

# LEGAL & POLICY BRIEFING

## 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)

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## Introduction

This briefing provides information on the duties of local authority social services departments in Wales to migrant children and families, with a focus on safeguarding and destitution support for children and families whose immigration status prohibits them from accessing welfare benefits. In particular, it considers the implications of the transition in April 2016 for local authorities in Wales from providing services under the Children Act 1989 to this group to providing services under the Social Services and Well-being (Wales) Act 2014. It considers both the existing and the new assessment processes and provision of services, as well as linking to examples of promising practice and other useful information. It is intended for those working in local authorities undertaking assessments of need and/or providing services, and to families and those providing assistance to families in seeking statutory support.

## Status of this briefing

This briefing does not constitute legal advice and does not have statutory status. For advice on individual cases, you should seek legal advice 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 children and their families.

The Statutory Code of Practice for local authorities on the Social Services and Well-being Act Wales 2014 is due to be published in December 2015. This briefing refers to the draft code of practice<sup>2</sup> and will be updated in light of amendments to the final version. Statutory guidance relating to functions under the Children Act 1989, *'Framework for the Assessment of Children in Need and their Families'*, is available at: <http://gov.wales/docs/caecd/publications/110323frameworken.pdf>

Separate briefings focusing on the duties of local authorities to adults with needs for care and support and care leavers subject to immigration control under the Social Services and Well-being (Wales) Act 2014 shall follow later in 2015/6.

## 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, and where possible, a consideration of how these principles might be applied in order to meet the needs of migrant children and families for care and support (as a result of their specific circumstances, over and above settled children and families). It then goes on to consider which migrant families (by immigration status) may be in need under the current Children Act 1989 and in need of care and support under the Social Services and Well-being (Wales) Act 2014 and which of these groups may have entitlement to statutory accommodation and financial support other than through provisions under the Children Act 1989 or Social Services and Well-being (Wales) Act 2014. Following this, the briefing focuses on assessments of need, firstly under the Children Act 1989 and assessments of potential human rights breaches, and secondly under the Social Services and Well-being (Wales) Act 2014, before concluding with a consideration of how assessed or eligible needs can be met under these statutory provisions.

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

The Social Services and Well-Being Act (Wales) 2014 received royal assent on 1st May 2014 and will come into force in April 2016. It will replace 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 Act brings together social care law for adults and children into a single statute.

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1. Please see the following website to search for legal advice near to you: <http://find-legal-advice.justice.gov.uk>
  2. <http://gov.wales/docs/dhss/publications/150508code4en.pdf>
  3. <http://www.legislation.gov.uk/anaw/2014/4/contents>

**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 adults and children. 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 children, well-being also extends to:

- (a) physical, intellectual, emotional, social and behavioural development;*
- (b) "welfare" as that word is interpreted for the purposes of the Children Act 1989."*

Anyone exercising functions under the Act must seek to promote the well-being of people who need care and support. Children and families' 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 19 of the Act 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 people's need for care and support, reducing those needs and promoting the upbringing of children by their families. In relation to migrant children and their families, local authorities may decide to put in place preventative services targeted to their particular circumstances. For example in relation to immigration status, early legal advice for families to regularise irregular status could prevent the need for Social Services and Well-Being Act (Wales) 2014 support should a crisis occur whilst a parent's immigration status precludes them from accessing welfare benefits. Additionally, providing training to staff could be a preventative measure such that they are able to identify families that are eligible for alternative statutory support e.g. asylum seekers, families where the parent is on a spouse visa and is fleeing domestic violence, and mobile EU citizens that are working.

**Information, advice and assistance**

Section 17 Social Services and Well-Being Act (Wales) 2014 requires local authorities to provide people in need 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. 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: <http://welshrefugeecouncil.org.uk/wp-content/uploads/2013/07/Service-Directory-July-2013.pdf> (please note: consult directory to ascertain eligibility for these services for migrant children and families outside the asylum system).

**Voice and control**

The Act requires that the wishes of children are considered as part of the assessments of need, to the extent the local authority considers it appropriate having regard to the child's age and understanding. The wishes of those with parental responsibility for the children must also be sought in the assessment process. Assessments must focus on the strengths and abilities of children and families as well as their needs, and a consideration of what a person can contribute to their well-being must form part of the assessments.

