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Migrants' Rights and Entitlements to Local Authority Services and Support

National Guidance

February 2019

NRPF
network

No Recourse to Public Funds Network



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Foreword

Scotland is enriched by the diversity of its communities and benefits significantly from the contribution that migrants and their families make to our society, economy and local areas. Our obligations to promote and respect human rights extend to every child and adult living in Scotland; as do our commitments to deliver high quality services to all of our communities.

Under successive pieces of UK legislation, basic rights and entitlements to public services have been restricted for people with insecure immigration status. ‘No Recourse to Public Funds’ policies in particular have denied some people living in Scotland access to social security, housing and homelessness assistance in times of crisis. This approach disproportionately affects vulnerable people and is at odds with the Scottish Government and Local Government’s aims, including to eradicate child poverty and create a fairer Scotland.

We recognise that there is a need to work more closely together, across our two spheres of government, to support vulnerable people with insecure immigration status and to make sure that they do not become destitute. Local authorities in particular, provide a vital safety net in these circumstances, including to families with children, adults with physical and mental health issues and survivors of domestic abuse. We know that this is a challenging area of service delivery and creates specific pressures for our social services.

The guidance seeks to strengthen understanding of the complex legal frameworks that shape eligibility to support and considers good practice at a time of limited resources. In 2019, we will also work together to develop a national strategy that better supports statutory agencies and our community partners to reduce the risks of destitution among people with no recourse to public funds living in Scotland.

COSLA Community Wellbeing Spokesperson, Cllr Kelly Parry

Cabinet Secretary for Communities and Local Government, Aileen Campbell MSP

This guidance was commissioned by COSLA to support Scottish local authorities.

The guidance does not attempt to provide an exhaustive statement of the relevant law, nor is it a substitute for legal advice either generally or in relation to individual cases.

The guidance was written by NRPF Network and JustRight Scotland. It was funded by the Scottish Government.

The document will be updated to reflect significant changes in policy and legislation. The guidance was last updated in February 2019.

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1 Introduction

1.1 How to use this guidance

This guidance sets out the current legal framework and good practice to assist local authorities in meeting their statutory duties and delivering an effective social work response when working with people who have no recourse to public funds (NRPF).

Local authorities also have wider responsibilities to support the integration of migrants and asylum seekers and to promote good relations within their communities. They are expected to act to reduce poverty, homelessness and discrimination experienced by anyone living in their local areas. The guidance therefore seeks to provide additional advice on responses that may be needed in circumstances where migrants are at risk of homelessness.

It highlights specific considerations for working with children and young people, adults with disabilities, and survivors of trafficking or domestic abuse, that may require a targeted response. The guidance will be regularly reviewed, with a view to updating it to incorporate any significant changes in policy and legislation.

This guidance intends to:

- Provide general guidance about the issues a local authority housing officer or social work practitioner, including those working in Health and Social Care Partnerships, would need to consider when working with migrant individuals and families in Scotland.
- Provide information for people working in all sectors, who need to establish a migrant individual or family's support options and entitlement to services.
- Supplement any statutory guidance that must be followed by social workers and other professionals, for example, when assessing a child's needs.
- Provide examples of good practice ~~and guidance with regards to~~ in responding to the needs of destitute migrant individuals and families with no recourse to public funds (NRPF).

Social workers and others who are responsible for administering social services' support may need to refer to several chapters in the guidance in order to establish how to best to work with a person or family from the point of referral to finding a pathway to reduce their need for support from the local authority. Please refer to the 'At a Glance Index' to find out which chapters are essential reading.

The guidance is not intended to constitute advice in relation to any specific case. Every attempt has been made to present up to date and accurate information, and the guidance will be updated periodically. However, local authority decision makers are advised to check the current legal position and seek advice from their legal team on individual cases.

1.2 Acknowledgements

This guidance has been written and produced by the No Recourse to Public Funds (NRPF) Network (Catherine Houlcroft) and JustRight Scotland (Jen Ang).

It was supported by a Steering Group, which was attended by the following representative agencies and members: COSLA (Eloise Nutbrown, Andrew Morrison, Ania Tajsiaik); Scottish Government (Nathalie Ledger, Jackie Walder, Aileen Harding); Edinburgh City Council (Sean Bell, Alistair Dinnie); Glasgow City Council (Susanne Millar, Margaret Ball); Inverclyde Council (Jim Laird); British Red Cross (Jillian McBride, Phil Arnold); Scottish Refugee Council (Esther Muchena).

The Steering Group would like to acknowledge the input and contribution of members of the No Recourse to Public Funds Network in Scotland, Shelter Scotland (Fiona MacPhail & Chris Ryan); NHS Health Scotland (Emma Doyle); ALACHO (Tony Cain); Colin Turbett; Scottish Women's Aid (Jo Ozga) and colleagues within COSLA and the Scottish Government.

1.3 Disclaimer

This guidance does not constitute legal advice. It is intended to support local authorities in Scotland by setting out key factors and considerations when making decisions about service provision for migrants. It has a particular focus on supporting people with no recourse to public funds. The guidance does not attempt to provide an exhaustive statement of the relevant law, nor is it a substitute for legal advice either generally or in relation to individual cases. Local authorities will need to seek their own legal advice where relevant and consider independently how best to use the guidance.

1.4 Terms of use

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2 Immigration status and eligibility for public funds

Under UK immigration laws, access to certain public services is dependent on a person's immigration status. This chapter provides a summary of common immigration status types and outlines how these will typically impact on a person's ability to claim public funds, specifically: social security benefits, homelessness assistance and a local authority allocation of social housing.

Later chapters of the guidance set out ways in which a local authority can effectively establish a person's immigration status and what other services a person may be able to access if they are faced with homelessness, including support from social services.

Key points

- Local authority officers working in frontline services need to be able to understand how a person's immigration status affects their entitlement to benefits and other services, in order to ensure that people receive all of the services they are entitled to, establish correct referral routes, and take any necessary steps to alleviate destitution.
- People who have 'no recourse to public funds' (NRPF) will not be able to access most social security benefits, homelessness assistance and a local authority allocation of social housing, but in some cases may be able to receive accommodation and financial support from social services.
- Even when a person's immigration status does not prevent them from accessing social security benefits, they may experience problems obtaining these, for example, because they do not meet other eligibility criteria linked to their residency in the UK, they cannot evidence the length of their residence in the UK, or because their entitlements are misunderstood.
- In most cases, establishing a pathway out of destitution will involve accessing specialist immigration advice. It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory bodies for solicitors and barristers or is an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC). Local authorities must therefore ensure that staff do not provide immigration advice to individuals unless they are accredited to do so with the OISC and should consider establishing lists of local regulated immigration advice services to signpost people to.

2.1 Common types of immigration status

The UK's immigration laws are complex, and it can be difficult to establish whether or not a person has permission to enter or remain in the UK, and if so, on what basis. It is the responsibility of the Home Office to decide what a person's immigration status is, usually

after the person has made an application, and only a properly OISC regulated immigration adviser can lawfully advise an individual on their immigration matter. However, social workers and other local authority officers will need to be able to identify a person's immigration status and understand how this impacts on their entitlements, in order to be able to determine what type of support and services may be available to migrants and their families. The information in this section intends to provide a basic summary of the different types of immigration status people may have. Please also refer to the glossary.

