

**Establishing
Migrants' Access to
Benefits and Local
Authority Services in
Scotland**

A Guide for Local Authorities

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March 2012



COSLA

STRATEGIC MIGRATION
PARTNERSHIP

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This document is an interpretation of the law by the author Sarah Kyambi. The views expressed in this document are not attributable to the project partners or the organisations and individuals who assisted in developing, funding or publishing it.

Acknowledgements

Much of the material in this guidance for Scottish Local Authorities has been taken directly from the Child Poverty Action Group (2011) Benefits for Migrants Handbook, 5th Edition. Thanks must therefore go to its authors: Pamela Fitzpatrick, Timothy Lawrence and Colin McCloskey. The guidance documents developed by the No Recourse to Public Funds Network have also been heavily drawn upon.

In developing this guidance the author was assisted by a project steering group composed of COSLA (Mhoraig Green and Derek Mitchell), Scottish Government Fresh Talent Team (Amanda Callaghan and George McPherson), Scottish Government Equalities Team (Pauline McMillan), UKBA (Samuel Barton and others), City of Edinburgh Council (James Pinkerton), Glasgow City Council (Catherine Grant) and Highland Council (Cath King). Many thanks to the steering group members and their colleagues, for their time and assistance.

Special thanks must go to the others who commented on drafts and whose expertise helped clarify difficult issues. In particular: Kenneth MacDonald (Glasgow City Council), Jonathan Price (NRPF Network), Iain Chisholm (Positive Action in Housing), Henri Krishna (CPAG), Sean Bell and Vanja Bakalovic (City of Edinburgh Council), Fiona Malcolm and Janice Wilson (Highland Council).

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Glossary

Common Travel Area – The geographic area comprising the UK, Republic of Ireland, Isle of Man and the Channel Islands, between which there are no immigration controls.

Destitute Plus – a case law term requiring that a person needs to have an infirmity additional ('plus') to destitution or the threat of destitution to qualify for social care services.

Discretionary Leave – Leave granted at the discretion of the UKBA. The terms of the leave can vary.

Failed Asylum Seeker¹ - an asylum seeker whose case has been refused and who has no further in-country rights of appeal.

Habitual residence – required for entitlement to a range of benefits habitual residence is not defined in benefit regulations and should be determined by looking at all the circumstances in a given case. Factors to be considered include the intention to stay in the UK, the period of actual residence and employment record.

Illegal entrant – a person who has entered or sought to enter the UK unlawfully, including by deception. Defined at s. 33(1) Immigration Act 1971.

Maintenance undertaking - means a written undertaking given by another person in pursuance of the immigration rules to be responsible for that person's maintenance and accommodation.

Overstayer - a person who illegally remains in the UK after the period of their permitted visit expires.

Person Subject to Immigration Control – a person who requires leave to enter or remain in the UK.

Points Based System – a new tiered system for controlling the immigration to the UK of persons from outside the EEA for work or study reasons.

Public funds – this guide uses the definition of public funds contained in paragraph 6 of the Immigration Rules.

Right of abode – the right to enter, remain, leave and return freely to the UK without the need to obtain 'leave' from the immigration authorities.

Third Country National – a national of a country outside the EEA.

UK Border Agency – the Home Office agency that deals with immigration. For simplicity this guidance document uses the term UKBA to refer to the Home Office and the Secretary of State for the Home Department.

¹ This guidance document adopts the term 'failed asylum seekers' throughout as it is the terminology found in statute and UKBA briefings. No pejorative meaning is intended in the word 'failed'

Abbreviations

AA	Attendance Allowance
CB	Child Benefit
CTA	Common Travel Area
CTB	Council Tax Benefit
CESC	Council of Europe Social Charter
CPAG	Child Poverty Action Group
C(S)A	Children (Scotland) Act 1995
DLA	Disability Living Allowance
DVR	Domestic Violence Rule
ECHR	European Convention on Human Rights
ECSMA	European Convention on Social and Medical Assistance
EEA	European Economic Area
EU	European Union
FAS	Failed Asylum Seeker
HB	Housing Benefit
IA	Immigration Act 1971
IAA	Immigration and Asylum Act 1999
ILR	Indefinite Leave to Remain
IS	Income Support
JSA	Job Seekers Allowance
MHCTSA	Mental Health (Care and Treatment)(Scotland) Act 2003
NAA	National Assistance Act 1948
NIAA	Nationality, Immigration and Asylum Act 2002
OISC	Offices of the Immigration Services Commissioner
PAIH	Positive Action in Housing
Reg	Regulation
SW(S)A	Social Work (Scotland) Act 1968
TCN	Third Country National
UASC	Unaccompanied Asylum Seeking Children
WTC	Working Tax Credit

Introduction

Within the nation-state system, rights are generally accessed from one's state of nationality and not from another nation-state. Because immigrants are outside their state of nationality, their access to rights is more complex. When determining rights to benefits and welfare services it is helpful to divide immigrants into three broad categories:

Category one: Nationals of countries with which the UK has a political agreement. For this group, treaty agreements between states allow their nationals to access rights within each other's territories. This category comprises mainly of European Economic Area (EEA) nationals.²

Category two: People who come to the UK for protection from persecution or human rights abuse. If protection is granted they will be able to access their rights from the UK as a 'surrogate' state. However, while their claim for protection is being processed their rights are strongly curtailed. This group includes asylum seekers (who are excluded from mainstream benefits) and those who have been granted refugee status or other forms of protection (who have extensive access to benefits and welfare services).

Category three: Third Country Nationals (TCNs) who do not fit into either of the above groups. These immigrants tend to have minimal access to benefits and services in the UK with their leave to remain in the UK often subject to a 'no recourse to public funds' condition. This group include immigrants who have come to work, study or for family reasons. In general terms this group are expected to return to their country of origin to access their rights.

The above categorisation is a simple, but helpful, summation for the complex rules that govern an immigrant's access to benefits and welfare services. It is important to bear in mind which category an immigrant falls into as this is a key determinant of the area of law under which their entitlement arises.

In addition to these rules there are human rights standards that impose a certain minimum standard below which the treatment of people is not permitted to fall. Human rights are usually engaged in situations where there is no other recourse to support and the level of hardship cannot be alleviated by return to the country of origin.

Individuals may also be given leave to remain on a discretionary basis by the UKBA. This is called Discretionary Leave and the terms of the leave can vary.

² There are other nationals who benefit from treaty arrangements with the UK

1. Category One: Treaty Related rights

The most significant here are nationals of the EEA.³ These nationals are subject to special rules related to promoting the free movement of labour and rights of EU citizens to live and move freely across the EU. The strongest rights come through the free movement of workers and entitlements to benefits and welfare services are linked to being in work or self-employment. Detailed rules apply when EEA nationals cease to be in work or self-employment. Among EU nationals Bulgarians and Romanian rights are restricted by transitional arrangements which apply until 31 December 2013. These limit their access to the UK labour market, consequently the entitlements of this group are dealt with separately in the section on A2 nationals.

Other, less well known, international treaties have consequences for the rights of immigrants from certain countries. For instance, nationals of states that have ratified the European Convention on Social and Medical Assistance (ECSMA) and/or the Council of Europe Social Charter (CESC)⁴ have rights to assistance if they are lawfully in the UK. Co-operation and association agreements may allow nationals of Algeria, Israel, Morocco, San Marino, Tunisia and Turkey access to specific entitlements. Special provisions apply to persons who left Montserrat after 1 November 1995 due to the volcanic eruption. As far as possible these additional arrangements will be noted in the text.

Finally, some Commonwealth citizens may have retained a right of abode in the UK.⁵ Where they can prove they have the right to abode Commonwealth citizens would not be subject to immigration control and entitled to benefits and welfare service.

2. Group Two: Protection Related Rights

People who come to the UK to seek protection from persecution and/or serious human rights abuse enter a different immigration stream called the 'asylum process'. Those waiting for a decision on their case are called 'asylum seekers'. Some of these individuals will have their claim recognised under the 1951 Refugee Convention and are then recognised as 'refugees'. Others may not be awarded refugee status but will nonetheless see their claims for protection recognised and be awarded 'humanitarian protection'. Refugees are treated the same as UK nationals in terms of entitlements to benefits and welfare support.

Asylum seekers waiting on a decision may be supported outside the mainstream benefits system by the UKBA.⁶ Asylum seekers whose claims for protection have been refused and who have no further in-country rights of appeal are termed 'failed asylum seekers' and are expected to return to their country of origin. Failed asylum seekers have no entitlements to support but may qualify for

³ That is EU member states and Norway, Iceland and Lichtenstein. See further appendix 1.

⁴ See appendix 2 for a list of ratifying states

⁵ The right to abode is now exclusive to British Citizens

⁶ Except for Unaccompanied Asylum Seeking Children' who are the responsibility of local authorities.

'hard case' support from the UKBA. Local Authorities may have duties to support asylum seekers and failed asylum seekers with social care needs.

3. Group 3: Other Immigrant Groups

People who do not fall into the above two categories are TCNs without any claims for protection. They may have come to the UK to work, study or for family reasons. They usually have no recourse to public funds and are excluded from accessing benefits or welfare services. The circumstances in which this group can access support are limited.

No Recourse to Public Funds

What does 'no recourse to public funds' mean?

Immigration law provides that a person may be given limited leave subject to various conditions.⁷ These conditions usually include that a person must be able to support themselves without accessing public funds or causing any member of their family to require additional public funds or to live below a particular standard of accommodation or maintenance. This condition is often termed having 'no recourse to public funds'.

The Immigration and Asylum Act 1999 also excludes 'persons subject to immigration control' from benefits and from housing authority allocation and homelessness assistance unless they are of a category prescribed by the UKBA.⁸

What are 'public funds'?

The term 'public funds' has a specific meaning in immigration law and does not include all services funded by public money. Financial support from local authorities under social work or children's legislation is not a 'public fund' in this sense. Neither are health services or education – although access may be restricted by other rules.

'Public funds' are defined in paragraph 6 of the Immigration Rules. In Scotland these are:

- attendance allowance, severe disablement allowance, carer's allowance and disability living allowance;
- income support;
- council tax benefit;
- housing benefit;
- a social fund payment;
- child benefit;
- income based jobseeker's allowance;
- income related allowance (employment and support allowance);
- state pension credit;
- child tax credit and working tax credit
- housing and homelessness assistance.⁹

This is a complete listing of what constitutes 'public funds' in Scotland for the purposes of the Immigration Rules.

⁷ Immigration Act 1971 section 3(1)(c)

⁸ Sections 115, 118 and 119 respectively

⁹ This list is exhaustive. Other contribution based benefits such as contribution-based job seekers allowance or maternity allowance do not count as public funds. Also NHS services and education services do not count as public funds.

Who is a 'person subject to immigration control'?

In relation to the exclusion from benefits section 115(9) of the Immigration and Asylum Act 1999, a 'person subject to immigration control' is defined as:

'a person who is not a national of an EEA state and who-

- (a) Requires leave to enter or remain in the UK but does not have it;*
- (b) Has leave to enter or remain in the UK which is subject to a condition that he does not have recourse to public funds;*
- (c) Has leave to enter or remain in the UK given as a result of a maintenance undertaking; or*
- (d) Has leave to enter or remain in the UK only as a result of paragraph 17 of Schedule 4*

Section 118(6) (housing authority accommodation) and section 119 (homelessness: Scotland and Northern Ireland) use a slightly different definition:

“Person subject to immigration control” means a person who under the 1971 Act requires leave to enter or remain in the UK (whether or not such leave has been given).

It is clear that the term 'persons subject to immigration control' includes overstayers, illegal entrants, sponsored immigrants, people on work, student or family visas with no recourse to public funds, and, people pursuing certain immigration appeals. These people are not entitled to those benefits defined as 'public funds' and they are not eligible for housing allocation¹⁰ and homelessness assistance.¹¹

What is less clear is when EEA nationals can be 'persons subject to immigration control'. This issue lies at the heart of the Court of Appeal decision in The Mayor and Burgesses of the London Borough of Barnet v Hassan Ismail and Ms Nimco Abdi.¹² The judgement notes that following entry into the European Union the Immigration Act 1988 sets up special arrangements for EU nationals in section 7:

'a person shall not... require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'

Thus EEA nationals are not 'persons subject to immigration control' as long as they are exercising an 'enforceable Community right'. The judgement found that to be exercising an 'enforceable Community right' an EEA national needs to be a 'qualified person' under regulation 14 of the

¹⁰ A person may, however, apply for housing allocation prior to becoming eligible for housing allocation

¹¹ There are exceptions as some categories of immigrant are prescribed as exempt from these exclusions by the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, No 636 and the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order, 2000, No 706

¹² [2006] EWCA Civ 383

Immigration (EEA) Regulations 2000. Consequently, an EEA national becomes a 'person subject to immigration control' if they are not a qualified person (i.e if they do not have the right to reside). The subsequent Immigration (EEA) Regulations 2006 make clear:

In accordance with section 7 of the Immigration Act 1988(1), a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.¹³

Consequently, in relation to entitlements to benefits, housing and homelessness, statutory orders have adjusted entitlements such that EEA nationals need to meet a 'right to reside' test. In some instances the right to reside test laid down in the statutory instruments is narrower than restricting entitlement to those with a right of residence and excludes those with only an initial right to reside or an extended right to reside as a jobseeker from housing and homelessness assistance and various benefits.¹⁴

Social Care

Social care in Scotland includes the services provided by local authorities under the Social Work (Scotland) Act 1968 and the Mental Health (Care and Treatment) Act 2003.

Who can access social care?

Schedule 3 of the Nationality, Immigration and Asylum Act 2002 lists four classes of persons ineligible for support under sections 12 and 13A of the Social Work (Scotland) Act 1968.¹⁵ These classes are:

- those who have refugee status in another EEA state;
- EEA nationals (unless refusing support breaches their rights under the Community Treaties);
- failed asylum seekers; and
- persons unlawfully in the UK.

Note, however, the exclusions under the Nationality, Immigration and Asylum Act 2002 do not apply to children.¹⁶ Withholding support is also subject to human rights considerations and local

¹³ S.I 2006, No 1003

¹⁴ See further the discussion in the EEA Nationals section

¹⁵ The Act excludes them from s.45 Health Services and Public Health Act 1968 (local authority: welfare of the elderly); s 12 and s. 13A Social Work (S) Act 1968 (social welfare services); s. 254 and sch 20 NHS Act 2006; s 22, s29 and s 30 Children (Scotland) Act 1995; s .29(1)(b) Housing (S)Act 1987 (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested).

¹⁶ NIAA 2002, Schedule 3, para 2(b)

authorities will need to consider whether a human rights breach will result when refusing support under sections 12 and 13A of the Social Work (Scotland) Act.

In addition to the above withdrawal of social care support, persons to whom section 115 of the Immigration and Asylum Act 1999 applies are excluded from sections 12, 13A (residential accommodation with nursing) and 13B (provision of care and after-care) of the Social Work (Scotland) Act 1968 and sections 25 to 27 (provision of services) of the Mental Health (Care and Treatment)(Scotland) 2003¹⁷ *where their need has arisen solely due to destitution or the anticipated effects of destitution*. Section 115 excludes 'persons subject to immigration control', but in its definition of this group excludes EEA nationals at the outset. Under section 115 prescribed categories can also be exempted from the exclusion by statutory order.¹⁸ Immigrants who are excluded from social care as 'persons subject to immigration control' include:

- illegal entrants;
- overstayers;
- those who have leave on condition they have no recourse to public funds;
- those sponsored under a maintenance undertaking; and
- those who have leave to pursue an appeal.¹⁹

Accessing social care as a 'person in need requiring assistance'

The exclusion from social care provision under the 1999 Immigration and Asylum Act is qualified²⁰ and applies only in those instances where the need has arisen solely due to destitution or the physical effects, or anticipated physical effects, of destitution. Where the need arises apart from destitution a local authority has a duty to assess and provide support.

The exclusion from social care provision in England and Wales derives from section 116 of the 1999 Immigration and Asylum Act which inserts the clause refusing support where need arises solely due to destitution into section 21 of the National Assistance Act 1948 and related legislation. The corresponding statutes in Scotland are the Social Work (Scotland) Act 1968²¹ and the Mental Health (Care and Treatment) (Scotland) Act 2003.²²

Case law in England and Wales on what was often called the 'destitute plus' clarified exceptions to the exclusion from support under s.21 of the National Assistance Act 1948. Within this case law the

¹⁷ The Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005, No 2078

¹⁸ Social Security (Persons from Abroad) Amendment Regulations 2006, No 1026 and Allocation of Housing and Homelessness Provision (eligibility) (England) 2006, No 1294

¹⁹ S.115(9) IAA

²⁰ Unlike the exclusions from benefits, housing and homelessness assistance which is absolute

²¹ Section 12 (general social welfare services of local authorities); section 13A (provision of residential accommodation with nursing), section 13B (provision of care and after-care)

²² Section 25 (care and support services), section 26 (services designed to promote well-being and social development), section 27 (assistance with travel)

'destitute plus' are defined as the 'infirm destitute.'²³ Persons subject to immigration control are 'destitute plus' if they are destitute within the meaning of s.95(3) Immigration and Asylum Act, but (importantly) have care needs that arise for reasons other than destitution. It is this additional element of need due to infirmity (the 'plus') that makes local authorities responsible for meeting this groups' needs.²⁴ In M v Slough Baroness Hale clarifies that the distinction being made is that between the 'able bodied' destitute and the 'infirm' destitute²⁵, with local authorities having social care duties only towards the latter. The key is that entitlement arises from the need for care and attention and not from the destitution.

The UKBA will apply this case law in Scotland, but it is worth noting that any issue over the application of M v Slough has not been tested in the Scottish courts. There are several difficulties that local authorities need to consider when determining the application of M v Slough in Scotland:

- 1) Section.21 NAA on which the case law is based was repealed and replaced in Scotland by s.12 Social Work (Scotland) Act 1968. It is possible that the wording of the Acts differs to such a degree that the House of Lords ruling in M v Slough cannot be seen as highly persuasive in terms of its application to the Scottish Statutes. However, the explanatory notes to the 1999 Immigration and Asylum Act on s.120 state: "This section replicates the effect of sections 116 and 117 with respect to Scotland, similarly removing entitlements to general social welfare provisions". On this basis it seems that the intention of Parliament is to replicate the effect of the exclusion from s.21 National Assistance Act in s.116 by similarly excluding persons subject to immigration control from social care assistance unless the need arises from causes other than destitution. On this basis it should be considered whether the judgement should be seen as providing persuasive precedent in Scotland.
- 2) The lead judgement in M v Slough makes much of the phrase a person 'in need of care and attention' found in the NAA. This phrase is not in the Social Work (Scotland) Act 1968 where the language is of a person 'in need requiring assistance'. Key in the lead judgement is Baroness Hale's finding that 'the natural and ordinary meaning of the words 'care and attention' in this context is 'looking after'. Looking after means doing something for the person being cared for which he cannot or should not be expected to do for himself".²⁶ Local authorities need to consider whether the judgement applies in Scotland in the absence of the same phrase in the Social Work (Scotland) Act 1968.
- 3) It could be said that aside from the particular phrase 'care and attention' the judgement makes a key distinction between the 'able bodied' and the 'infirm'. Local authorities should consider whether Baroness Hale's finding turns on the fact that the duty arises because of the need and not because of destitution or poverty.

²³ AW & Ors, R (on application of) v L. B. of Croydon & Ors (2007) EWCA 266, para 30

²⁴ R (Westminster City Council v NASS [2002] UKHL 38

²⁵ 'Infirm' in this context includes those with mental health problems as well as physical health problems

²⁶ The term 'destitute plus' has been replaced in England by the term 'looked after' following the Slough judgement. This guidance takes the language of the Social Work (Scotland) Act of a 'person in need requiring assistance'

Can accommodation be provided under the Social Work (Scotland) Act 1968?

Local authorities in Scotland need to consider their ability to provide accommodation under the Social Work (Scotland) Act 1968. The difficulty arises from Scottish case law which restricts the provision of accommodation under the Social Work (Scotland) Act 1968 to residential accommodation (i.e accommodation in an institution or hostel). The case of Assessor for Edinburgh v Brodie (1976) considers whether s.12 empowers a local authority to supply a house to a disabled person. Lord Thomson concludes: "if a local authority wishes to supply as a home for a disabled person a house which makes special provision for the needs of that disabled person, the local authority has power to do so under the Housing Acts and not under the Social Work (Scotland) Act 1968"

Local authorities need to consider the consequences of the Brodie judgement in terms of their ability to provide (non-managed) housing for immigrants as part of addressing their social care needs when an immigrant is excluded from the provisions of the Housing (Scotland) Act 1987.

It could be argued that the judgement in Brodie can in no way have been prescient of the 1999 Immigration and Asylum Act or that housing and community care provision by local authorities have changed substantially since 1976 such that the restrictions surrounding the type of housing provision are no longer relevant. However, Brodie is a Scots case in a court equivalent to the Inner House and, as such, is binding on local authorities in Scotland.

What about Human Rights?

The Human Rights Act 1998 requires public bodies such as local authorities to uphold the rights contained in the European Convention on Human Rights (ECHR). Local authorities should consider in all cases whether exclusion from services and support would amount to a human rights breach. The NRPF network provides a [Human Rights Assessment Template](#) that can be used by local authorities for this purpose.²⁷

Other routes to providing for immigrants

Scottish Local Authorities have the power under s. 20 of the Local Government of Scotland Act 'to promote wellbeing'. It is for local authorities in Scotland to consider whether to use these powers to provide support for immigrants excluded from other support. However, this is a power only and imposes no duty on local authorities. Furthermore, s.20 is subject to limiting provisions in s.22 and local authorities will need to consider whether the restrictions on local authority powers in the 1999 Immigration and Asylum Act and the 2002 Nationality, Immigration and Asylum Act constitute such 'limiting provisions' such that it is not open to local authorities to utilise section 20 to provide support to immigrant groups specifically excluded by prior legislation.

²⁷ NRPF Connect, UK-wide database of cases supported by social services, is currently being developed and is to be launched in April 2012.

Human Rights Considerations

The Human Rights Act 1998 incorporates the European Convention on Human Rights (ECHR) into UK law. This means that the articles of the ECHR have direct effect inside the UK and human rights cases can be heard in domestic courts. The Human Rights Act places a duty on all public bodies, including local authorities, to comply with the rights set out in the Convention. The key Convention rights in relation to immigrants are: Article 3 (prohibition on torture or inhuman or degrading treatment or punishment); Article 8 (respect for family and private life) and, in cases where a person is involved in court proceedings, Article 6 (right to a fair and public hearing).

In assessing whether a person needs to be supported by the local authority to prevent a human rights breach the local authority should be clear that it is assessing whether a human rights breach would occur in the UK.²⁸ It is for the UKBA to determine risk on return to the country of origin.²⁹ A local authority needs to consider whether it is open to a person to return to their country of origin, leaving aside any consideration of risk on return. Where there are practical barriers to return the local authority should then assess whether the person should be supported to prevent a human rights breach while those practical matters are resolved.³⁰ Where there are legal barriers to return the local authority should assess whether the person should be supported until any outstanding matters have been concluded.³¹ In determining whether a person facing practical or legal barriers to leaving the UK should be supported by the local authority all avenues of support available to the person should be considered. The NRPF network provides a [Human Rights Assessment Template](#) that can be used by local authorities.

Where no barriers to return exist, a local authority may be able to discharge its duties under the Human Rights Act by offering travel assistance. Where return would prevent a breach, it would be lawful for a local authority to offer assistance with returning a person to their country of origin. Case law has determined that where a person is 'freely able' to return to their country of origin and refuses travel assistance any hardship or degradation they suffer is a consequence of their decision to remain in the UK and any resulting human rights breach has not been caused by the local authority.³² The local authority should consider the impact of offering travel assistance in its human rights assessment. Local authorities should be mindful of their duties towards children where parents or carers refuse to return to their country of origin.³³ A child in need assessment needs to

²⁸ SSH D v Limbuela & Ors [2004] EWCA Civ 540

²⁹ Binomugisha v Southwark LBC [2006] EWHC (Admin) and R (on the application of AW)(Claimant) v Croydon LBC (Defendant): R (on the application of (1) A (2) D (3) Y (Claimants) v Hackney LBC (Defendant) & Secretary of State for the Home Dept. [2005] EHC 2950 (Admin)

³⁰ For example where a person is unable to travel due to pregnancy, illness, lack of travel documents etc

³¹ For example where a custody claim or an article 8 claim is being determined

³² R(Kimani) v Lambeth Borough Council [2003] EWCA Civ 1150; Grant v Lambeth Borough Council [2004] EWCA Civ 1711

³³ NRPF Network guidance (forthcoming) will advise further on this issue

consider whether a child would cease to be in need on return to the country of origin before offering travel assistance as a means of meeting duties under children legislation.³⁴

Article 3

Article 3 is the absolute prohibition on 'torture, inhuman or degrading treatment or punishment'. The threshold for a breach of article 3 is extremely high.³⁵ Local authorities need to consider whether refusing support would result in a person being tortured or exposed to inhuman or degrading treatment or punishment.

Article 8

Article 8 is often the most relevant for local authorities as this involves cases where the UKBA is not responsible for providing support while the claim is being determined. Article 8 is the 'right to respect for his private and family life, his home and his correspondence'. It is a qualified right and can be interfered with where it is 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

Claimants of Article 8 rights are not entitled to asylum support and a local authority should consider whether it is necessary to provide such families with support to prevent a human rights breach occurring while the Article 8 claim is being determined by the UKBA. In the case of Birmingham CC v Clue the Court of Appeal sets out various elements of a human rights assessment in the case of someone who is pursuing an Article 8 claim that does not involve risk on return. The assessment had two elements: (i) is the claimant destitute? (this involves considering all the avenues of support available to the claimant - including work where there is permission to work; (ii) is the application abusive or hopeless (care should be taken not to pre-judge the UKBA's decision under article 8).

Article 6

Where a person is a defendant in criminal proceeding or a party in civil proceedings it may be relevant to consider whether return to the country of origin would infringe their right to a fair and public hearing under Article 6. Under this Article a person involved in legal proceedings in the UK may need to remain in the UK until such a time as his case was heard. Again such a person would not be eligible for asylum support and it would be for the local authority to consider whether support would be needed in the interim to prevent a human rights breach.

³⁴ M v London Borough of Islington [2004] EWCA Civ 235; Blackburn-Smith v Lambeth LBC [2007] EWHC 767

³⁵ N v Secretary of State for the Home Dept (2005) UKHL 31

Travel Assistance

Local authorities have powers to assist and arrange travel enabling a person to return to their country of origin. In situations where return is a viable option³⁶ a local authority should consider whether offering travel assistance effectively discharges its duties under the Human Rights Act as part of a human rights assessment. However, even when parents refuse offers of return travel it must be remembered that the local authority's duties towards any children remain.³⁷

Local authorities can offer to arrange return travel for EEA nationals and those recognised as refugees in another EEA state.³⁸ These powers do not allow for any cash payments to be made directly to the persons travelling. Where there are children involved accommodation can be arranged pending return.