**Best interest principle**

Those exercising functions under Social Services and Well-Being Act (Wales) 2014 are required to have due regard to the UN Convention on the Rights of the Child (under its Section 7 (2)), which includes a requirement on statutory bodies to consider the best interests of the child as a primary consideration in any action concerning them. Guidance on the application of the best interest principle is forthcoming in the Act's Code of Practice. See below section on Substantive Human Rights Assessments for more information on the best interest principle to be applied in the context of service exclusions facing certain migrant children and their families.

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

Section 46 Social Services and Well-Being Act (Wales) 2014 details exclusions to the provision of care and support under the Act affecting people subject to immigration control. However, these exclusions only apply to adults and not to children. 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."*

Whilst the question of support to families with dependent children is not addressed explicitly under Section 46, it is unlikely that the separation of children from their parents will ensure duties under Section 46 are met such that adults subject to immigration control are not supported under the Act. The likelihood of securing a court order to that effect, of children and families' rights to private and family life under Article 8 European Convention on Human Rights (ECHR) and of due regard to the best interests of the child are relevant considerations here.

**Devolved and non-devolved areas of law**

Whilst social care is a devolved area of law and policy (and from April 2016 will have a Wales specific Act) 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.

Whilst Parts 4 (care and supervision) and 5 (protection of children) of the Children Act 1989 will remain in place in Wales, Part 5 should be read alongside Part 7 of the Social Services and Well-being (Wales) Act 2014.

**Destitution and welfare exclusions**

Welfare benefit exclusions affect certain migrants who have no recourse to public funds (NRPF), an immigration policy affecting people who are subject to immigration control, as defined under s115 Immigration and Asylum Act 1999. It applies to adults but not children, however the policy affects public funds ('welfare benefits') whose purpose is to support children. Public funds is a legal term for a list of welfare benefits that are defined 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 Children Act 1989 and Social Services and Well-being (Wales) Act 2014 is not a public fund.**

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?**

Families with dependent children living in Wales with no recourse to public funds as a condition of their leave to remain in the UK include:

- Asylum seekers
- Refused asylum seekers
- People in Wales on visas
- Visa overstayers
- Illegal entrants
- People granted Limited Leave to Remain (LLR) under certain immigration routes (more information below)

Citizens of European Economic Area (EEA) countries ('mobile EU citizens') do not have NRPF because they are not subject to immigration control under s115 Immigration and Asylum Act 1999. However, their access to welfare benefits is codified in specific regulations (that are the subject of a separate, forthcoming Legal and Policy Briefing on Access to Welfare Benefits). Where mobile EU citizens are not entitled to welfare benefits, they may be eligible for support under Children Act 1989 and Social Services and Well-Being Act (Wales) 2014, according to the assessment process detailed in this briefing.

**Families in the asylum system**

Asylum seekers have NRPF. Families with dependent children are eligible instead for accommodation and financial support provided by the Home Office under Section 95 Immigration and Asylum Act 1999 ('NASS support'). Families entitled to NASS support are excluded from receiving accommodation and financial support under Section 17 Children Act 1989 (and similar Scottish and Northern Irish statutes) by Section 122 Immigration and Asylum Act 1999.

Families that are eligible for NASS support include those with pending asylum claims and Article 3 ECHR claims; these groups would therefore not be eligible for Section 17 Children Act 1989 support. NASS support for families with dependent children does not currently cease if their asylum/Article 3 application is rejected, although the UK government have included restrictions to this support affecting families with dependent children who are all-appeal rights exhausted in the Immigration Bill 2015. Please check updates to this briefing or contact the Welsh Refugee Council for more information on developments in this area.

The Welsh Government intends to take account of these exclusions in the regulations made under the Social Services and Well-being (Wales) Act 2014, which deal with consequential amendments to primary legislation. These regulations will come into force at the same time the Act is commenced. It is likely therefore that families eligible for NASS support will be excluded from accommodation and financial support under Section 37 Social Services and Well-being (Wales) Act 2014. This briefing will be updated in light of changes made to the regulations.

**People on spouse visas fleeing domestic violence**

People on spouse visas have NRPF. However, if they are fleeing domestic violence and meet certain conditions, including that they intend to apply to settle in the UK, they may be able to have the NRPF condition on their visa revoked and temporarily access Housing Benefit, enabling them to secure space in a refuge or other temporary accommodation.