British nationality/ citizenship

A British citizen has the right of abode in the UK, which means that they can enter the UK when they wish to, even if they have never lived here before. British nationality law is complex and British citizenship may be acquired by birth, descent, or by making an application to the Home Office to register or naturalise. A child will not automatically be British solely by being born in the UK, following a change in the law that has applied since 1 January 1983.

Non-EEA nationals

Most people who are nationals of countries that are outside of the European Economic Area (non-EEA nationals) are required to obtain permission to enter or remain in the UK. This will involve applying for entry clearance (if they are outside of the UK) and leave to enter (on arrival to the UK), or leave to remain (within the UK) under the UK Immigration Rules. These rules set out the categories under which a person can apply, for example, to work, study, visit, join family or seek international protection. There will also be some instances where the Home Office may grant permission to remain in the UK on a discretionary basis or to prevent a human rights breach. Some key terms are set out in the table below.

Certain citizens of Commonwealth countries may have the right of abode and will be free to enter and live in the UK without being required to obtain leave to enter or remain.

A person who is living in the UK without any immigration permission, when they are required to have this under the UK's immigration laws, may be unlawfully present and may also be described as having irregular immigration status or as a person without leave.

Term	Description	Additional information
Leave to enter	Immigration permission issued by an Immigration Officer on entry to the UK.	Most people are required to apply for prior entry clearance at a visa application centre abroad, which will be provided as a vignette (stamp) in the person's passport.
Leave to remain	Immigration permission issued by the Home Office, which is applied from within the UK.	An application can be made by completing a form and submitting this online, by post or in person. Paper forms are being phased out and will be replaced by an online system.

Indefinite leave to enter Indefinite leave to remain	Immigration permission with no time limit on the length of stay in the UK. Also referred to as 'settled status'.	May be lost if the person leaves the UK for two years or longer. In most cases has no conditions.
Limited leave to enter Limited leave to remain	Immigration permission issued for a time limited period. Leave may be granted under the Immigration Rules, outside of the rules or on a discretionary basis.	Will have conditions imposed, for example, restrictions on employment and access to public funds. A person may be on a settlement route depending on the type of leave they have, which means they can apply for indefinite leave to remain after a specified period of time, usually 5 or 10 years.
Visa overstayer	A person who had leave to enter or remain in the UK for a limited period and is currently without leave because their previous leave has expired, or their leave was curtailed so it expired early.	Will be treated as unlawfully present and may be issued with a removal decision and reporting instructions. Will not be able to work and may be subject to sanctions on certain services (sometimes referred to 'hostile environment' measures).

Protection (asylum) claims

The table below contains some common terms associated with people who have claimed asylum in the UK because they fear persecution in their country of origin, including the status they might acquire following the outcome of their asylum claim.

Term	Description
Asylum seeker	A person who has made a claim to the UK government for protection (asylum) under the United Nations Refugee Convention 1951 and is waiting to receive a decision from the Home Office on their application or from the Court in relation to an appeal. Has permission to live in the UK but may be subject to reporting requirements and will not usually have the right to work, although there are some exceptions to this. ¹
Refugee status	A person who has been recognised as having a well-founded fear of persecution in their country of origin for reasons of race, religion,

¹ <https://www.gov.uk/government/publications/working-whilst-an-asylum-claim-is-considered/working-in-the-uk-whilst-an-asylum-case-is-considered>

	<p>nationality, membership of a particular social group, or political opinion under the UN Refugee Convention 1951.</p> <p>Will be granted five years limited leave to remain and can apply for indefinite leave to remain after five years.</p>
Humanitarian protection	<p>A person who has been recognised as having a real risk of serious harm or well-founded fear of persecution in their country of origin, but not for any reason set out under the UN Refugee Convention 1951.</p> <p>Will be granted five years limited leave to remain and can apply for indefinite leave to remain after five years.</p>
UASC leave or section 67 leave, or Calais leave	<p>When an Unaccompanied Asylum Seeking Child (UASC) is refused asylum and humanitarian protection, they may be granted another form of leave, depending on the reception conditions in their home country and how they arrived in the UK.</p>
ARE asylum seeker	<p>A person who has made an unsuccessful claim for asylum which has been finally determined by the Home Office and/or courts, has no further right to appeal, and has not been granted any other form of leave to remain. (The UK Government uses the term 'failed asylum seeker' in legislation and guidance).</p>

It is important to be aware that a person's immigration status may change. For example, a person seeking asylum, who has been refused and exhausted their rights to appeal, could make further submissions to the Home Office raising new asylum grounds that are accepted as a fresh claim, and become an 'asylum seeker' again. If their claim is successful, they would be granted leave to remain in the UK.

EEA & Swiss nationals

The rights of nationals of European Economic Area (EEA) countries*, and their family members, to enter and live in the UK are governed by European Union (EU) free movement laws. As the UK is due to leave the EU on 29 March 2019, the entry and residence rights of EEA nationals will change and they will become subject to the UK Immigration Rules that currently apply to nationals of countries outside of the EEA. A new immigration system with revised Immigration Rules is due to be implemented by 1 January 2021. If a deal is reached between the UK Government and the EU, there will be a transition period which is expected to last until 31 December 2020, during which time, free movement will continue to apply. In the event of a 'no deal' scenario, free movement will end on 29 March 2019 and temporary arrangements will be made for EEA nationals entering the UK after this date, until the new immigration system is implemented.

EEA nationals living in the UK by 29 March 2019 (or by the end of any transition period), will be required to apply under the EU Settlement Scheme, which has been introduced by the UK Government to enable EEA nationals and their family members to settle in the UK permanently after free movement ends. Under the scheme, EEA nationals will be granted leave to remain under the Immigration Rules.

*For the purpose of this guidance, the term 'EEA national' includes Swiss nationals.

EEA nationals and most family members are not required to obtain documentation to confirm their residence rights under EU free movement laws. However, many non-EEA family members will apply for a document to confirm their status to enable them to work and access services. Also, those applying under the EU Settlement Scheme will obtain a different form of immigration status. Some key terms are set out in the table below.

Term	Description	Additional information
EEA right to reside	The rights of EEA nationals and their family members to enter and live in the UK are set out in the European Union (EU) Free Movement of Persons Directive 2004/38/EC, the Immigration (European Economic Area) Regulations 2016, or are derived from EU treaties.	<p>A right to reside is acquired:</p> <ul style="list-style-type: none"> • During the first three months of residence (initial right of residence) • When an EEA national is: jobseeking, working, self-employed, self-sufficient or studying • When the person is the family member of an EEA national with a right to reside
EEA permanent residence	The right to live in the UK permanently may be acquired by an EEA national, or their family member.	<p>Permanent residence is acquired:</p> <ul style="list-style-type: none"> • By an EEA national when they have exercised a right to reside in the UK (on a single or combination of grounds) for five years • By a non-EEA family member who has exercised a right to reside in the UK as the family member of an EEA national for five years • In some instances following a shorter residence period
EEA family permit	A document issued overseas to allow a non-EEA family member to enter the UK with or to join the EEA national.	The permit is valid for six months and normally, the person would apply for an EEA residence card if they want documentation to confirm their right of residence as a family member.
EEA residence card	A document issued by the Home Office to evidence a non-EEA nationals' right to reside as the family member of an EEA national.	A residence card will be valid for five years. Enquiries will still need to be made to establish whether the circumstances at the time the document was issued continue to apply.

Pre- settled status	Limited leave to remain granted for up to five years under the EU Settlement Scheme.	Can apply for indefinite leave to remain under the EU Settlement Scheme after five years' continuous residence in the UK.
Settled status	Indefinite leave to remain granted under the EU Settlement Scheme.	There is no time limit on the person's length of stay in the UK but may be lost if they leave the UK for five years or longer.

