require care and support to determine whether they need care and support, and if so, what those needs are. The assessment aims to ascertain whether there is a Section 35 Social Services and Well-being (Wales) Act 2014 duty on the local authority to provide care and support through the provision of services, such as those detailed in the Act's Section 34.

In the case of asylum seekers, local authorities should have regard for the judgment in the case of *NASS v Westminster City Council (2002) UKHL 38* in which it was determined that the availability of Home Office accommodation and financial support to destitute asylum seekers under Section 95 Immigration and Asylum Act 1999 (then called 'National Asylum Support Service (NASS) support') should not be taken into consideration (considered 'otherwise available') in the assessment of need (then under Section 21 National Assistance Act 1948). The principle in *NASS v Westminster City Council (2002) UKHL 38* has been reaffirmed in England under the Care Act 2015 in the case of *SG v Haringey Council (2015) EWHC 2579 (admin)*.

### Ordinary residence

'Ordinary residence' is not defined in the Social Services and Well-being (Wales) Act 2014 and in order to determine whether a person is 'ordinarily resident' in a local authority area, regard should be given to the principles established in the case of *R v Barnet LBC ex parte Shah [1983] AC 309*, where 'ordinary residence' was described as a person's: *"...abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration."*

The Code of Practice on the exercise of social services functions in relation to part 11 (Miscellaneous and General) of the Social Services and Well-being (Wales) Act 2014 states that a determination of a person's ordinary residence should take into account factors such as time, intention and continuity, and the core principle in *Shah* i.e. a place that has been voluntarily adopted for a settled purpose, whether for a short or long duration.

If adults are in NHS accommodation, they retain their ordinary residence where they were living immediately prior to being in those institutions. Where a local authority places a person in a registered care home in another local authority area, they retain their ordinary residence in the original local authority area (Section 194(2) Social Services and Well-being (Wales) Act 2014). This does not extend to other forms of accommodation placements.

Where a person has no place of settled residence, the local authority where that person is present must assess a person's need for care and support and, where applicable, meet those needs.

### Section 19 Social Services and Well-being (Wales) Act 2014 assessments: key steps

There are three broad steps under Social Services and Well-being (Wales) Act 2014 in determining an adult's eligibility for support under Section 35 Social Services and Well-being (Wales) Act 2014 where they are subject to immigration control (two where they are not), comprising:

1. Establishing whether an adult has needs for care and support;
2. If that person is subject to immigration control, determining whether a person's need for care and support arises due to the physical effects of destitution or the anticipated physical effects of destitution;
3. Determining whether the needs of the adult for care and support are eligible because they meet the eligibility criteria (as detailed in the Act's Regulations). As part of the eligibility test, it must be determined whether a person's needs can be met other than through the provision of care and support by the local authority or through preventative services.

Once a person's eligibility for care and support has been established, a local authority may undertake a financial assessment to determine whether the person should pay for the services being provided.

The Section 19 assessment must be undertaken in partnership with the individual and include an analysis of their circumstances, their personal outcomes<sup>5</sup>, what barriers they face in achieving those outcomes, any risks that may occur should those outcomes not be achieved and the person's strengths and capabilities. Additionally, the assessment must establish whether there is reasonable cause to suspect the adult is at risk. It must also consider whether the person would benefit from preventative services or information, advice and assistance. The assessment must involve carers, where feasible, and determine whether they are able and willing to provide care.

Once a person's needs for care and support are determined and they are subject to immigration control (see section above *Who has NRPF?* for more information), the local authority must determine whether the identified needs for care and support arise or do not arise as a result of the physical effects of destitution or the anticipated physical effects of destitution. In other words, would these needs exist independently of the physical effects or the anticipated effects of the person's situation of destitution? Destitution is defined under Section 46 (2) Social Services and Well-being (Wales) Act 2014, by linking directly to the definition of destitution under Section 95 Immigration and Asylum Act 1999, where it is defined as where a person appears to be destitute because they do not have any adequate accommodation and/or cannot meet their essential living needs, or are likely to become destitute within 14 days. 'Essential living needs' under Section 95 Immigration and Asylum Act 1999 are given a broad interpretation in the case of *Refugee Action v SSHD [2014] EWHC 1033*, to include toiletries, nappies and the means to maintain interpersonal relationships, meaning that those who cannot afford such things are considered to be destitute.