Where a local authority is approached by asylum seekers or people who are unlawfully in the UK looking to return to their country of origin these should be referred to the Choices Assisted Voluntary Return Programme run by Refugee Action (Tel: 080 800 0007). Alternatively Embassies may also be able to purchase travel tickets for their nationals.

³⁶ There is no physical or practical impediment to travel, no risk on return and any outstanding legal claim could be pursued from the country of origin

³⁷ NRPF Network guidance (forthcoming) will advise on local authorities duties to children where parents refuse to return to their country of origin

³⁸ Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations, 2002, No 3078

Good Practice Guidance

General Guidelines

Immigrants should receive a humane response when approaching local authorities. Confidentiality should be preserved and data protection issues need to be explained. Informed consent should be sought when sharing information with other agencies. Local authorities' duties to inform other agencies should be explained at the outset. Local authorities have a duty to inform the UKBA of anyone who is unlawfully in the UK or who is failed asylum seeker.³⁹

When dealing with people who have a limited or no understanding of English, interpreters should be used to ensure information has been understood. The use of family members as interpreters has a negative impact on the quality of interpretation and can interfere with confidentiality. Using family members as interpreters should be avoided where possible.

A local authority's response to requests for assistance should be consistent. It is good practice for local authorities to keep within legal duties when offering assistance. Where a local authority cannot offer assistance it is good practice to offer advice and signposting to other avenues of support. But this should not be done where it is clear that someone will not qualify for a service or as a substitute for local authority services.

Good practice in assessment requires a single assessment approach with an identified lead officer. A local authority assessment of the duty to support has two basic elements:

1. An eligibility test
2. An assessment of need

If a person is destitute the local authority can provide temporary emergency accommodation while assessments are being carried out.

Eligibility Test

Establishing eligibility requires:

- (a) Establishing immigration status. Local authorities should establish designated officers to liaise with UKBA through their Local Immigration Team.⁴⁰ Individuals presenting at local authority offices should provide proof of identity and immigration status.
- (b) Establishing if a person is ineligible for support under schedule 3 Nationality, Immigration and Asylum Act 2002. Exclusions under schedule 3 do not apply to children. It is up to an

³⁹ NIAA 2002, Schedule 3, para 14

⁴⁰ For contact details for Local Immigration Teams in Scotland see appendix 3

applicant to show that they do not fall into one of these categories. Persons ineligible under this legislation are:

- a. Persons with refugee status in another EEA country and their dependants
- b. EEA nationals⁴¹ and their dependants
- c. Failed asylum seekers who are not complying with removal directions and their dependants
- d. Persons unlawfully in the UK⁴²

A person who is ineligible under schedule 3 may access support where they can show that this is necessary to prevent a breach of their human rights or their rights under the EU treaties. In the case of a possible human rights breach a human rights assessment would be the lead assessment in the case of single adults.⁴³ This means that a local authority should first assess whether there would be a breach of human rights if no support was provided. Only if providing no support would amount to a human rights breach, should the local authority go on to assess community care needs.

- (c) Establishing which local authority is territorially responsible. The test is whether a person is 'ordinarily resident' in the local authority area. Where someone has been transferred to a hospital or other authority for treatment territorial responsibility remains with the sending authority or the authority where they were ordinarily resident prior to treatment.

Assessment of Need

The duty to assess need arises under s.12A of the Social Work (Scotland) Act 1968. The duty requires local authorities to first assess the need for community care services and then, having regard to the assessed needs, decide whether the needs call for provision by the local authority of such services. It is good practice to develop a single, shared needs assessment bringing together local authorities, health boards, NHS trusts and housing authorities.

As far as reasonable and practicable the views of the person being assessed should be considered as part of the needs assessment, as should the views of any carer who provides a substantial amount of care on a regular basis. Where it appears that care is required as a matter of urgency a local authority has the power to provide care services prior to assessment while an assessment of needs is being carried out.

Children

All children are covered by the Children (Scotland) Act 1995 regardless of immigration status. Local authorities should be mindful of their duties under children's legislation and consider carrying out a

⁴¹ Excluding UK nationals

⁴² This includes visa overstayers and failed asylum seekers who made in-country applications for asylum.

⁴³ *R (on the application of N) v Coventry City Council* [2008] EWHC 2786 (Admin)

child in need assessment.⁴⁴ Such an assessment should be based on the needs of the child and on any potential risk to the child. Support provided to children may extend to their family where this safeguards or promotes a child's welfare. However, some adult immigrants⁴⁵ are excluded from support or services provided under s.22, 29 or 30 of the Children (Scotland) Act 1995 under schedule 3, Nationality, Immigration and Asylum Act 2002. In cases where a child's carer is excluded from the Children (Scotland) Act local authorities should undertake a human rights assessment in conjunction with the child in need assessment.

⁴⁴ S. 22 C(S)A 1995

⁴⁵ Specifically, EEA nationals without a right of residence, people with refugee status abroad, failed asylum seekers and unlawful immigrants

Domestic Violence Rule

The Domestic Violence Rule (DVR) is a concession that reduces length of time a spouse/partner of a person with ILR or British citizenship has to wait (2 years) before becoming eligible to apply for ILR in circumstances of domestic abuse. Suffering domestic violence does not in any other case give rise to settlement status (ILR).

DVR and Spouses on a temporary visa

Rule 289 of the immigration rules makes an exception for a person who has come to the UK on a temporary spouse/partner visa where the relationship breaks down due to domestic violence. Under this 'domestic violence rule' the Secretary of State may grant ILR/ILE to a person who has been admitted to the UK for a period not exceeding 27 months or given an extension of stay for 2 years as the spouse/civil partner or unmarried partner (including same sex partner) of a person present and settled in the UK. This applies only where the relationship existed at the beginning of the period of leave and where a person is able to produce evidence that domestic violence has led to the permanent break down of that relationship before the period of leave has expired. To benefit from the rule an applicant must not have any unspent convictions within the meaning for the Rehabilitation of Offenders Act 1974.

A person who meets these criteria can be make an application to UKBA under the Domestic Violence Concession to access public funds while they make an application for indefinite leave to remain. Successful applicants will be granted access to public funds for three months which will then allow them to access income-related benefits and housing assistance. This arrangement replaces the Sojourner Project which operated until March 2012.

People on temporary spouse visas usually have NRPF. In this case there are no avenues to housing or benefits and access to support under social care provisions will require that a person has needs that do not arise solely from destitution. If a person on a temporary spouse visa fleeing domestic violence is caring for a child, that child will be able to access support and housing under the Children (Scotland) Act 1995 s.22. A person with limited leave as a spouse/partner will usually have permission to work and may be able to support themselves through employment. Local authorities should consider whether a person who has suffered domestic violence may qualify for support under s.12 of the Social Work (Scotland) Act 1968 depending on the appearance of need.⁴⁶

⁴⁶ Oxfordshire CC v Khan & Anor [2004] EWCA Civ 309

Other Immigrants suffering Domestic Violence

EEA national

An EEA national who is in the UK as a dependant will need to be exercising his/her rights under the Communities Treaties in order to be able to stay in the UK and access benefits or LA support or services. The spouse/civil partner of an EEA national can retain the right to reside upon termination of the relationship. Usually such a person would have to have been in the relationship for at least three years and have spent at least one year of the relationship in the UK. However, an exception is made where 'the continued right of residence in the UK is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.'⁴⁷

Workers/Students

People who have leave as workers or students and experience domestic violence continue to have those rights attached to their immigration status. They should be referred to agencies that support persons suffering domestic violence.

Spouses of Workers/Students

Dependants of a person on a temporary work or student visa do not qualify under DVR to apply for ILR. They would need to return to their country of origin and apply for entry clearance in their own right if they want to continue to live in the UK.

If relationship breakdown would put a person at risk on return to their country of origin this could form the basis of an asylum claim and needs to be referred to an immigration adviser.

Spouses of Asylum Seekers

If a dependant on asylum claim is suffering domestic violence the claims need to be separated and a claim needs to be made in the dependent's own right. Where they are in receipt of asylum support the UKBA and accommodation provider should be informed of domestic violence and alternative support arrangements should be made.

⁴⁷ Reg 10 (5)(d)(iv), Immigration (EEA) Regulations, 2006, No.1003

If the breakdown of a relationship would put a person at risk on return to their country of origin this could form the basis of an asylum claim and needs to be referred to an immigration adviser.

Spouses of failed Asylum Seekers

Where a dependent of a failed asylum seeker is suffering domestic abuse the UKBA and accommodation provider should be informed so that alternative living arrangements can be made.

Where domestic abuse and relationship breakdown would put a person at risk on return to their country of origin they may need to make a claim for asylum in their own right. This will need to be referred to an immigration advisor.⁴⁸ If the fresh claim is accepted by the UKBA then that person may qualify for asylum support rather than section 4 support.

⁴⁸ Immigration advisors should be registered with the OISC

Migrants' Entitlements by category

Refugees and Humanitarian Protection

A refugee is someone whom the UKBA has recognised as a refugee under the 1951 Refugee Convention. The Refugee Convention obliges the UK to provide refugees with 'the same treatment with respect to public relief and assistance as is accorded to their nationals'. So refugees are not affected by the public funds rules and can generally access the same benefits as nationals as long as they can meet the rules on entitlement that apply generally. They can also have some claims backdated to the date of their initial asylum claim.

A person with humanitarian protection (HP) is someone the UKBA recognises has fled serious human rights abuse, but who does not fit the legal definition of 'refugee'. People with either HP have the same entitlements to benefits and services as refugees. But they are not allowed to backdate any claims to the date of the asylum claim

Social Care

Refugee, and others with a protection status, are entitled to social care services on the same basis as UK nationals.

Benefits

Refugees, and others with a protection status, are entitled to the same benefits as British citizens provided they can meet the eligibility criteria.

Non means-tested benefits (e.g. child benefit) can be backdated to the date the claim for asylum was made as long as this is applied for within three months of notification of the grant of refugee status. Refugees studying English are a group entitled to Income Support as long as they are attending an English course for more than 15 hours a week and, on the date the course began, had been in the UK for 12 months or fewer.

Tax Credits

Refugees, and others with a protection status, are entitled to the same tax credits as British Citizens provided they can meet the eligibility criteria. Child tax credits can be backdated to the date of the asylum claim as long as this is applied for within three months of notification of the grant of refugee status.⁴⁹

Tax Credits are administered by HMRC under the Tax Credits Act 2002. They are Working Tax Credits and Child Tax Credits.

⁴⁹ See Tax Credits (Immigration) Regulations 2003 No 653

Housing

Refugees, and others with a protection status, are not affected by the exclusions from housing allocation and homelessness assistance under the 1999 Immigration and Asylum Act. They are listed as one of the classes of persons exempt from s. 118 of the Act in the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order.⁵⁰ Refugees can be given new tenancies and are exempt from any exclusions regarding assistance when homeless that can apply to other immigrant groups. This is the case for all recognised refugees regardless of whether their status is limited or indefinite.

In Scotland, unlike in England and Wales, accommodation provided to asylum seekers does not establish a local connection to the dispersal area.⁵¹ Consequently refugees are entitled to apply for housing or homelessness assistance in any local authority area in Scotland in the immediate period following the grant of refugee status.

Family

Refugees and those granted HP are entitled to be joined by their pre-existing family and may apply for family reunification following the grant of refugee status. In either case the family members of a recognised refugee have the same entitlements to benefits as a refugee and are not affected by the public funds rule.

⁵⁰ 2000, No 706, Reg 3 (a)

⁵¹ S. 7 Homelessness etc (Scotland) Act 2003

Indefinite Leave to Remain

Someone who has Indefinite Leave to Remain (or Indefinite leave to enter) the UK has no conditions attached to their leave and can access benefits if eligible. Indefinite Leave to Remain (ILR) is sometimes called 'settlement'.

Social Care

Immigrants with ILR or ILE have the same access to social care services as British citizens.

Benefits

A person with ILR or ILE has no restrictions attached in claiming public funds they are therefore entitled to claim benefits as long as they meet the eligibility criteria.

Where ILR or ILE has been granted on the undertaking that a sponsor would be responsible for maintenance a person may be restricted from claiming benefits and their sponsor will be liable to repay any benefits claimed.⁵² This restriction applies for five years from the date of the sponsorship undertaking or the date of entry. If the sponsor dies the restriction lapses and the person can access means-tested benefits.

Tax Credits

A person with ILR or ILE has no restrictions attached in claiming public funds. They are therefore entitled to tax credits provided they qualify.

However, where ILR or ILE has been granted on the undertaking that a sponsor would be responsible for maintenance then the sponsored person may be restricted from claiming benefits and the sponsor will be liable to repay any benefits claimed. This restriction applies for five years from the date of the sponsorship undertaking or the date of entry. If the sponsor dies, the restriction lapses.⁵³

Housing

A person with ILR or ILE is eligible for housing authority allocation and homelessness assistance if they are habitually resident in the common travel area.⁵⁴ They are among the categories prescribed as exempt from the exclusions under sections 118 and 119 of the 1999 Immigration and Asylum Act.

There is no definition of 'habitual residence' in the immigration regulations. Case law has established that to be 'habitually resident' a person must have the right to reside and must be 'resident for an appreciable period of time'.⁵⁵ What amounts to an 'appreciable period of time' can vary greatly⁵⁶ and the intention to make a home in the UK is key. A person who has lived in the UK for two years or more generally qualifies automatically as habitually resident, and a period of 3-6 months residence is usually seen as sufficient.

⁵² Para 317 Immigration Rules

⁵³ See Tax Credits (Immigration) Regulations 2003

⁵⁴ Persons with ILR/ILE would come under Class C of the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000, no 706

⁵⁵ *Nessa v Chief Adjudication Officer* [1999] UKHL 41

⁵⁶ There is no fixed minimum period.

However, where a person has indefinite leave on the basis of a sponsorship agreement they are not entitled to assistance with housing or homelessness until five years after entry or after the undertaking. This restriction lapses if the sponsor has died.

Family

The partner of a person with ILR/ILE who is not an EEA national is usually given two years temporary leave and has the opportunity to apply for indefinite leave after that period. During the period of temporary leave such a partner would have permission to work and would be subject to the no recourse to public funds rule. Where the partner of a person with ILR/ILE is also an EEA national they may acquire the right to reside under the EU treaties (see section on EEA nationals).

If the relationship is terminated before an application for ILR has been made then the non-EEA national partner would be expected to return to their country of origin.

There is an exception in the immigration rules for those instances where a relationship ends due to domestic violence before the two year period of temporary leave has expired. Here the partner may be able to apply for indefinite leave under the domestic violence rule.⁵⁷

⁵⁷ See further section on DVR

EEA Nationals

EEA nationals are nationals of the EU member states⁵⁸ plus Norway, Liechtenstein, Iceland. Swiss nationals are not EEA nationals but have the same entitlements due to reciprocal agreements. Until 31 December 2013 transition arrangements apply to Bulgarian and Romanian nationals (A2 nationals) limiting their free movement to work in the UK. The entitlements of A2 nationals will be dealt with separately in the next section. Nationals of the eight Central and Eastern European countries that joined the EU in 2004 (previously called A8 nationals) had restrictions on their right to work in the UK. These restrictions ceased on 1 May 2011.

The rights of EU nationals to move and reside freely within the EU member states derive from EU Treaties and directives. They have been codified in EU directive 2004/38. In the UK this directive has been implemented by the Immigration (European Economic Area) Regulations 2006, No. 1003.⁵⁹ For the sake of simplicity this guidance confines itself to the UK regulations and treats the 'right to reside' in the EEA Regulations as a proxy for EU treaty rights. However, users of this guidance should be aware that there remains a large and contested body of law that may impact on EEA nationals' rights and should seek legal advice on specific issues as necessary.

EEA nationals are not 'persons subject to immigration control' as long as they have a 'right to reside'.⁶⁰ EEA nationals have an initial right to reside in the UK for three months. This derives from their right as EU Citizens to 'move and reside freely within the territory of the Member States'. EEA nationals can also have an extended right to reside. The extended right to reside depends on them being a 'qualified person'.

A 'qualified person' is an EEA national who is in the UK and is:

- a jobseeker;
- a worker;
- a self-employed person;
- a self-sufficient person; or
- a student.⁶¹

An EEA national who is a qualified person can reside in the UK for as long as they remain a qualified person.⁶² After residing lawfully in the UK for five years continuously, an EEA national acquires a permanent right to reside in the UK. An EEA national can also acquire permanent residence on

⁵⁸ The current member states of the EU are: Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain, Sweden and the UK.

⁵⁹ These Regulations apply the EU Directive to EEA nationals in the UK and not only EU nationals. However it should be noted that for non-EU EEA nationals the rights derive from the Regulation, whereas for EU nationals the rights derive from the Directive itself.

⁶⁰ Regs 13, 14 and 15 Immigration (EEA) Regulations 2006, No 1003

⁶¹ 2006 Immigration (EEA) Regulations, No 1003, part 6

⁶² Although the UKBA does have the power to remove them if this is justified on the grounds of public policy, public security or public health

becoming a 'worker or self-employed person who has ceased activity'⁶³. Once acquired, permanent residence can only be lost following a period of absence from the UK of over two consecutive years or if the UKBA authorises a person's removal on serious grounds of public policy or public security.

The entitlements of EEA nationals in the UK depend mainly on their right to reside.⁶⁴ At present UK regulations exclude EEA nationals from income-related benefits if their only right to reside is the initial right to reside EU citizen under regulation 13. If an EEA national has no right to reside then they are not exercising their Community treaty rights and their presence in the UK becomes 'subject to immigration control'.⁶⁵ Secondary legislation has introduced a right to reside test. This affects entitlements to benefit and housing eligibility excluding those who have only an initial right to reside and, in some instances, excluding those whose extended right to reside is as a jobseeker only.

Social Care

Local authorities are the key deliverers of social care in Scotland. The Social Work (Scotland) Act 1968 and the Mental Health (Care and Treatment) (Scotland) Act 2003 are the central statutes setting out the powers and duties of Scottish Local Authorities.

EEA nationals can access support under section 12 (general social welfare services of local authorities) and section 13A (provision of residential accommodation with nursing) of the Social Work (Scotland) Act 1968 as long as they have a right of residence.⁶⁶ Schedule 3 of the Nationality, Immigration and Asylum Act 2002 excludes EEA nationals from support under section 12 and 13A of the Social Work (Scotland) Act 1968 (*inter alia*), unless to do so would breach their rights under the Communities treaties. Note that children are exempt from schedule 3 of the Nationality, Immigration and Asylum Act 2002.

In addition to Schedule 3, the 1999 Immigration and Asylum Act excludes 'persons subject to immigration control' from section 13B (provision of care and after-care) of the Social Work (Scotland) Act 1968 and from sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 unless:

"his need for assistance has arisen solely—(a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute."

⁶³ 2006 Immigration (EEA) Regulations, No 1003, part 15

⁶⁴ The right to reside test in the UK is however currently subject to infringement proceedings initiated by the European Commission see: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1118&format=PDF&aged=0&language=EN&guiLanguage=en>

⁶⁵ See Mayor and Burgesses of the London Borough of Barnet v Hassan Ismail, Nimco Abdi and First Secretary of State [2006] EWCA Civ 383

⁶⁶ Regs 13, 14 & 15 Immigration (EEA) Regulations 2006

It is not clear whether any EEA national would be excluded from social care under the Immigration and Asylum Act 1999 as the definition of 'person subject to immigration control' excludes EEA nationals from the outset. Section 120 adopts the definition of a 'person subject to immigration control' from s.115(9) as:

"A person subject to immigration control" means a person who is not a national of an EEA state and who-

- (a) Requires leave to enter or remain in the UK but does not have it;*
- (b) Has leave to enter or remain in the UK which is subject to a condition that he does not have recourse to public funds;*
- (c) Has leave to enter or remain in the UK given as a result of a maintenance undertaking; or*
- (d) Has leave to enter or remain in the UK only as a result of paragraph 17 of Schedule 4*

However, case law on the issue of whether EEA nationals can be 'persons subject to immigration control' adopts a different conclusion in that EEA nationals can be persons subject to immigration control if they are not exercising community rights.⁶⁷ In other words an EEA national needs to have a right of residence under regulations 13, 14 or 15 of the Immigration (EEA) Regulations 2006. Following the case law EEA nationals can only access services under section 13B of the Social Work (Scotland) Act 1968 or under sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003 if they have a right of residence or if their need does not stem from destitution alone. Following the statute definition of 'persons subject to immigration control' in s.115, however, any EEA national would be able to access these particular social care provisions.⁶⁸

Children of EEA nationals are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need⁶⁹ assessment should be carried out.⁷⁰

Benefits⁷¹

EEA nationals with the right to reside are not 'persons subject to immigration control' and as such are not subject to the no recourse to public funds rule.⁷² However, UK regulations also exclude EEA nationals with only an initial right to reside as an EU citizen from benefits. Consequently economically inactive EEA nationals do not generally have entitlements to income-related benefits.

⁶⁷ Mayor and Burgesses of the London Borough of Barnet v Hassan Ismail, Nimco Abdi and First Secretary of State [2006] EWCA Civ 383

⁶⁸ Note that support under s.12 and 13A of the SW(S)A is governed by Schedule 3, NIAA 2002

⁶⁹ S. 22 C(S)A 1995

⁷⁰ Adult EEA nationals with no right of residence are excluded from s.22, 29 & 30 C(S)A 1995 by scheduled 3, NIAA 2002. This exclusion does not affect children.

⁷¹ This guidance does not cover contributory benefits.

⁷² Mayor & Burgesses of the LB Barnet v Hassan Ismail, Ms Nimco Abdi and First Secretary of State [2006] EWCA Civ 383

To access income-related benefits⁷³ an EEA national needs to pass the right to reside test.⁷⁴ For IS, HB and CTB a person must be habitually resident in the CTA. For these benefits a person will not be habitually resident if their only right to reside is an initial right to reside⁷⁵ or if their extended right to reside⁷⁶ is as a jobseeker or as the family member⁷⁷ of a jobseeker.⁷⁷ Therefore to claim these benefits an EEA national needs to be in employment, self-employment, self-sufficient or a student.⁷⁸ In the case of income-based JSA having a right to reside as a job seeker is sufficient or family member of a jobseeker is sufficient, but having only an initial right to reside is insufficient. However, claiming income based JSA can allow a person to be passported onto HB and CTB even though, as a work seeker, they would not otherwise meet the right to reside test for these benefits.

For child benefit, DLA, CA and AA the test is 'ordinary residence' and the claimant must be present in the UK at the time of the claim.

Other benefits⁷⁹ do not apply a right to reside test as the entitlement springs from the EU coordination rules that try to ensure non-discrimination between different EU nationals exercising mobility rights within the EU. To access these benefits EEA nationals need to meet the same eligibility requirements as British Citizens. In assessing contributions, social security contributions made in other EU member states should be counted alongside National Insurance contributions.

Tax Credits

There are Working Tax Credits and Child Tax Credits. EEA nationals are entitled to claim tax credits subject to residence and eligibility requirements. In general the residency requirement is that a person be living in the UK.⁸⁰ This is not affected by short absences for holidays or business trips. In some circumstances tax credits may be claimed even where a person (or a child on whose behalf a claim is being made) is not living in the UK.⁸¹

Housing

EEA nationals may be excluded from housing allocation and homelessness assistance when they do not have a right to reside in the UK, as they then become 'persons subject to immigration control'.⁸² The Immigration Asylum Act 1999 excludes a 'person subject to immigration control' from housing authority accommodation (s. 118) and homelessness accommodation or assistance (s. 119) unless he

⁷³ These benefits are: income support, income-based job seekers' allowance, council tax benefit, child benefit.

⁷⁴ This test was introduced on 1 May 2004. Persons who were in receipt of IS, income-based JSA, PC, HB or CTB before this date do not have to meet the right to reside test and enjoy transitional protection. See further CPAG pg 117

⁷⁵ Reg 13, Immigration (EEA) Regulations 2006, No 1003

⁷⁶ Reg 14, Immigration (EEA) Regulations 2006, No. 1003

⁷⁷ The Social Security (Persons from Abroad) Amendment Regulations 2006, No 1026

⁷⁸ As defined by reg 4, Immigration (EEA) Regulations 2006, No.1003

⁷⁹ These benefits are: disability living allowance, maternity allowance, contribution based job seekers allowance and contribution based employed and support allowance.

⁸⁰ The test here is 'ordinarily resident'

⁸¹ See further the Tax Credits (Residence) Regulations 2003 No 654, Tax Credits (Resident) (Amendment) Regulations 2004 No 1243 and the Tax Credits (Miscellaneous Amendments) Regulations 2006

⁸² See Mayor and Burgesses of LB of Barnet v Hassan Ismail and Others [2006] EWCA Civ 383

is of a class specified in an order by the UKBA. The definition adopted in sections 118 and 119 of 'person subject to immigration control' is:

a person who under the 1971 Act requires leave to enter or remain in the UK (whether or not such leave has been given).

The Immigration (EEA) Regulations 2006 stipulate:

In accordance with section 7 of the Immigration Act 1988(1), a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.⁸³

In other words once an EEA national does not have a right to reside under the 2006 Immigration (EEA) Regulations they require leave to remain and as such are persons subject to immigration control.

The Scottish Government's Code of Guidance on Homelessness⁸⁴ treated all EEA nationals as eligible for homelessness assistance. This position has been superseded by legislative developments⁸⁵ and entitlements to housing and homelessness assistance are restricted to EEA nationals with a right to reside.

Secondary legislation in England goes further in restricting the access of EEA nationals to housing allocation and homelessness assistance. The Allocation of Housing and Homelessness (eligibility) (England) Regulations 2006⁸⁶ excludes those EEA nationals with an initial 3 month right to reside or with an extended right to reside as a jobseeker from housing accommodation and assistance. In Scotland these groups would continue to be eligible, yet they would not be directly entitled to income-related benefits apart from income related JSA. This would mean these EEA nationals would not be receiving housing benefit or council tax benefit⁸⁷ even though they would be eligible housing and homelessness assistance.

In cases where EEA nationals are not eligible for housing or homelessness assistance local authorities need to consider their duties towards any children. Children of EEA nationals are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need⁸⁸

⁸³ S.I. 2006, No 1003, Sch 2, para 1

⁸⁴ Scottish Executive, May 31, 2005

⁸⁵ In particular the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2008, No 1768

⁸⁶ S.I. 2006 No. 1294

⁸⁷ Unless passported onto these benefits following a claim of income based JSA

⁸⁸ S. 22 C(S)A 1995

assessment should be carried out. Support provided under children's legislation may include the provision of accommodation.⁸⁹

Family

The right of residence enjoyed by EEA nationals extends to family members accompanying them. Family members are defined in the Immigration (EEA) Regulations. They include a person's spouse or civil partner, children under 21 (or over 21 if still dependent), children of the spouse or partner under 21 (or over 21 if dependent), parents or grandparents. For EEA nationals who are students the definition of family members is more narrow and includes only children or spouses. There are circumstances in which other dependants can be recognised as family members - these are set out in regulation 8 of the Immigration (EEA) Regulations.⁹⁰ These rights apply whether or not the family member is an EEA national. This means that the family of an EEA national have the same rights to benefits and services as EEA nationals, even if they are not themselves EEA nationals.