More terms are set out in the glossary and for more information, see:

- 6.4 Establishing immigration status
- 13.2 How to find a legal aid lawyer or OISC adviser
- 15 EEA nationals and family members
- 16 Asylum seekers

2.2 How immigration status affects access to services

The eligibility rules for many publicly funded services often contain requirements that are dependent on a person's nationality or immigration status. However, the term 'public funds' in an immigration context is very specific and only includes some benefits, homelessness assistance and a local authority allocation of social housing. Local authority staff therefore need to be aware of the following:

- When a person, who is a national of a country outside of the European Economic Area (a non-EEA national), has a type of immigration status that allows access, or 'recourse', to public funds, they will be eligible for mainstream benefits, homelessness assistance and a local authority allocation of social housing.
- When a non-EEA national has a type of immigration status that does not permit recourse to public funds – 'no recourse to public funds' (NRPF) - then generally they will not be able to access mainstream benefits, homelessness assistance and a local authority allocation of social housing.
- If a person with NRPF claims one of these benefits by mistake, then this may cause them to breach a condition attached to their leave.
- EEA nationals and their family members can typically access benefits and housing but may not be eligible to claim income-based benefits if they do not meet certain tests, such as the right to reside element of the habitual residence test, or when they cannot evidence that they meet those tests. Eligibility for benefits is usually linked to economic activity.
- Even if a person has recourse to public funds, their immigration status may still be a relevant factor in establishing whether or not they will be eligible for some publicly funded services other than social security benefits, homelessness assistance and a local authority allocation of social housing.

- It is important not to make assumptions about a person’s immigration status and what services they will be entitled to; the UK’s immigration laws are complex and a person’s immigration status can change over time.
- Local authority staff will need to understand common types of immigration status and the implications this has on person’s ability to access to services and support. They will also need to understand how to ask the right questions to identify a person’s immigration status, and when it may be appropriate to obtain this information from other organisations, for example, the person’s legal adviser or the Home Office.

For more information, see:

- 2.3 Who has recourse to public funds
- 2.4 Who has NRPF
- 3 Public funds for immigration purposes
- 4 Eligibility for other publicly funded services
- 6.4 Establishing immigration status
- 14 EEA nationals and family members

2.3 Who has recourse to public funds?

People with the types of immigration status listed in the table below **will** have recourse to public funds which means they will be able to claim benefits and access all other mainstream public services, provided they meet any other eligibility requirements that may apply. It is important that local authority officers correctly identify a person’s immigration status, so the person is not refused services that they are actually entitled to. When a person has recourse to public funds, their immigration documentation will not state this, as normally only restrictions are specified, so this should usually be adequate evidence that they have recourse. Despite having recourse to public funds, some migrants will experience problems accessing benefits, which are highlighted in the table below.

Immigration status	Consideration
Indefinite leave to remain (apart from adult dependent relative for first five years) No time limit Right of abode	It is possible for some people to have a form of settled status in the UK without the documents to prove this. A well-publicised example is the situation of undocumented Commonwealth citizens who arrived in the UK between the late 1940s and 1970s - ‘the Windrush generation’. People in this position, and other nationals who arrived before 31 December 1988, should be signposted to immigration advice for help with documenting their status, which may involve making an application under the ‘Windrush Scheme’. ² Providers of benefits and housing services may wish to consider alternative evidence in the interim, for

² <https://www.gov.uk/government/publications/undocumented-commonwealth-citizens-resident-in-the-uk>

	<p>example, a letter from a legal representative. In May 2018, the DWP issued an urgent bulletin to housing benefit staff advising them to pause any action to terminate or refuse a claim made by an undocumented Commonwealth citizen from the Caribbean.³</p>
<p>European Economic Area (EEA) nationals and their family members</p>	<p>EEA nationals are not required to apply to the Home Office for any form of evidence to demonstrate their right to reside, and therefore they may not have proof of this right. EEA nationals may also not be eligible to receive income-based benefits if they fail the right to reside and/or habitual residence tests, or struggle to evidence that they meet these tests. In such instances they are often referred to (incorrectly) as having NRPF but may need to be treated as such for the purpose of determining alternative support options. However, that situation can change, for example, if they become economically active and establish that they are eligible for benefits.</p> <p>EEA nationals and their family members need to be made aware that they will need to apply under the EU Settlement Scheme, to secure their rights to remain in the UK, after the UK leaves the EU on 29 March 2019.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 2.1 Common types of immigration status • 15 EEA nationals and family members • 19.1 Rights of EU nationals after the UK leaves the EU
<p>Refugee status Humanitarian protection</p>	<p>When a person is recognised as a refugee, or given humanitarian protection, and granted leave to remain, they have recourse to public funds. However, they may still experience destitution if their Home Office asylum support is terminated before they receive benefits. As the Home Office currently provides a 28-day notice period, this is a common occurrence. In such circumstances the local authority may need to consider options for support in the interim.</p>
<p>Refugee family reunion</p>	<p>Close family members of refugees and people with humanitarian protection can apply to join their relative</p>

³ HB Bulletin U1/2018: 'Windrush generation' information for local authorities
<https://www.gov.uk/government/publications/housing-benefit-urgent-bulletins-2018>

	<p>in the UK under refugee family reunion rules. Although immediate family members will usually be granted recourse to public funds, other family members, and spouses who married the refugee after they fled from their country of origin, might not be. Although the refugee in the UK will be entitled to benefits and housing, if any family members joining them are NRPF then this may have implications on the level of benefits they can receive. In such instances, a 'mixed' family should be referred for benefits and immigration advice, and social services may need to establish whether they need to provide any assistance under section 22 of the Children (Scotland) Act 1995 or section 12 of the Social Work (Scotland) Act 1968.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 8 Social services' support – children within families • 9 Social services' support – adults
<p>UASC leave</p> <p>Section 67 'Dubs' leave</p> <p>Calais leave</p> <p>(Granted to an unaccompanied asylum seeking child who does not qualify for refugee status or humanitarian protection)</p>	<p>Local authorities may be required to assist children with leave to remain who have joined family members, who themselves might be asylum seekers or have some other form of limited leave to remain. Even though the child's recourse to public funds is not in doubt, this can create complexity in accessing the right combination of benefits and local authority support to safeguard the welfare of the child. Local authorities may need to consider their obligations under other legislation, for example, Section 22 of the Children (Scotland) Act 1995.</p>
<p>Discretionary leave to remain, including:</p> <ul style="list-style-type: none"> • Leave granted to a person who has received a conclusive grounds decision that they are a victim of trafficking or modern day slavery • Destitution domestic violence concession 	<p>Prior to a person being awarded discretionary leave, they are unlikely to have had access to public funds and may not have a National Insurance number or bank account. This can result in delays in benefits being administered after they have been granted a form of discretionary leave which enables them to have recourse to public funds.</p>
<p>Limited leave to remain granted under family and private life rules on a 10-year settlement route</p>	<p>When a person has leave to remain with recourse to public funds, it is possible that they may have the NRPF condition applied when they extend their leave.</p>