The third stage of the assessment process is the eligibility test. Once the adult's needs for care and support are determined, the local authority must assess whether those needs are eligible under The Care and Support (Eligibility) (Wales) Regulations 2015. Four conditions must be met in order for the adult's needs to be eligible. They are as follows:

*"1. The need arises from the adult's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances;*

*2. The need relates to one or more of the following -*

*(i) ability to carry out self-care or domestic routines;*

*(ii) ability to communicate;*

*(iii) protection from abuse or neglect;*

*(iv) involvement in work, education, learning or in leisure activities;*

*(v) maintenance or development of family or other significant personal relationships;*

*(vi) development and maintenance of social relationships and involvement in the community; or*

*(vii) fulfilment of caring responsibilities for a child;*

*3. The need is such that the adult is not able to meet that need, either -*

*(i) alone;*

*(ii) with the care and support of others who are willing to provide that care and support; or*

*(iii) with the assistance of services in the community to which the adult has access; and*

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5. 'Personal outcomes' are defined in the Care and Support (Assessment) (Wales) Regulations 2015 as the outcomes which have been identified in relation to a person in accordance with section 19(4)(a), 21(4)(b) or 24(4)(c) or (d) of the Act.

4. *The adult is unlikely to achieve one or more of the adult's personal outcomes unless –*
- (i) *the local authority provides or arranges care and support to meet the need; or*
  - (ii) *the local authority enables the need to be met by making direct payments.”*

The case of *SG v Haringey Council (2015) EWHC 2579 (admin)* in England in relation to eligibility for accommodation under the Care Act 2014 is illustrative in Wales. In this case, it was determined that the principles of the previous assessment of eligibility for accommodation under Section 21 National Assistance Act 1948 still apply under the Care Act 2014 in England i.e. where a person's need for care and support must be related to their accommodation in order to be eligible for accommodation as part of the local authority's care package.

A person will be eligible for care and support where their needs can only be met through a care and support plan provided by the local authority, and the local authority will have to establish whether those needs can be met by the person's family/friends, their carer or by services in the third sector.

Summary of steps:

1. What are the adult's needs for care and support?
2. Do these needs arise from the physical effects of destitution or the anticipated physical effects of destitution?
3. Do these needs meet the eligibility criteria as stipulated in the The Care and Support (Eligibility) (Wales) Regulations 2015 and can those needs and well-being outcomes be met other than through the provision of care and support by the local authority?

Where the needs of an adult do not meet the eligibility criteria however, there may still be a duty on the local authority to provide care and support to a person to protect them from abuse, neglect or harm, or the risk of abuse, neglect or harm.

### **Aftercare services under Section 117 Mental Health Act 1983**

Under Section 117 Mental Health Act 1983, local authorities and the NHS have a joint duty to provide aftercare services to people who have been compulsorily detained under Sections 3, 37, 45A, 47 or 48 Mental Health Act 1983. The Social Services and Well-Being (Wales) Act 2014 leaves Section 117 Mental Health Act 1983 (aftercare services) intact. Please see the Code of Practice for Wales concerning the Mental Health Act 1983 for further information about the assessment process and provision of services.<sup>6</sup>

Aftercare services may comprise a range of support, including the provision of supported accommodation (in a nursing home, for example), to prevent readmission. Ordinary accommodation (in the private rented sector, for example) cannot be provided under Section 117 Mental Health Act 1983 (*Bromley and Greenwich v Mwanza 2010 EWHC 1462*). For people with NRPF, accommodation can either be provided under Section 117 Mental Health Act 1983 as part of the aftercare package (if supported accommodation to reduce risk of readmission is required) or if the adult doesn't qualify for such accommodation they would need to be assessed under the Social Services and Well-being (Wales) Act 2014 for their eligibility for ordinary accommodation. In such circumstances, the person must have eligible needs and the relevant assessment process should be followed (see previous section *Section 19 Social Services and Well-being (Wales) Act 2014 assessments: key steps*).

