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Hostility enacted

[In seeking to intensify the “hostile environment” for illegal migrants in the UK, the Immigration Act 2016 makes important changes likely to affect both private and public law practitioners in different sectors, as Jennifer Ang and Sarah Craig explain]

This article discusses several key changes introduced by the Immigration Act 2016 we believe to be of interest to solicitors in Scotland: significant reforms to the immigration appeals system, reforms to the asylum support system affecting migrant children and young people leaving care, and upcoming changes to residential tenancies and licensing laws.

The 2016 Act is striking for the way in which its measures extend beyond immigration control at borders, reaching into many parts of our daily environment, and enlisting an ever wider range of actors as agents of immigration control by, for example, involving landlords and licensing boards in immigration status checks.

Because it extends across so many areas of life, it is inevitable that the 2016 Act makes incursions into areas usually regarded as devolved. Here, it would be valid to point out that immigration legislation affecting spheres of life beyond immigration control at borders is not new: the Immigration and Asylum Act 1999, for example, legislated on homelessness provision for asylum seekers, also normally a devolved matter. However, the 2016 Act intensifies still further the programme of reforms aimed at creating a “hostile environment for illegal migrants” which was initiated in the Immigration Act 2014, a programme which has the potential to impact on wide segments of society. Both Acts have brought about a step change in the incursions into devolved areas.

Implementing the 2016 Act in Scotland

The consequences for Scotland are wide-ranging and complex. As primary legislation from the UK Government, some provisions of the 2016 Act (such as the measures aimed at reducing the number of immigration appeals in the tribunals system, and increasing the number of successful removals) will take effect in Scotland at the same time as in England, Wales and Northern Ireland, without any variation in policy or practice.

Others, such as offences created for illegal working, will also take effect at the same time in Scotland as elsewhere, but have been drafted with specific adjustments to take account of the Scottish criminal justice system (for example s 34, inserting Immigration Act 1971, s 24B).

There are further provisions for which detail is only given for England (or England & Wales) in the Act itself, with regulations to follow for the rest of the UK. It is not clear why some provisions have been set out in the Act, while others give the Home Secretary wide “Henry VIII” powers to make regulations with similar effect for the rest of the UK. The regime for licensed premises (Draft Immigration (Alcohol Licensing) (Scotland) Regulations; Draft Immigration (Late Hours Catering) (Scotland) Regulations), and the residential tenancies provisions, will each be brought into effect in Scotland by regulation, meaning that they will receive minimal parliamentary review, a feature which prompted the House of Lords Constitution Committee, among others, to voice concerns in a January 2016 report about lack of scrutiny and the differential approach being taken to the devolved administrations.

Elsewhere, a mixed approach is taken: some of the asylum support provisions affecting Scotland are set out in the Act itself (sched 11), and others will follow in regulations to be made at a later date (sched 12).

Pushing the borders of the Sewel convention?

Since the 2016 Act’s provisions affect many devolved areas, it is worth noting first that, while the Westminster Parliament has the power to legislate on any matter, reserved or devolved (Scotland Act 1998, s 28(7)), in terms of the Sewel convention it practises self-restraint by not “normally” legislating on devolved matters without the consent of the Scottish Parliament; and secondly, that the Sewel convention has recently been placed on a statutory footing (Scotland Act 2016, s 2, inserting 1998 Act, s 28(8)).

We know, because of an exchange of correspondence between UK and Scottish Government ministers, that Immigration Minister James Brokenshire declined to meet Margaret Burgess, then Scottish Housing Minister, to discuss the incursions into Scots landlord and tenant law made by the 2016 Act, on the ground that, since immigration was a reserved matter and the Scottish Parliament’s legislative consent was not required, a meeting was unnecessary (letter of 13 October 2015). This raises general questions about what inter-governmental cooperation should look like when UK legislation covers subject matters which are shared between the two Parliaments, as well as whether the Sewel convention requires reform. On this, differing views have been expressed: see www.scottishconstitutionalfutures.org, posts by Iain Jamieson (7 May 2016) and Tom Mullen and Sarah Craig (15 April and 28 May 2016).

Deport first, appeal later

A significant reform brought about by the 2016 Act is the removal of in-country appeal rights for a wide range of immigration and human rights cases through the extension of the “deport first, appeal later” regime (s 63).

Previously, a person appealing against a Home Office asylum or immigration decision would, in most cases, be entitled to remain in the UK to pursue that appeal. The new regime requires the appellant to leave and pursue the appeal from abroad, if the Home Office certifies that doing so will not cause “a real risk of serious irreversible harm”. The regime was introduced for foreign national offenders only by the 2014 Act (it was upheld by the Court of Appeal in *<Kiarie & Byndloss v Secretary of State for the Home Department>* [2015] EWCA Civ 1020), but has been significantly extended in the 2016 Act.

Although the Home Office cannot certify asylum or other international protection claims, it will be able to certify a broad range of human rights-based immigration cases, including right to family life cases relying on ECHR article 8.

This means that a family, whose application to the Home Office to remain together in the UK arising from article 8 has been refused, must appeal that refusal after removal of one member of that family. The forced physical separation of a family pursuing an immigration appeal will undoubtedly affect their ability to meaningfully enjoy and maintain family life within the meaning of article 8, as well as potentially weakening the evidential basis of their claim and procedurally undermining effective preparations for any later out-of-country appeal.

The Government is, of course, entitled to interfere with the article 8 right in some circumstances, provided the interference is justified in pursuit of its overriding aim of maintaining effective immigration control and the means are proportionate. The extension of “deport first, appeal later” outside the foreign national offender context requires us to ask whether the forcible separation of families is defensible as a proportionate measure, in cases where there are no allegations of criminality or risk to public security.

Scotland’s children, or migrant children?