<p>where the person is accepted by the Home Office as being destitute (otherwise the NRPF condition is imposed)</p>	<p>This can lead to any benefits being claimed suddenly stopping giving rise to homelessness and destitution. In such instances they should be signposted to immigration advice as they may be able to apply to have the NRPF condition removed by applying to the Home Office for a change of conditions which will vary their leave.⁴</p>
<p>Continuing leave (3C leave) when a person previously had limited leave with recourse to public funds</p>	<p>A person's leave will be extended under section 3C of the Immigration Act 1971 when they submit an application for leave to remain before their previous leave expires and are still waiting for a decision from the Home Office after their leave has expired.</p> <p>When a person has 3C leave, any conditions attached to their previous leave will continue to apply until their application or appeal is concluded, for example, they may retain permission to work or recourse to public funds.</p> <p>If the leave to remain application is refused, 3C leave will only continue whilst the person is appealing this decision when:</p> <ul style="list-style-type: none"> • the application is refused after the person's leave to remain has expired; and • the person has lodged their appeal within the given deadline. <p>3C leave will stop if a person lodges an appeal after the given deadline, even if the court later accepts it as being made 'out of time'. When 3C leave ends and the person has not been granted another form of leave to remain then they will become an overstayer, at which point any entitlement to benefits and employment will end.</p>

2.4 Who has NRPF?

No recourse to public funds (NRPF) applies to people who are 'subject to immigration control', i.e., people with the immigration status types specified in the table below.⁵

A non-EEA national who..	Examples
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⁴ <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

⁵ Section 115(9) of the Immigration and Asylum Act 1999

Requires leave to enter or remain in the UK but does not have it (is without leave)	<ul style="list-style-type: none"> • Visa overstayer • Illegal entrant • Asylum seeker • ARE asylum seeker
Has leave to enter or remain in the UK which is subject to a condition that they have no recourse to public funds (NRPF)*	<ul style="list-style-type: none"> • Spouse of a settled person • Tier 4 student and their dependents • Leave to remain under family or private life rules
Has leave to enter or remain in the UK that is subject to a maintenance undertaking	<ul style="list-style-type: none"> • Adult dependent relative of a British citizen or person with settled status for first five years they are in the UK⁶

* When a person has leave to remain with NRPF, 'no public funds' will be written on their immigration document. If there is no such statement then it can be assumed that a person does have recourse to public funds, although they would still need to satisfy the relevant benefit or housing eligibility requirements in order to access these.

⁶ An adult dependent relative of a British citizen or person with settled status will have indefinite leave to enter or remain in the UK with a prohibition on claiming public funds for a period of five years, although they may apply for non-means tested benefits during this period. Once five years has passed, or if the person who made the undertaking has died, they will have full recourse to public funds. Regulation 2 & Schedule of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 <http://www.legislation.gov.uk/ukxi/2000/636/schedule>; Home Office Modernised Guidance on Public Funds <https://www.gov.uk/government/publications/public-funds>

3 Public funds for immigration purposes

Under UK immigration laws, access to certain public services is dependent on a person's immigration status. This chapter provides details of what services are classed as 'public funds' for immigration purposes.

Later chapters provide information on how to identify whether a person has access to public funds and whether other forms of assistance may be available.

Key points

- The 'no recourse to public funds' (NRPF) condition prevents people from accessing most mainstream social security benefits, homelessness assistance and a local authority allocation of social housing, although there are some exceptions which may mean a particular benefit can be claimed by a person with NRPF.
- A person with NRPF is not prevented from accessing other publicly funded services, although their immigration status or length of residence may be a relevant factor in establishing entitlement to certain services.
- Local authorities have duties to safeguard the welfare of children, young people leaving care and vulnerable adults, which can include providing accommodation and financial support when a person has NRPF and is prevented from accessing mainstream benefits and social housing by their immigration status.
- Local authority staff working across all first points of contact should be aware of the support options that a person with NRPF may have, so that an appropriate referral can be made to the relevant social work team when a family or vulnerable adult is at risk of homelessness.

3.1 Social security benefits

The definition of a 'public fund' is set out in the Immigration Rules, and does not include all services provided by or funded by public bodies, but only specific benefits and some local authority housing provision. These are also set out in the Home Office policy document, 'Modernised Guidance on Public Funds' and are outlined here.⁷

The following benefits are classed as 'public funds' for immigration purposes:

- Attendance allowance
- Carer's allowance
- Child benefit
- Child tax credit
- Council tax benefit

⁷ <https://www.gov.uk/government/publications/public-funds>

- Council tax reduction
- Disability living allowance
- Domestic rate relief (Northern Ireland)
- Housing benefit
- Income-based jobseeker's allowance
- Income-related employment & support allowance
- Income support
- Personal independence payment
- Severe disablement allowance
- Social fund payment, including a: budgeting loan, sure start maternity grant, funeral payment, cold weather payment and winter fuel payment ⁸
- Scottish Welfare Fund ⁹
- State pension credit
- Universal credit
- Working tax credit¹⁰

A person with NRPF will be excluded from claiming the above benefits unless an exception applies.

The following exceptions mean that a person may be able to claim some of the benefits that are classed as public funds when they have leave to remain with NRPF without this affecting their immigration status:

- They are a national of a country that has a reciprocal arrangement with the UK, as listed in the Home Office guidance.
- They have a European Economic Area (EEA) national family member, including a British citizen, for example, a parent with leave to remain with NRPF who has a British child can claim child benefit.
- They make a joint claim for tax credits with a partner who has recourse to public funds, for example, a British citizen.
- They have indefinite leave to enter or remain as an adult dependent relative during the first five years they are in the UK (in which time they can claim non-means tested benefits).

If a person with NRPF is unsure about whether an exception applies, they should seek advice from a benefits adviser and an immigration adviser before making a claim.

A person who is lawfully present in the UK and has the NRPF condition may be able to claim the following benefits if they have been in work or have paid National Insurance contributions:

- Bereavement benefit
- Contributory-based employment and support allowance

⁸ In Northern Ireland included crisis loans and community care grants until 1 November 2016.

⁹ Added on 6 April 2016. Replaced community care grants and crisis loans in Scotland. England, and Northern Ireland have similar local welfare schemes which are also on this list, but the Discretionary Assistance Fund in Wales is not currently included.

¹⁰ Section 115 of the Immigration and Asylum Act 1999 and paragraph 6 of the Immigration Rules

- Contributory- based jobseeker's allowance
- Guardian's allowance
- Incapacity benefit
- Maternity allowance
- Retirement pension
- Statutory maternity pay
- Statutory sickness pay
- Widows benefit

Over the next few years, a number of benefits are being devolved to Scotland: most disability and carer's benefits, along with a small number of low income benefits. The Scottish Government has set up Social Security Scotland to administer these benefits, and is discussing with the Home Office how these benefits will be treated following devolution to Scotland. However, since immigration policy is reserved to the UK Government, the entitlement of people who are subject to immigration control is unlikely to change.

For more information, see:

- 19.2 Social Security (Scotland) Act 2018

3.2 Social housing allocation

If a non-EEA national requires leave to enter or remain in the UK they will not be eligible to make an application to the local authority's mainstream housing allocations list for a social housing tenancy, unless they are in a particular class/ group of people, including:

- Refugee
- Person with humanitarian protection
- Person with leave to remain granted outside of the Immigration Rules (this could also be referred to as discretionary leave to remain) when they do not have NRPF as a condition of their leave
- Person who has indefinite leave to enter or remain who is habitually resident in the UK, Republic of Ireland, Isle of Man or Channel Islands (unless their indefinite leave to remain is subject to an undertaking that their sponsor will maintain and accommodate them, and they have been resident in the UK for less than five years or their sponsor has died)¹¹
- Full-time student when certain circumstances apply
- Person with leave to remain under section 67 of the Immigration Act 2016 ('Dubs leave')¹¹

The full list can be found in the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000.