No immigration exclusions apply in respect of the Mental Health Act 1983, including its Section 117. However, some categories of migrants are excluded<sup>7</sup> from support under Social Services and Well-being (Wales) Act 2014 by

6. The code of practice is currently being updated.

7. NB consequential amendments to primary legislation to this effect are pending and this briefing is drafted assuming the relevant exclusions will come into force.

Schedule 3 Nationality, Immigration and Asylum Act 2002 (more below). Where this is the case, their entitlement to ordinary accommodation under Section 35 Social Services and Well-being (Wales) Act 2014 as part of a Section 117 Mental Health Act 1983 aftercare package, will be subject to a Human Rights Assessment (more below).

### Assessments of carers

Assessments of carers take place under Section 24 Social Services and Well-Being Act (Wales) 2014 and apply to carers of all ages. Carers assessments are triggered where it appears to a local authority that there is a need, however the duty to assess carers does not arise when an assessment is refused and the person has capacity. A joint carers and adult's assessment may also be undertaken under Section 28 Social Services and Well-Being Act (Wales) 2014.

The Social Services and Well-Being Act (Wales) 2014 defines 'carers' as *"a person who provides or intends to provide care for an adult or a disabled child"* but does not include those who provide this care and support under or by virtue of a contract or as voluntary work.

Section 24 carers assessments must determine the carer's personal outcomes and must take into consideration whether a carer is able and willing to provide care and support (the local authority cannot assume that they are willing and/or able to continue providing care). There are four conditions that must be met for a carer to be eligible for support. A carer will meet the eligibility criteria under the Care and Support Eligibility (Wales) (Regulations) 2015 if their needs arise as a result of providing care for an adult with needs for care and support or a disabled child. Secondly, their need must relate to one or more of the following:

- (i) *ability to carry out self-care or domestic routines;*
- (ii) *ability to communicate;*
- (iii) *protection from abuse or neglect;*
- (iv) *involvement in work, education, learning or in leisure activities;*
- (v) *maintenance or development of family or other significant personal relationships;*
- (vi) *development and maintenance of social relationships and involvement in the community; or*
- (vii) *in the case of an adult carer, fulfilment of caring responsibilities for a child;*
- (viii) *in the case of a child carer, achieving developmental goals;*

Thirdly, in order to be eligible the carer cannot meet the need alone, with the support of others who are willing to provide that support; or with the assistance of services in the community to which the carer has access. Fourthly, it must be determined whether the carer will be unlikely to achieve one or more of their personal outcomes unless -

- (i) *the local authority provides or arranges support to the carer to meet the carer's need;*
- (ii) *the local authority provides or arranges care and support to the person for whom the carer provides care, in order to meet the carer's need; or*
- (iii) *the local authority enables the need to be met by making direct payments.*

The duty to meet the support needs of adult carers are provided under Sections 40 and 41 Social Services and Well-Being Act (Wales) 2014 and can include services listed under its Section 34 (how to meet needs). There is no duty to meet the support needs of a carer when the needs of the adult they are caring for have arisen from the physical effects of destitution or the anticipated physical effects of destitution (Section 46 (4) Social Services and Well-Being Act (Wales) 2014).

Services to carers under Section 40 and 41 Social Services and Well-Being Act (Wales) 2014 are excluded for some categories of migrants by Schedule 3 Nationality, Immigration and Asylum Act 2002, and therefore subject to a Human Rights Assessment (more below).