A non-EEA spouse of an EEA national who was a qualified person may retain a right of residence upon the death of that person or on the termination of their marriage in certain conditions, but only if they are in such a situation as would make them a worker or a self-employed or self-sufficient person.⁹¹ The EU Directive provides for an EU national's family member to retain an extended right to reside where a spouse dies or a marriage is terminated. However in this case the EU national's family member must become a worker, a self-employed person or self-sufficient before acquiring permanent residence.⁹²

Children of a worker or former worker who have embarked on a course of education also have a right to reside in the UK as long as they are continuing their education.⁹³ This right of residence is retained in situations where the qualified person has died or left the UK. There is case law that extends this right to reside to the person with custody of the child.⁹⁴ Family members who retain a right of residence have the same access to benefits and services as do EEA nationals with an extended right to residence.

In cases where children are involved local authorities should be mindful of their duties under the Children (Scotland) Act 1995. Support provided to children may extend to their family members. However, adult EEA nationals are excluded from support under s.22, 29 and 30 of the Children (Scotland) Act 1995 if they have no right of residence.

⁸⁹ Adult EEA nationals without a right of residence are excluded from s.22, 29 and 30 C(S)A 1995 by schedule 3, NIAA 2002

⁹⁰ This includes a partner with whom the EEA national has a durable relationship

⁹¹ Reg 10, Immigration (EEA) Regulations 2006

⁹² Art 12 & 13 EU Directive 2004/38

⁹³ There are different interpretations as to the extent of this right. See CPAG pgs 243-244.

⁹⁴ Nimco Hassan Ibrahim C – 310/08 and Maria Teixeira C – 480/08 (ECJ)

A2 Nationals

Under the Treaty of Accession, nationals from Romania and Bulgaria (A2 nationals) are members of the European Union, but their rights to access the UK's labour market are restricted.⁹⁵ Accession rules restrict the types of employment A2 nationals can undertake during the accession period. The accession period runs to 31 December 2013.

An A2 national has the same right as any other EEA national to enter and move freely in the UK. This means they have an initial right to reside within the UK for 3 months as an EU citizen, during which time they must not become an unreasonable burden on the state. Following this 3 month period they can extend their right to remain in the UK if they can show that they are exercising an EU Treaty Right either as a self-employed person, a student or a self-sufficient person (who is not economically active). A2 nationals cannot have the right to reside as a jobseeker.

An A2 national must have worker authorisation before they can work legally in the UK, unless they are exempt from the worker authorisation scheme, or they are classed as a Highly Skilled Migrant under the previous government work permit programme. Those workers with worker authorisation should be issued with an accession worker card relevant only to the employer and employment that they are undertaking.

Exemptions from the Worker Authorisation Scheme

- A2 nationals who had leave to enter or remain in the UK under the 1971 Immigration Act on 30 December 2006 and were not subject to any conditions restricting employment at that time.
- A2 nationals who had been working legally in the UK for 12 months continuously without breaks of 30 days ending on or after 31 December 2006.
- A2 nationals who are the spouse of an EEA national or British Citizen.
- A2 nationals who are highly skilled and are in possession of a registration certificate confirming that they have unrestricted access to the labour market.
- A2 nationals who are students and work less than 20 hours per week (during term time) and have a registration certificate that restricts their right to employment.
- A2 nationals who have worked for 12 months continuously or more legally in the UK and have a registration certificate giving unrestricted access to the labour market.
- A2 nationals who have a permanent right of residence (legally resided in the UK, in accordance with any provisions, for a continuous period of five years).⁹⁶

Social Care

Local Authorities are the key deliverers of social care in Scotland. The Social Work (Scotland) Act 1968 and the Mental Health (care and treatment) (Scotland) Act 1984 are the central statutes setting out the powers and duties of Scottish Local Authorities.⁹⁷ Immigration law excludes some immigrant groups from social care. In determining whether A2 nationals are eligible for support under social

⁹⁶ New rights given under Directive 2004/38.

⁹⁷ For a full list of legislation see appendix 3

care provisions you need to determine what EU treaty rights are engaged by their presence in the UK. After the initial 3 month right to reside as an EU citizen, an A2 national can have the right to reside only as a self-employed person, a self-sufficient person or as a student, unless they are exempt from the worker authorisation scheme. In these instances an A2 national should be treated like any other EU national (refer to EEA nationals section). This means that they may be eligible for social care services.

A2 nationals who are exercising their rights as an EU citizen, a student, a self-sufficient person or as self-employed have the same entitlements as other EEA nationals in the same situation (see section on EEA nationals). A2 nationals who are exempt from worker authorisation have the same rights as other EEA nationals in the same situation (see section on EEA nationals). A2 nationals who have to be authorised to work in the UK acquire the same rights as other EEA nationals after 12 months of continuous authorised employment, where they have a registration certificate, at which point they gain the extended right to reside as a 'worker'. Where an A2 national is in authorised work or exempt from the scheme has an accident or is unable to work due to illness they may be able to continue to be treated as "worker" and may be able to access appropriate benefits.

A2 nationals complying with the worker authorisation scheme would have the same eligibility to social care provisions as other EEA nationals but these would cease if such a person is made unemployed. Unlike other EEA nationals, where an A2 national loses their authorised work place, they lose their right to reside and access to the majority of means-tested benefits, unless they can satisfy another Treaty Right. There is no provision for an A2 person who requires worker authorisation to remain in the UK legitimately as a jobseeker if their employment is terminated. Where an A2 national takes up employment without obtaining authorisation they may be committing a criminal offence.

Where an A2 national requires social care services and this need has not arisen solely due to destitution or the physical effects, or anticipated physical effects, of destitution they may qualify as a 'person in need requiring assistance' and be able to access social care support regardless of whether they have a right to reside.

Children of EEA nationals are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need⁹⁸ assessment should be carried out.⁹⁹

Benefits¹⁰⁰

Where an A2 national is in the UK under the worker authorisation scheme, or exempt from the scheme, they are entitled to claim in-work benefits such as Housing Benefit, Council Tax Benefit, Working Tax Credit and Child Benefit as long as they remain in their authorised employment.

An A2 national who completes 12 months of continuous authorised employment is issued with a registration certificate and gains free access to the UK labour market and can claim benefits freely. If

⁹⁸ S. 22 C(S)A 1995

⁹⁹ Adult EEA nationals with no right of residence are excluded from s.22, 29 & 30 C(S)A 1995 by scheduled 3, NIAA 2002. This exclusion does not affect children.

¹⁰⁰ This guidance does not cover contributory benefits

an A2 national subject to worker authorisation loses their authorised job before 12 months have elapsed, they lose their right to reside and cannot access the range of means-tested benefits.

Tax Credits

Where an A2 national is in the UK under the worker authorisation scheme, or exempt from the scheme, they are entitled to claim working tax and child tax credits for as long as they remain in their authorised employment.

If an A2 national subject to worker authorisation loses their authorised work before 12 months of continuous employment have elapsed they lose their entitlement to claim tax credits.

Housing

Where an A2 national is in the UK under the worker authorisation scheme or exempt from the scheme, they are entitled to access homelessness assistance and local authority housing allocation on the same basis as other EEA nationals. In these instances see EEA nationals housing section to explain issues regarding eligibility in Scotland.

An A2 national who completes 12 months of continuous authorised employment is issued with a registration certificate and gains access to the UK labour market and therefore has the same eligibility for housing allocation and homelessness assistance as other EEA nationals.

Children of EEA nationals are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹⁰¹ assessment should be carried out. Support provided under children's legislation may include the provision of accommodation.¹⁰²

Family

Regulation 7 of the Immigration (EEA) Regulations 2006 defines who is a family member of an A2 national not subject to worker authorisation. Such family members are entitled to apply for a registration certificate or a residence card under Regs 16 and 17 of the same regulations.

The family members of an A2 national subject to worker authorisation are known as 'authorised family members'. Authorised family members are defined in reg 3 of the Accession (Worker Authorisation and Worker Registration)(Amendment) Regulations.¹⁰³

Where there are children local authorities should be mindful of their duties under the Children (Scotland) Act 1995. Support provided to children may extend to their family members. However, adult EEA nationals are excluded from support under s.22, 29 and 30 of the Children (Scotland) Act 1995 if they have no right of residence.

¹⁰¹ S. 22 C(S)A 1995

¹⁰² Adult EEA nationals without a right of residence are excluded from s.22, 29 and 30 C(S)A 1995 by schedule 3, NIAA 2002

¹⁰³ SI 2009, No 2426

Workers

People who come to the UK to work do so either under the points based system or through one of the remaining work permit categories. The rules regarding renewal of visas, access to settlement and ability to change employer vary, but in general all immigrants who come to the UK from outside the EEA to work are persons subject to immigration control and usually have no recourse to public funds. The terms of their leave will be stated on their visa.

Social Care

Third Country Nationals who come to the UK on a work visa are excluded from social care provision unless their need for assistance has arisen for reasons other than destitution. Section 120 of the Immigration and Asylum Act restricts the access of 'persons subject to immigration control' to services under s.12, s13A and 13B of the Social Work (Scotland) Act and sections 25 to 27 of the Mental Health(Scotland) Act 2003 allowing support only where their need for assistance has not 'arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute.'¹⁰⁴

Consequently people on a work visa are generally excluded from social care unless they are 'a person in need requiring assistance' (i.e their needs arise apart from destitution or the anticipated effects of destitution).¹⁰⁵

Children of TCN immigrant workers are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹⁰⁶ assessment should be carried out. Support provided under children's legislation can extend to support for the child's family.

Benefits¹⁰⁷

Third Country Nationals on a work visa usually have no recourse to public funds as a condition of their leave. They are also a group to whom section 115 of the Immigration and Asylum Act 1999 applies. Section 115 excludes this group from income-related benefits.¹⁰⁸

There are some exceptions. Access to income-based JSA, income support, social fund payments, housing benefit and council tax benefit can occur if:

- a person is temporarily without funds due to a disruption in remittances from abroad, provided there is a reasonable expectation that funds will resume;
- a person has leave on a maintenance undertaking and the sponsor dies;

¹⁰⁴ Destitution for these purposes is defined in s.95 IAA 1999

¹⁰⁵ See further the social care section

¹⁰⁶ S. 22 C(S)A 1995

¹⁰⁷ This guidance does not cover contributory benefits

¹⁰⁸ Specifically income-based JSA, attendance allowance, severe disablement allowance, carers allowance, disability living allowance, income support, social fund payments, child benefit, housing benefit or council tax benefit

- a person has leave under a maintenance agreement and five years have passed since entry or the undertaking (whichever is the later); or
- a person is a national of a state that has ratified the ECSMA or the CESC.¹⁰⁹¹¹⁰

Furthermore, the EU has entered into co-operation and association agreements with third countries that contain provisions for equal treatment in matters of social security. On this basis, nationals of Algeria, Israel, Morocco, San Marino, Tunisia and Turkey and their families are entitled to access a range of benefits¹¹¹ provided they are working lawfully in the UK.

Tax Credits

As persons 'subject to immigration control' third country national on a work visa are not generally entitled to child tax credit or working tax credits. Exceptions may apply to the following:¹¹²

- those subject to a maintenance undertaking who have been resident in the UK for 5 years;
- those subject to a maintenance undertaking whose sponsor has died;
- those whose funds from abroad have been temporarily disrupted;
- those who are nationals of states covered by European Convention of Social and Medical Assistance or the Council of Europe Social Charter and are lawfully in the UK; or
- those workers from states with which the EC has an agreement for equal treatment for social security.¹¹³

Housing

Third Country Nationals who are in the UK for work purposes are not eligible for housing allocation or homelessness assistance.¹¹⁴ They are also excluded from housing benefit as persons subject to immigration control.¹¹⁵

The 1999 Immigration and Asylum Act permits certain categories of immigrants to be exempted from this overall exclusion, some of those exempted could be in the UK for work reasons. These include:

- sponsored immigrants who have been in the UK for more than five years;
- sponsored immigrants whose sponsor has died; and
- persons who fled the volcano in Montserrat in 1st November 1995¹¹⁶

¹⁰⁹ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, No 636

¹¹⁰ See appendix 2 for a table of ECSMA and CESC ratifying states

¹¹¹ The benefits include: attendance allowance, carer's allowance, child benefit, child tax credit, disability living allowance, ESA in youth, social fund payments and income-based JSA

¹¹² See Tax Credits (Immigration) Regulations 2003 No 653

¹¹³ These are: Algeria, Israel, Morocco, San Marino, Tunisia and Turkey

¹¹⁴ Sections 118 and 119 of the 1999 IAA

¹¹⁵ Section 115 1999 IAA

¹¹⁶ Persons Subject to Immigration Control (Housing Authority Allocation and Homelessness) Order, 2000, No 706

Children of TCN immigrant workers are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹¹⁷ assessment should be carried out. Support provided under children's legislation can extend to support for the child's family and may include the provision of accommodation.

Family

If a person has come to the UK to accompany a worker from outside the EEA and that person is not an EEA national then they are a person subject to immigration control and are likely to have leave subject to no recourse to public funds.

If a person who has come to the UK to accompany a worker from outside the EEA, but is an EEA national they may be able to access benefits and welfare services as an EEA national.

Should the relationship be terminated then a person from outside the EEA will need to return to their country of origin to apply for entry clearance, unless they have grounds for an asylum or ECHR claim. The partner of a person who is on a temporary work visa cannot benefit from the domestic violence rule as this applies to the partners of people with settlement status (ILR) with British citizenship.

Where there are children local authorities should be mindful of their duties under the Children (Scotland) Act 1995.

¹¹⁷ S. 22 C(S)A 1995

Students

A person who visits the UK to study from outside the EEA usually has a student visa under the old immigration rules (until 29 March 2009) or has come in as a student under tier four of the points based system. There are some shorter visas available for people coming to study on short courses (student visitor visas) or coming to finalise arrangements for their studies. Students are given leave to enter or remain subject to restrictions on working hours and on the condition that they have no recourse to public funds. The general terms of their leave will be stated on their visa.

Social Care

Third Country Nationals who are in the UK to study are excluded from social care provision under section 120 of the 1999 Immigration and Asylum Act as 'persons subject to immigration control'. The Act restricts access to services under s.12, s13A and 13B of the Social Work (Scotland) Act and sections 25 to 27 of the Mental Health (Care and Treatment)(Scotland) Act 2003. It allows support only where the need for assistance has not 'arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute.'¹¹⁸ TCNs on a student visa are generally excluded from social care unless they are in a situation that amounts to being 'person in need requiring assistance'.¹¹⁹

Children of TCN students are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹²⁰ assessment should be carried out. Support provided under children's legislation can extend to support for the child's family.

Benefits¹²¹

TCNs who are in the UK to study usually have 'no recourse to public funds'. They are 'persons subject to immigration control and as such s.115 Immigration and Asylum Act 1999 applies. This section excludes them from income-related benefits.'¹²²

Section 115 allows for exceptions to be made for prescribed categories. Secondary legislation allows for TCN students to access to income-based JSA, income support, social fund payments, housing benefit and council tax benefit if:

- they are temporarily without funds due to a disruption in remittances from abroad, provided there is a reasonable expectation that funds will resume;
- a person has leave on a maintenance undertaking and the sponsor dies;

¹¹⁸ Destitution for these purposes is defined in s.95 IAA 1999

¹¹⁹ See the social care section

¹²⁰ S. 22 C(S)A 1995

¹²¹ This guidance does not cover contributory benefits

¹²² Income based JSA, attendance allowance, severe disablement allowance, carers allowance, disability living allowance, income support, social fund payments, child benefit, housing benefit or council tax benefit

- a person has leave under a maintenance agreement and five years have passed since entry or the undertaking (whichever is the later); or
- they are a national of a state that has ratified the ECSMA or the CESC.¹²³
- Furthermore, the EU has entered into co-operation and association agreements with third countries that contain provisions for equal treatment in matters of social security. On this basis, nationals of Algeria, Israel, Morocco, San Marino, Tunisia and Turkey and their families are entitled to access a range of benefits¹²⁴ provided they are lawfully in the UK.

Tax Credits

As 'persons subject to immigration control' TCN students are not generally entitled to claim tax credits. However, exceptions may apply and students may be able to claim child tax credits or working tax credits if:¹²⁵

- their leave is subject to a maintenance undertaking;
- their funds from abroad have been temporarily disrupted;
- they are nationals of states covered by European Convention of Social and Medical Assistance (ECSMA) or the Council of Europe Social Charter; or
- they are from states with which the EC has an agreement for equal treatment for social security.¹²⁶

Housing

Third Country Nationals who are in the UK to study have no rights to access local authority housing¹²⁷, assistance with homelessness or housing benefit. The 1999 Immigration and Asylum Act excludes 'persons subject to immigration control' from housing allocation under s.118, homelessness assistance under section 119 and housing benefit under s.115.

There may be some exceptions where students fall into categories prescribed as exempt. These include:

- sponsored immigrants who have been in the UK for more than five years;
- sponsored immigrants whose sponsor has died; and
- persons who fled the volcano in Montserrat in 1st November 1995¹²⁸

¹²³ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, No 636

¹²⁴ The benefits include: attendance allowance, carer's allowance, child benefit, child tax credit, disability living allowance, ESA in youth, social fund payments and income-based JSA

¹²⁵ See Tax Credits (Immigration) Regulations 2003 No 653

¹²⁶ These are: Algeria, Israel, Morocco, San Marino, Tunisia and Turkey

¹²⁷ Student living in student halls owned by local authorities are exempted by class F under the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 200, No 706

¹²⁸ Persons Subject to Immigration Control (Housing Authority Allocation and Homelessness) Order, 2000, No 706

Children of TCN immigrant workers are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹²⁹ assessment should be carried out. Support provided under children's legislation can extend to support for the child's family and may include the provision of accommodation.

Family

If a person has come to the UK to accompany a student from outside the EEA and that person is also a TCN they are a person subject to immigration control. Their visa will state the general terms of their leave including whether they have permission to work or any recourse to public funds.

If a person who has come to the UK to accompany a student from outside the EEA, but is an EEA national they may have access to benefits and welfare services as an EEA national.

Should the relationship be terminated then any TCN will need to return to their country of origin to apply for entry clearance in their own right, unless they have an asylum or ECHR claim. The partner of a person who is on a student visa cannot benefit from the domestic violence rule as this applies only to the partners of people who have settlement status (ILR) or British citizenship.

Where there are children local authorities should be mindful of their duties under the Children (Scotland) Act 1995.

¹²⁹ S. 22 C(S)A 1995

Partners with temporary leave¹³⁰

Persons may enter the UK to join or accompany their spouse or partner. They will usually be granted limited leave without recourse to public funds. The general conditions of entry will be stated on the visa.

Social Care

Third Country Nationals who come to the UK as a spouse or partner would be persons subject to immigration control. Section 120 of the Immigration and Asylum Act restricts their access to services under s.12, s13A and 13B of the Social Work (Scotland) Act and sections 25 to 27 of the Mental Health (Care and Treatment)(Scotland) Act 2003 allowing support only where their need for assistance has not 'arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute.'¹³¹ Consequently a person on a spouse visa cannot access social care provisions unless they are a 'person in need requiring assistance'.¹³²

The children of immigrants are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹³³ assessment should be carried out. Support provided under children's legislation can extend to support for the child's parent.

*Benefits*¹³⁴

Third country nationals who are in the UK for family reasons are persons subject to immigration control. Therefore section 115 of the Immigration and Asylum Act 1999 applies. This section excludes them from income related benefits.¹³⁵

There are some exceptions. Access to income based JSA, income support, social fund payments, housing benefit and council tax benefit can occur if¹³⁶:

- a person is temporarily without funds due to a disruption in remittances from abroad, provided there is a reasonable expectation that funds will resume;
- a person has leave on a maintenance undertaking and the sponsor dies;
- a person has leave under a maintenance agreement and five years have passed since entry or the undertaking (whichever is the later); or
- a person is a national of a state that has ratified the ECSMA or the CESC.¹³⁷

¹³⁰ This section applies to spouses/partners of British Citizens or persons with settled status and those who have joined individuals on work or student visas. For spouses/partners of EEA nationals and asylum seekers refer to the relevant section

¹³¹ Destitution for these purposes is defined in s.95 IAA 1999

¹³² See further social care section

¹³³ S. 22 C(S)A 1995

¹³⁴ This guidance does not cover contributory benefits

¹³⁵ Income-related JSA, attendance allowance, severe disablement allowance, carers allowance, disability living allowance, income support, social fund payments, child benefit, housing benefit or council tax benefit

¹³⁶ Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, No 636

- Furthermore, the EU has entered into co-operation and association agreements with third countries that contain provisions for equal treatment in matters of social security. On this basis, nationals of Algeria, Israel, Morocco, San Marino, Tunisia and Turkey and their families are entitled to access a range of benefits¹³⁸ provided they are working lawfully in the UK.

Tax Credits

Third Country Nationals who are in the UK on a temporary spouse/partner visa are persons subject to immigration control. As such they are not generally entitled to child tax credits or working tax credits.

Exceptions may apply to the following:¹³⁹

- those subject to a maintenance undertaking;
- those whose funds from abroad have been disrupted;
- those who are nationals of states covered by European Convention of Social and Medical Assistance or the Council of Europe Social Charter;¹⁴⁰ or
- those workers from states with which the EC has an agreement for equal treatment for social security.¹⁴¹

Housing

A spouse/partner with temporary leave has no access to local authority housing¹⁴², assistance with homelessness¹⁴³ or housing benefit¹⁴⁴. A spouse with temporary leave whose partner is a British Citizen or has ILR may be put on the tenancy agreement where housing is provided from the local authority. The housing is treated as being claimed by the eligible individual.

The UKBA does exempt certain classes of persons from this exclusion under the Persons Subject to Immigration Control (Housing and Homelessness) Order 2000.¹⁴⁵ These include:

- sponsored immigrants who have been in the UK for more than five years;
- sponsored immigrants whose sponsor has died; and
- persons who fled the volcanic eruption in Montserrat on 1st November 1995.

¹³⁷ See appendix 2 for a list of ECSMA and CESC ratifying states

¹³⁸ The benefits include: attendance allowance, carer's allowance, child benefit, child tax credit, disability living allowance, ESA in youth, social fund payments and income-based JSA

¹³⁹ See Tax Credits (Immigration) Regulations 2003 No 653

¹⁴⁰ See appendix 2 for a list of ECSMA and CESC ratifying states

¹⁴¹ These are: Algeria, Israel, Morocco, San Marino, Tunisia and Turkey

¹⁴² S. 118 1999 IAA

¹⁴³ S. 119 1999 IAA

¹⁴⁴ S. 115 1999 IAA

¹⁴⁵ SI 2000, No 706

Children of immigrants are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹⁴⁶ assessment should be carried out. Support provided under children's legislation can extend to support for the child's family and may include the provision of accommodation.

¹⁴⁶ S. 22 C(S)A 1995

Asylum Seekers

An asylum seeker is a person who has made a claim for protection under the 1951 Refugee Convention and/or Article 3 of the ECHR.¹⁴⁷ Asylum seekers are given support outside the mainstream benefits system. A person continues to be supported as an asylum seeker for 28 days after their claim is determined if any leave is granted. They can also continue to be supported as an asylum seeker if (a) they come to the end of their claim having exhausted all appeal rights, but the main applicant has dependent children under the age of 18 or (b) their claim is refused but they have outstanding appeal rights in the UK. UKBA support will be terminated after 21 days following the applicant becoming appeal rights exhausted if there are no dependent children under the age of 18. They then may be eligible for Section 4 support administered by UKBA (see next section on failed asylum seekers).

Since April 2008 support for asylum seekers is provided by the UKBA. The UKBA took over this function from the Borders and Immigration Agency which replaced National Asylum Seeker Support Service (NASS) in April 2006. NASS provided asylum seeker support since a separate system of support was established in 1996 and asylum seeker support is often still referred to as 'NASS support'. An asylum seeker is entitled to asylum support if they are destitute or likely to become destitute¹⁴⁸ and (for those who have claimed asylum after 8 January 2003) they have made their claim 'as soon as reasonably practicable'.

Asylum support can be withdrawn from asylum seekers who claimed asylum in-country rather than at the port of entry where the UKBA deems the asylum application was not lodged 'as soon as reasonably practicable'.¹⁴⁹ There is no legal definition of 'as soon as reasonably practical' but UKBA policy states that a claim made within three days of entry should be treated as having been made 'as soon as reasonably practicable'. Where support has been withheld, the lack of support must not amount to a human rights breach under the ECHR. Support will not be withheld from in-country applicants where there are dependent children under 18.

An asylum seeker whose claim was refused and who has subsequently had fresh representations for an asylum claim accepted for consideration by the UKBA becomes an asylum seeker again and as such may receive asylum support if eligible. Similarly, where a failed asylum seeker has been granted leave to appeal following the submission of an out-of-time appeal, they become an asylum seeker again and may be eligible for asylum support.

EEA nationals and their dependants are a class of persons prescribed by schedule 3 Nationality, Immigration and Asylum Act as ineligible for asylum support under sections 4, 95 & 98 Immigration

¹⁴⁷ A person who has made a claim under other articles of the ECHR (e.g. Art. 8) is not an asylum seeker.

¹⁴⁸ Under s.95 (3) IAA1999 a person is destitute if: '(a) he does not have adequate accommodation or any means of obtaining it (whether or not his essential living needs are met); or (b) he has adequate accommodation or the means of obtaining it, but cannot meet other essential living needs.' A person is regarded as destitute upon applying for asylum support if destitution is likely with 14 days and continues to be regarded as destitute if destitution is likely within 56 days.

¹⁴⁹ S.55 NIAA 2002

and Asylum Act 1999, except to the extent necessary to prevent a breach of rights under the ECHR or the Communities Treaties. The onus is on the applicant to show a breach would be committed. An EEA national who applies for asylum would be allowed to work under the Communities Treaties. A2 nationals would have their access to the labour market restricted (see A2 section).¹⁵⁰

Where an asylum seeker has a dependent who is under 18, they will continue to be supported under asylum support until the child turns 18 as long as they remain in the UK. This only applies for dependents present during the time of the asylum claim, not any children born following refusal.¹⁵¹

For the purposes of asylum support an asylum seeker has to be over 18. If a person under the age of 18 has made a claim for asylum they should be supported by the local authority, not UKBA. (see section on UASCs).

Social Care

As persons subject to immigration control asylum seekers are excluded from social care provision unless their need for care arises for reasons other than destitution. The 1999 Immigration and Asylum Act restricts asylum seeker's access to services under s.12, s13A and 13B of the Social Work (Scotland) Act and sections 25 to 27 of the Mental Health (Care and Treatment)(Scotland) Act 2003 allowing support only where their need for assistance has not 'arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute.'¹⁵²

Where a social care need arises for reasons other than destitution the local authority becomes responsible for providing accommodation and support services.¹⁵³ The local authority should inform the UKBA of the care need so the UKBA can make arrangements to stop providing support. Where a parent has an assessed care need the local authority should provide accommodation adequate for the whole family and the UKBA will make a contribution to cover the accommodation and subsistence needs for the other family members.¹⁵⁴ Where a dependent child has an assessed care need the UKBA remains responsible for providing support. However, the local authority should assess under the Children (Scotland) Act 1995 whether any additional care support is needed and should provide that support if necessary.¹⁵⁵

¹⁵⁰ See UKBA Policy Bulletin No 76.