A person with NRPF can be allocated a property by a housing association where they have housing need under the housing association's allocation policy. They can apply for housing with a housing association either directly to the association or via a common housing register

¹¹ Paragraph 118 of the Immigration and Asylum Act 1999; the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000

where this is in operation. If they obtain a tenancy in this way, then it will not be considered to be a public fund for immigration purposes. However, they will not be eligible to claim housing benefit, so may face difficulties meeting their rent payments if they are not able to work, or have a low income.

However, when a person is allocated housing by a housing association where they have applied for housing to a local authority who then nominates them to a housing association under a nomination agreement, or to discharge homelessness duties, this would be a public fund for immigration purposes.

EEA nationals and their family members who are exercising a right to reside will also be eligible.

For more information, see:

- 2.1 Common types of immigration status
- 14 EEA nationals and family members

3.3 Homelessness assistance

If a person requires leave to enter or remain in the UK they will not be eligible to make a homelessness application or receive temporary homeless accommodation under part II of the Housing (Scotland) Act 1987, unless they are in a particular class/ group of people, including:

- Refugee
- Person with humanitarian protection
- Person with leave to remain granted outside of the Immigration Rules (this could be also referred to as discretionary leave to remain) when they do not have NRPF as a condition of their leave
- Person who has indefinite leave to enter or remain who is habitually resident in the UK, Republic of Ireland, Isle of Man or Channel Islands (unless their indefinite leave to remain is subject to an undertaking that their sponsor will maintain and accommodate them, and they have been resident in the UK for less than five years or their sponsor has died).
- Person with leave to remain under section 67 of the Immigration Act 2016 (leave given to unaccompanied children who entered the UK under the 'Dubs amendment')¹²

The full list can be found in the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000.

EEA nationals and their family members who are exercising a right to reside will also be eligible.

The Housing (Scotland) Act 1987 does not require the local authority to decide whether a person is eligible for homelessness assistance, but enquiries regarding this would need to be made in order to correctly apply the restrictions that are set out in immigration legislation (as above). A local authority should accept a homeless application if it believes that someone may

¹² Paragraph 119 of the Immigration and Asylum Act 1999; the Persons subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000

be eligible and may be homeless. Temporary accommodation should be provided whilst the local authority investigates the application, which may include establishing the applicant's immigration status. The local authority will need to decide on (1) whether the person is homeless and (2) whether they are intentionally homeless. The local authority may also, should it choose to do so, inquire whether the person has a local connection to another local authority area in the UK.

People who were dispersed into asylum support accommodation are not considered to have a local connection to that area, as they had no choice as to where they may be accommodated.

A local authority can make charges for temporary accommodation. Such charges must be reasonable and may be subject to challenge by a homeless person.

Where a local authority decides to refer the person to another local authority area, accommodation should be provided until such time as the referral to the other local authority area has been finally decided between the two local authorities.

Normally, there is an ongoing duty to provide temporary accommodation whilst the local authority reviews its decision on a homeless application at the request of the person. However, some people can only be provided with temporary homeless accommodation whilst their review is being decided, where this is necessary to prevent a breach of their human rights or EU treaty rights.

Special rules apply to homelessness applications from a 'mixed' household, for example, where the applicant is eligible, but their partner and/or children are ineligible.

There is a difference in how a homeless application should be treated, depending on whether the main applicant is eligible because they are a person who does not require leave to enter or remain in the UK (a 'restricted case' scenario), or is eligible because they are a person who does require leave to enter or remain in the UK and is in one of the classes of persons specified above, for example, they have refugee status. This is a complex area and specialist advice may need to be taken.

Where the eligible applicant has members of the family who are ineligible (because they do not fall within one of the classes of persons specified above), the local authority may be limited in the assistance that can be provided to the whole family, depending on the reason why the applicant is eligible.

A 'restricted case' scenario applies when the main applicant is eligible on the basis that they are a person who does not require leave to enter or remain in the UK, but their family members are ineligible. A restricted case is typically a case where 'but for' the person who is ineligible being part of the household, the applicant would not be homeless. For example, if a person is homeless because their accommodation has become overcrowded due to a person, who is ineligible, joining the household, the reason for their homelessness (overcrowded accommodation) would not have arisen but for the presence of the ineligible person. The local authority would require to take this into account and may offer accommodation in the private rented sector. Where the person who is ineligible has no bearing on the homeless application, this shouldn't result in the homeless application being treated any differently.

In instances where the local authority can assist the household as a whole, then the housing officer may need to signpost any members who have leave to remain with the NRPF condition to a legal adviser to find out whether accessing homelessness assistance would cause them to be in breach of their immigration conditions.

Where the main applicant is a person who requires leave to enter or remain in the UK and is in one of the classes of persons specified above, the local authority can disregard the ineligible persons in the household. This may mean, for example, that an eligible applicant applying as homeless because the 'mixed' household are living in overcrowded accommodation, may be found not to be homeless, because the ineligible family members are disregarded.

When an entire family are ineligible for homelessness assistance, then a referral to social services for a GIRFEC assessment should be made to establish whether duties under section 22 of the Children (Scotland) Act 1995 arise.

For more information, see:

- 2.1 Common types of immigration status
- 6.4 Establishing immigration status
- 7 Social services' support - exclusion
- 15 EEA nationals and family members

4 Eligibility for other publicly funded services

There are a wide range of services available for people living in Scotland that are not classed as public funds for immigration purposes. This chapter describes how a person's immigration status will impact on their ability to claim these.

Later chapters of this guidance will provide advice on how to effectively assess a person's eligibility for social services' support when they have no recourse to public funds (NRPF).

Key points

- A person with 'no recourse to public funds' (NRPF) is not prevented from accessing other publicly funded services due to having this condition. However, their nationality, immigration status or length of residence may be a relevant factor in establishing entitlement to some other services.
- Local authorities have the discretion to provide free school meals. When these are not universally funded, and school uniform grants, to children in low-income families that do not meet eligibility requirements due to the parent's immigration status.
- Many NHS services in Scotland are provided free of charge regardless of a person's immigration status.
- Social services' duties to safeguard the welfare of children, young people leaving care and vulnerable adults may be engaged in order to alleviate destitution when a person or family is prevented by their immigration status from accessing social security benefits and requires accommodation and financial support.

4.1 Baby boxes

The Scottish Government provides a free baby box to every new baby that is born and living in Scotland. The box contains essential items for the baby and can be used for the baby to sleep in. The mother will receive the box in weeks 32 to 36 of her pregnancy and can apply for it through her midwife.¹³

All babies will be eligible to receive the box, regardless of their or their parents' nationality and immigration status. As the box can only be applied for through a midwife, only women engaged with health services will be able to receive it.

¹³ <https://www.parentclub.scot/baby-box>; <https://www.mygov.scot/baby-box/>

4.2 Child maintenance

A claim for child maintenance from a former partner through the UK Government's Child Maintenance Service (formerly the Child Support Agency), regardless of the parent's immigration status.¹⁴

The parent caring for the child, non-resident parent and qualifying children must all be habitually resident in the UK; there is no requirement for them to have recourse to public funds or to be lawfully present. Applications can be progressed if the person does not have a National Insurance number, although the identity of all parties involved will need to be proved, preferably with birth certificates.