### Immigration restrictions on support provided by local authorities

Some categories of migrants are excluded from receiving support under Part 4 Social Services and Well-being (Wales) Act 2014 (duties to meet needs of children, adults and carers) 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.

Local authorities must withhold services to people under statutes listed in Schedule 3 NIAA unless doing so would breach their rights under the European Convention of Human Rights (ECHR) and, if they are nationals of EEA countries, their rights under EU law.

For single adults who are migrants and do not fall into one of the excluded groups under Schedule 3 NIAA (e.g. asylum seekers, people with limited leave to remain) the assessment process as detailed in the section *Section 19 Social Services and Well-being (Wales) Act 2014 assessments: key steps*, is unaffected and the local authority continues to have a duty to meet eligible needs.

Where Schedule 3 NIAA applies because a person falls into one of the five excluded categories and they are seeking local authority support under the Social Services and Well-being (Wales) Act 2014, local authorities must assess whether the withholding or withdrawal of support would constitute a breach of human rights and EU rights, as appropriate. 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>.

For single adults excluded from local authority social services support, the Human Rights Assessment can be the lead assessment if the local authority has sufficient information to conclude that the person can return without undertaking a full needs assessment (*R (N) v Coventry City Council 2008 EWHC 2786 (Admin)*). Human Rights Assessments for single adults should be fact-specific, gathering evidence to assess whether the provision of Section 35 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 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 in relation to the care and support needs of the person. Evidence available to local authorities and to 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 person to return to their country of origin, in which case the local authority must assess what duties are owed to the person in Wales (by undertaking a Section 19 assessment of need for care and support). 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 services in Wales under Section 35 Social Services and Well-being (Wales) Act 2014 or through assistance to the 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 are ones that 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.

Where a legal or practical barrier prevents a person from returning to their country of origin, local authorities should assess what duties are owed to that person in Wales by proceeding with the assessment of need for care and support under Section 19 Social Services and Well-being (Wales) Act 2014.

### 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 person cannot be expected to return to their country of origin, then the local authority must determine what care and support the person requires in Wales. If human rights concerns that haven't 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 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 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 services under Section 35 Social Services and Well-being (Wales) Act 2014 in Wales is necessary to prevent a breach of ECHR rights. As services under Part 4 of the 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 single adults with needs for care and support 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 person is dying and whether they would die with dignity on return. In the case of *De Almeida v Royal Borough of Kensington and Chelsea [2012] EWHC 1082*, the courts ruled that Article 3 ECHR threshold had been reached and that the local authority had erred in refusing services, because the claimant was terminally ill and refusing him care and requiring him to return to Portugal would amount to 'inhuman treatment.'

#### 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 person being assessed as well as their family members must be considered, with a focus on which relationships would be



affected if the 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 Section 35 Social Services and Well-being (Wales) Act 2014 support e.g. through visits, telephone or Skype contact.

### III. Rights under EU law

An assessment of potential breaches of EU rights should form part of the Human Rights Assessment where mobile EU citizens are requesting support from social services. 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.

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 support under Section 35 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 person's circumstances. If it is the local authority's opinion that a breach of the person's human rights/EU rights would occur should a person return to their country of origin, they should proceed with a Section 19 Social Services and Well-being (Wales) Act 2014 assessment to determine a person's needs for care and support and what services should be put in place by the local authority to meet those needs. 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 person in arranging return, provide temporary assistance or enable friends/family to provide support, as appropriate.

### Provision of services under Social Services and Well-being (Wales) Act 2014

Once a person's needs for care and support have been determined and those needs meet the Act's eligibility criteria, the local authority has to provide the care and support necessary to meet their needs. However, local authorities also have discretionary powers to meet the care and support needs of an individual irrespective of the eligibility determination. Section 34 Social Services and Well-being (Wales) Act 2014 details the kinds of support that could be provided by local authorities to meet the eligible needs of a person, which includes accommodation in a care home or premises of some other type, and payments.<sup>8</sup> It also lists: care and support at home or in the community; services, goods and facilities; information and advice; counselling and advocacy; social work; payments (including direct payments); aids and adaptations; and occupational therapy. Note: there is no mention of travel, education, training or work in the kinds of support available to people under the Act.