The Destitution Domestic Violence (DDV) Concession allows people who have entered the UK on a partner visa to claim welfare benefits where they are fleeing domestic violence, intend to settle in the UK and are destitute.

To apply for the DDV Concession, individuals should complete the following form and return to the Home Office using the instructions on the form: <https://www.gov.uk/government/publications/application-for-benefits-for->

visa-holder-domestic-violence. A range of organisations in Wales, such as BAWSO (see text box below) or a legal representative can provide assistance to applicants.

### **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.

### **Parents of British children**

Parents of British children who are from outside the EU may derive an EU right of residence if they are the primary carer of that child, following the European Court of Justice case of Zambrano [2011] EUECJ C-34/09. Parents who fall into this category should seek immigration advice on regularising their status. People deriving their EU right of residence under the Zambrano ruling have the right to work but have NRPF.

## **Assessments of need**

### **Assessments of need under Section 17 Children Act 1989**

Assessments of need for destitute NRPF families in Wales are completed under s17 Children Act 1989 up to April 2016. The provision of services at a level required to meet assessed needs are also provided under s17 Children Act 1989. Section 17 Children Act 1989 is the duty of local authorities to safeguard and promote the welfare of children who are in need, and so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs. Local authorities are required to assess children where they present as in need. Services can include the provision of accommodation and financial support.

Local authorities are required to work to the statutory guidance in the assessment and provision of services under the Children Act 1989, requiring local authorities to undertake child-centred assessments based on a child's needs and views, to have clear criteria that stipulate the level of need necessary to trigger an assessment and to undertake an assessment in no longer than 35 days. The statutory guidance does not address the particular considerations local authorities must have in regards to destitute families with NRPF seeking support under Section 17 Children Act 1989, namely assessments of destitution and human rights considerations (more information below).

### **Assessments of destitution**

A destitute child is a child in need for the purposes of Section 17. There is no definition of destitution under Section 17 Children Act 1989. However, in assessing whether a family is destitute or not, there are a limited number of legal tools that are illustrative. Firstly, destitution is defined under Section 95 Immigration and Asylum Act 1999 as those who appear 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. It is reasonable for a local authority to assess the alternative support available to a family that could prevent destitution e.g. through earnings or the support available from family and friends.

5. Framework for the Assessment of Children in Need and their Families: <http://gov.wales/docs/caecd/publications/110323frameworken.pdf>.

6. *R v Northavon District Council* [1994] AC 402 and *R (G) v Barnet LBC* [2003] UKHL 57.

Secondly, a number of recent test cases have considered what local authorities must provide in order to meet the needs of children (these are considered below under Provision of Services). From this, one might infer that resources available to a family below that which is considered to meet the needs of children would bring them within the definition of a child in need for the purposes of Section 17 Children Act 1989.

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

Assessments of need for children under Social Services and Well-being (Wales) Act 2014 will take place under its Section 21. Section 21 Social Services and Well-being (Wales) Act 2014 will require local authorities to assess children in their area who may require care and support to determine whether they need care and support, and if so, what those needs are. A Section 21 Social Services and Well-being (Wales) Act 2014 assessment will be triggered where it appears to a local authority that a child may need care and support in addition to, or instead of, the care and support provided by their family. The assessment aims to ascertain whether there is a Section 37 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.

There are two broad steps under Social Services and Well-being (Wales) Act 2014 in determining children and families' eligibility for support, comprising the assessment of need for care and support and determining whether the needs of the child for care and support are eligible because they meet the eligibility criteria (as detailed in the Act's Regulations), then concluding by determining whether the care and support provided by the local authority meets a child's well-being outcomes or whether these can be met independently of the local authority's care and support e.g. via care and support provided by family or in the community.

The second stage of the assessment process is the eligibility test. Once the child's need 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 child's needs to be eligible. They are as follows:

*"The need of a child...meets the eligibility criteria if—*

*(a) either—*

- (i) the need arises from the child's physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances; or
- (ii) the need is one that if unmet is likely to have an adverse effect on the child's development;

*(b) 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) achieving developmental goals;

*(c) the need is one that neither the child, the child's parents nor other persons in a parental role are able to meet, either—*

- (i) alone or together,
- (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 child, the parents or other persons in a parental role have access; and



- (d) the child is unlikely to achieve one or more of the child'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.”*

Under Section 21(7) Social Services and Well-being (Wales) Act 2014, a disabled child is presumed to be in need of care and support in addition to, or instead of the care and support provided by that child's family.