A parent can obtain independent advice from Child Maintenance Options and must contact this service before applying to the Child Maintenance Service. If they do not have a National Insurance number, they can ask Child Maintenance Options for their case to be managed via the Exceptional Case Handling Process.¹⁵

4.3 Discretionary Housing Payment

A Discretionary Housing Payment may be paid by a local authority to people to top-up a Housing Benefit or Universal Credit shortfall, or to help with the costs of removal or a rent deposit. This is only available to people who have recourse to public funds and who are eligible for Housing Benefit or Universal Credit.¹⁶

4.4 Early learning and childcare

The Scottish Government funds councils to offer up to 600 hours' 'early learning and childcare' per year for eligible children. Local authorities have a duty to secure funded early learning and childcare (ELC) for each 'eligible...child belonging to its area'.¹⁷

An eligible child is defined in legislation, without reference to immigration status.¹⁸

Eligible children are:

- All 3 and 4 year olds from the relevant start date.¹⁹
- 2 year olds who are 'looked after' by the local council or where the parent is receiving certain benefits (including support under Part 6 of the Immigration and Asylum Act 1999 – section 95 Home Office asylum support). These criteria are broadly in line with the eligibility requirements for free school meals.²⁰

¹⁴ <https://www.mygov.scot/child-maintenance/>; <https://www.gov.uk/child-maintenance/overview>

¹⁵ <http://www.cmoptions.org/>

¹⁶ <https://www.mygov.scot/discretionary-housing-payment/>

¹⁷ Section 47(1) of the Children and Young People (Scotland) Act 2014 ('the 2014 Act')

¹⁸ At section 47(2) of the 2014 Act and in the Provision of Early Learning and Childcare (Specified Children) (Scotland) Order 2014, as amended

¹⁹ <https://www.mygov.scot/childcare-costs-help/start-and-end-dates/>

²⁰ <https://www.mygov.scot/childcare-costs-help/funded-early-learning-and-childcare/>

Local authorities also have discretion to provide access to funded early learning and childcare to any other child, as they see fit.²¹

The amount of funded hours is being increased gradually from now until August 2020, up to 1140 hours per year. This increase is managed by local councils and each will be taking their own approach.

The UK Government also has a tax-free childcare scheme which can be accessed by families in Scotland with children under 12 or disabled children under 17, when parents are working and meet income requirements. A parent can apply for this if they are British or an EEA national, have settled status, or have leave to remain with recourse to public funds, and would need to make the application if their partner has leave to remain with NRPF. Families where a single parent or both parents are working and have leave to remain with NRPF will not be able to apply for tax-free childcare.²²

4.5 Education

All children, regardless of their immigration status, can receive state school education whilst they are of compulsory school age.²³

The only children who cannot receive a state school education are those who have leave to enter or remain with a condition that does not permit study, or study at a state school. This will apply to children who have been issued with leave to enter or remain as a Visitor, Tier 4 (Child) or Short-term student (Child). (Although an exception may apply to some child visitors.)²⁴

When applying to undertake Further Education (FE) (age 16+), a person with NRPF will only be able to undertake a course for free if they meet the funding criteria; immigration status and length of residence in the UK will be relevant factors.

Many people may have accessed, or wish to access, ESOL classes, which are subject to different funding rules. Guidance on accessing Scottish Funding Council (SFC) funded courses sets out the eligibility routes for fee waiver grants.²⁵

For Higher Education, the criteria for lower 'home' fee rates, and student finance to help with course and living costs, are also based on immigration status and length of residence in the UK. Universities Scotland have published detailed guidance on access to Higher Education for refugees and asylum seekers.²⁶

For more information about eligibility requirements higher education course funding, student support and bursaries see:

²¹ Section 1(C) of the Education (Scotland) Act 1980

²² <https://www.gov.uk/help-with-childcare-costs/tax-free-childcare>

²³ <https://www.gov.uk/know-when-you-can-leave-school>; the Education (Scotland) Act 1981

²⁴ <https://www.gov.uk/government/publications/visit-guidance>

²⁵ http://www.sfc.ac.uk/web/FILES/guidance_sfcgd072018/SFCGD072018_Fee_Waiver_2018-19.pdf

²⁶ <https://www.universities-scotland.ac.uk/wp-content/uploads/2016/11/Guidance-on-Providing-Asylum-Seekers-and-Refugees-with-Access-to-Higher-Education-Nov-2016.pdf>

- The Student Awards Scotland (SAAS) – Higher Education ²⁷

Enquiries about FE funding would need to be made directly to the relevant college.

4.6 Education Maintenance Allowance

Education Maintenance Allowance is available to a young person age 16 to 19 if they are living in a low-income household and are undertaking full-time study at a school, full or part-time study at an FE college or education centre, or are taking part in an 'activity agreement'.²⁸

They may apply to the local authority if they are attending school or otherwise to their college. The eligibility requirements for the allowance are based on the young person's nationality, immigration status and residence in the UK, as well as the household income. A young person who has a form of settled status (for example, indefinite leave to remain), refugee status, another type of leave following an asylum claim, or EEA nationality, may be eligible if they also meet the residence requirements. People without leave or who have limited leave to remain will not be eligible.

4.7 Free school meals

The table below sets out free school meal entitlement for children and young people studying at publicly funded schools. After primary 3, entitlement is generally linked to the parent being in receipt of qualifying benefits or asylum support so, for children in migrant families, the parent's immigration status might affect whether they can receive free school meals. However local authorities have the discretion to provide free school meals in cases where the regular eligibility criteria is not met.²⁹

Where a child is eligible for free school meals, lunch is provided. Some local authorities may also provide breakfasts free of charge, or they may provide meals during weekends or school holiday times, to pupils who qualify for free school meals. Where extra provision, over and above free school meals has been made, local authorities have the flexibility to decide who should receive it.

School year/ age	Eligibility for free school meals
Pre-school age children	Children can get a free lunch in early learning and childcare if a parent is receiving an eligible benefit or section 95 Home Office asylum support.
Primary 1, 2 and 3	All children at publicly-funded schools in Scotland automatically get free school lunches at this stage, regardless of their or their parents' immigration status. For example, a child in an NRPF household will be able to receive free school meals during these school years.

²⁷ <https://www.saas.gov.uk/>

²⁸ <http://www.legislation.gov.uk/ssi/2007/156/contents/made>; <https://www.mygov.scot/ema/>

²⁹ <https://www.mygov.scot/school-meals/>

<p>Primary 4 until statutory school leaving age</p>	<p>Children will continue to receive free school meals at this stage if their parents or carers are receiving an eligible qualifying benefit or section 95 Home Office asylum support.³⁰</p> <p>Local authorities also have the discretion to provide free school meals to children who are not eligible under the regular qualifying criteria, where their families are experiencing financial hardship. This includes providing them for families who have NRPF due to their immigration status.</p> <p>Where families are experiencing difficulty in meeting the cost of paying for school meals, for whatever reason, they may contact their local council directly in order to seek advice about what assistance may be available.</p>
<p>16-18 year olds</p>	<p>Older pupils can also claim free school meals where they are receiving any of the eligible qualifying benefits in their own right.</p> <p>Where a pupil within this age bracket has NRPF due to their immigration status, they may contact their local authority directly in order to seek advice about what assistance may be available.</p>

Good practice example

A council uses its discretion to provide entitlements to free school meals and school clothing grants to children within families who have no recourse to public funds (NRPF).

School staff and other local authority workers are aware of the risks of poverty for children whose parents have NRPF and who have a low income. The staff make information clearly available to parents that they can request free school meals and school clothing grants if they are on a low income and/or experiencing financial hardship.