¹⁵¹ S. 94(5) IAA

¹⁵² Destitution for these purposes is defined in s.95 IAA 1999

¹⁵³ *NASS v Westminster* [2002] UKHL 38

¹⁵⁴ *R (O) v Haringey LBC*, [2004] EWCA 385

¹⁵⁵ *R(A) v NASS and LB Waltham Forest*, [2003] EWCA Civ 1473

Benefits

Asylum seekers are supported outside the mainstream benefits system. They are given asylum support, often called NASS support. This is administered by the UKBA. Asylum seekers are not entitled to any other benefits.¹⁵⁶

Children under 18 seeking asylum are provided for by local authorities under children legislation (see UASC section)

If an asylum seeker is granted refugee status they can receive back-dated non means tested benefits such as child benefit from the date of their initial asylum claim. This must be applied for within three months of the grant of refugee status.

Tax Credits

As 'persons subject to immigration control' asylum seekers are not entitled to tax credits.¹⁵⁷

If an asylum seeker is granted refugee status they can receive back dated non means tested benefits. This must be applied for within three months of the grant of refugee status.

Housing

Accommodation for asylum seekers is provided by the UKBA as part of asylum support under s.95 and 96 of the Immigration and Asylum Act 1999. To qualify for support an asylum seeker must be destitute or facing destitution. The accommodation provided by the UKBA can include accommodation centres.¹⁵⁸ The UKBA usually grants temporary asylum support while an application for asylum support is being considered.¹⁵⁹ This is called 'emergency support'. The UKBA has the power to discontinue or suspend asylum support.¹⁶⁰

Local authorities may have a role in providing accommodation under s.95 Immigration and Asylum Act where the UKBA requests their assistance under s 99 and 100 Immigration and Asylum Act. It is important to realise that in this instance the local authority is not housing asylum seekers under their own duties but assisting the UKBA in exercising its powers.

Under the 2002 Nationality, Immigration and Asylum Act the UKBA may exclude in-country asylum applicants from asylum support (including accommodation) if they are not satisfied that a claim for

¹⁵⁶ The exception is asylum seekers without funds whose claims were made before the 5 February 1996 received income support at the urgent cases rate of 90 per cent and housing benefit. Cases without a decision from pre-1996 are now very rare.

¹⁵⁷ There are exceptions and transitional rules apply for asylum seekers who claimed asylum before 5 February 1996 and asylum seekers who claimed asylum before 3 April 2000. See Tax Credits (Immigration) Regulations 2003, No 653

¹⁵⁸ S17 and s 24 NIAA 2002

¹⁵⁹ S.98 IAA

¹⁶⁰ For the specific rules see Reg 20 (1) Asylum Support Regulations, 2000, No 704

asylum was made 'as soon as reasonably practicable'.¹⁶¹ According to s.55 (3) and (4) Nationality, Immigration and Asylum Act a local authority cannot in these circumstances offer such persons accommodation

The UKBA will not exclude dependent children under 18 from asylum support. Where an asylum seeker has a dependent who is under 18 they continue to be supported under asylum support until the child turns 18 while they remain in the UK. This means they also continue to be housed under asylum support.

Local authorities may provide accommodation for asylum seekers as part of meeting a social care need.¹⁶²

Family

Dependants of an asylum seeker are entitled to asylum support and temporary asylum support as long as they are destitute. A dependent is defined as a spouse, a child or a spouse's child under 18, a child of close family, a child living as part of a household and a partner living with him as part of a household for at least two of the three years prior to the asylum claim.¹⁶³ Where a dependant on an asylum claim has a claim to asylum in their own right this should be made at the earliest opportunity. Refer to an immigration advisor.

Asylum seekers with dependent children cannot be excluded from asylum support on the basis of not having claimed asylum 'as soon as reasonably practicable'.

Where asylum seekers have been excluded from UKBA support they may be able to get social services support under Children (Scotland) Act 1995. Social services only has duty to provide for the child, but this may require supporting the parents where this is in best interests of child or to prevent a breach of article 8 rights in relation to the child.

¹⁶² See social care section

¹⁶³ For more detail see Reg 2, Asylum Support (Interim Provisions) Regulations 1999, No 3056

Failed Asylum Seekers¹⁶⁴

A failed asylum seeker is a person who has come to the end of their asylum claim and has not been granted any leave to remain and has no further in-country right of appeal. Failed asylum seekers are not generally entitled to support from the UKBA and are expected to return to their country of origin. In some circumstances they may be able to claim support under section 4 of the Immigration and Asylum Act 1999. This is known as section 4 support or 'hard cases support'. Section 4 support consists of accommodation and vouchers only, with no cash support.

If section 4 support is applied for within 21 days of asylum support ending the UKBA will accept the applicant is destitute. However, if a person is not in receipt of UKBA support at the time when their asylum case comes to an end they must provide evidence of why they are no longer able to support themselves. To qualify for section 4 support a person must: be destitute¹⁶⁵ and meet one of the five criteria for support¹⁶⁶ or be applying for accommodation to support an application for bail or release from immigration detention.

To be eligible for section 4 support a person must meet one of the following five criteria:

- be taking all reasonable steps to leave the UK;
- be unable to leave the UK because of illness or a disability;¹⁶⁷
- be unable to leave the UK because there is no viable route for return;
- have applied for Judicial Review;¹⁶⁸
- be in a situation where support is necessary to prevent a human rights breach¹⁶⁹

A person whose initial asylum claim has been refused and who has made fresh representations or lodged an out-of-time appeal to the first tier tribunal is a failed asylum seeker and can apply for support under section 4 while waiting to see whether the UKBA or the courts are willing to consider further arguments. If the UKBA accepts the fresh representations amount to a fresh claim, or the tribunal gives permission to hear an out-of-time appeal then that person becomes an asylum seeker again and should claim asylum support under s. 95. If it is decided that the fresh representations do not amount to a fresh asylum claim or leave to appeal is denied then section 4 support will be reviewed and may be discontinued unless one of the five criteria for support applies.

¹⁶⁴ This guidance document adopts the term 'failed asylum seekers' throughout as it is the terminology found in statute and UKBA briefings. No pejorative meaning is intended in the word 'failed'

¹⁶⁵ S 95(3) IAA 1999 defines destitute as not having adequate accommodation or any means of getting it or not being able to meet essential living needs (even if you do have adequate accommodation). A person who is likely to become destitute within 14 days counts as destitute

¹⁶⁶ Reg 3 The Immigration and Asylum (Provision of Accommodation for Failed Asylum Seekers) Regulations 2005, No 930

¹⁶⁷ By this, it is meant an inability to travel and not that HR would be breached by a lack of medical treatment in country of destination

¹⁶⁸ In Scotland all that is necessary is for a JR application to have been lodged at court

¹⁶⁹ For instance: (a) fresh representations have been lodged with the UKBA; (b) an out of time appeal has been made to the first tier tribunal; (c) there is no safe route of return; or (d) other human rights arguments.

Section 4 support is continually reviewed. The UKBA will issue letters notifying the withdrawal of support within 21 days, these must be responded to with reasons why support needs to continue if circumstances allowing for section 4 support persist. Section 4 support can be withdrawn if the recipient does not comply with conditions of support as stipulated (e.g. reporting requirements, residence requirements, compliance with removal preparations).

Social Care

Failed asylum seekers are a class excluded from support or assistance under schedule 3 of the Nationality, Immigration and Asylum Act 2002. This excludes failed asylum seekers from s.12 and s.13A Social Work (Scotland) Act if they fail to comply with removal directions. Where a failed asylum seeker applied for asylum in-country they are an illegal entrant and as such will be excluded under schedule 3 even if they are complying with removal. However, the exclusion of support should not breach of rights under the ECHR.¹⁷⁰ Local authorities may need to carry out a human rights assessment to ensure they are not in breach of their obligations under the Human Rights Act 1998.

There are some remaining elements of social care provision in Scotland not covered by Schedule 3, Nationality, Immigration and Asylum Act 2002. These are services under 13B of the Social Work (Scotland) Act and sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003. The 1999 Immigration and Asylum Act excludes failed asylum seekers from these services unless their need has not 'arisen solely – (a) because he is destitute; or (b) because of the physical effects, or anticipated physical effects, of his being destitute.'¹⁷¹ In these instances a failed asylum seeker would qualify as a 'person in need requiring assistance' and be able to access support under those particular sections.¹⁷²

Local authorities should be aware that immigrant children are covered by the Children (Scotland) Act 1995 and consider whether a child in need¹⁷³ assessment should be carried out.¹⁷⁴

Benefits

Failed asylum seekers are not entitled to benefits. As asylum seekers they may have qualified for asylum support, which is support outside the mainstream benefits system. This ends after a claim has been determined and there is no further in-country right of appeal.¹⁷⁵ Some failed asylum seekers may be eligible for section 4 support which is also administered by UKBA (see above).

¹⁷⁰ See Human Rights Considerations section

¹⁷¹ Destitution for these purposes is defined in s.95 IAA 1999

¹⁷² See Social Care section

¹⁷³ S. 22 C(S)A 1995

¹⁷⁴ Adult FAS are excluded from s.22, 29 & 30 C(S)A 1995 by schedule 3, NIAA 2002

¹⁷⁵ If there are dependent children under 18 asylum support continues until removal or a grant of status

Tax Credits

Failed asylum seekers are not entitled to tax credits. There are some limited exceptions to this rule including transitional rules that apply to asylum seekers with claims predating 3 April 2000.

However, the transitional rules cease to apply following a UKBA decision on the claim, even if this decision is being appealed.

Housing

Failed asylum seekers are not eligible for housing or homelessness assistance under the Housing (Scotland) Act 1987. A failed asylum seeker may be accommodated as part of 'hard case support' under section 4. To be eligible for this asylum seekers must be destitute and meet one of the five criteria for support¹⁷⁶ (see opening section on failed asylum seekers). Where a failed asylum seeker has a social care need local authorities should consider whether the need is such that he may be provided with accommodation under the Social Work (S) Act 1968.¹⁷⁷

Where a failed asylum seeker has dependent children under 18, asylum support is not terminated until they leave the UK or are granted another form of status. This does not apply to children born after an asylum claim was exhausted. All children are covered by the Children (Scotland) Act 1995. Local authorities should consider whether a child in need¹⁷⁸ assessment should be carried out. Support provided under children's legislation may include the provision of accommodation.¹⁷⁹

Family

Dependants of failed asylum seekers are defined in the same way as the dependents of asylum seekers. Dependants can include a spouse, a child or a spouse's child under 18, a child of close family, a child living as part of his household and a partner living with him as part of his household for at least two of the three years prior to the asylum claim.¹⁸⁰ Where a dependant on an asylum claim has a claim to asylum in their own right this should be made at the earliest opportunity. People in this situation should be referred to an immigration advisor.¹⁸¹

Failed asylum seekers with children under 18 continue to be supported by asylum support until removal from the UK. They are not moved on to section 4 support. This does not apply where children are born after appeal rights have been exhausted.

Where there are children local authorities should be mindful of their duties under the Children (Scotland) Act 1995.

¹⁷⁶ Immigration and Asylum (Provision of Support to Failed Asylum Seekers) Regulations 2005

¹⁷⁷ See discussion in the Social Care section

¹⁷⁸ S. 22 C(S)A 1995

¹⁷⁹ Adult FAS are excluded from s.22, 29 & 30 C(S)A 1995 by schedule 3, NIAA 2002

¹⁸⁰ For more detail see Reg 2, Asylum Support (Interim Provisions) Regulations 1999, No 3056

¹⁸¹ Immigration advisors must be registered with the OISC

Unaccompanied Asylum Seeking Children

The UKBA defines an unaccompanied asylum seeking child (UASC) as:

a child who is:

- applying for asylum in their own right; and;
- separated from both parents and is not being cared for by an adult who by law has responsibility to do so

The UKBA will process the asylum claim of a UASC and may grant refugee status or HP on protection need grounds. Where a UASC does not qualify for a protection status on any of these grounds the UKBA will grant DL for three years or until the child is 17.5 years old.¹⁸² The UASC may be entitled to appeal a refusal of refugee or HP status and should be referred to an immigration advisor.¹⁸³ If the UASC is seeking to extend any grant of DL then an application must be made with the UKBA before their current DL expires otherwise the UASC will be subject to removal once they reach 18 years of age.

Responsibilities under the Children (Scotland) Act 1995

Local authorities are responsible for the accommodation and support of UASCs. An unaccompanied asylum seeking child is a 'child in need'.¹⁸⁴ Local authorities have a duty to safeguard and promote the wellbeing of children in need.¹⁸⁵ Local authorities should conduct a full needs assessment under the Children (Scotland) Act. Most UASCs will also be 'looked after' children with accommodation provided for them under section 25 of the Children (Scotland) Act 1995 on the basis of no one having parental responsibility towards them. All UASCs under 16 should be provided for under section 25. Some UASCs between the ages of 16-18 may only require to be supported at a lower level, but this would be based on an assessment of their needs. However, it is expected that most UASCs between 16-18 will be looked after by local authorities under section 25.

What services a UASC is eligible for depends on their immigration status. A UASC with refugee status, HP or DL will be entitled to access mainstream services. However, if an asylum claim is refused and there are no further in-country avenues for appeal a UASC becomes a failed asylum seeker and (if over 18) is excluded from Social Work (Scotland) Act 1968 and the Children (Scotland) Act 1995, unless human rights considerations require the provision of support.

In general, UASCs will be able to get their needs met under the Children (Scotland) Act 1995. Where a UASC has been looked after under section 25 they may continue to be looked after and

¹⁸² Due to the UKBA policy commitment that: 'no unaccompanied child will be removed from the United Kingdom unless the Secretary of State is satisfied that safe and adequate reception arrangements are in place in the country to which the child is to be removed'.

¹⁸³ Immigration advisors should be registered with the OISC.

¹⁸⁴ Defined in s.93 C(S)A

¹⁸⁵ S.22 C(S)A

accommodated until the age of 21 depending on a needs led assessment. Section 25(3) allows for the continuation of support where this is considered to safeguard and promote the child's welfare. Case law in England establishes that UASC's who have had accommodation provided to them by local authorities are in fact 'looked after' and as such qualify for the after-care provisions available to 'looked after' children.¹⁸⁶ This case law has not been tested in Scotland.

Wider Responsibilities

The support local authorities should offer UASC is not limited to financial assistance and accommodation. Local authorities' duties are to safeguard and promote the wellbeing of UASCs in the same way as for other 'children in need'. As part of their duties local authorities should ensure UASC have access to specialist legal representation to prepare their asylum claim and/or appeal. Social workers may need to accompany UASC to UKBA interviews to act as a 'responsible adult'. Their main role in this context is to ensure the child/ young person's welfare and best interests are safeguarded during the interview. Social workers will need to work with UASCs to develop pathway plans regarding their education and future, this may include the possibility of eventual removal from the UK. Local authorities may need to assist children in tracing their family by putting them in touch with relevant agencies.¹⁸⁷ They must bear in mind that UASC are often particularly vulnerable to abuse and may have been trafficked.¹⁸⁸ Local Authority staff should be aware of their responsibility to act as the 'first responder' if there are grounds for concern that a person may be a victim of human trafficking.¹⁸⁹

Age Assessments

Where a UASC's claimed age is queried by either the local authority or the UKBA the local authority is the lead agency in conducting Merton compliant age assessments.¹⁹⁰ A local authority must assess age for itself and not adopt a decision on age made by another agency. Stanley Burton J lays out the basic elements of age assessment as follows:

The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.

It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family

¹⁸⁶ R(on the application of Berhe and others) v Hillingdon LBC [2003] EWHC 2075; R(H and Others) v Wandsworth, Hackney, Islington LBC [2007] EWHC 1082

¹⁸⁷ British Red Cross Family Tracing Service

¹⁸⁸ UK Human Trafficking Centre

¹⁸⁹ <http://www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism>

¹⁹⁰ The Scottish Court of Session handed down an opinion on age assessments in the case of TL [Assisted Person] No.2 [2011] CSOH 196

*circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.*¹⁹¹

¹⁹¹ R (on application of B) v LB of Merton [2003] EWHC 1689

Persons Unlawfully in the UK

This group are often called 'illegal immigrants' but this term has no definition in UK immigration law. Persons unlawfully in the UK include those who have entered the UK illegally (illegal entrants) and those who may have entered the UK legally but whose stay is now outside their conditions of stay (overstayers).

Local authorities have a duty to inform the UKBA of any persons unlawfully in the UK.¹⁹²

Social Care

Schedule 3 of the Nationality, Immigration and Asylum Act 2002 excludes persons unlawfully in the UK from social care support under sections 12 (general social welfare services) and 13A (residential accommodation with nursing) of the Social Work (Scotland) Act 1968. This exclusion applies unless a refusal of services would breach human rights. Schedule 3 also excludes adults from application of s.22 (promotion of welfare of children in need), 29 (after care) and 30 (financial assistance) of the Children (Scotland) Act 1995. Children are exempt from schedule 3, but their parents or carers may be excluded from any support provided unless human rights obligations dictate otherwise. Local authorities need to conduct a human rights assessment to consider what support they may need to offer persons unlawfully in the UK.

Some social care provisions are not listed in schedule 3 but access to them is limited following section 120 of the Immigration Asylum Act 1999 to those cases where the need for care does not arise solely due to destitution or the anticipated effects of destitution. These social care provisions are section 13B (provision of care and after-care) of the Social Work (Scotland) Act 1968 and sections 25 to 27 (provision of services) of the Mental Health (Care and Treatment) (Scotland) Act 2003.

Benefits

Persons unlawfully in the UK have no entitlements to benefits.

Tax Credits

Persons unlawfully in the UK have no entitlement to tax credits

Housing

Persons unlawfully in the UK have no entitlement to housing allocation or homelessness provision under the Housing (Scotland) Act 1987.¹⁹³ Where there are social care needs, local authorities should

¹⁹² NIAA 2002, Schedule 3, para 14

¹⁹³ S. 118 & s.119 IAA 1999

consider whether they can provide accommodation in response to such needs.¹⁹⁴ Local authorities should also consider whether human rights considerations oblige them to provide accommodation.

Family

Local Authorities should remember that their duties to children under the Children (Scotland) Act 1995 endure regardless of the child's immigration status.

Where carers are excluded from support provided under the children's legislation by schedule 3, they may re-qualify for support due to the child's rights to family life under Article 8. Local authorities should conduct human rights assessments and fully consider the duties that may be owed to persons unlawfully in the UK.

¹⁹⁴ See discussion in social care section

APPENDICES

Appendix 1: EEA Member States

The following countries are members of the EEA:

Austria	Greece	Portugal
Belgium	Hungary**	Romania***
Bulgaria***	Ireland	Slovak Republic**
Cyprus**	Italy	Slovenia**
Czech Republic**	Latvia**	Spain
Denmark	Lithuania**	Sweden
Estonia**	Luxembourg	Iceland*
Finland	Malta**	Liechtenstein*
France	Netherlands	Norway*
Germany	Poland**	

*These countries are in the EEA, but are not members of the European Union.

**These countries joined the European Union (and therefore the EEA) on 1 May 2004.

***These countries joined the European Union (and therefore the EEA) on 1 January 2007

Appendix 2: Signatories of ECSMA & 1961 CESC

The European Convention on Social and Medical Assistance.

Before 3 April 2000 this Convention conferred benefits to all nationals of signatory states lawfully present in the UK to all nationals of states. Since then it applies only to states that have ratified the treaty. ECSMA requires ratifying states to provide assistance in cash or in kind to nationals of other ratifying states who are lawfully present in their territories without sufficient resources.

The 1961 Council of Europe Social Charter

Before 3 April 2000 this Charter conferred benefits to all signatory state nationals lawfully present in the UK. Since then it applies only to those states that have ratified the treaty

[Nationals of states that have ratified the treaties can claim HB and CTB at same rate as British nationals, as long as lawfully present and not temporary admission)

Table of states that have signed or ratified the ECSMA or CESC

State	ECSMA ratified	CESC 1961 ratified
Austria		Y
Belgium	Y	Y
Croatia		Y
Cyprus		Y
Czech Rep.		Y
Denmark	Y	Y
Estonia	Y	Y
Finland		Y
France	Y	Y
Germany	Y	Y
Greece	Y	Y
Hungary		Y
Iceland	Y	Y
Ireland	Y	Y
Italy	Y	Y
Latvia		Y
Luxembourg	Y	Y
Malta	Y	Y
Netherlands	Y	Y
Norway	Y	Y
Poland		Y
Portugal	Y	Y
Slovakia		Y
Spain	Y	Y
Sweden	Y	Y
Former Yugoslav Rep of Macedonia		Y
Turkey	Y	Y
United Kingdom	Y	Y

Appendix 3: UKBA Local Immigration Teams in Scotland

Asylum

Leader: Brenda Farrell

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Enforcement

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Scotland North:

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Scotland East and South:

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Appendix 4: Immigration (EEA) Regulations

Statutory Instruments 2006 No. 1003

IMMIGRATION

The Immigration (European Economic Area) Regulations 2006 (Updated with S.I. 2009, No 1117 and S.I. 2011, No 1247)

Made	30th March 2006
Laid before Parliament	4th April 2006
Coming into force	30th April 2006
The Secretary of State, being a Minister designated (1) for the purposes of section 2(2) of the European Communities Act 1972(2) in relation to measures relating to rights of entry into, and residence in, the United Kingdom, in exercise of the powers conferred upon him by that section, and of the powers conferred on him by section 109 of the Nationality, Immigration and Asylum Act 2002(3), makes the following Regulations:	

PART 1 INTERPRETATION ETC

Citation and commencement

1. These Regulations may be cited as the Immigration (European Economic Area) Regulations 2006 and shall come into force on 30th April 2006.

General interpretation

2.—(1) In these Regulations—

“the 1971 Act” means the Immigration Act 1971(4);

“the 1999 Act” means the Immigration and Asylum Act 1999(5);

“the 2002 Act” means the Nationality, Immigration and Asylum Act 2002;

“civil partner” (6) does not include a party to a civil partnership of convenience;

“decision maker” means the Secretary of State, an immigration officer or an entry clearance officer (as the case may be);

“deportation order” means an order made pursuant to regulation 24(3);”

“document certifying permanent residence” means a document issued to an EEA national, in accordance with regulation 18, as proof of the holder’s permanent right of residence under regulation 15 as at the date of issue;

“EEA decision” means a decision under these Regulations that concerns a person's—

(a) entitlement to be admitted to the United Kingdom;

(b) entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card; or

(c) removal from the United Kingdom;

“EEA family permit” means a document issued to a person, in accordance with regulation 12, in connection with his admission to the United Kingdom;

“EEA national” means a national of an EEA State;

“EEA State” means—

(a) a member State, other than the United Kingdom;

(b) Norway, Iceland or Liechtenstein; or

(c) Switzerland;

“entry clearance” has the meaning given in section 33(1) of the 1971 Act (7);

“entry clearance officer” means a person responsible for the grant or refusal of entry clearance;

- “exclusion order” means an order made under regulation 19(1B);
- “immigration rules” has the meaning given in section 33(1) of the 1971 Act;
- “military service” means service in the armed forces of an EEA State;
- “permanent residence card” means a card issued to a person who is not an EEA national, in accordance with regulation 18, as proof of the holder’s permanent right of residence under regulation 15 as at the date of issue;
- “registration certificate” means a certificate issued to an EEA national, in accordance with regulation 16, as proof of the holder’s right of residence in the United Kingdom as at the date of issue;
- “relevant EEA national” in relation to an extended family member has the meaning given in regulation 8(6);
- “residence card” means a card issued to a person who is not an EEA national, in accordance with regulation 17, as proof of the holder’s right of residence in the United Kingdom as at the date of issue;
- “spouse” does not include a party to a marriage of convenience
- “United Kingdom national” means a person who falls to be treated as a national of the United Kingdom for the purposes of the Community Treaties.
- (2) Paragraph (1) is subject to paragraph 1(a) of Schedule 4 (transitional provisions).
- (3) Section 11 of the 1971 Act (construction of references to entry)(4) shall apply for the purpose of determining whether a person has entered the United Kingdom for the purpose of these Regulations as it applies for the purpose of determining whether a person has entered the United Kingdom for the purpose of that Act.

Continuity of residence

- 3.—(1) This regulation applies for the purpose of calculating periods of continuous residence in the United Kingdom under regulation 5(1) and regulation 15.
- (2) Continuity of residence is not affected by —
- (a) periods of absence from the United Kingdom which do not exceed six months in total in any year;
- (b) periods of absence from the United Kingdom on military service; or
- (c) any one absence from the United Kingdom not exceeding twelve months for an important reason such as pregnancy and childbirth, serious illness, study or vocational training or an overseas posting.
- (3) But continuity of residence is broken if a person is removed from the United Kingdom under these Regulations.

“Worker”, “self-employed person”, “self-sufficient person” and “student”

- 4.—(1) In these Regulations —
- (a) “worker” means a worker within the meaning of Article 39 of the Treaty establishing the European Community (8);
- (b) “self-employed person” means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community;
- (c) “self-sufficient person” means a person who has—
- (i) sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence; and
- (ii) comprehensive sickness insurance cover in the United Kingdom;
- (d) “student” means a person who—
- (i) is enrolled at a private or public establishment, included on the Department for Education and Skills' Register of Education and Training Providers(9) or financed from public funds, for the principal purpose of following a course of study, including vocational training;
- (ii) has comprehensive sickness insurance cover in the United Kingdom; and
- (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

(2) For the purposes of paragraph (1)(c), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person—

(a) the requirement for that person to have sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden;

(b) the requirement for that person to have comprehensive sickness insurance cover in the United Kingdom shall only be satisfied if he and his family members have such cover.

(3) For the purposes of paragraph (1)(d), where family members of the person concerned reside in the United Kingdom and their right to reside is dependent upon their being family members of that person, the requirement for that person to assure the Secretary of State that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence shall only be satisfied if he assures the Secretary of State that his resources and those of the family members are sufficient to avoid him and the family members becoming such a burden.

(4) For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if —

(a) they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system; or (b) paragraph (a) does not apply but, taking into account the personal situation of the person concerned and, where applicable, any family members, it appears to the decision maker that the resources of the person or persons concerned should be regarded as sufficient.

“Worker or self-employed person who has ceased activity”

5.—(1) In these Regulations, “worker or self-employed person who has ceased activity” means an EEA national who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if he—

(a) terminates his activity as a worker or self-employed person and—

(i) has reached the age at which he is entitled to a state pension on the date on which he terminates his activity; or

(ii) in the case of a worker, ceases working to take early retirement;

(b) pursued his activity as a worker or self-employed person in the United Kingdom for at least twelve months prior to the termination; and

(c) resided in the United Kingdom continuously for more than three years prior to the termination.

(3) A person satisfies the conditions in this paragraph if—

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) either—

(i) he resided in the United Kingdom continuously for more than two years prior to the termination; or

(ii) the incapacity is the result of an accident at work or an occupational disease that entitles him to a pension payable in full or in part by an institution in the United Kingdom.