'Development' for the purposes of (a)(ii) relates to the "physical, intellectual, emotional, social and behavioural development of that child." Destitution, for example, may affect a child's development if they would be without accommodation or access to basic material goods, such as food and toiletries. This need may also relate to families' ability to carry out self-care or domestic routines, amongst other eligibility conditions.

The draft code of practice highlights the following principle on which eligibility rests:

*“The person has needs which meet the eligibility criteria if an assessment establishes that they can, and can only, overcome barriers to achieving their well-being outcomes by the local authority preparing a care and support plan (or a support plan for a carer) to meet their assessed needs, and ensuring that the plan is delivered.”<sup>7</sup>*

The Minister for Health and Social Services has however confirmed that the final Code to the 2014 Act will make clear that the *burden of responsibility in relation to the 'can and can only' test falls on the person carrying out the assessment*<sup>8</sup> - ie the local authority social services assessor will have to establish that that assessed needs can be met by the child's family/friends or by services in the third sector. It will however only be clear when the final Code is published as to the extent to which, the assessment of eligibility under Section 21 Social Services and Well-being (Wales) Act 2014 bears resemblance to the assessment of destitution as part of the eligibility assessment under the Children Act 1989 for families with NRPF (i.e. whether any support is available from family or friends that would prevent destitution).

Summary of steps:

1. What are the needs of the child for care and support and their desired well-being outcomes?
2. Do these needs meet the eligibility criteria as stipulated in the The Care and Support (Eligibility) (Wales) Regulations 2015?
3. 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 children do not meet the eligibility criteria however, there may still be a duty on the local authority to provide care and support to a child to protect them from abuse, neglect or harm, or the risk of abuse, neglect or harm.

### **Immigration restrictions on support provided by local authorities**

Schedule 3 Nationality, Immigration and Asylum Act 2002 (NIAA) restricts local authorities from providing Section 17 Children Act 1989 support to five groups of people:

- mobile EU citizens;
- people granted refugee status in other EU countries;
- refused asylum seekers who have failed to comply with removal directions;

7. <http://gov.wales/docs/dhss/publications/150508code4en.pdf>.

8. National Assembly for Wales The Record of Proceedings 14/07/2015 (16.51) at <http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=3179&assembly=4&c=Record%20of%20Proceedings#234578>.

- 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 Section 17 Children Act 1989 support from families unless doing so would breach their rights under the European Convention of Human Rights (ECHR) and, if they are EU citizens, their rights under EU law.

The Welsh Government intends to take account of these exclusions in the regulations made under the Social Services and Well-being (Wales) Act 2014, which deal with consequential amendments to primary legislation. These regulations will come into force at the same time the Act is commenced. For the purpose of this briefing therefore, we shall outline the process for assessing whether the provision of support under Section 37 Social Services and Well-being (Wales) Act 2014 is necessary in order to prevent a breach of human rights under the ECHR. This briefing will be updated in light of changes made to the regulations.

Where Schedule 3 NIAA applies because the family fall into one of the five excluded categories and they are seeking local authority support under the Children Act 1989/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. 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 for destitute families should be fact-specific, gathering evidence to assess whether the provision of Section 17 Children Act 1989/Section 37 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 family'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 family. Evidence available to local authorities and to families/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 family to return to the parents' country of origin, in which case the local authority must assess what duties are owed to the family in Wales (a child in need assessment). 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 the Children Act 1989/Social Services and Well-being (Wales) Act 2014 or through assistance to the family 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 family returning to the parent's 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 asylum and immigration applications to the Home Office. 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 family from returning to the parents' country of origin, local authorities should assess what duties are owed to a child and their family in Wales by proceeding with the child in need assessment..

### 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 family cannot be expected to return to their country of origin, then the local authority must determine what care and support the child 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 children and families have any enforceable rights to remain in the UK. For families 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 family's circumstances or the circumstances in their country of origin have changed since the decision was issued.