Social workers support families who are in receipt of financial assistance from the local authority to apply for/or receive their child's entitlements to free school meals and school clothing grants, along with other funds and sources of support they may be eligible for.

4.8 Legal aid

The Scottish Legal Aid Board (SLAB) operates an advice and assistance scheme for civil legal matters in Scotland, which will fund legal advice for people who cannot afford to pay for it themselves, where an important civil right is at stake. On this basis, legal advice that a destitute person or family may require on their immigration status and options, and also on their entitlement to accommodation and support, may be available from a legal aid lawyer free of charge.

³⁰ <https://www.mygov.scot/school-meals/>

There are no eligibility requirements for legal aid based on a person's nationality or immigration status, so a person with NRPF can access this.

Legal aid lawyers must apply a two-stage test in order to determine whether to grant legal aid to assist an individual. The first part of the test looks at financial eligibility, and the second part of the test considers whether the person requires the assistance of a lawyer in order to obtain or protect an important legal right. The financial eligibility test is deemed to have been met automatically where a person is already in receipt of asylum support or many forms of means-tested benefits, as long as they do not also have significant capital assets (such as significant savings, or ownership of a house, car, etc.). The second part of the test considers whether the legal advice required is in relation to the person's civil rights and is the type of advice that would be expected to be received from a solicitor.

The SLAB provides more information about eligibility tests for legal aid in Scotland.³¹

For more information, see:

- 13.2 How to find a legal aid lawyer or OISC adviser

4.9 National Entitlement Card (concessionary travel)

Immigration status may be a relevant factor in determining whether someone can obtain a National Entitlement Card (NEC) for free or concessionary travel. If a person with a disability is not eligible for certain benefits (Personal Independence Payment, Disability Living Allowance, Attendance Allowance) they may still qualify under other eligibility criteria.³²

The card can be issued to people who are resident in Scotland when they are:

- Over 60 years' old
- Age five and over and have a disability that they are able to evidence according to specific documentary requirements
- Age 16-18 (Young Scot NEC)
- Volunteering full time and under 26 years old (Young Scot NEC)

People can apply for the card through their local authority.

4.10 NHS treatment

Many NHS services are provided free of charge to people in Scotland regardless of their nationality or immigration status, but some people may be required to pay for certain types of treatment.³³

Free services

- Services delivered by a GP
- Prescriptions

³¹ <https://www.slab.org.uk/public/civil/eligibility/>

³² <https://www.transport.gov.scot/concessionary-travel/>

³³ <https://www.nhsinform.scot/care-support-and-rights/health-rights/access/healthcare-for-refugees-and-asylum-seekers-and-overseas-visitors>

- Dental and optical examinations*
- Community services, such as mental health and drug and alcohol services
- Accident and emergency (A&E) services up until the point that the person is accepted as an in-patient
- Family planning services
- Diagnosis & treatment of contagious diseases, including HIV ³⁴
- Diagnosis & treatment of sexually transmitted diseases
- Compulsory detention or admission due to a mental health condition (under the Mental Health (Care and Treatment) (Scotland) Act 2003)
- Treatment of a mental health condition as a requirement of a community payback order

* Most dental and ophthalmic treatment will also be free if the person meets one of the exemptions to these services or has obtained an HC2 certificate on the basis of having a low income, for example support from social services or a charity. NHS Scotland has produced a useful leaflet providing more information about these exemptions. ³⁵

Chargeable services

- Any treatment provided in a hospital, or by staff working under the direction of a hospital, that is not listed above.

A person may be charged for hospital treatment if they are an 'overseas visitor' and are not in a group that is exempt from paying the charges. A person will be an overseas visitor if they are not ordinarily resident in Great Britain or Northern Ireland.

People who do not have to pay for chargeable services

The following people will be ordinarily resident if they are living lawfully in the UK for a settled purpose:

- British citizen
- EEA national
- Non-EEA national who has either:
 - settled status, for example, indefinite leave to remain; or
 - a right to reside under EU law, for example, the primary carer of a British child

Anyone else will be referred to as an 'overseas visitor' and will be required to pay for hospital treatment unless an exemption applies.

The exemptions are set out in the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989, and include a person who has:

- Made a formal application for asylum, whether pending or unsuccessful
- Refugee status
- Leave to enter or remain in order to work or to be self-employed

³⁴ For full list, see Schedule 1 of the National Health Service (Charges to Overseas Visitors) (Scotland) Regulations 1989

³⁵ <https://www.gov.scot/Resource/0052/00525866.pdf>

- Leave to enter or remain on a settlement route, for example, as a spouse of a British citizen, or as the parent of a British child/ child who has lived in the UK for seven years
- Lived lawfully in the UK on any other basis for one year or longer prior to receiving treatment
- Is studying full-time in the UK at a further or higher education institution
- Is a survivor of trafficking or modern slavery who has either received a reasonable grounds decision and is still waiting for their conclusive grounds decision, or has received a positive conclusive grounds decision
- Is detained for a criminal matter or immigration matter
- Is the spouse, civil partner or child of a person in the above categories

An asylum seeker will be entitled to NHS treatment on the same basis as a UK national who is ordinarily resident in Scotland, even if their claim is unsuccessful and they become appeal rights exhausted (ARE). Asylum seekers who are granted Refugee Status or another form of leave to remain will continue to be exempt from NHS charges on the same basis as a person who is ordinarily resident in Scotland.

People who apply for leave to enter or remain in the UK for a limited period will usually need to pay the Immigration Health Charge (IHC) as part of their application, in order to receive most chargeable NHS treatment for free. This has not yet been incorporated in to the Scottish charging regulations, but such people will have the same access to free NHS care as a person who is ordinarily resident in Scotland.

People who may have to pay for chargeable services

A person may need to pay for hospital treatment if they are:

- A person without leave who has not claimed asylum
- On a short-term visit visa of less than six months

This could, therefore, include people who are being provided with accommodation and financial support by social services because they have no recourse to public funds (NRPF).

Maternity provision, including antenatal care, must not be delayed or refused due to issues arising regarding charging and inability to pay, because such treatment is classed as immediate and urgent medical care. However, when a pregnant woman is liable to pay for her maternity care, she may be charged after the care has been provided.

The NHS has the ability to write off debts and not pursue them if a person is destitute or genuinely without funds.

However, when a person accrues an unpaid NHS debt of £200 or more, this information may be shared with the Home Office. Where a person accrues an NHS debt of £500 or more, then this could lead to an immigration application being refused.

Further information and resources:

- NHS Inform – Healthcare for asylum seekers, refugees and overseas visitors with helpline and webchat advice service³⁶
- Scottish Government – Overseas visitors³⁷
- Chief Executive Letter (CEL) 9 (2010) – Guidance on the charging regulations³⁸
- NHS Circular: PCA(M)(2018) 10 - Guidance on GP registration³⁹

4.11 School clothing grants

Local authorities will provide some families with financial help towards the cost of buying a school uniform through the payment of a school clothing grant. In May 2018, the Scottish Government reached an agreement with COSLA to ensure that eligible families would be paid at least £100. This arrangement has now come into effect.

Eligibility criteria for school clothing grants are set locally by individual councils. However, this criteria varies across different local authority areas, although information on eligibility criteria is available on every local authority's website. There is no legislation governing the eligibility for school clothing grants, therefore local authorities have the flexibility to waive their local criteria where they think it is appropriate to do so. Families with no recourse to public funds should contact their local authority directly to seek advice on what assistance may be available.⁴⁰

4.12 Social services' assistance

Assistance provided by social services to a child, family or adult is not a public fund for immigration purposes, and should not be refused to a person with NRPF.