The local authority must prepare a care and support plan for eligible adults under Section 54 Social Services and Well-being (Wales) Act 2014 which identifies their personal outcomes, what actions will be taken by the person and the local authority, what needs will be met through the delivery of care and support, how progress will be monitored and measured and what financial and other resources will be required. The duty to provide information and advice under Section 17 of the Act continues for the period eligible people are provided with care and support.

In the case of asylum seekers, local authorities should have regard for the judgment in the case of *NASS v Westminster City Council (2002) UKHL 38* in which it was determined that where needs are eligible, the local authority would be required to meet all needs, including accommodation, financial support, and care and support.

8. For full list, see: <http://www.legislation.gov.uk/anaw/2014/4/section/34>.



In determining the level of financial support provided to adults under Section 35 Social Services and Well-being (Wales) Act 2014, the amounts provided under similar statutory provisions (e.g. Section 95 Immigration and Asylum Act 1999) and the case law on this question, whilst focusing on duties under Section 17 Children Act 1989 in England to families with dependent children, are illustrative.<sup>9</sup> The courts have not set a specific amount to be provided as subsistence payments. Rather it has been argued that the level of support should be determined by local authorities as part of the needs assessment, specific to the circumstances of children and families (*C, T, M & U v Southwark Council [2014] EWHC 3983*); and that whilst having a standard subsistence rate across the local authority is lawful, it should allow for exceptions to be made in light of specific circumstances (*PO v Newham Council [2014] EWHC 2561*). In the case of *Mensah & Bello v Salford City Council [2014] EWHC 3537*, it was argued that providing at subsistence rates pegged to Section 4 Immigration and Asylum Act 1999 rates (£35.39 per person, per week) would meet the basic subsistence needs of families. Local authorities in Wales do not receive any central government funding to account for the specific costs incurred by single adults with no recourse to public funds being supported under Section 35 Social Services and Well-being (Wales) Act 2014.

### **Destitute, migrant single adults: support in the voluntary sector**

Some migrant single adults are not eligible for statutory support when they become destitute. These include those who are neither an asylum seeker or a refused asylum seeker that meets the conditions of Section 4 Immigration and Asylum Act 1999 support; a mobile EU citizen that is eligible for welfare benefits because they have a right to reside and, where applicable, are habitually resident; a person that has recourse to public funds because they have ILR, refugee status or another subsidiary protection status; and those who do not have eligible needs for care and support under the Social Services and Well-being (Wales) Act 2014.

Furthermore, some migrant single adults may have a legal right to some form of statutory accommodation and financial support, but in practice they have been unable to secure it.

Research by Ceri Hutton and Sue Lukes has identified seven models of accommodation and support for migrants with NRPF, as well as providing a resource to practitioners who are interested in developing such models. These are: hosting in spare rooms; providing rooms in a shared house with wrap-around support; providing rooms for migrants within mixed shared houses; communities of residents (migrant and non-migrant) living together; night shelters that are not dependent on Housing Benefit income; hostels with beds set aside for people with NRPF; and fundraising to pay rent for a migrant to live in a house or hostel.

Several organisations in Wales are members of the No Accommodation (NACCOM) network of accommodation providers to destitute migrants. These include Share Tawe in Swansea, who run a hosting scheme for destitute asylum seekers, Share Dydd, who run a hosting scheme in Cardiff, and Home4U, which offers accommodation to asylum seekers who are destitute in Cardiff.

At a strategic level, the Cardiff Destitution Network brings together organisations across Cardiff to look at ways of resolving destitution amongst asylum seekers through the sharing of information and pooling of expertise.