The purpose of the Human Rights Assessment is to assess whether the provision of services under the Children Act 1989/Social Services and Well-being (Wales) Act 2014 in Wales is necessary to prevent a breach of ECHR rights. As Section 17 Children Act 1989 (and Section 37 Social Services and Well-being (Wales) Act 2014 – please note disclaimer above) is excluded by Schedule 3 NIAA for the five excluded groups detailed above, the provision of this support is not necessary if no ECHR breach would occur should the family return, and as such, a key principle underpinning the assessment is that of 'returnability.' Information about voluntary return available to migrant children and their families is available at:

- Refugee Action Assisted Voluntary Return: <http://www.choices-avr.org.uk>. Please note: Refugee Action's Choices programme will cease on 31st December 2015 and assisted voluntary returns will be coordinated directly by the Home Office.
- Home Office Voluntary Departures: <https://www.gov.uk/return-home-voluntarily>

The Human Rights Assessment for children and families is, in effect, comprised of five components (the fifth only relating to mobile EU citizens). The first three 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 because return to country of origin would subject them to torture or inhumane or degrading treatment, for example on health grounds or because the family fears returning to their country of origin. The test to be applied is whether the person is dying and whether they would die with dignity on return. The Article 3 ECHR rights of each family member may need to be considered where health or other concerns in relation to return are raised.

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

Article 8 ECHR is not an absolute right and can be enjoyed in the parent's country of origin. The rights of each family member must be considered, with a focus on which relationships would be affected if the family were to return e.g. between one parent and a child, or between grandparents and a child. The strength of those relationships should be considered along with how those relationships could be maintained other than through the provision of Section 17 Children Act 1989/Section 37 Social Services and Well-being (Wales) Act 2014 support e.g. through visits, telephone or Skype contact.

#### ***III. Best interests of child***

A primary consideration of the assessment is whether the withholding or withdrawal of support from the family is in the child's best interest. Where the child's age allows, their views on the implications of the assessment should be ascertained. Framing the consideration for local authorities is whether it is reasonable to expect the child to live

in another country. Whilst the best interest of the child is a primary consideration, it can be outweighed by the cumulative effect of other considerations

#### ***IV. Child in need on return to country of origin***

If a child would be 'in need' on return to the parents' country of origin, then a Section 17 Children Act 1989/ Section 37 Social Services and Well-being (Wales) Act 2014 duty may arise in Wales. An assessment to that effect is required where Schedule 3 NIAA applies (*M v Islington* [2004] EWCA Civ 235), and can be included within the Human Rights Assessment. General enquires regarding the services available to the child in the country of origin should they return, are required here, rather than a comparison with the level or quality of parallel services available to the child in Wales. These include housing, ability of the parent to work, health and education, and a consideration of whether the state and/or family, community or third sector organisations could provide that support. Evidence to support such claims can be found in country of origin reports or other authoritative information available to the local authority (e.g. from embassies), or from conversations with family members or relevant authorities in the country in question.

#### ***V. 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. A child or parent may be exercising these rights.

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 17 Children Act 1989/Section 37 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 families where a person is exercising rights as a student (a child in school, for example) would less likely result in such a breach. If no EU rights are being exercised, then no breach would occur.

#### **Child protection**

Parts 4 and 5 of the Children Act 1989 (care and supervision, and protection of children) will remain in force in Wales beyond April 2016 and investigations relating to children who are suffering, or are at risk of suffering, significant harm under Section 47 Children Act 1989 are unchanged by the Social Services and Well-being (Wales) Act 2014. No immigration exclusions (in regard to nationality or immigration status) apply to parts 4 and 5 of the Children Act 1989 and as such, local authorities should follow standard procedures where families subject to immigration control are the subject of these proceedings.

The 2014 Act includes a new duty under its Section 130 on local authorities and their relevant partners (including the police, other local authorities, probation and the NHS) to report to the local authority if they have reasonable cause to suspect that a child is experiencing or at risk of abuse, neglect or other forms of harm and has needs for care and support. Such reports will engage the section 47 investigation and associated powers under Part 5 of the Children Act 1989.

## **Provision of services**

### **Children Act 1989**

Up to April 2016, services to children in need are provided under s17 Children Act 1989. Children that are assessed to be in need under s17 Children Act must receive a range and level of services that are appropriate to their needs.