The 2016 Act also makes sweeping reforms to the asylum support system, removing the right to appeal against certain types of Home Office decisions, and creating new categories of support which reflect a new “blended” approach to responsibility for the support and care of asylum seekers.

Of particular interest in Scotland are provisions seeking to amend the leaving care entitlements of looked-after children based on their migration status. As mentioned above, some aspects of these provisions have been set out in sched 11, with primary legislation for England & Wales set out in sched 12, and broad powers (contained in a Henry VIII clause) to enact secondary legislation with similar effect in Scotland at a later date.

Migrant children who might be taken into local authority care include separated children (under 18s separated from both parents and other relatives and not being cared for by an adult who, by law or custom, is responsible for doing so), as well as some who are “children in need” as a result of being abandoned or abused by their parents or carers (Children Act 1989, s 17; Children (Scotland) Act 1995, s 25).

Local authorities have primary responsibility for the care and support of these children, and receive a modest contribution from the Home Office only in respect of asylum seeking children. If a child is granted some form of limited leave to remain (such as refugee status), that child will then be eligible for mainstream benefits during the period of that leave.

In England & Wales, as in Scotland, the duties of the local authority to looked-after children are set out in primary legislation, and arise when children transition to independent adulthood with the support of leaving care and aftercare provisions (in Scotland: Children (Scotland) Act 1995, Children and Young People (Scotland) Act 2014). These duties have, until now, been understood to apply to all looked-after children, regardless of migration status, and have been an important source of support for children who would otherwise be destitute.

The 2016 Act seeks to break this link by setting out the circumstances in which local authorities do and do not require to support financially children leaving care, effectively creating an exception to local authority care obligations based on migration status.

A local authority no longer requires to support a formerly looked-after child who reaches the age of 18, and who has no pending asylum claim or initial immigration application under leaving care and aftercare provisions. Instead, the Act proposes that the young person should first be assessed for eligibility for adult asylum seeker support, failing which they may be provided some form of asylum support by the local authority, to be specified by regulation at a later date.

In brief, the local authority retains a power to support these young people under its leaving care and aftercare regulations, but is relieved of the duty to do so. Furthermore, the Home Secretary assumes the role of setting out in regulations the parameters of these new forms of support.

Although it is difficult to anticipate what exactly this new support will look like, the immediate concern these provisions raise is the probability that they will amount to something less than a similarly placed British child, or even a migrant child with settled status, would be entitled to.

In addition, these provisions illustrate the complex questions that arise with regard to legislative consent and intergovernmental cooperation, when the Westminster Government seeks to legislate directly on immigration grounds in an area normally considered to be devolved – child welfare law and the duties of local authorities towards all children in Scotland.

Renting and licensing: a hostile environment

The 2014 Act initiated the “right to rent” programme, and the 2016 Act enlists the aid of private sector landlords in the task of immigration control still further. “Right to rent” requires landlords to carry out immigration status checks, and imposes financial penalties (the provisions have thus far only been brought into force in England, on 1 February 2016, but apply to the whole of the UK). The 2016 Act builds on this by creating new offences (s 39) of leasing accommodation to “disqualified” migrants – those not British citizens, or European Economic Area or Swiss nationals, and not having a right to rent in relation to the premises (2014 Act, s 21), and by giving landlords new powers to terminate tenancy agreements (s 40) and obtain possession (s 41).

These measures only apply to England, and there is no equivalent provision for the rest of the UK. Instead, the Secretary of State is given wide powers to make important changes to landlord and tenant law, including the creation of criminal offences, through regulations which may amend, repeal or revoke any enactment, and which apply to Wales, Scotland and Northern Ireland (s 42).

Along with the “right to rent” and asylum support measures, those measures preventing people without permission to work from obtaining alcohol and takeaway licences are also to be brought in by regulation in Scotland, which means that Scottish institutions have been left with the task of implementing them, notwithstanding the unease expressed during their passage through Parliament (referred to above). Finding a way for Scottish and UK administrations to cooperate, and even compromise, on how these regulations will look in Scotland is therefore one of the challenging tasks set by this Act.

The provisions aimed at preventing people without permission to work from operating taxis and private hire vehicles are, by contrast, on the face of the Act (sched 5, para 29).

A more hostile environment for all?

The hostile environment which the 2016 Act and its predecessor aimed to create seems somehow a pressing topic to examine, writing this conclusion as we do, just hours after the EU referendum delivered a result which neither of us wanted to see. We therefore conclude personally.

Many will think that it is reasonable to expect that someone who is unlawfully resident should not have the right to drive taxis, or to work in licensed premises: but is obliging licensing boards to notify the Home Secretary of every personal licence application, and requiring them to think of all licence applicants as either migrant or non-migrant, the right way to go about it? The “right to rent” provisions increase the chances of landlords discriminating against potential tenants on racial grounds, and thus impact negatively on a much wider group of people than the unlawfully resident (see further, Joint Council for the Welfare of Immigrants, “No Passport Equals No Home: An independent evaluation of the ‘right to rent’ scheme,” 3 September 2015). They also encourage private individuals to make enquiries they might not otherwise make, and make connections between immigration status and criminality.

These measures have the potential to increase racism and discrimination across a broad spectrum, but they also have the potential to affect us all. The “deport first, appeal later” provisions will exclude a group of people from accessing justice, and that group includes migrants, but it also includes their UK citizen family members. The “right to rent”, illegal working and licensing provisions will lead to data about migrants and non-migrants alike being shared, raising significant questions about data protection, confidentiality and proportionality (see ss 6, 13 and 55).

In short, the hostile environment which the 2016 Act aimed to create for “illegal” migrants, through the measures described above, as well as those we have not had space to cover, have the potential to make our world more hostile, and Scotland a little less like home for us, too.

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