The Welsh Refugee Council (WRC) in Cardiff can provide short-term support to destitute asylum seekers and refugees. Support is in the form of cash payments of £10 per week and a food parcel. In Newport, the WRC can provide on-going support for destitute asylum seekers and refugees. This is not time-limited but clients' circumstances are regularly assessed to determine need and encourage the underlying cause of their destitution to be addressed. Support is in the form of cash payments of £10 per week and a food parcel. And in Swansea, the WRC has a small destitution fund to provide one-off and short-term support destitute asylum seekers and refugees.

9. NB: Section 49 Social Services and Well-being (Wales) Act 2014 places restrictions on the circumstances in which payments (other than direct payments) can be made.

Support is in the form of cash payments of £10 per week. WRC accepts referrals from other organisations for these services.

The Red Cross in Cardiff, Newport and Swansea offers twelve 12 weeks of support to destitute migrants in the form of £10 cash per week and a food parcel. Oasis in Cardiff offers food parcels and is open every day from 10am-3pm with a free meal for asylum seekers, refugees and others in need at 12:30pm. BAWSO in Cardiff has a small hardship fund for destitute women and the The Huggard Centre in Cardiff offers subsidised hot meals along with free soup and bread.

## Further resources

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

<http://gov.wales/topics/health/socialcare/act/>

## Key legislation

- Social Services and Well-being (Wales) Act 2014
- The Care and Support (Population Assessments) (Wales) Regulations 2015
- The Care and Support (Partnership Arrangements for Population Assessments) (Wales) Regulations 2015
- The Social Services and Well-being (Wales) Act 2014 (Social Enterprise, Co-operative and Third Sector) (Wales) Regulations 2015
- The Care and Support (Assessment) (Wales) Regulations 2015
- The Care and Support (Eligibility) (Wales) Regulations 2015
- The Care and Support (Care Planning) (Wales) Regulations 2015
- The Care and Support (Direct Payments) (Wales) Regulations 2015
- The Care and Support (Choice of Accommodation) (Wales) Regulations 2015
- The Care and Support (Provision of Health Services) (Wales) Regulations 2015
- The Care and Support (Financial Assessment) (Wales) Regulations 2015
- The Care and Support (Charging) (Wales) Regulations 2015
- The Care and Support (Review of Charging Decisions and Determinations) (Wales) Regulations 2015
- The Care and Support (Deferred Payments) (Wales) Regulations 2015
- The Adult Protection and Support Orders (Authorised Officer) (Wales) Regulations 2015
- The Safeguarding Boards (Functions and Procedures) (Wales) Regulations 2015
- The Safeguarding Boards (General) (Wales) Regulations 2015
- The National Independent Safeguarding Board (Wales) (No.2) Regulations 2015
- The Partnership Arrangements (Wales) Regulations 2015
- The Care and Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015
- The Care and Support (Disputes about Ordinary Residence, etc.) (Wales) Regulations 2015
- The Care and Support (Business Failure) (Wales) Regulations 2015
- The National Assistance Act 1948
- 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
- Mental Health Act 1983: Code of Practice for Wales

### **Useful resources**

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

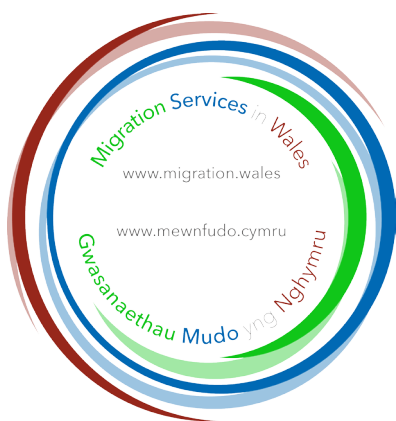
### **Migration Services in Wales Legal and Policy Briefings:**

- 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)
- Migrants' Entitlements to Welfare Benefits in Wales
- Access to Healthcare for Migrants in Wales
- Human Trafficking, Modern Slavery and the National Referral Mechanism in Wales

All available at: <http://migration.wales/migration-information/legal-briefings>

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### 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 ESRC 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.