(4) A person satisfies the conditions in this paragraph if—

(a) he is active as a worker or self-employed person in an EEA State but retains his place of residence in the United Kingdom, to which he returns as a rule at least once a week; and

(b) prior to becoming so active in that EEA State, he had been continuously resident and continuously active as a worker or self-employed person in the United Kingdom for at least three years.

(5) A person who satisfies the condition in paragraph (4)(a) but not the condition in paragraph (4)(b) shall, for the purposes of paragraphs (2) and (3), be treated as being active and resident in the United Kingdom during any period in which he is working or self-employed in the EEA State.

(6) The conditions in paragraphs (2) and (3) as to length of residence and activity as a worker or self-employed person shall not apply in relation to a person whose spouse or civil partner is a United Kingdom national.

(7) For the purposes of this regulation—

(a) periods of inactivity for reasons not of the person's own making;

(b) periods of inactivity due to illness or accident; and

(c) in the case of a worker, periods of involuntary unemployment duly recorded by the relevant employment office,

shall be treated as periods of activity as a worker or self-employed person, as the case may be.

“Qualified person”

6.—(1) In these Regulations, “qualified person” means a person who is an EEA national and in the United Kingdom as—

(a) a jobseeker;

(b) a worker;

(c) a self-employed person;

(d) a self-sufficient person; or

(e) a student.

(2) A person who is no longer working shall not cease to be treated as a worker for the purpose of paragraph (1)(b) if—

(a) he is temporarily unable to work as the result of an illness or accident;

(b) he is in duly recorded involuntary unemployment after having been employed in the United Kingdom, provided that he has registered as a jobseeker with the relevant employment office and—

(i) he was employed for one year or more before becoming unemployed;

(ii) he has been unemployed for no more than six months; or

(iii) he can provide evidence that he is seeking employment in the United Kingdom and has a genuine chance of being engaged;

(c) he is involuntarily unemployed and has embarked on vocational training; or

(d) he has voluntarily ceased working and embarked on vocational training that is related to his previous employment.

(3) A person who is no longer in self-employment shall not cease to be treated as a self-employed person for the purpose of paragraph (1)(c) if he is temporarily unable to pursue his activity as a self-employed person as the result of an illness or accident.

(4) For the purpose of paragraph (1)(a), “jobseeker” means a person who enters the United Kingdom in order to seek employment and can provide evidence that he is seeking employment and has a genuine chance of being engaged.

Family member

7.—(1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—

(a) his spouse or his civil partner;

(b) direct descendants of his, his spouse or his civil partner who are—

(i) under 21; or

(ii) dependants of his, his spouse or his civil partner;

- (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
- (d) a person who is to be treated as the family member of that other person under paragraph (3)
- (2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless—
- (a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or
 - (b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).
- (3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.
- (4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4).

“Extended family member”

- 8.—(1) In these Regulations “extended family member” means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).
- (2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and—
- (a) the person is residing in a country other than the United Kingdom in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;
 - (b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or
 - (c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.
- (3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.
- (4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent relative of the EEA national were the EEA national a person present and settled in the United Kingdom.
- (5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.
- (6) In these Regulations “relevant EEA national” means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

Family members of United Kingdom nationals

- 9.—(1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national as if the United Kingdom national were an EEA national.

(2) The conditions are that—

- (a) the United Kingdom national is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom; and
- (b) if the family member of the United Kingdom national is his spouse or civil partner, the parties are living together in the EEA State or had entered into the marriage or civil partnership and were living together in that State before the United Kingdom national returned to the United Kingdom.

(3) Where these Regulations apply to the family member of a United Kingdom national the United Kingdom national shall be treated as holding a valid passport issued by an EEA State for the purpose of the application of regulation 13 to that family member.

“Family member who has retained the right of residence”

10.—(1) In these Regulations, “family member who has retained the right of residence” means, subject to paragraph (8), a person who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the conditions in this paragraph if—

- (a) he was a family member of a qualified person when the qualified person died;
- (b) he resided in the United Kingdom in accordance with these Regulations for at least the year immediately before the death of the qualified person; and
- (c) he satisfies the condition in paragraph (6).

(3) A person satisfies the conditions in this paragraph if—

(a) he is the direct descendant of—

- (i) a qualified person who has died;
- (ii) a person who ceased to be a qualified person on ceasing to reside in the United Kingdom; or
- (iii) the person who was the spouse or civil partner of the qualified person mentioned in subparagraph (i) when he died or is the spouse or civil partner of the person mentioned in subparagraph (ii); and

(b) he was attending an educational course in the United Kingdom immediately before the qualified person died or ceased to be a qualified person and continues to attend such a course.

(4) A person satisfies the conditions in this paragraph if the person is the parent with actual custody of a child who satisfies the condition in paragraph (3).

(5) A person satisfies the conditions in this paragraph if—

- (a) he ceased to be a family member of a qualified person on the termination of the marriage or civil partnership of the qualified person;
- (b) he was residing in the United Kingdom in accordance with these Regulations at the date of the termination;
- (c) he satisfies the condition in paragraph (6); and
- (d) either—

- (i) prior to the initiation of the proceedings for the termination of the marriage or the civil partnership the marriage or civil partnership had lasted for at least three years and the parties to the marriage or civil partnership had resided in the United Kingdom for at least one year during its duration;
- (ii) the former spouse or civil partner of the qualified person has custody of a child of the qualified person;
- (iii) the former spouse or civil partner of the qualified person has the right of access to a child of the qualified person under the age of 18 and a court has ordered that such access must take place in the United Kingdom; or
- (iv) the continued right of residence in the United Kingdom of the person is warranted by particularly difficult circumstances, such as he or another family member having been a victim of domestic violence while the marriage or civil partnership was subsisting.

(6) The condition in this paragraph is that the person—

(a) is not an EEA national but would, if he were an EEA national, be a worker, a self-employed person or a self-sufficient person under regulation 6; or

(b) is the family member of a person who falls within paragraph (a).

(7) In this regulation, "educational course" means a course within the scope of Article 12 of Council Regulation (EEC) No. 1612/68 on freedom of movement for workers(10).

(8) A person with a permanent right of residence under regulation 15 shall not become a family member who has retained the right of residence on the death or departure from the United Kingdom of the qualified person or the termination of the marriage or civil partnership, as the case may be, and a family member who has retained the right of residence shall cease to have that status on acquiring a permanent right of residence under regulation 15.

PART 2 EEA RIGHTS

Right of admission to the United Kingdom

11.—(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA State.

(2) A person who is not an EEA national must be admitted to the United Kingdom if he is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15 and produces on arrival—

(a) a valid passport; and

(b) an EEA family permit, a residence card or a permanent residence card.

(3) An immigration officer may not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card or permanent residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is—

(a) an EEA national;

(b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom; or

(c) a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15.

(5) But this regulation is subject to regulations 19(1) and (2).

Issue of EEA family permit

12.—(1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and—

(a) the EEA national—

(i) is residing in the UK in accordance with these Regulations; or

(ii) will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and

(b) the family member will be accompanying the EEA national to the United Kingdom or joining the EEA national there.

(2) An entry clearance officer may issue an EEA family permit to an extended family member of an EEA national who applies for one if—

(a) the relevant EEA national satisfies the condition in paragraph (1)(a);

(b) the extended family member wishes to accompany the relevant EEA national to the United Kingdom or to join him there; and

(c) in all the circumstances, it appears to the entry clearance officer appropriate to issue the EEA family permit.

(3) Where an entry clearance officer receives an application under paragraph (2) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(4) An EEA family permit issued under this regulation shall be issued free of charge and as soon as possible.

(5) But an EEA family permit shall not be issued under this regulation if the applicant or the EEA national concerned is subject to a deportation or exclusion order or falls to be excluded from the United Kingdom on grounds of public policy, public security or public health in accordance with regulation 21.

Initial right of residence

13.—(1) An EEA national is entitled to reside in the United Kingdom for a period not exceeding three months beginning on the date on which he is admitted to the United Kingdom provided that he holds a valid national identity card or passport issued by an EEA State.

(2) A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom provided that he holds a valid passport.

(3) But—

(a) this regulation is subject to regulation 19(3)(b); and

(b) an EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom shall cease to have the right to reside under this regulation.

Extended right of residence

14.—(1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

(2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

(3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

(4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

(5) But this regulation is subject to regulation 19(3)(b).

Permanent right of residence

15.—(1) The following persons shall acquire the right to reside in the United Kingdom permanently—

(a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;

(b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

(c) a worker or self-employed person who has ceased activity;

(d) the family member of a worker or self-employed person who has ceased activity; (e) a person who was the family member of a worker or self-employed person where—

(i) the worker or self-employed person has died;

(ii) the family member resided with him immediately before his death; and

(iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;

(f) a person who—

(i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and

(ii) was, at the end of that period, a family member who has retained the right of residence.

(2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.

(3) But this regulation is subject to regulation 19(3)(b).

PART 3

RESIDENCE DOCUMENTATION

Issue of registration certificate

16.—(1) The Secretary of State must issue a registration certificate to a qualified person immediately on application and production of—

(a) a valid identity card or passport issued by an EEA State;

(b) proof that he is a qualified person.

(2) In the case of a worker, confirmation of the worker's engagement from his employer or a certificate of employment is sufficient proof for the purposes of paragraph (1)(b).

(3) The Secretary of State must issue a registration certificate to an EEA national who is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 immediately on application and production of—

(a) a valid identity card or passport issued by an EEA State; and

(b) proof that the applicant is such a family member.

(4) The Secretary of State must issue a registration certificate to an EEA national who is a family member who has retained the right of residence on application and production of—

(a) a valid identity card or passport; and

(b) proof that the applicant is a family member who has retained the right of residence.

(5) The Secretary of State may issue a registration certificate to an extended family member not falling within regulation 7(3) who is an EEA national on application if—

(a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

(b) in all the circumstances it appears to the Secretary of State appropriate to issue the registration certificate.

(6) Where the Secretary of State receives an application under paragraph (5) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.

(7) A registration certificate issued under this regulation shall state the name and address of the person registering and the date of registration and shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1).

Issue of residence card

17.—(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of—

(a) a valid passport; and

(b) proof that the applicant is such a family member.

- (2) The Secretary of State must issue a residence card to a person who is not an EEA national but who is a family member who has retained the right of residence on application and production of—
- (a) a valid passport; and
 - (b) proof that the applicant is a family member who has retained the right of residence.
- (3) On receipt of an application under paragraph (1) or (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with a certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.
- (4) The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if—
- (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and
 - (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.
- (5) Where the Secretary of State receives an application under paragraph (4) he shall undertake an extensive examination of the personal circumstances of the applicant and if he refuses the application shall give reasons justifying the refusal unless this is contrary to the interests of national security.
- (6) A residence card issued under this regulation may take the form of a stamp in the applicant's passport and shall be valid for—
- (a) five years from the date of issue; or
 - (b) in the case of a residence card issued to the family member or extended family member of a qualified person, the envisaged period of residence in the United Kingdom of the qualified person, whichever is the shorter.
- (6A) A residence card issued under this regulation shall be entitled "Residence card of a family member of an EEA national" or "Residence card of a family member who has retained the right of residence", as the case may be.

(7) A residence card issued under this regulation shall be issued free of charge.

(8) But this regulation is subject to regulation 20(1) and 20(1A).

Issue of a document certifying permanent residence and a permanent residence card

18.—(1) The Secretary of State must issue an EEA national with a permanent right of residence under regulation 15 with a document certifying permanent residence as soon as possible after an application for such a document and proof that the EEA national has such a right is submitted to the Secretary of State.

(2) The Secretary of State must issue a person who is not an EEA national who has a permanent right of residence under regulation 15 with a permanent residence card no later than six months after the date on which an application for a permanent residence card and proof that the person has such a right is submitted to the Secretary of State.

(3) Subject to paragraph (5) a permanent residence card shall be valid for ten years from the date of issue and must be renewed on application.

(4) A document certifying permanent residence and a permanent residence card shall be issued free of charge.

(5) A document certifying permanent residence and a permanent residence card shall cease to be valid if the holder ceases to have a right of permanent residence under regulation 15.

(6) But this regulation is subject to regulation 20.

PART 4

REFUSAL OF ADMISSION AND REMOVAL ETC

Exclusion and removal from the United Kingdom

19.—(1) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if his exclusion is justified on grounds of public policy, public security or public health in accordance with regulation 21.

(1A) A person is not entitled to be admitted to the United Kingdom by virtue of regulation 11 if that person is subject to a deportation or exclusion order.

(1B) If the Secretary of State considers that the exclusion of an EEA national or the family member of an EEA national is justified on the grounds of public policy, public security or public health in accordance with regulation 21 the Secretary of State may make an order for the purpose of these Regulations prohibiting that person from entering the United Kingdom.

(2) A person is not entitled to be admitted to the United Kingdom as the family member of an EEA national under regulation 11(2) unless, at the time of his arrival—

(a) he is accompanying the EEA national or joining him in the United Kingdom; and

(b) the EEA national has a right to reside in the United Kingdom under these Regulations.

(3) Subject to paragraphs (4) and (5), an EEA national who has entered the United Kingdom or the family member of such a national who has entered the United Kingdom may be removed if –

(a) that person does not have or ceases to have a right to reside under these Regulations; or

(b) the Secretary of State has decided that the person's removal is justified on grounds of public policy, public security or public health in accordance with regulation 21.

(4) A person must not be removed under paragraph (3) as the automatic consequence of having recourse to the social assistance system of the United Kingdom.

(5) A person must not be removed under paragraph (3) if he has a right to remain in the United Kingdom by virtue of leave granted under the 1971 Act unless his removal is justified on the grounds of public policy, public security or public health in accordance with regulation 21.

Refusal to issue or renew and revocation of residence documentation

20.—(1) The Secretary of State may refuse to issue, revoke or refuse to renew a registration certificate, a residence card, a document certifying permanent residence or a permanent residence card if the refusal or revocation is justified on grounds of public policy, public security or public health.

(1A) The removal of a person from the United Kingdom under these Regulations invalidates a registration certificate, residence card, document certifying permanent residence or permanent residence card held by that person or an application made by that person for such a certificate, card or document.

(2) The Secretary of State may revoke a registration certificate or a residence card or refuse to renew a residence card if the holder of the certificate or card has ceased to have a right to reside under these Regulations.

(3) The Secretary of State may revoke a document certifying permanent residence or a permanent residence card or refuse to renew a permanent residence card if the holder of the certificate or card has ceased to have a right of permanent residence under regulation 15.

(4) An immigration officer may, at the time of a person's arrival in the United Kingdom—

(a) revoke that person's residence card if he is not at that time the family member of a qualified person or of an EEA national who has a right of permanent residence under regulation 15, a family member who has retained the right of residence or a person with a right of permanent residence under regulation 15;

(b) revoke that person's permanent residence card if he is not at that time a person with a right of permanent residence under regulation 15.

(5) An entry clearance officer or immigration officer may at any time revoke a person's EEA family permit if—

(a) the revocation is justified on grounds of public policy, public security or public health; or

(b) the person is not at that time the family member of an EEA national with the right to reside in the United Kingdom under these Regulations or is not accompanying that national or joining him in the United Kingdom.

(6) Any action taken under this regulation on grounds of public policy, public security or public health shall be in accordance with regulation 21.

Decisions taken on public policy, public security and public health grounds

21.—(1) In this regulation a “relevant decision” means an EEA decision taken on the grounds of public policy, public security or public health.

(2) A relevant decision may not be taken to serve economic ends.

(3) A relevant decision may not be taken in respect of a person with a permanent right of residence under regulation 15 except on serious grounds of public policy or public security.

(4) A relevant decision may not be taken except on imperative grounds of public security in respect of an EEA national who—

(a) has resided in the United Kingdom for a continuous period of at least ten years prior to the relevant decision; or

(b) is under the age of 18, unless the relevant decision is necessary in his best interests, as provided for in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989(11).

(5) Where a relevant decision is taken on grounds of public policy or public security it shall, in addition to complying with the preceding paragraphs of this regulation, be taken in accordance with the following principles—

(a) the decision must comply with the principle of proportionality;

(b) the decision must be based exclusively on the personal conduct of the person concerned;

(c) the personal conduct of the person concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society;

(d) matters isolated from the particulars of the case or which relate to considerations of general prevention do not justify the decision;

(e) a person’s previous criminal convictions do not in themselves justify the decision.

(6) Before taking a relevant decision on the grounds of public policy or public security in relation to a person who is resident in the United Kingdom the decision maker must take account of considerations such as the age, state of health, family and economic situation of the person, the person’s length of residence in the United Kingdom, the person’s social and cultural integration into the United Kingdom and the extent of the person’s links with his country of origin.

(7) In the case of a relevant decision taken on grounds of public health—

(a) a disease that does not have epidemic potential as defined by the relevant instruments of the World Health Organisation(12) or is not a disease to which section 38 of the Public Health (Control of Disease) Act 1984(13) applies (detention in hospital of a person with a notifiable disease) shall not constitute grounds for the decision; and

(b) if the person concerned is in the United Kingdom, diseases occurring after the three month period beginning on the date on which he arrived in the United Kingdom shall not constitute grounds for the decision.

PART 5

PROCEDURE IN RELATION TO EEA DECISIONS

Person claiming right of admission

22.—(1) This regulation applies to a person who claims a right of admission to the United Kingdom under regulation 11 as—

(a) a person, not being an EEA national, who is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15; or

(b) an EEA national, where there is reason to believe that he may fall to be excluded under regulation 19(1) or (1A).

(2) A person to whom this regulation applies is to be treated as if he were a person seeking leave to enter the United Kingdom under the 1971 Act for the purposes of paragraphs 2, 3, 4, 7, 16 to 18 and 21 to 24 of Schedule 2 to the 1971 Act(14) (administrative provisions as to control on entry etc), except that—

(a) the reference in paragraph 2(1) to the purpose for which the immigration officer may examine any persons who have arrived in the United Kingdom is to be read as a reference to the purpose of determining whether he is a person who is to be granted admission under these Regulations;

(b) the references in paragraphs 4(2A), 7 and 16(1) to a person who is, or may be, given leave to enter are to be read as references to a person who is, or may be, granted admission under these Regulations; and

(c) a medical examination is not to be carried out under paragraph 2 or paragraph 7 as a matter of routine and may only be carried out within three months of a person's arrival in the United Kingdom.

(3) For so long as a person to whom this regulation applies is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to the 1971 Act, he is deemed not to have been admitted to the United Kingdom.

Person refused admission

23.—(1) This regulation applies to a person who is in the United Kingdom and has been refused admission to the United Kingdom—

(a) because he does not meet the requirement of regulation 11 (including where he does not meet those requirements because his EEA family permit, residence card or permanent residence card has been revoked by an immigration officer in accordance with regulation 20); or

(b) in accordance with regulation 19(1), (1A) or (2).

(2) A person to whom this regulation applies, is to be treated as if he were a person refused leave to enter under the 1971 Act for the purpose of paragraphs 8, 10, 10A, 11, 16 to 19 and 21 to 24 of Schedule 2 to the 1971 Act, except that the reference in paragraph 19 to a certificate of entitlement, entry clearance or work permit is to be read as a reference to an EEA family permit, residence card or a permanent residence card.

Person subject to removal

24.—(1) If there are reasonable grounds for suspecting that a person is someone who may be removed from the United Kingdom under regulation 19(3), that person may be detained under the authority of an immigration officer pending a decision whether or

not to remove the person under that regulation, and paragraphs 17 and 18 of Schedule 2 to the 1971 Act shall apply in relation to the detention of such a person as those paragraphs apply in relation to a person who may be detained under paragraph 16 of that Schedule.”

(2) Where the decision is taken to remove a person under regulation 19(3)(a), the person is to be treated as if he were a person to whom section 10(1)(a) of the 1999 Act(15) applied, and section 10 of that Act (removal of certain persons unlawfully in the United Kingdom) is to apply accordingly.

(3) Where the decision is taken to remove a person under regulation 19(3)(b), the person is to be treated as if he were a person to whom section 3(5)(a) of the 1971 Act(16) (liability to deportation) applied, and section 5 of that Act(17) (procedure for deportation) and Schedule 3 to that Act(18) (supplementary provision as to deportation) are to apply accordingly.

(4) A person who enters the United Kingdom in breach of a deportation or exclusion order shall be removable as an illegal entrant under Schedule 2 to the 1971 Act and the provisions of that Schedule shall apply accordingly.

(5) Where such a deportation order is made against a person but he is not removed under the order during the two year period beginning on the date on which the order is made, the Secretary of State shall only take action to remove the person under the order after the end of that period if, having assessed whether there has been any material change in circumstances since the deportation order was made, he considers that the removal continues to be justified on the grounds of public policy, public security or public health.

(6) A person to whom this regulation applies shall be allowed one month to leave the United Kingdom, beginning on the date on which he is notified of the decision to remove him, before being removed pursuant to that decision except—

(a) in duly substantiated cases of urgency;

(b) where the person is detained pursuant to the sentence or order of any court;

(c) where a person is a person to whom regulation 24(4) applies.

Revocation of deportation and exclusion orders

24A.—(1) A deportation or exclusion order shall remain in force unless it is revoked by the Secretary of State under this regulation.

(2) A person who is subject to a deportation or exclusion order may apply to the Secretary of State to have it revoked if the person considers that there has been a material change in the circumstances that justified the making of the order.

(3) An application under paragraph (2) shall set out the material change in circumstances relied upon by the applicant and may only be made whilst the applicant is outside the United Kingdom.

(4) On receipt of an application under paragraph (2), the Secretary of State shall revoke the order if the Secretary of State considers that the order can no longer be justified on grounds of public policy, public security or public health in accordance with regulation 21.

(5) The Secretary of State shall take a decision on an application under paragraph (2) no later than six months after the date on which the application is received.

PART 6

APPEALS UNDER THESE REGULATIONS

Interpretation of Part 6

25.—(1) In this Part—

“Asylum and Immigration Tribunal” has the same meaning as in the 2002 Act;

“Commission” has the same meaning as in the Special Immigration Appeals Commission Act 1997(19);

“the Human Rights Convention” has the same meaning as “the Convention” in the Human Rights Act 1998(20); and

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951(21) and the Protocol relating to the Status of Refugees done at New York on 31st January 1967(22).

(2) For the purposes of this Part, and subject to paragraphs (3) and (4), an appeal is to be treated as pending during the period when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.

(3) An appeal is not to be treated as finally determined while a further appeal may be brought; and, if such a further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.

(4) A pending appeal is not to be treated as abandoned solely because the appellant leaves the United Kingdom.

Appeal rights

26.—(1) Subject to the following paragraphs of this regulation, a person may appeal under these Regulations against an EEA decision.

(2) If a person claims to be an EEA national, he may not appeal under these Regulations unless he produces a valid national identity card or passport issued by an EEA State.

(3) If a person claims to be the family member or relative of an EEA national he may not appeal under these Regulations unless he produces—

(a) an EEA family permit; or

(b) other proof that he is related as claimed to an EEA national.

(4) A person may not bring an appeal under these Regulations on a ground certified under paragraph

(5) or rely on such a ground in an appeal brought under these Regulations.

(5) The Secretary of State or an immigration officer may certify a ground for the purposes of paragraph (4) if it has been considered in a previous appeal brought under these Regulations or under section 82(1) of the 2002 Act(23).

(6) Except where an appeal lies to the Commission, an appeal under these Regulations lies to the Asylum and Immigration Tribunal.

(7) The provisions of or made under the 2002 Act referred to in Schedule 1 shall have effect for the purposes of an appeal under these Regulations to the Asylum and Immigration Tribunal in accordance with that Schedule.

Out of country appeals

27.—(1) Subject to paragraphs (2) and (3), a person may not appeal under regulation 26 whilst he is in the United Kingdom against an EEA decision—

(a) to refuse to admit him to the United Kingdom;

(aa) to make an exclusion order against him;

(b) to refuse to revoke a deportation or exclusion order made against him;

(c) to refuse to issue him with an EEA family permit; or

(d) to remove him from the United Kingdom after he has entered the United Kingdom in breach of a deportation or exclusion order.

(2) Paragraphs (1)(a) and (aa) do not apply where the person is in the United Kingdom and—

(a) the person a valid EEA family permit, registration certificate, residence card, document certifying permanent residence or permanent residence card on his arrival in the United Kingdom or can otherwise prove that he is resident in the United Kingdom;

(b) the person is deemed not to have been admitted to the United Kingdom under regulation 22(3) but at the date on which notice of the decision to refuse to admit him is given he has been in the United Kingdom for at least 3 months or;

(c) a ground of the appeal is that, in taking the decision, the decision maker acted in breach of his rights under the Human Rights Convention or the Refugee Convention, unless the Secretary of State certifies that that ground of appeal is clearly unfounded.

(3) Paragraph (1)(d) does not apply where a ground of the appeal is that, in taking the decision, the decision maker acted in breach of the appellant's rights under the Human Rights Convention or the Refugee Convention, unless the Secretary of State certifies that that ground of appeal is clearly unfounded.

Appeals to the Commission

- 28.—(1) An appeal against an EEA decision lies to the Commission where paragraph (2) or (4) applies.
- (2) This paragraph applies if the Secretary of State certifies that the EEA decision was taken—
- (a) by the Secretary of State wholly or partly on a ground listed in paragraph (3); or
 - (b) in accordance with a direction of the Secretary of State which identifies the person to whom the decision relates and which is given wholly or partly on a ground listed in paragraph (3).
- (3) The grounds mentioned in paragraph (2) are that the person's exclusion or removal from the United Kingdom is—
- (a) in the interests of national security; or
 - (b) in the interests of the relationship between the United Kingdom and another country.
- (4) This paragraph applies if the Secretary of State certifies that the EEA decision was taken wholly or partly in reliance on information which in his opinion should not be made public—
- (a) in the interests of national security;
 - (b) in the interests of the relationship between the United Kingdom and another country; or
 - (c) otherwise in the public interest.
- (5) In paragraphs (2) and (4) a reference to the Secretary of State is to the Secretary of State acting in person.
- (6) Where a certificate is issued under paragraph (2) or (4) in respect of a pending appeal to the Asylum and Immigration Tribunal the appeal shall lapse.
- (7) An appeal against an EEA decision lies to the Commission where an appeal lapses by virtue of paragraph (6).
- (8) The Special Immigration Appeals Commission Act 1997 shall apply to an appeal to the Commission under these Regulations as it applies to an appeal under section 2 of that Act to which subsection (2) of that section applies (appeals against an immigration decision) but paragraph (i) of that subsection shall not apply in relation to such an appeal.