This might include services for disabled children, and/or financial support and accommodation for NRPF children and families. Local authorities do not receive any central government funding to account for the specific accommodation and subsistence-related costs incurred by NRPF families being supported under Section 17 Children Act 1989.

There is no statutory guidance on the level of support or the provision of accommodation under Section 17 Children Act. Case law has ruled that the Homelessness Code of Practice does not apply to those provided with accommodation under Section 17 Children Act 1989 (*C, T, M & U v Southwark Council* [2014] EWHC 3983) but that the provision of long-term B&B placements was 'regrettable', a more appropriate option being self-contained accommodation. Whilst the question of subsistence payments under Section 17 Children Act 1989 has been the subject of significant litigation, the courts have not set a specific amount. 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.

#### **Social Services and Well-being (Wales) Act 2014**

Once the child's needs for care and support have been determined and those needs meet the Act's eligibility criteria, the local authority is required to provide no more than the minimum support necessary to meet their needs. 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 child, which includes accommodation in a care home, children's home or premises of some other type and payments. The duty to provide information and advice under Section 17 of the Act continues for the period eligible children and their families are provided with care and support. The local authority must prepare a care and support plan for eligible children and families which identifies their desired outcomes, what actions will be taken by the family 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.

In determining the level of subsistence provided to NRPF families under Section 37 Social Services and Well-being (Wales) Act 2014, the amounts provided under similar statutory provisions (e.g. Section 4 IAA; Section 17 Children Act 1989) and the case law on this question, as detailed in the previous sub-section, will be illustrative. Local authorities in Wales will not receive any central government funding to account for the specific costs incurred by NRPF families being supported under Section 37 Social Services and Well-being (Wales) Act 2014.

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

## Further resources

Welsh Government Social Services and Well-being (Wales) Act 2014 homepage  
<http://gov.wales/topics/health/socialcare/act/?lang=en>

## Statutory guidance

Department for Education (2015) Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/419595/Working\\_Together\\_to\\_Safeguard\\_Children.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419595/Working_Together_to_Safeguard_Children.pdf)

## Non-statutory practice guidance

NRPF Network (2011) Assessing and supporting children and families and former looked-after children who have no recourse to public funds (NRPF) for support from local authorities under the Children Act 1989  
[http://www.nrpfnetwork.org.uk/guidance/Documents/children\\_families\\_nrpf\\_guidance.pdf](http://www.nrpfnetwork.org.uk/guidance/Documents/children_families_nrpf_guidance.pdf)

## Key legislation

Social Services and Well-being (Wales) Act 2014  
<http://www.legislation.gov.uk/anaw/2014/4/contents>

The Care and Support (Eligibility) (Wales) Regulations 2015  
<http://www.legislation.gov.uk/wsi/2015/1578/regulation/4/made>

Children Act 1989  
<http://www.legislation.gov.uk/ukpga/1989/41/contents>

Immigration and Asylum Act 1999  
<http://www.legislation.gov.uk/ukpga/1999/33/contents>

Nationality, Immigration and Asylum Act 2002  
<http://www.legislation.gov.uk/ukpga/2002/41/contents>

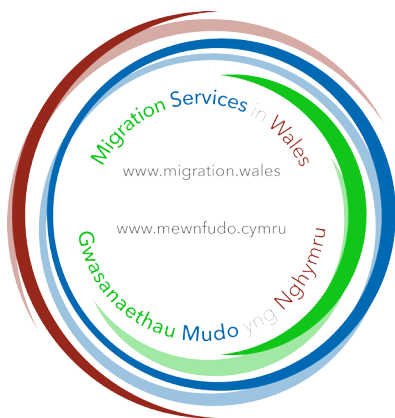
Human Rights Act 1998  
<http://www.legislation.gov.uk/ukpga/1998/42/introduction>

## Research

Price, J and Spencer, S (2015) Safeguarding children from destitution: local authority responses to families with no recourse to public funds  
[http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/PR-2015-No\\_Recourse\\_Public\\_Funds\\_LAs.pdf](http://www.compas.ox.ac.uk/fileadmin/files/Publications/Reports/PR-2015-No_Recourse_Public_Funds_LAs.pdf)

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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.