Effect of appeals to the Asylum and Immigration Tribunal

- 29.—(1) This Regulation applies to appeals under these Regulations made to the Asylum and Immigration Tribunal.
- (2) If a person in the United Kingdom appeals against an EEA decision to refuse to admit him to the United Kingdom, any directions for his removal from the United Kingdom previously given by virtue of the refusal cease to have effect, except in so far as they have already been carried out, and no directions may be so given while the appeal is pending.
- (3) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom, any directions given under section 10 of the 1999 Act or Schedule 3 to the 1971 Act for his removal from the United Kingdom are to have no effect, except in so far as they have already been carried out, while the appeal is pending.
- (4) But the provisions of Part I of Schedule 2, or as the case may be, Schedule 3 to the 1971 Act with respect to detention and persons liable to detention apply to a person appealing against a refusal to admit him or a decision to remove him as if there were in force directions for his removal from the United Kingdom, except that he may not be detained on board a ship or aircraft so as to compel him to leave the United Kingdom while the appeal is pending.
- (5) In calculating the period of two months limited by paragraph 8(2) of Schedule 2 to the 1971 Act for—
- (a) the giving of directions under that paragraph for the removal of a person from the United Kingdom; and
 - (b) the giving of a notice of intention to give such directions,
- any period during which there is pending an appeal by him under is to be disregarded.
- (6) If a person in the United Kingdom appeals against an EEA decision to remove him from the United Kingdom, a deportation order is not to be made against him under section 5 of the 1971 Act while the appeal is pending.

(7) Paragraph 29 of Schedule 2 to the 1971 Act (grant of bail pending appeal) applies to a person who has an appeal pending under these Regulations as it applies to a person who has an appeal pending under section 82(1) of the 2002 Act.

PART 7
GENERAL

Effect on other legislation

30. Schedule 2 (effect on other legislation) shall have effect.

Revocations, transitional provisions and consequential amendments

31.—(1) The Regulations listed in column 1 of the table in Part 1 of Schedule 3 are revoked to the extent set out in column 3 of that table, subject to Part 2 of that Schedule and to Schedule 4.

(2) Schedule 4 (transitional provisions) and Schedule 5 (consequential amendments) shall have effect.

Tony McNulty
Minister of State
Home Office
30th March 2006

SCHEDULE 1
APPEALS TO THE ASYLUM AND IMMIGRATION TRIBUNAL

The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the Asylum and Immigration Tribunal as if it were an appeal against an immigration decision under section 82(1) of that Act:

section 84(1)(24), except paragraphs (a) and (f);

sections 85 to 87;

sections 103A to 103E;

section 105 and any regulations made under that section; and

section 106 and any rules made under that section(25).

SCHEDULE 2
EFFECT ON OTHER LEGISLATION

Leave under the 1971 Act

1.—(1) In accordance with section 7 of the Immigration Act 1988(26), a person who is admitted to or acquires a right to reside in the United Kingdom under these Regulations shall not require leave to remain in the United Kingdom under the 1971 Act during any period in which he has a right to reside under these Regulations but such a person shall require leave to remain under the 1971 Act during any period in which he does not have such a right.

(2) Where a person has leave to enter or remain under the 1971 Act which is subject to conditions and that person also has a right to reside under these Regulations, those conditions shall not have effect for as long as the person has that right to reside.

Persons not subject to restriction on the period for which they may remain

2.—(1) For the purposes of the 1971 Act and the British Nationality Act 1981(27), a person who has a permanent right of residence under regulation 15 shall be regarded as a person who is in the United Kingdom without being subject under the immigration laws to any restriction on the period for which he may remain.

(2) But a qualified person, the family member of a qualified person and a family member who has retained the right of residence shall not, by virtue of that status, be so regarded for those purposes.

Carriers' liability under the 1999 Act

3. For the purposes of satisfying a requirement to produce a visa under section 40(1)(b) of the 1999 Act(28) (charges in respect of passenger without proper documents), “a visa of the required kind” includes an EEA family permit, a residence card or a permanent residence card required for admission under regulation 11(2).

Appeals under the 2002 Act and previous immigration Acts

4.—(1) The following EEA decisions shall not be treated as immigration decisions for the purpose of section 82(2) of the 2002 Act (right of appeal against an immigration decision)—

(a) a decision that a person is to be removed under regulation 19(3)(a) by way of a direction under section 10(1)(a) of the 1999 Act (as provided for by regulation 24(2));

(b) a decision to remove a person under regulation 19(3)(b) by making a deportation order under section 5(1) of the 1971 Act (as provided for by regulation 24(3));

(c) a decision to remove a person mentioned in regulation 24(4) by way of directions under paragraphs 8 to 10 of Schedule 2 to the 1971 Act.

(2) A person who has been issued with a registration certificate, residence card, a document certifying permanent residence or a permanent residence card under these Regulations or a registration certificate under the Accession (Immigration and Worker Registration) Regulations 2004(29), or a person whose passport has been stamped with a family member residence stamp, shall have no right of appeal under section 2 of the Special Immigration Appeals Commission Act 1997 or section 82(1) of the 2002 Act. Any existing appeal under those sections of those Acts or under the Asylum and Immigration Appeals Act 1993(30), the Asylum and Immigration Act 1996(31) or the 1999 Act shall be treated as abandoned.

(3) Subject to paragraph (4), a person may appeal to the Asylum and Immigration Tribunal under section 83(2) of the 2002 Act against the rejection of his asylum claim where—

(a) that claim has been rejected, but

(b) he has a right to reside in the United Kingdom under these Regulations.

(4) Paragraph (3) shall not apply if the person is an EEA national and the Secretary of State certifies that the asylum claim is clearly unfounded.

(5) The Secretary of State shall certify the claim under paragraph (4) unless satisfied that it is not clearly unfounded.

(6) In addition to the national of a State which is a contracting party to the Agreement referred to in section 84(2) of the 2002 Act, a Swiss national shall also be treated as an EEA national for the purposes of section 84(1)(d) of that Act.

(7) An appeal under these Regulations against an EEA decision (including an appeal made on or after 1st April 2003 which is treated as an appeal under these Regulations under Schedule 4 but not an appeal made before that date) shall be treated as an appeal under section 82(1) of the 2002 Act against an immigration decision for the purposes of section 96(1)(a) of the 2002 Act.

(8) Section 120 of the 2002 Act shall apply to a person if an EEA decision has been taken or may be taken in respect of him and, accordingly, the Secretary of State or an immigration officer may by notice require a statement from that person under subsection (2) of that section and that notice shall have effect for the purpose of section 96(2) of the 2002 Act.

(9) In sub-paragraph (1), “family member residence stamp” means a stamp in the passport of a family member of an EEA national confirming that he is the family member of an accession State worker requiring registration with a right of residence under these Regulations as the family member of that worker; and in this sub-paragraph “accession State worker requiring registration” has the same meaning as in regulation 2 of the Accession (Immigration and Worker Registration) Regulations 2004.

Regulation 31(2)

SCHEDULE 3
REVOCATIONS AND SAVINGS
PART 1
TABLE OF REVOCATIONS

Regulations revoked	References	Extent of revocation
The Immigration (European Economic Area) Regulations 2000	S.I. 2000/2326	The whole Regulations
The Immigration (European Economic Area) (Amendment) Regulations 2001	S.I. 2001/865	The whole Regulations
The Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002	S.I. 2002/1241	The whole Regulations
The Immigration (European Economic Area) (Amendment) Regulations 2003	S.I. 2003/549	The whole Regulations
The Immigration (European Economic Area) (Amendment No. 2) Regulations 2003	S.I. 2003/3188	The whole Regulations
The Accession (Immigration and Worker Registration) Regulations 2004	S.I. 2004/1219	Regulations 3 and 6
The Immigration (European Economic Area) and Accession (Amendment) Regulations 2004	S.I. 2004/1236	Regulation 2
The Immigration (European Economic Area) (Amendment) Regulations 2005	S.I. 2005/47	The whole Regulations
The Immigration (European Economic Area)(Amendment) (No. 2) Regulations 2005	S.I. 2005/671	The whole Regulations

PART 2
SAVINGS

1. The—

(a) Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002(32) are not revoked insofar as they apply the 2000 Regulations to posted workers; and
(b) the 2000 Regulations and the Regulations amending the 2000 Regulations are not revoked insofar as they are so applied to posted workers;

and, accordingly, the 2000 Regulations, as amended, shall continue to apply to posted workers in accordance with the Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002.

2. In paragraph 1, “the 2000 Regulations” means the Immigration (European Economic Area) Regulations 2000(33) and “posted worker” has the meaning given in regulation 2(4)(b) of the Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002.

SCHEDULE 4
TRANSITIONAL PROVISIONS

Interpretation

1. In this Schedule—

(a) the “2000 Regulations” means the Immigration (European Economic Area) Regulations 2000(34) and expressions used in relation to documents issued or applied for under those Regulations shall have the meaning given in regulation 2 of those Regulations;

(b) the “Accession Regulations” means the Accession (Immigration and Worker Registration) Regulations 2004(35).

Existing documents

2.—(1) An EEA family permit issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were an EEA family permit issued under these Regulations.

(2) Subject to paragraph (4), a residence permit issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were a registration certificate issued under these Regulations.

(3) Subject to paragraph (5), a residence document issued under the 2000 Regulations shall, after 29th April 2006, be treated as if it were a residence card issued under these Regulations.

(4) Where a residence permit issued under the 2000 Regulations has been endorsed under the immigration rules to show permission to remain in the United Kingdom indefinitely it shall, after 29th April 2006, be treated as if it were a document certifying permanent residence issued under these Regulations and the holder of the permit shall be treated as a person with a permanent right of residence under regulation 15.

(5) Where a residence document issued under the 2000 Regulations has been endorsed under the immigration rules to show permission to remain in the United Kingdom indefinitely it shall, after 29th April 2006, be treated as if it were a permanent residence card issued under these Regulations and the holder of the permit shall be treated as a person with a permanent right of residence under regulation 15.

(6) Paragraphs (4) and (5) shall also apply to a residence permit or residence document which is endorsed under the immigration rules on or after 30th April 2006 to show permission to remain in the United Kingdom indefinitely pursuant to an application for such an endorsement made before that date.

Outstanding applications

3.—(1) An application for an EEA family permit, a residence permit or a residence document made but not determined under the 2000 Regulations before 30 April 2006 shall be treated as an application under these Regulations for an EEA family permit, a registration certificate or a residence card, respectively.

(2) But the following provisions of these Regulations shall not apply to the determination of an application mentioned in sub-paragraph (1)—

(a) the requirement to issue a registration certificate immediately under regulation 16(1); and

(b) the requirement to issue a certificate of application for a residence card under regulation 17(3).

Decisions to remove under the 2000 Regulations

4.—(1) A decision to remove a person under regulation 21(3)(a) of the 2000 Regulations shall, after 29th April 2006, be treated as a decision to remove that person under regulation 19(3)(a) of these Regulations.

(2) A decision to remove a person under regulation 21(3)(b) of the 2000 Regulations, including a decision which is treated as a decision to remove a person under that regulation by virtue of regulation 6(3)(a) of the Accession Regulations, shall, after 29th April 2006, be treated as a decision to remove that person under regulation 19(3)(b) of these Regulations.

(3) A deportation order made under section 5 of the 1971 Act by virtue of regulation 26(3) of the 2000 Regulations shall, after 29th April 2006, be treated as a deportation made under section 5 of the 1971 Act by virtue of regulation 24(3) of these Regulations.

Appeals

5.—(1) Where an appeal against an EEA decision under the 2000 Regulations is pending immediately before 30th April 2006 that appeal shall be treated as a pending appeal against the corresponding EEA Decision under these Regulations.

(2) Where an appeal against an EEA decision under the 2000 Regulations has been determined, withdrawn or abandoned it shall, on and after 30th April 2006, be treated as an appeal against the corresponding EEA decision under these Regulations which has been determined, withdrawn or abandoned, respectively.

(3) For the purpose of this paragraph—

(a) a decision to refuse to admit a person under these Regulations corresponds to a decision to refuse to admit that person under the 2000 Regulations;

- (b) a decision to remove a person under regulation 19(3)(a) of these Regulations corresponds to a decision to remove that person under regulation 21(3)(a) of the 2000 Regulations;
- (c) a decision to remove a person under regulation 19(3)(b) of these Regulations corresponds to a decision to remove that person under regulation 21(3)(b) of the 2000 Regulations, including a decision which is treated as a decision to remove a person under regulation 21(3)(b) of the 2000 Regulations by virtue of regulation 6(3)(a) of the Accession Regulations;
- (d) a decision to refuse to revoke a deportation order made against a person under these Regulations corresponds to a decision to refuse to revoke a deportation order made against that person under the 2000 Regulations, including a decision which is treated as a decision to refuse to revoke a deportation order under the 2000 Regulations by virtue of regulation 6(3)(b) of the Accession Regulations;
- (e) a decision not to issue or renew or to revoke an EEA family permit, a registration certificate or a residence card under these Regulations corresponds to a decision not to issue or renew or to revoke an EEA family permit, a residence permit or a residence document under the 2000 Regulations, respectively.

Periods of residence under the 2000 Regulations

6.—(1) Any period during which a person carried out an activity or was resident in the United Kingdom in accordance with the 2000 Regulations shall be treated as a period during which the person carried out that activity or was resident in the United Kingdom in accordance with these Regulations for the purpose of calculating periods of activity and residence under these Regulations.

SCHEDULE 5

CONSEQUENTIAL AMENDMENTS

Statutory Instruments

The Channel Tunnel (International Arrangements) Order 1993

1.—(1) The Channel Tunnel (International Arrangements) Order 1993(36) is amended as follows.

(2) In Schedule 4, in paragraph 5—

- (a) at the beginning of the paragraph, for “the Immigration (European Economic Area) Regulations 2000” there is substituted “the Immigration (European Economic Area) Regulations 2006”;
- (b) in sub-paragraph (a), for “regulation 12(2)” there is substituted “regulation 11(2)” and for “residence document or document proving family membership” there is substituted “residence card or permanent residence card”;
- (c) for sub-paragraph (b) there is substituted—
 - “(b) in regulations 11(4) and 19(2) after the word “arrival” and in regulations 20(4) and (5) after the words “United Kingdom” insert “or the time of his production of the required documents in a control zone or a supplementary control zone”.

The Travel Restriction Order (Prescribed Removal Powers) Order 2002

2.—(1) The Travel Restriction Order (Prescribed Removal Powers) Order 2002(37) is amended as follows.

(2) In the Schedule, for “Immigration (European Economic Area) Regulations 2000 (2000/2326)” in the first column of the table there is substituted “Immigration (European Economic Area) Regulations 2006” and for “Regulation 21(3)” in the corresponding row in the second column of the table there is substituted “Regulation 19(3)”.

The Immigration (Notices) Regulations 2003

3.—(1) The Immigration (Notices) Regulations 2003(38) are amended as follows.

(2) In regulation 2, in the definition of “EEA decision”—

- (a) at the end of paragraph (b), “or” is omitted;
- (b) in paragraph (c), after “residence document;”, there is inserted “or”; and
- (c) after paragraph (c), there is inserted—

“(d)on or after 30th April 2006, entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, document certifying permanent residence or permanent residence card;”

The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003

4.—(1) The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003(39) is amended as follows.

(2) In article 11(1), for sub-paragraph (e) there is substituted—

“(e)the Immigration (European Economic Area) Regulations 2006.”.

(3) In Schedule 2, in paragraph 5—

(a)at the beginning of the paragraph, for “the Immigration (European Economic Area) Regulations 2000” there is substituted “the Immigration (European Economic Area) Regulations 2006”;

(b)in sub-paragraph (a), for “in regulation 2, at the beginning insert” there is substituted “in regulation 2(1), after the definition of “civil partner” insert”;

(c)in sub-paragraph (b), for “regulation 12(2)” there is substituted “regulation 11(2)” and for “residence document or document proving family membership” there is substituted “residence card or permanent residence card”;

(d)for sub-paragraph (c) there is substituted—

“(c)in regulations 11(4) and 19(2) after the word “arrival” and in regulations 20(4) and (5) after the words “United Kingdom” insert “or the time of his production of the required documents in a Control Zone”.

The Immigration and Asylum Act 1999 (Part V Exemption: Relevant Employers) Order 2003

5.—(1) The Immigration and Asylum Act 1999 (Part V Exemption: Relevant Employers) Order 2003(40) is amended as follows.

(2) In Article 2, in the definition of “EEA national” and “family member of an EEA national”, for “Immigration (European Economic Area) Regulations 2000” there is substituted “Immigration (European Economic Area) Regulations 2006”.

The Immigration (Restrictions on Employment) Order 2004

6.—(1) The Immigration (Restrictions on Employment) Order 2004(41) is amended as follows.

(2) In Part 1 of the Schedule (descriptions of documents for the purpose of article 4(2)(a) of the Order)—

(a)for paragraph 4 there is substituted—

“4. A registration certificate or document certifying permanent residence within the meaning of regulation 2 of the Immigration (European Economic Area) Regulations 2006, including a document which is treated as a registration certificate or document certifying permanent residence by virtue of Schedule 4 to those Regulations.”;

(b)for paragraph 5 there is substituted—

“5. A residence card or a permanent residence card within the meaning of regulation 2 of the Immigration (European Economic Area) Regulations 2006, including a document which is treated as a residence card or a permanent residence card by virtue of Schedule 4 to those Regulations”.

The Accession (Immigration and Worker Registration) Regulations 2004

7.—(1) The Accession (Immigration and Worker Registration) Regulations 2004(42) are amended as follows.

(2) In regulation 1(2) (interpretation)—

(a)after paragraph (b) there is inserted—

“(ba)“the 2006 Regulations” means the Immigration (European Economic Area) Regulations 2006;”;
 (b)in paragraph (j), for “regulation 3 of the 2000 Regulations” these is substituted “regulation 4 of the 2006 Regulations”.

(3) In regulation 2 (“accession State worker requiring registration”)—

(a)for paragraph (6)(b) there is substituted—

“(b)a family member of a Swiss or EEA national (other than an accession State worker requiring registration) who has a right to reside in the United Kingdom under regulation 14(1) or 15 of the 2006 Regulations;”;

(b)paragraph (9)(a) is omitted;

(c)for paragraph (9)(c) there is substituted—

“(c)“family member” has the same meaning as in regulation 7 of the 2006 Regulations.”.

(4) In regulation 4 (right of residence of work seekers and workers from relevant acceding States during the accession period)—

(a)in paragraph (1), before “Council Directive” there is inserted “Council Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States(43), insofar as it takes over provisions of”;

(b)in paragraph (3), for “2000 Regulations” there is substituted “2006 Regulations”;

(c)in paragraph (4), for “An” there is substituted “A national of a relevant accession State who is seeking employment and an” and for “2000 Regulations” there is substituted “2006 Regulations”.

(5) For regulation 5 (application of 2000 Regulations in relation to accession State worker requiring registration) there is substituted—

“Application of 2006 Regulations in relation to accession State worker requiring registration

5.—(1) The 2006 Regulations shall apply in relation to a national of a relevant accession State subject to the modifications set out in this regulation.

(2) A national of a relevant accession State who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of “qualified person” in regulation 6(1) of the 2006 Regulations and an accession State worker requiring registration shall be treated as a worker for the purpose of that definition only during a period in which he is working in the United Kingdom for an authorised employer.

(3) Subject to paragraph (4), regulation 6(2) of the 2006 Regulations shall not apply to an accession State worker requiring registration who ceases to work.

(4) Where an accession State worker requiring registration ceases working for an authorised employer in the circumstances mentioned in regulation 6(2) of the 2006 Regulations during the one month period beginning on the date on which the work begins, that regulation shall apply to that worker during the remainder of that one month period.

(5) An accession State worker requiring registration shall not be treated as a qualified person for the purpose of regulations 16 and 17 of the 2006 Regulations (issue of registration certificates and residence cards).”

The Asylum and Immigration Tribunal (Procedure) Rules 2005

8.—(1) The Asylum and Immigration Tribunal (Procedure) Rules 2005(44) are amended as follows.

(2) In regulation 18(1)(b), after “(“the 2000 Regulations”)” there is inserted “or, on or after 30th April 2006, paragraph 4(2) of Schedule 2 to the Immigration (European Economic Area) Regulations 2006 (“the 2006 Regulations”)”.

(3) In regulation 18(2), after “2000 Regulations” there is inserted “or paragraph 4(2) of Schedule 2 to the 2006 Regulations”.

(1) S.I. 2000/1813.

(2) 1972 c. 68.

(3) 2002 c. 41.

- (4) 1971 c. 77.
- (5) 1999 c. 33.
- (6) Civil partner has the meaning given by Schedule 1 to the Interpretation Act 1978 (c. 30) as amended by paragraph 59 of Schedule 27 to the Civil Partnership Act 2004 (c. 33).
- (7) Section 33(1) is amended by paragraph 5 of the Schedule to the Immigration Act 1988 (c. 14).
- (8) OJ No. C325, 24.12.02, p. 51.
- (9) The Register of Education and Training Providers is maintained by, and is available on the website of, the Department for Education and Skills
- (10) OJ No. L 257, 19.10.68, p. 2 (OJ/SE 1st series 1968, vol II, p. 475).
- (11) Cmd 1976.
- (12) The relevant instrument of the World Health Organisation for these purposes is currently the International Health Regulations (2005).
- (13) 1984 c. 22; section 38 applies to a "notifiable disease", as defined in section 10 of the Act and has been applied to an additional list of diseases by the Public Health (Infectious Diseases) Regulations S.I. 1988/1546.
- (14) The relevant parts of Schedule 2 were amended by Schedule 6 to the Criminal Justice Act 1972 (c. 71), paragraphs 2 and 3 of Schedule 4 to the British Nationality Act 1981 (c. 61), paragraphs 6, 8, 9 and 10 of the Schedule to the Immigration Act 1988 (c. 14), paragraphs 5, 7, 10 and 11 of Schedule 2, and Schedule 4 to the Asylum and Immigration Act 1996 (c. 49), paragraph 70 of Schedule 13 to the Access to Justice Act 1999 (c. 22), section 140 of and paragraphs 43, 56, 58 to 63 of Schedule 14, and Schedule 16 to the 1999 Act, sections 63, 64 and 73 of and paragraphs 3 and 4 of Schedule 7 to the 2002 Act, paragraph 149 of Schedule 8 to the Courts Act 2003 (c. 39), paragraph 1 of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c. 19), and S.I. 1993/1813.
- (15) Section 10 is amended by sections 73 to 75 of and Schedule 9 to the 2002 Act.
- (16) Section 3(5) is amended by paragraphs 43 and 44 of Schedule 14 to the 1999 Act.
- (17) Section 5 is amended by paragraph 2 of Schedule 4 to the British Nationality Act 1981 (c. 61), paragraph 2 of the Schedule to the Immigration Act 1988 (c. 14), paragraph 2 of Schedule 2 to the Asylum and Immigration Act 1996 (c. 49) and paragraph 37 of Schedule 27 to the Civil Partnership Act 2004 (c. 33).
- (18) Schedule 3 is amended by paragraphs 1 and 2 of Schedule 10 to the Criminal Justice Act 1982 (c. 48), paragraph 10 of Schedule 10 to the Immigration Act 1988 (c. 14), paragraph 13 of Schedule 2 to the Asylum and Immigration Act 1996 (c. 49), section 54 of, and paragraphs 43 and 68 of Schedule 14 to, the 1999 Act, paragraphs 7 and 8 of Schedule 7 to the 2002 Act, paragraph 150 of Schedule 8, and Schedule 10, to the Courts Act 2003 (c. 39), and section 34 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c. 19).
- (19) 1997 c. 68.
- (20) 1998 c. 42.
- (21) Cmd 9171.
- (22) Cmd 3906.
- (23) Section 82(1) is amended by section 26 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (c. 19).
- (24) Section 84(1) is amended by S.R. 2003/341.
- (25) Sections 85 to 87 and 105 to 106 are amended by, and sections 103A to 103E are inserted by, section 26 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (c. 19).
- (26) 1988 c. 14.
- (27) 1981 c. 61.
- (28) Section 40 was substituted by paragraph 13 of Schedule 8 to the 2002 Act.
- (29) S.I 2004/1219, amended by S.I. 2004/1236 and S.I. 2005/2400.
- (30) 1993 c. 23.
- (31) 1996 c. 49.

- (32)S.I. 2002/1241.
- (33)S.I. 2000/2326, amended by S.I. 2001/865, S.I. 2003/549, S.I. 2003/3188, S.I. 2005/47 and S.I. 2005/671.
- (34)S.I. 2000/2326, amended by S.I. 2001/865, S.I. 2003/549, S.I. 2003/3188, S.I. 2005/47 and S.I. 2005/671.
- (35)S.I. 2004/1219, amended by S.I. 2004/1236 and 2005/2400.
- (36)S.I. 1993/1813, amended by S.I. 1994/1405, S.I. 1996/2283, S.I. 2000/913, S.I. 2000/1775, S.I. 2001/178, S.I. 2001/418, S.I. 2001/1544, S.I. 2000/3707 and S.I. 2003/2799.
- (37)S.I. 2002/313.
- (38)S.I. 2003/658.
- (39)S.I. 2003/2818.
- (40)S.I. 2003/3214.
- (41)S.I. 2004/755.
- (42)S.I. 2004/1219; amended by S.I. 2004/1236 and S.I. 2005/2400.
- (43)OJ L 158, 30.4.2004, p.77 (the full title of the Directive is Council Directive 2004/38/EC of the European Parliament and the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC).
- (44)S.I. 2005/230.

Appendix 5: Accession (Immigration and Worker Authorisation) Regulations

Statutory Instruments 2006 No. 3317

IMMIGRATION

The Accession (Immigration and Worker Authorisation) Regulations 2006 (Updated to include amendments S.I. 2007, No 475 and S.I. 2011, No 2816)

Made 13th December 2006

Coming into force 1st January 2007

The Secretary of State, being a Minister designated(1) for the purposes of section 2(2) of the European Communities Act 1972(2) in relation to measures relating to the right of entry into, and residence in, the United Kingdom and access to the labour market of the United Kingdom, in exercise of the powers conferred upon him by that section, and in exercise of the powers conferred upon him by section 2 of the European Union (Accessions) Act 2006(3), makes the following Regulations, a draft of which has been approved by resolution of each House of Parliament:

PART 1

General

Citation, commencement, interpretation and consequential amendments

1.—(1) These Regulations may be cited as the Accession (Immigration and Worker Authorisation) Regulations 2006 and shall come into force on 1st January 2007.

(2) In these Regulations—

- (a) “the 1971 Act” means the Immigration Act 1971(4);
- (b) “the 2006 Regulations” means the Immigration (European Economic Area) Regulations 2006(5);
- (c) “accession period” means the period beginning on 1st January 2007 and ending on 31st December 2013
- (d) “accession State national subject to worker authorisation” has the meaning given in regulation 2;
- (e) “accession worker authorisation document” shall be interpreted in accordance with regulation 9(2);
- (f) “authorised category of employment” means a category of employment listed in the first column of the table in Schedule 1;
- (g) “authorised family member” has the meaning given in regulation 3;
- (h) “civil partner” does not include a party to a civil partnership of convenience(6);
- (i) “EEA State” means—
 - (i) a member State, other than the United Kingdom;
 - (ii) Norway, Iceland or Liechtenstein;
 - (iii) Switzerland;
- (j) “employer” means, in relation to a worker, the person who directly pays the wage or salary of that worker;
- (k) “family member” shall be interpreted in accordance with regulation 7 of the 2006 Regulations;
- (l) “highly skilled person” has the meaning given in regulation 4;
- (m) “immigration rules” means the rules laid down as mentioned in section 3(2) of the 1971 Act applying on 1st January 2007(7);
- (n) “letter of approval under the work permit arrangements” has the meaning given in paragraph 1(b) of Schedule 1;
- (o) “registration certificate” means a certificate issued in accordance with regulation 16 of the 2006 Regulations;

- (p) "relevant requirements" means, in relation to an authorised category of employment, the requirements set out in the second column of the table in Schedule 1 for that category;
- (q) "Sectors Based Scheme" has the meaning given in paragraph 1(f) of Schedule 1;
- (r) "spouse" does not include a party to a marriage of convenience;
- (s) "student" has the meaning given in regulation 4(1)(d) of the 2006 Regulations;
- (t) "worker" means a worker within the meaning of Article 39 of the Treaty establishing the European Community(8), and "work" and "working" shall be construed accordingly.

(3) Schedule 2 (consequential amendments) shall have effect.

"Accession State national subject to worker authorisation"

2.—(1) Subject to the following paragraphs of this regulation, in these Regulations "accession State national subject to worker authorisation" means a national of Bulgaria or Romania.

(2) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation if on 31st December 2006 he had leave to enter or remain in the United Kingdom under the 1971 Act that was not subject to any condition restricting his employment or he is given such leave after that date.

(3) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation if he was legally working in the United Kingdom on 31st December 2006 and had been legally working in the United Kingdom without interruption throughout the period of 12 months ending on that date.

(4) A national of Bulgaria or Romania who legally works in the United Kingdom without interruption for a period of 12 months falling partly or wholly after 31st December 2006 shall cease to be an accession State national subject to worker authorisation at the end of that period of 12 months.

(5) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is also a national of—

- (a) the United Kingdom; or
- (b) an EEA State, other than Bulgaria or Romania.

(6) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is the spouse or civil partner of a national of the United Kingdom or of a person settled in the United Kingdom.

(7) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he has a permanent right of residence under regulation 15 of the 2006 Regulations.

(8) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is a family member of an EEA national who has a right to reside in the United Kingdom under the 2006 Regulations, unless that EEA national is—

- (a) an accession State national subject to worker authorisation; or
- (b) a national of Bulgaria or Romania who is not an accession State national subject to worker authorisation solely by virtue of falling within paragraph (10) or (10B).

(9) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is a highly skilled person and holds a registration certificate that includes a statement that he has unconditional access to the United Kingdom labour market.

(10) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is in the United Kingdom as a student and —

- (a) holds a registration certificate that includes a statement that he is a student who may work in the United Kingdom whilst a student in accordance with the condition set out in paragraph (10A); and
- (b) complies with that condition.

(10A) The condition referred to in paragraph (10) is that the student shall not work for more than 20 hours a week unless —

- (a) he is following a course of vocational training and is working as part of that training; or
- (b) he is working during his vacation.

(10B) A national of Bulgaria or Romania who ceases to be a student at the end of his course of study is not an accession State national subject to worker authorisation during the period of four months beginning with the date on which his course ends provided he holds a registration certificate that was issued to him before the end of the course that includes a statement that he may work during that period.

(11) A national of Bulgaria or Romania is not an accession State national subject to worker authorisation during any period in which he is a posted worker.

(12) For the purposes of paragraphs (3) and (4) of this regulation—

(a) a person working in the United Kingdom during a period falling before 1st January 2007 was working legally in the United Kingdom during that period if—

- (i) he had leave to enter or remain in the United Kingdom under the 1971 Act for that period, that leave allowed him to work in the United Kingdom, and he was working in accordance with any condition on that leave restricting his employment; or
- (ii) he was entitled to reside in the United Kingdom for that period under the Immigration (European Economic Area) Regulations 2000(9) or the 2006 Regulations without the requirement for such leave;

(b) a person working in the United Kingdom on or after 1st January 2007 is legally working during any period in which he—

- (i) falls within paragraphs (5) to (10B); or
- (ii) holds an accession worker authorisation document and is working in accordance with the conditions set out in that document;

(c) a person shall be treated as having worked in the United Kingdom without interruption for a period of 12 months if he was legally working in the United Kingdom at the beginning and end of that period and any intervening periods in which he was not legally working in the United Kingdom do not, in total, exceed 30 days.

(13) In this regulation—

- (a) “posted worker” means a worker who is posted to the United Kingdom, within the meaning of Article 1(3) of Directive 96/71/EC concerning the posting of workers(10), by an undertaking established in an EEA State;
- (b) the reference to a person settled in the United Kingdom shall be interpreted in accordance with section 33(2A)(11) of the 1971 Act.

Authorised family member

3.—(1) For the purposes of these Regulations a person shall be treated as an authorised family member if he is the family member of—

- (a) an accession State national subject to worker authorisation who has a right to reside in the United Kingdom under regulation 14(1) of the 2006 Regulations, unless that national only has a right to reside under that regulation by virtue of his status as a worker and he is working as an au pair, a seasonal agricultural worker or under the Sectors Based Scheme; or
- (b) a national of Bulgaria or Romania who is not an accession State national subject to worker authorisation solely by virtue of falling within paragraph (10) or (10B) of regulation 2.

(2) The spouse or civil partner of a person who has leave to enter or remain in the United Kingdom under the 1971 Act that allows him to work in the United Kingdom shall also be treated as an authorised family member.

“Highly skilled person”

- 4.—(1) In these Regulations “highly skilled person” means a person who—
- (a) meets the criteria specified by the Secretary of State for the purpose of paragraph 135A(i)(12) of the immigration rules (entry to the United Kingdom under the Highly Skilled Migrant Programme) and applying on 1st January 2007, other than the criterion requiring a proficiency in the English language; or
 - (b) has been awarded one of the following qualifications and applies for a registration certificate or submits a registration certificate to the Secretary of State under regulation 7(4) within 12 months of being awarded the qualification—
 - (i) a Higher National Diploma or degree awarded by a relevant institution in Scotland; or
 - (ii) a degree with second class honours or above in a subject approved by the Department for Education and Skills for the purpose of participation in the Science and Engineering Graduates Scheme(13), or a master’s degree or doctorate in any subject, awarded by a relevant institution in England, Wales or Northern Ireland.
- (2) In paragraph (1)(b), “relevant institution” means an institution that is financed from public funds or included on the Department for Education and Skills’ Register of Education and Training Providers(14) on 1st January 2007.

Derogation from provisions of Community law relating to workers

5. Regulations 6, 7 and 9 derogate during the accession period from Article 39 of the Treaty establishing the European Communities, Articles 1 to 6 of Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community(15) and Council Directive 2004/38/EC(16) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

PART 2

Immigration

Right of residence of an accession State national subject to worker authorisation

- 6.—(1) An accession State national subject to worker authorisation shall, during the accession period, only be entitled to reside in the United Kingdom in accordance with the 2006 Regulations, as modified by this regulation.
- (2) An accession State national subject to worker authorisation who is seeking employment in the United Kingdom shall not be treated as a jobseeker for the purpose of the definition of “qualified person” in regulation 6(1) of the 2006 Regulations and such a person shall be treated as a worker for the purpose of that definition only during a period in which he holds an accession worker authorisation document and is working in accordance with the conditions set out in that document.
- (3) Regulation 6(2) of the 2006 Regulations shall not apply to an accession State national subject to worker authorisation who ceases to work.

Issuing registration certificates and residence cards to nationals of Bulgaria and Romania and their family members during the accession period

- 7.—(1) Subject to paragraph (2), an accession State national subject to worker authorisation shall not be treated as a qualified person for the purposes of regulations 16 and 17 of the 2006 Regulations (issue of registration certificates and residence cards) during the accession period unless he falls within sub-paragraphs (c), (d) or (e) of regulation 6(1) of the 2006 Regulations.
- (2) The Secretary of State shall issue a registration certificate to an accession State national subject to worker authorisation on application if he is satisfied that the applicant—
- (a) is seeking employment in the United Kingdom; and
 - (b) is a highly skilled person.
- (3) Where the Secretary of State issues a registration certificate during the accession period to a Bulgarian or Romanian national under paragraph (2) or in any case where he is satisfied that the Bulgarian or Romanian national is not an accession State national subject to worker authorisation (other than solely by virtue of falling within paragraph (10) or (10B) of regulation 2), the registration

certificate shall include a statement that the holder of the certificate has unconditional access to the United Kingdom labour market.

(4) A Bulgarian or Romanian national who holds a registration certificate that does not include a statement that he has unconditional access to the United Kingdom labour market may, during the accession period, submit the certificate to the Secretary of State for the inclusion of such a statement.

(5) The Secretary of State shall re-issue a certificate submitted to him under paragraph (4) with the inclusion of a statement that the holder has unconditional access to the United Kingdom labour market if he is satisfied that the holder—

(a) is a highly skilled person; or

(b) has ceased to be an accession State national subject to worker authorisation other than solely by virtue of falling within paragraph (10) or (10B) of regulation 2;

(6) A registration certificate issued to a Bulgarian or Romanian student during the accession period shall include a statement that the holder of the certificate is a student who may work in the United Kingdom whilst a student in accordance with the condition set out in regulation 2 (10A) and who, on ceasing to be a student, may work during the period referred to in regulation 2(10B), unless it includes a statement under paragraph (3) or (5) that the holder has unconditional access to the United Kingdom labour market.

(7) But this regulation is subject to regulation 20 of the 2006 Regulations (power to refuse to issue and to revoke registration certificates).

Transitional provisions to take account of the application of the 2006 Regulations to nationals of Bulgaria and Romania and their family members on 1st January 2007

8.—(1) Where before 1st January 2007 directions have been given for the removal of a Bulgarian or Romanian national or the family member of such a national under paragraphs 8 to 10A of Schedule 2 to the 1971 Act(17) or section 10 of the 1999 Act, those directions shall cease to have effect on and after that date.

(2) Where before 1st January 2007 the Secretary of State has made a decision to make a deportation order against a Bulgarian or Romanian national or the family member of such a national under section 5(1) of the 1971 Act—

(a) that decision shall, on and after 1st January 2007, be treated as if it were a decision under regulation 19(3)(b) of the 2006 Regulations; and

(b) any appeal against that decision, or against the refusal of the Secretary of State to revoke the deportation order, made under section 63 of the 1999 Act or section 82(2)(j) or (k) of the 2002 Act before 1st January 2007, shall, on or after that date, be treated as if it had been made under regulation 26 of the 2006 Regulations.

(3) In this regulation—

(a) “the 1999 Act” means the Immigration and Asylum Act 1999(18);

(b) “the 2002 Act” means the Nationality, Immigration and Asylum Act 2002(19);

(c) any reference to the family member of a Bulgarian or Romanian national is a reference to a person who on 1st January 2007 acquires a right to reside in the United Kingdom under the 2006 Regulations as the family member of a Bulgarian or Romanian national.

PART 3

Accession State worker authorisation

Requirement for an accession State national subject to worker authorisation to be authorised to work

9.—(1) An accession State national subject to worker authorisation shall only be authorised to work in the United Kingdom during the accession period if he holds an accession worker authorisation document and is working in accordance with the conditions set out in that document.

(2) For the purpose of these Regulations, an accession worker authorisation document is—

- (a) a passport or other travel document endorsed before 1st January 2007 to show that the holder has leave to enter or remain in the United Kingdom under the 1971 Act, subject to a condition restricting his employment in the United Kingdom to a particular employer or category of employment;
 - (b) a seasonal agricultural work card, except where the holder of the card has a document mentioned in sub-paragraph (a) giving him leave to enter the United Kingdom as a seasonal agricultural worker; or
 - (c) an accession worker card issued in accordance with regulation 11.
- (3) But a document shall cease to be treated as an accession worker authorisation document under paragraph (2)—
- (a) in the case of a document mentioned in paragraph (2)(a), at the end of the period for which leave to enter or remain is given;
 - (b) in the case of a seasonal agricultural work card, at the end of the period of six months beginning with the date on which the holder of the card begins working for the agricultural employer specified in the card;
 - (c) in the case of an accession worker card, on the expiry of the card under regulation 11(7).
- (4) For the purpose of this regulation—
- (a) “seasonal agricultural work card” means a Home Office work card issued by the operator of a seasonal agricultural workers scheme approved by the Secretary of State for the purpose of paragraph 104(ii) of the immigration rules;
 - (b) the reference to a travel document other than a passport is a reference to a document which relates to a national of Bulgaria or Romania and which is designed to serve the same purpose as a passport.

Application for an accession worker card

- 10.—(1) An application for an accession worker card may be made by an accession State national subject to worker authorisation who wishes to work for an employer in the United Kingdom if—
- (a) the employment concerned falls within an authorised category of employment; or
 - (b) the applicant is an authorised family member.
- (2) The application shall be in writing and shall be made to the Secretary of State.
- (3) The application shall state—
- (a) the name, address, and date of birth of the applicant;
 - (b) the name and address of the employer for whom the applicant wishes to work; and
 - (c) unless the applicant is an authorised family member, the authorised category of employment covered by the application.
- (4) The application shall be accompanied by—
- (a) the applicant’s national identity card or passport; and
 - (b) two passport size photographs of the applicant.
- (5) Where the applicant is not an authorised family member, the application shall, in addition to the documents required by paragraph (4), be accompanied by—
- (a) where the relevant requirements for the authorised category of employment specified in the application require the applicant to hold a letter of approval under the work permit arrangements, that letter;
 - (b) where sub-paragraph (a) does not apply, a letter from the employer specified in the application confirming that the applicant has an offer of employment with the employer; and
 - (c) any other proof that the applicant wishes to provide to establish that he meets the relevant requirements.
- (6) Where the applicant is an authorised family member, the application shall, in addition to the documents required by paragraph (4), be accompanied by—
- (a) a letter from the employer specified in the application confirming that the applicant has an offer of employment with the employer; and

(b) proof that the applicant is an authorised family member.

(7) In this regulation "address" means, in relation to an employer which is a body corporate or partnership, the head or main office of that employer.

Issuing an accession worker card etc

11.—(1) Subject to paragraph (2), the Secretary of State shall issue an accession worker card pursuant to an application made in accordance with regulation 10 if he is satisfied that the applicant is an accession State national subject to worker authorisation who—

(a) is an authorised family member; or

(b) meets the relevant requirements for the authorised category of employment covered by the application.

(2) The Secretary of State shall not issue an accession worker card if he has decided to remove the applicant from the United Kingdom under regulation 19(3)(b) of the 2006 Regulations (removal on grounds of public policy, public security or public health).

(3) An accession worker card issued under this regulation to an authorised family member shall include a condition restricting the applicant's employment to the employer specified in the application.

(4) An accession worker card issued under this regulation pursuant to an application that was accompanied by a letter of approval under the work permit arrangements shall include the following conditions—

(a) a condition restricting the applicant's employment to the employer specified in the application and any secondary employer; and

(b) a condition restricting him to the type of employment specified in the letter of approval under the work permit arrangements.

(5) In any other case, an accession worker card issued under this regulation shall include the following conditions—

(a) a condition restricting the applicant's employment to the employer specified in the application; and

(b) a condition restricting him to the authorised category of employment specified in the application.

(6) An accession worker card issued under this regulation shall include a photograph of the applicant and shall set out—

(a) the name, nationality and date of birth of the applicant;

(b) the name and address of the employer specified in the application;

(c) the conditions required by paragraph (3), (4) or (5), as the case may be; and

(d) the date on which the card was issued.

(7) An accession worker card shall expire if the holder of the card ceases working for the employer specified in the application.

(8) Where the Secretary of State is not satisfied as mentioned in paragraph (1) or where paragraph (2) applies, he shall refuse the application and issue a notice of refusal setting out the reasons for the refusal.

(9) An accession worker card or notice of refusal issued under this regulation shall be sent to the applicant by post together with the identity card or passport that accompanied the application.

(10) In this regulation, "secondary employer" means, in relation to an applicant, an employer who is not specified in his application and who employs the applicant for no more than 20 hours a week when the applicant is not working for the employer who is specified in the application.

Unauthorised employment of accession State national – employer offence

12.—(1) Subject to paragraphs (2) and (3), an employer who employs an accession State national subject to worker authorisation during the accession period shall be guilty of an offence if—

(a) the employee does not hold an accession worker authorisation document; or

(b) the employee's accession worker authorisation document is subject to conditions that preclude him from taking up the employment.

- (2) Subject to paragraph (4), in proceedings under this regulation it shall be a defence to prove that before the employment began there was produced to the employer a document that appeared to him to be a registration certificate issued to the worker and—
- (a) the registration certificate contained a statement that the worker has unconditional access to the United Kingdom labour market; or
 - (b) the registration certificate contained a statement that the worker is a student who may work in the United Kingdom whilst a student in accordance with the condition set out in regulation 2(10A) and who, on ceasing to be a student, may work during the period referred to in regulation 2(10B), and the employer has not employed that worker otherwise than in accordance with that condition or during that period.
- (3) Subject to paragraph (4), in proceedings under this regulation it shall be a defence to prove that before the employment began there was produced to the employer a document that appeared to him to be an accession worker authorisation document that authorised the worker to take up the employment.
- (4) The defence afforded by paragraph (2) and (3) shall not be available in any case where the employer—
- (a) did not take and retain a copy of the relevant document; or
 - (b) knew that his employment of the worker constituted an offence under this regulation.
- (5) A person guilty of an offence under this regulation shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- (6) Where an offence under this regulation committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
- (a) any director, manager, secretary or other similar officer of the body corporate; or
 - (b) any person purporting to act in such a capacity,
- he, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.
- (7) Where the affairs of a body corporate are managed by its members, paragraph (6) shall apply in relation to acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
- (8) Where an offence under this regulation is committed by a partnership (other than a limited partnership) each partner shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.
- (9) Paragraph (6) shall have effect in relation to a limited partnership as if—
- (a) a reference to a body corporate were a reference to a limited partnership; and
 - (b) a reference to an officer of the body corporate were a reference to a partner.
- (10) An offence under this regulation shall be treated as—
- (a) a relevant offence for the purpose of sections 28B and 28D of the 1971 Act(20) (search, entry and arrest);
 - (b) an offence under Part III of that Act (criminal proceedings) for the purposes of sections 28E, 28G and 28H(21) of that Act (search after arrest); and
 - (c) an offence referred to in section 28AA(22) of that Act (arrest with warrant).

Unauthorised working by accession State national – employee offence

13.—(1) Subject to paragraph (2), an accession State national subject to worker authorisation who works in the United Kingdom during the accession period shall be guilty of an offence if—

- (a) he does not hold an accession worker authorisation document; or
- (b) he is working in breach of the conditions set out in his accession worker authorisation document.

(2) A person guilty of an offence under this regulation shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for not more than three months, or both.

- (3) A constable or immigration officer who has reason to believe that a person has committed an offence under this regulation may give that person a notice offering him the opportunity of discharging any liability to conviction for that offence by payment of a penalty in accordance with the notice.
- (4) The penalty payable in pursuance of a notice under paragraph (3) is £1000 and shall be payable to the Secretary of State.
- (5) Where a person is given a notice under paragraph (3) in respect of an offence—
- (a) no proceedings may be instituted for that offence before the expiration of the period of twenty one days following the date of the notice; and
 - (b) he may not be convicted of that offence if before the expiration of that period he pays the penalty in accordance with the notice.
- (6) A notice under paragraph (3) must give such particulars of the circumstances alleged to constitute the offence as are necessary for giving reasonable information of the offence.
- (7) A notice under paragraph (3) must also state—
- (a) the period during which, by virtue of paragraph (5), proceedings will not be instituted for the offence;
 - (b) the amount of the penalty; and
 - (c) that the penalty is payable to the Secretary of State at the address specified in the notice.
- (8) Without prejudice to payment by any other method, payment of a penalty in pursuance of a notice under paragraph (3) may be made by pre-paying and posting a letter containing the amount of the penalty (in cash or otherwise) to the Secretary of State at the address specified in the notice.
- (9) Where a letter is sent in accordance with paragraph (8) payment is to be regarded as having been made at the time at which that letter would be delivered in the ordinary course of post.

Deception – employee offence

- 14.—(1) A person is guilty of an offence if, by means which include deception by him, he obtains or seeks to obtain an accession worker card.
- (2) A person guilty of an offence under this regulation shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for not more than three months, or both.

Offences under regulations 13 and 14 – search, entry and arrest

15. An offence under regulation 13 or 14 shall be treated as—
- (a) a relevant offence for the purpose of sections 28B and 28D of the 1971 Act (search, entry and arrest);
 - (b) an offence under Part III of that Act (criminal proceedings) for the purpose of sections 28E, 28G and 28H of that Act (search after arrest); and
 - (c) an offence under section 24(1)(b) of that Act for the purpose of sections 28A, 28CA and 28FA(23) of that Act (arrest without warrant, entry of business premises to arrest and search for personal records).

Liam Byrne

Minister of State

Home Office

13th December 2006

Regulation 1(2)

SCHEDULE 1

Authorised categories of employment and relevant requirements

<i>Authorised category of employment</i>	<i>Relevant requirements in relation to authorised</i>
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	<i>category of employment</i>
Authorised categories of employment requiring a letter of approval under the work permit arrangements	
Employment under the Sectors Based Scheme	The applicant— (1) holds a letter of approval under the work permit arrangements issued under the Sectors-Based Scheme; and (2) is capable of undertaking the employment specified in that letter.
Training or work experience	The applicant— (1) holds a letter of approval under the work permit arrangements issued under the Training and Work Experience Scheme; and (2) is capable of undertaking the training or work experience as specified in that letter.
Work permit employment	The applicant— (1) holds a letter of approval under the work permit arrangements issued in relation to work permit employment; and (2) is capable of undertaking the employment specified in that letter.

Other authorised categories of employment

<i>Authorised category of employment</i>	<i>Relevant requirements in relation to authorised category of employment</i>
Airport based operational ground staff of an overseas air line	The applicant has been transferred to the United Kingdom by an overseas-owned airline operating services to and from the United Kingdom to take up duty at an international airport as station manager, security manager or technical manager.
Au pair placement	The applicant – (1) has and intends to take up an offer of an au pair placement; (2) is aged between 17 to 27 inclusive; (3) is unmarried and is not in a civil partnership; and (4) is without dependants.
Domestic worker in a private household	The applicant— (1) is over 18; (2) has been employed for at least a year outside the United Kingdom as a domestic worker under the same roof as his employer or in a household that the employer uses for himself on a regular basis; and (3) intends to be so employed by that employer in the United Kingdom.

Minister of religion, missionary or member of a religious order	<p>The applicant—</p> <p>(1)if a minister of religion—</p> <p>(a)has either been working for at least one year as a minister of religion in any of the five years immediately prior to the date on which the application for the worker accession card is made or, where ordination is prescribed by a religious faith as the sole means of entering the ministry, has been ordained as a minister of religion following at least one year's full time or two years' part time training for the ministry; and</p> <p>(b)holds an International English Language Testing System Certificate issued to him to certify that he has achieved level 4 competence in spoken English, and the Certificate is dated not more than two years prior to the date on which the application for an accession worker card is made;</p> <p>(2)if a missionary, has been trained as a missionary or has worked as a missionary and is being sent or has been sent to the United Kingdom by an overseas organisation;</p> <p>(3)if a member of a religious order, is living or coming to live in a community maintained by the religious order of which he is a member and, if intending to teach, does not intend to do so save at an establishment maintained by his order; and</p> <p>(4)intends to work in the United Kingdom as a minister of religion, missionary or for the religious order of which he is a member.</p>
Overseas government employment	<p>The applicant intends to work in the United Kingdom for an overseas government or the United Nations or other international organisation of which the United Kingdom is a member.</p>
Postgraduate doctors, dentists and trainee general practitioners	<p>The applicant—</p> <p>(1)is a graduate from a medical or dental school who is eligible for provisional or limited registration with the General Medical Council or General Dental Council and intends to work in the United Kingdom as a doctor or dentist as part of his training; or</p> <p>(2)is a doctor, dentist or trainee general practitioner eligible for full or limited registration with the General Medical Council or the General Dental Council and intends to work in the United Kingdom as part of his postgraduate training or general practitioner training in a hospital or the Community Health Services.</p>

Private servant in a diplomatic household	The applicant— (1)is over 18; and (2)intends to work in the United Kingdom as a private servant in the household of a member of staff of a diplomatic or consular mission who enjoys diplomatic privileges and immunity within the meaning of the Vienna Convention on Diplomatic Relations(24).
Representative of an overseas newspaper, news agency or broadcasting organisation	The applicant has been engaged by an overseas newspaper, news agency or broadcasting organisation outside the United Kingdom and is being posted to the United Kingdom by that newspaper, agency or organisation to act as its representative.
Sole representative	The applicant— (1)has been employed outside the United Kingdom as a representative of a firm that has its headquarters and principal place of business outside the United Kingdom and has no branch, subsidiary or other representative in the United Kingdom; (2)intends to work as a senior employee with full authority to take operational decisions on behalf of the overseas firm for the purpose of representing it in the United Kingdom by establishing and operating a registered branch or wholly owned subsidiary of that overseas firm; and (3)is not a majority shareholder in that overseas firm.
Teacher or language assistant	The applicant intends to work at an educational establishment in the United Kingdom under an exchange scheme approved by the Department for Education and Skills, the Scottish or Welsh Office of Education or the Department of Education, Northern Ireland, or administered by the British Council's Education and Training Group.
Overseas qualified nurses	The applicant— (1)has obtained confirmation from the Nursing and Midwifery Council that he is eligible for admission to the Overseas Nurses Programme; and (2)has been offered and intends to take up a supervised practice placement through an education provider that is recognised by the Nursing and Midwifery Council or a midwifery adaptation programme placement in a setting approved by that Council

1. In this Schedule—

- (a) “au pair placement” means an arrangement whereby a young person—
- (i) comes to the United Kingdom for the purpose of learning English;
 - (ii) lives for a time as a member of an English speaking family with appropriate opportunities for study; and
 - (iii) helps in the home for a maximum of 5 hours per day in return for an allowance and with two free days per week;
- (b) “letter of approval under the work permit arrangements” means a letter issued by the Secretary of State under the work permit arrangements stating that employment by the employer specified in the letter of the person so specified for the type of employment so specified satisfies the labour market criteria set out in those arrangements;
- (c) “member of a religious order” means a person who lives in a community run by that order;
- (d) “minister of religion” means a religious functionary whose main regular duties comprise the leading of a congregation in performing the rites and rituals of the faith and in preaching the essentials of the creed;
- (e) “missionary” means a person who is directly engaged in spreading a religious doctrine and whose work is not in essence administrative or clerical;
- (f) “Sectors Based Scheme” means the scheme established by the Secretary of State for the purpose of paragraph 135I(i)(25) of the immigration rules (requirements for leave to enter the United Kingdom for the purpose of employment under the Sectors Based Scheme);
- (g) “Training and Work Experience Scheme” means the scheme established by the Secretary of State for the purpose of paragraph 116(i) of the immigration rules (requirement for leave to enter the United Kingdom for approved training or work experience);
- (h) “work permit arrangements” means the arrangements published by the Secretary of State (26) setting out the labour market criteria to be applied for the purpose of issuing the work permits referred to in paragraphs 116(i) (Training and Work Experience Scheme) and 128(i) of the immigration rules and the immigration employment document referred to in paragraph 135I(i) (Sectors Based Scheme) of the immigration rules;
- (i) “work permit employment” means a category of employment covered by the work permit arrangements, other than employment covered by the Sectors Based Scheme and the Training and Work Experience Scheme.

Regulation 1(3)

SCHEDULE 2

Consequential amendments

The Accession (Immigration and Worker Registration) Regulations 2004

1.—(1) The Accession (Immigration and Worker Registration) Regulations 2004(27) are amended as follows.

(2) In regulation 2 (“accession State worker requiring registration”)—

- (a) for paragraph (5)(b) there is substituted—
- “(b) another EEA State, other than a relevant accession State or Bulgaria or Romania;”;
- (b) for paragraph (6)(b) there is substituted—
- “(b) a family member of a Swiss or EEA national who has a right to reside in the United Kingdom under the 2006 Regulations, other than the family member of—
- (i) a national of a relevant accession State who only has a right to reside under regulation 13 of those Regulations and would be an accession State worker requiring registration if he began working in the United Kingdom;
 - (ii) an accession State worker requiring registration who only has a right to reside under regulation 14 of those Regulations by virtue of being treated as a worker for

- the purpose of the definition of “qualified person” in regulation 6(1) of those Regulations; or
- (iii) an accession State national subject to worker authorisation or a student who is not an accession State national subject to worker authorisation solely by virtue of falling within regulation 2(10) of the 2006 Accession Regulations;”;
- (c) in paragraph (9), before paragraph (b) there is inserted—
- “(aa) “2006 Accession Regulations” means the Accession (Immigration and Worker Authorisation) Regulations 2006 and “accession State national subject to worker authorisation” has the meaning given in regulation 2 of those Regulations;”.

The 2006 Regulations

2.—(1) The 2006 Regulations are amended as follows.

(2) In Schedule 2 (effect on other legislation)—

(a) in paragraph 1 (leave under the 1971 Act)—

(i) at the beginning of sub-paragraph (2) there is inserted “Subject to sub-paragraph (3),”;

(ii) after sub-paragraph (2) there is inserted—

“(3) Where the person mentioned in sub-paragraph (2) is an accession State national subject to worker authorisation working in the United Kingdom during the accession period and the document endorsed to show that the person has leave is an accession worker authorisation document, any conditions to which that leave is subject restricting his employment shall continue to apply.

(4) In sub-paragraph (3)—

(a) “accession period” has the meaning given in regulation 1(2)(c) of the Accession (Immigration and Worker Authorisation) Regulations 2006;

(b) “accession State national subject to worker authorisation” has the meaning given in regulation 2 of those Regulations; and

(c) “accession worker authorisation document” has the meaning given in regulation 9(2) of those Regulations.”;

(b) in paragraph 4 (appeals under the Nationality, Immigration and Asylum Act 2002 and previous immigration Acts)—

(i) in sub-paragraph (2), after “Accession (Immigration and Worker Registration) Regulations 2004,” there is inserted “or an accession worker card under the Accession (Immigration and Worker Authorisation) Regulations 2006,”;

(c) in sub-paragraph (9), after “accession State worker requiring registration” where it first occurs there is inserted “or an accession State national subject to worker authorisation working in the United Kingdom” and at the end of the sub-paragraph there is inserted “and “accession State national subject to worker authorisation” has the meaning given in regulation 2 of the Accession (Immigration and Worker Authorisation) Regulations 2006”.

(3) Paragraph 7(3)(a) of Schedule 5 (consequential amendments) is omitted.

(1) S.I. 2000/1813 and S.I. 2004/706

(2) 1972 c.68.

(3) 2006 c.2.1971 c.77.

(4) 1971 c.77

(5) S.I. 2006/1003.

(6) “Civil partner” has the meaning given by Schedule 1 to the Interpretation Act 1978 (c.30), as amended by paragraph 59 of Schedule 27 to the Civil Partnership Act 2004 (c.33).

(7) Immigration Rules H.C. 395, laid before Parliament on 23 May 1994 (as amended).

(8) OJ No. C325, 24.12.02, p.51.

(9) S.I. 2000/2326; amended by S.I. 2001/865, S.I. 2003/549, S.I. 2003/3188, S.I.2005/47 and S.I. 2005/671.

- (10) O.J. L 018, 21.1.1997, p.1 (the full title of the Directive is Council Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services).
- (11) Section 33(2A) was inserted by paragraph 7(b) of Schedule 4 to the British Nationality Act 1981 (c. 61).
- (12) Paragraph 135A(i) was inserted by immigration rules changes on 1st April 2003 (HC 538). The specified criteria are published by Work Permits UK, part of the Home Office, and are available on the Home Office website (www.workingintheuk.gov.uk).
- (13) Details of the Science and Engineering Graduates Scheme are available on the Home Office website (www.workingintheuk.gov.uk).
- (14) The Register of Education and Training Providers is maintained by, and is available on the website of, the Department for Education and Skills (www.dfes.gov.uk/providersregister).
- (15) O.J. L 257, 19.10.1968, p.2.
- (16) OJ L 158, 30.4.2004, p.77 (the full title of the Directive is Council Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 75/34/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC).
- (17) Paragraphs 8 to 10 have been amended by the Schedule to the Immigration Act 1988 (c.14), Schedule 2 to the Asylum and Immigration Act 1996 (c. 49) and Schedule 7 to the Nationality, Immigration and Asylum Act 2002 (c.41), and paragraph 10A was inserted by section 73 of the 2002 Act.
- (18) 1999 c. 33; section 63 of the 1999 Act was repealed by Schedule 9 to the Nationality, Immigration and Asylum Act 2002 but continues to have effect in relation to appeals made before 1st April 2003.
- (19) 2002 c. 41.
- (20) Section 28B was inserted by section 129 of the Immigration and Asylum Act 1999 (c.33) and section 28D was inserted by section 131 of that Act; both sections have been amended by sections 144 and 150 of the Nationality, Immigration and Asylum Act 2002 (c.41).
- (21) Sections 28E, 28G and 28 H were inserted by sections 132, 134 and 135 of the Immigration and Asylum Act 1999(c.33) respectively.
- (22) Section 28AA was inserted by section 152 of the Nationality, Immigration and Asylum Act 2002 (c. 41).
- (23) Section 28A was inserted by section 128 of the Immigration and Asylum Act 1999 (c.33) and amended by sections 144 and 150 of the Nationality, Immigration and Asylum Act 2002 (c.41); sections 28CA and 28FA were inserted by sections 153 and 154 of the Nationality, Immigration and Asylum Act 2002 respectively.
- (24) Cmnd. 2565.
- (25) Paragraph 135I was inserted by immigration rules changes on 30th May 2003 (Cm 5829).
- (26) These arrangements are published by Work Permits UK, part of the Home Office, and are available on the Home Office website (www.workingintheuk.gov.uk).
- (27) S.I. 2004/1219; the relevant amending instruments are S.I. 2004/1236 and S.I. 2006/1003.

Appendix 6: Persons subject to immigration control (housing authority accommodation and homelessness)

Statutory Instruments 2000 No. 706

IMMIGRATION HOUSING, ENGLAND HOUSING, SCOTLANDHOUSING, NORTHERN IRELAND The Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000

(Updated to include S.I. 2006, No 2521, S.I 2008, No 1768)

Made	7th March 2000
Laid before Parliament	13th March 2000
Coming into force	3rd April 2000

In exercise of the powers conferred on him by sections 118, 119 and 166(3) of the Immigration and Asylum Act 1999(1), the Secretary of State hereby makes the following Order:

Citation, commencement and extent

1.—(1) This Order may be cited as the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000 and shall come into force on 3rd April 2000.

(2) This Order does not extend to Wales.

(3) Article 4 extends to England only.

(4) Articles 5 and 8 extend to Northern Ireland only.

(5) Articles 6 and 9 extend to Scotland only.

(6) Article 7 extends to Scotland and Northern Ireland only.

Interpretation

2. In this Order—

“the 1971 Act” means the Immigration Act 1971(2);

“the 1985 Act” means the Housing Act 1985(3);

“the 1999 Act” means the Immigration and Asylum Act 1999;

“asylum-seeker” means a person who is not under 18 and who made a claim for asylum which is recorded by the Secretary of State as having been made on or before 2nd April 2000 but which has not been determined;

“child in need” means a child—

(a) who is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him

of services by a local authority under Part III of the Children Act 1989(5) (local authority support for children and families);

(b) whose health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) who is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed by regulations made under section 17 of the Children Act 1989(6) (provision of services for children in need, their families and others);

“claim for asylum” means a claim that it would be contrary to the United Kingdom’s obligations under the Refugee Convention for the claimant to be removed from, or required to leave, the United Kingdom;

“Common Travel Area” means the United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively;

“designated course” means a course of any kind designated by regulations made by the Secretary of State for the purposes of paragraph 10 of Schedule 1 to the 1985 Act(7) (student lettings which are not secure tenancies);

“development” means physical, intellectual, emotional, social or behavioural development;

“educational establishment” means a university or institution which provides further education or higher education (or both); and for the purposes of this definition “further education” has the same meaning as in section 2 of the Education Act 1996(8) (definition of further education) and “higher education” means education provided by means of a course of any description mentioned in Schedule 6 to the Education Reform Act 1988(9) (courses of higher education);

“family”, in relation to a child in need, includes any person who has parental responsibility for the child and any other person with whom he has been living;

“full-time course” means a course normally involving not less than 15 hours attendance a week in term time for the organised day-time study of a single subject or related subjects;

“health” means physical or mental health;

“the immigration rules” means the rules laid down as mentioned in section 3(2) of the 1971 Act (general provisions for regulation and control);

“the Refugee Convention” means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951(10) as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967(11);

“specified education institution” means—

(a) a university or other institution within the higher education sector within the meaning of section 91(5) of the Further and Higher Education Act 1992(12) (interpretation of Education Acts), in respect of a university or other institution in England, or section 56(2) of the Further and Higher Education (Scotland) Act 1992(13) (interpretation of Part II), in respect of a university or other institution in Scotland;

(b) an institution in England within the further education sector within the meaning of section 91(3) of the Further and Higher Education Act 1992;

- (c) a college of further education in Scotland which is under the management of an education authority or which is managed by a board of management in terms of Part I of the Further and Higher Education (Scotland) Act 1992 (further education in Scotland);
- (d) a central institution in Scotland within the meaning of section 135(1) of the Education (Scotland) Act 1980(14) (interpretation);
- (e) an institution in England which provides a course qualifying for funding under Part I of the Education Act 1994(15) (teaching training);
- (f) a higher education institution in Northern Ireland within the meaning of Article 30(3) of the Education and Libraries (Northern Ireland) Order 1993(16) (funding by Department of higher education); or
- (g) an institution of further education in Northern Ireland within the meaning of Article 3 of the Further Education (Northern Ireland) Order 1997(17) (definition of "further education").

Housing authority accommodation—England, Scotland and Northern Ireland

3. The following are classes of persons specified for the purposes of section 118(1) of the 1999 Act (housing authority accommodation) in respect of England, Scotland and Northern Ireland—

- (a) Class A—a person recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention;
- (b) Class B—a person—
 - (i) who has leave to enter or remain in the United Kingdom granted outside the provisions of the immigration rules; and
 - (ii) whose leave is not subject to a condition requiring him to maintain and accommodate himself, and any person who is dependent on him, without recourse to public funds;
- (bb) Class BA—a person who has humanitarian protection granted under the immigration rules;".
- (c) Class C—a person who has current leave to enter or remain in the United Kingdom which is not subject to any limitation or condition and who is habitually resident in the Common Travel Area other than a person—
 - (i) who has been given leave to enter or remain in the United Kingdom upon an undertaking given by another person (his "sponsor") in writing in pursuance of the immigration rules to be responsible for his maintenance and accommodation;
 - (ii) who has been resident in the United Kingdom for less than five years beginning on the date of entry or the date on which the undertaking was given in respect of him, whichever date is the later; and
 - (iii) whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive;
- (d) Class D—a person who left the territory of Montserrat after 1st November 1995 because of the effect on that territory of a volcanic eruption;
- (f) Class F—a person who is attending a full-time course at a specified education institution in a case where the housing accommodation which is or may be provided to him—
 - (i) is let by a housing authority to that specified education institution for the purposes of enabling that institution to provide accommodation for students attending a full-time course at that institution; and
 - (ii) would otherwise be difficult for that housing authority to let on terms which, in the opinion of the housing authority, are satisfactory.

Housing authority accommodation—England

4.—(1) The following are classes of persons specified for the purposes of section 118(1) of the 1999 Act in respect of England—

(a) Class G—a person who is owed a duty under section 21 of the National Assistance Act 1948(20) (duty of local authorities to provide accommodation);

(b) Class H—a person who is either a child in need or a member of the family of a child in need;

(c) Class I—a person—

(i) who is owed a duty under section 63(1) (interim duty to accommodate in case of apparent priority need), 65(2) or (3) (duties to persons found to be homeless) or 68(1) or (2) (duties to persons whose applications are referred) of the 1985 Act(21);

(ii) who is owed a duty under section 188(1) (interim duty to accommodate in case of apparent priority need), 190(2) (duties to persons becoming homeless intentionally), 193(2) (duty to persons with priority need who are not homeless intentionally), 195(2) (duties in case of threatened homelessness) or 200(1), (3) or (4) (duties to applicant whose case is considered for referral or referred) of the Housing Act 1996(22); or

(iii) in respect of whom a local housing authority are exercising their power under section 194(1) (power exercisable after minimum period of duty under section 193) of the Housing Act 1996;

(d) Class J—an asylum-seeker to whom, or a dependant of an asylum-seeker to whom, a local authority is required to provide support in accordance with regulations made under Schedule 9 to the 1999 Act (asylum support: interim provisions);

(e) Class K—a person who is attending a designated course, which is a full-time course, at an educational establishment in a case where the housing accommodation which is or may be provided to him by a local housing authority—

(i) is not and will not be let to him as a secure tenancy by virtue of paragraph 10 of Schedule 1 to the 1985 Act(23) (student lettings which are not secure tenancies); and

(ii) would otherwise be difficult for that local housing authority to let on terms which, in the opinion of the local housing authority, are satisfactory;

(f) Class L—a person who has a secure tenancy within the meaning of section 79 of the 1985 Act (secure tenancies).

(2) “Dependant”, in relation to an asylum-seeker within paragraph (1)(d) (Class J), means a person in the United Kingdom who—

(a) is his spouse;

(b) is a child of his, or of his spouse, who is under 18 and dependent on him; or

(c) falls within such additional category as may be prescribed under section 94(1) of the 1999 Act (interpretation of Part VI—support for asylum-seekers), for the purposes of regulations made under Schedule 9 to the 1999 Act (asylum support: interim provisions), in relation to an asylum-seeker.

Housing authority accommodation—Northern Ireland

5. The following are classes of persons specified for the purposes of section 118(1) of the 1999 Act in respect of Northern Ireland—

(a) Class M—a person who is a secure tenant of the Northern Ireland Housing Executive or a registered housing association within the meaning of Article 25 of the Housing (Northern Ireland) Order 1983(24) (secure tenancies);

(b) Class N—a person who is owed a duty under Article 8 (interim duty to accommodate in case of apparent priority need), 10(2) or (3) (duties to persons found to be homeless) or 11(2) (duties to persons found to be threatened with homelessness) of the Housing (Northern Ireland) Order 1988(25).

Housing authority accommodation—Scotland

6. The following are classes of persons specified for the purposes of section 118(1) of the 1999 Act in respect of Scotland—

(a) Class O—a person who is a secure tenant within the meaning of Part III of the Housing (Scotland) Act 1987(26) (rights of public sector tenants);

(b) Class P—a person who is owed a duty under section 29 (interim duty to accommodate in case of apparent priority need), 31 (duties to persons found to be homeless), 32 (duties to persons found to be threatened with homelessness) or 34 (duties to persons whose applications are referred to another local authority) of the Housing (Scotland) Act 1987.

Homelessness—Scotland and Northern Ireland

7.—(1) The following are classes of persons specified for the purposes of section 119(1) of the 1999 Act (homelessness: Scotland and Northern Ireland) in respect of Scotland and Northern Ireland—

(a) the classes specified in article 3(a) to (d) (Class A, Class B, Class BA, Class C and Class D);

(b) Class Q—a person who is an asylum-seeker and who made a claim for asylum—

(i) which is recorded by the Secretary of State as having been made on his arrival (other than on re-entry) in the United Kingdom from a country outside the Common Travel Area; and

(ii) which has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned;

(c) Class R—a person who is an asylum-seeker and—

(i) who made a relevant claim for asylum on or before 4th February 1996; and

(ii) who was, on 4th February 1996, entitled to benefit under regulation 7A of the Housing Benefit (General) Regulations 1987(27) (persons from abroad) or regulation 7A of the Housing Benefit (General) Regulations (Northern Ireland) 1987(28) (persons from abroad).

(2) In paragraph (1)(c)(i), a relevant claim for asylum is a claim for asylum which—

- (a) has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned; or
- (b) has been recorded as having been decided (other than on appeal) on or before 4th February 1996 and in respect of which an appeal is pending which—
- (i) was pending on 5th February 1996; or
 - (ii) was made within the time limits specified in the rules of procedure made under section 22 of the 1971 Act (procedure)(29).

Homelessness—Northern Ireland

The following is a class of person specified for the purposes of section 119(1) of the 1999 Act in respect of Northern Ireland—

8. Class T—a person who is an asylum-seeker and—
- (a) who was in Northern Ireland when the Secretary of State made a declaration to the effect that the country of which that person is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country;
 - (b) who made a claim for asylum which is recorded by the Secretary of State as having been made within a period of three months from the day on which that declaration was made; and
 - (c) whose claim for asylum has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned.

Homelessness—Scotland

9. The following is a class of person specified for the purposes of section 119(1) of the 1999 Act in respect of Scotland—

- Class V—a person who is an asylum-seeker and—
- (a) who was in Great Britain when the Secretary of State made a declaration to the effect that the country of which that person is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country;
 - (b) who made a claim for asylum which is recorded by the Secretary of State as having been made within a period of three months from the day on which that declaration was made; and
 - (c) whose claim for asylum has not been recorded by the Secretary of State as having been either decided (other than on appeal) or abandoned.

Revocation

10. The following Orders are revoked—
- (a) the Housing Accommodation and Homelessness (Persons subject to Immigration Control) Order 1996(34), in so far as it extends to England and Scotland;
 - (b) the Homelessness (Persons subject to Immigration Control) (Amendment) Order 1997(35), in so far as it extends to England and Scotland;
 - (c) the Housing Accommodation and Homelessness (Persons subject to Immigration Control) (Amendment) Order 1998(36), in so far as it extends to England;

- (d) (d)the Housing Accommodation and Homelessness (Persons subject to Immigration Control) (Northern Ireland) Order 1998(37);
- (e) (e)the Housing Accommodation and Homelessness (Persons subject to Immigration Control) (Amendment) (Scotland) Order 1999(38); and
- (f) (f)the Housing Accommodation (Persons subject to Immigration Control) (Amendment) (England) Order 1999(39).

Barbara Roche
Minister of State
Home Office
7th March 2000

- (1) 1999 c. 33. The Secretary of State can exercise the power under section 118 in relation to England, Scotland and Northern Ireland but not Wales: see article 2 of and the entry for section 9 of the Asylum and Immigration Act 1996 (c. 49) in Schedule 1 to the National Assembly for Wales (Transfer of Functions) Order 1999 (S.I. 1999/672). See also section 17 of the Interpretation Act 1978 (c. 30) (sections 118 and 119 re-enact, with modifications, section 9 of the 1996 Act). Section 9 of the 1996 Act, in so far as it extended to England and Wales, was amended by paragraph 3 of Schedule 16, and Parts VII and VIII of Schedule 19, to the Housing Act 1996 (c. 52).
- (2) 1971 c. 77.
- (3) 1985 c. 68.
- (4) 1995 c. 18.
- (5) 1989 c. 41.
- (6) See section 105(1) of the Children Act 1989 for definition of "prescribed". Section 17 was amended by paragraph 13 of Schedule 3 to the Disability Living Allowance and Disability Working Allowance Act 1991 (c. 21), section 4 of, and paragraph 108 of Schedule 2 to, the Social Security (Consequential Provisions) Act 1992 (c. 6) and paragraph 19 of Schedule 2 to the 1995 Act.
- (7) Paragraph 10 was amended by paragraph 2 of Schedule 16 to the Housing Act 1996 (c. 52).
- (8) 1996 c. 56.
- (9) 1988 c. 40.
- (10) Cmnd. 9171.
- (11) Cmnd. 3906.
- (12) 1992 c. 13.
- (13) 1992 c. 37.

- (14)1980 c. 44.
- (15)1994 c. 30.
- (16)S.I. 1993/2810 (N.I. 12).
- (17)S.I. 1997/1772 (N.I. 15).
- (18)Cmnd. 9512.
- (19)Cmnd. 2643.
- (20)1948 c. 29; section 21 was amended by sections 195(6) and 272(1) of, and paragraph 2(1) of Schedule 23 and Schedule 30 to, the Local Government Act 1972 (c. 70), paragraph 11(1) of Schedule 13 to the Children Act 1989 (c. 41), section 42(1) of, and paragraph 5(1) to (3) of Schedule 9 and Schedule 10 to, the National Health Service and Community Care Act 1990 (c. 19), section 20(4) of, and the Schedule to, the Housing (Homeless Persons) Act 1977 (c. 48), section 57(1) and (2) of, and paragraph 44 of Schedule 4 and Schedule 5 to, the National Health Service Reorganisation Act 1973 (c. 32), and section 116 of the 1999 Act.
- (21)The repeal of Part III of the Housing Act 1985, which includes sections 63, 65 and 68 and which was commenced by the Housing Act 1996 (Commencement No. 5 and Transitional Provisions) Order 1996 (S.I. 1996/2959 (C. 88)), does not, by virtue of paragraph 1 of the Schedule to that Order, apply to applicants under Part III of that Act whose applications were made before 20th January 1997.
- (22)1996 c. 52.
- (23)Paragraph 10 was amended by paragraph 2 of Schedule 16 to the Housing Act 1996.
- (24)S.I. 1983/1118 (N.I. 15).
- (25)S.I. 1988/1990 (N.I. 23).
- (26)1987 c. 26.
- (27)S.I. 1987/1971; relevant amending instruments are S.I. 1994/470 and 1994/1807.
- (28)S.R. 1987 No. 461; relevant amending regulations are S.R. 1994 No. 80 and S.R. 1994 No. 266.
- (29)Section 22 was amended by S.I. 1987/465; there are other amendments not relevant to this Order.
- (30)S.I. 1995/2705 (N.I. 15).
- (31)1992 c. 7.
- (32)1992 c. 4. Section 124 was amended by paragraph 30 of Schedule 2, and Schedule 3, to the Jobseekers Act 1995.

(33)Section 19 was amended by paragraph 67 of Schedule 1 to the Employment Rights Act 1996 (c. 18) and paragraph 141 of Schedule 7 to the Social Security Act 1998 (c. 14).

(34)S.I. 1996/1982; relevant amending instruments are S.I. 1997/628, 1998/139, 1999/723 (S. 48) and 1999/3057.

(35)S.I. 1997/628.

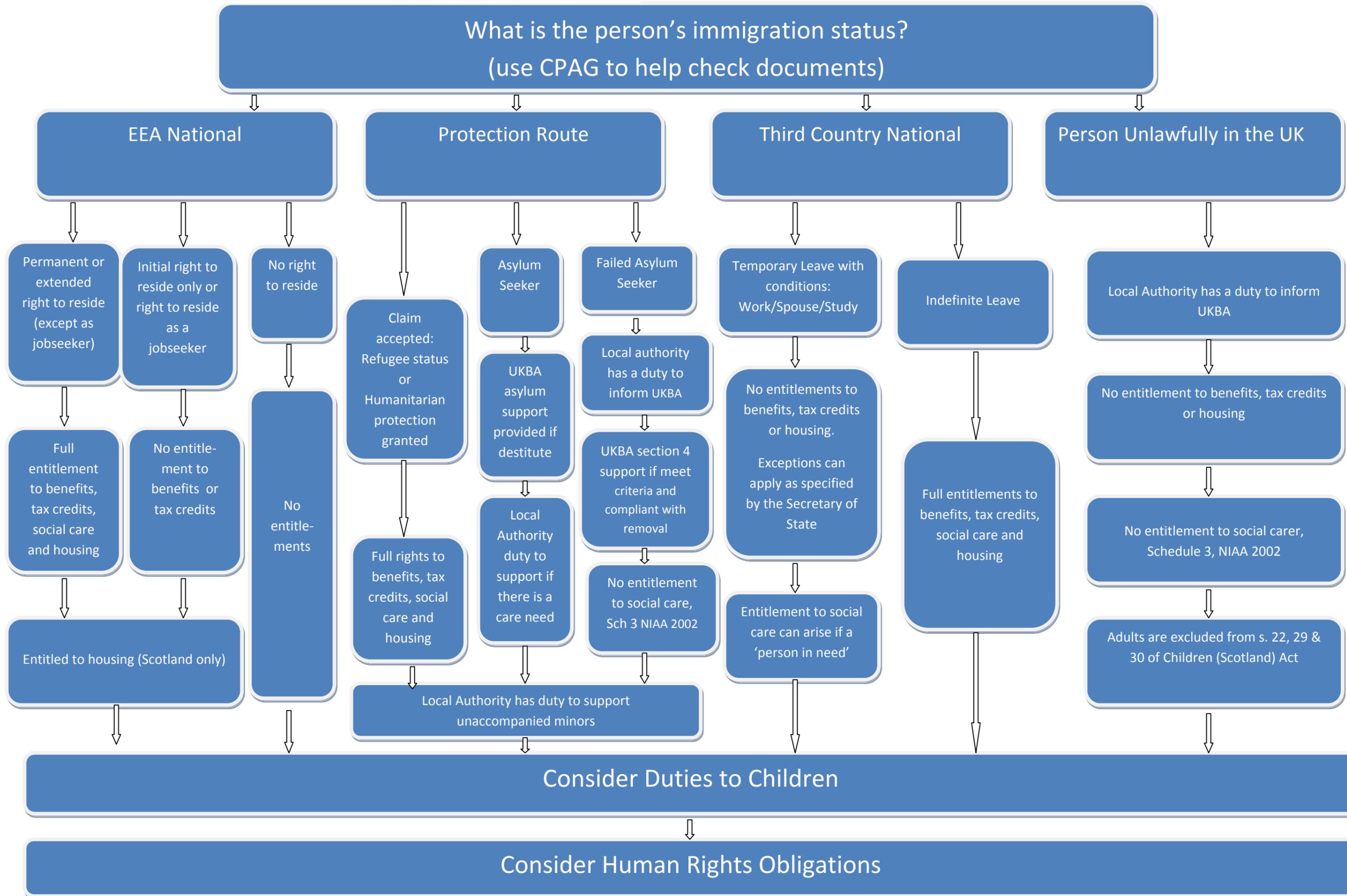
(36)S.I. 1998/139.

(37)S.I. 1998/1004.

(38)S.I. 1999/723 (S. 48).

(39)S.I. 1999/3057.

Appendix 7: Flowchart for local authorities to assist in determining migrants' eligibility





COSLA

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PARTNERSHIP

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