Social services may be required to provide accommodation and financial support to migrants or families who are unable to access benefits or housing assistance because they have no recourse to public funds (NRPF). However, such assistance may be limited for some people depending on their nationality or immigration status, as certain groups of people can only receive this support in order to prevent a breach of their human rights or EU treaty rights due to an exclusion that is set out under Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002. This applies to assistance provided under the following legislation:

- Accommodation and financial support provided to a family to meet a child's needs⁴¹
- Aftercare support, including accommodation, provided to a young person leaving care from age 16 to 26, when they are age 18 or older⁴²
- Care and support, including accommodation, provided to an adult⁴³

³⁶ <https://www.nhsinform.scot/care-support-and-rights/health-rights/access/healthcare-for-refugees-and-asylum-seekers-and-overseas-visitors>

³⁷ <https://www.gov.scot/Topics/Health/Services/Overseas-visitors>

³⁸ https://www.sehd.scot.nhs.uk/mels/CEL2010_09.pdf

³⁹ [https://www.sehd.scot.nhs.uk/pca/PCA2018\(M\)10.pdf](https://www.sehd.scot.nhs.uk/pca/PCA2018(M)10.pdf)

⁴⁰ <https://www.mygov.scot/clothing-grants/>

⁴¹ Section 22 of the Children (Scotland) Act 1995

⁴² The Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014

⁴³ Sections 12 or 13A of the Social Work (Scotland) Act 1968

A person's nationality and immigration status will not prevent them from receiving other types of social services assistance, for example, a child with a disability in an asylum seeking family who are accommodated by the Home Office can also be provided with services by the local authority to meet their needs.

A looked after migrant child's immigration status will not impact on their entitlements to support as a looked after child, but will be highly relevant to any care planning that takes place, as the child may need help accessing legal advice to secure a long-term form of immigration status or British citizenship. It will also impact on their entitlements when they need to access further or higher education and other services, including aftercare support, post-18 years old. This also applies to European Economic Area (EEA) children.

For more information, see:

- 5 Social services' support – introduction
- 6 Social services' support – referrals
- 7 Social services' support – exclusion
- 8 Social services' support – children within families
- 9 Social services' support – adults
- 10 Young people leaving care

4.13 Eligibility summary table

The table below is intended to provide an indication as to whether a person may be able to access a public fund or other publicly funded service on the basis of the person's immigration status only. It does not take into account other requirements, such as residence requirements ~~or that~~, and notes when discretion may be used to provide a service.

For more information about additional eligibility requirements, see:

- 2.1 Common types of immigration status
- 3 Public funds for immigration purposes
- 4 Eligibility for other publicly funded services
- Glossary

Eligibility for public services based on the person or parent's immigration status (not taking into account any additional residence requirements)	Refugee	Asylum seeker	ARE asylum seeker	ILR/ right of abode	Leave to remain with NRPF	Leave to remain with recourse	EEA national/ family member	Zambrano carer	Without leave (e.g. visa overstayer)
Public funds for immigration purposes									
Social security benefits	✓	x	x	✓	x	✓	✓	x	x
Homelessness assistance	✓	x	x	✓	x	✓	✓	✓	x
Allocation of social housing (via local authority)	✓	x	x	✓	x	✓	✓	✓	x
Other public services									
Baby box	✓	✓	✓	✓	✓	✓	✓	✓	✓
Child maintenance	✓	✓	✓	✓	✓	✓	✓	✓	✓
Discretionary housing payment	✓	x	x	✓	x	✓	✓	x	x
Early learning & childcare	✓	?	?	✓	✓x	✓	✓	✓	x
Education – school age	✓	✓	✓	✓	✓	✓	✓	✓	✓
Education maintenance allowance	✓	x	x	✓	x	x	✓	x	x
Free school meals (P4+)	✓	✓	✓	✓	?	✓	✓	?	?
FE & HE funding	✓	x	x	✓	✓	✓	✓	x	x
Legal aid	✓	✓	✓	✓	✓	✓	✓	✓	✓
National Entitlement Card	✓	✓	✓	✓	✓	✓	✓	✓	✓
NHS - GP services	✓	✓	✓	✓	✓	✓	✓	✓	✓
NHS - free hospital treatment	✓	✓	✓	✓	✓	✓	✓	✓	x
School uniform grants	✓	✓	✓	✓	?	✓	✓	?	?
Social services' assistance	✓	✓	✓	✓	✓	✓	✓	✓	✓

Key	✓	Will meet immigration criteria or there are no immigration criteria. Must also meet any other criteria, e.g. residence requirements	✓x	May be eligible for some schemes
	x	Will not meet immigration criteria	?	Discretion may be used

5 Social services' support - introduction

This chapter sets out the general legal position and good practice points for a social worker or other practitioners to consider when a migrant child or adult is referred for social services' assistance, specifically, accommodation and financial support.

Later chapters provide more detailed information on eligibility for social services' support for migrant children, adults with disabilities and other vulnerable groups.

Key points

- Social services' duties to safeguard the welfare of children, young people leaving care and vulnerable adults, may be engaged when a person or family is prevented by their immigration status from accessing social security benefits and requires accommodation and financial support to alleviate destitution.
- Social services' assistance is not a public fund for immigration purposes and can be provided to children and adults who are in need, regardless of their immigration status. However, for certain adults and families, the provision of accommodation and financial support is subject to a human rights assessment which considers whether they can return to their country of origin to avoid a situation of destitution in the UK as an alternative to being supported by social services.
- Social workers need to be aware of the different ways that having 'no recourse to public funds' (NRPF) can impact on vulnerable groups, for example, women and children who are at risk of domestic abuse and must ensure that their practice is gender and culturally sensitive.
- When assessing eligibility for accommodation and financial support, in most cases social workers will need to undertake additional steps, for example, providing access to an interpreter, liaising with the person's legal adviser, or obtaining immigration status information from the Home Office, ensuring that data protection legislation is adhered to.

5.1 Policy context

Local authorities play an important role in promoting social integration and cohesion within their communities. The provision of accommodation and financial support by social services has been recognised by the UK and Scottish Governments, and the UK Supreme Court, as being an essential safety net to protect the most vulnerable migrants from destitution where their immigration status prevents them from accessing mainstream benefits and housing services.⁴⁴

⁴⁴ The Scottish Parliament Equalities and Human Rights Committee, Hidden Lives - New Beginnings: Destitution, asylum and insecure immigration status in Scotland (22 May 2017)

Supporting migrants who have NRPF is a complex area of social services' provision, as a child or adult's needs will be met, not only through the delivery of standard social care services, but also by providing accommodation and financial support. This is an additional budgetary pressure faced by local government, which also gives rise to extra demands on social workers and other officers in terms of knowledge and skills. However, it is important to remember that key principles of social work ethics and practice will still apply.

NRPF cases can be challenging, with problems arising from a person's insecure immigration status compounding what may already be complex needs. Fear of immigration authorities, uncertainty about the future, and/or anxiety about not being able to access support from public authorities, can cause significant stress for migrants and their families.

Immigration status can be used as a tool for control or abuse in domestic relationships and can also be a factor in human trafficking cases. Perpetrators and traffickers may use a survivor's fear of being reported to the authorities to perpetrate abuse, preventing their victim from seeking help or going to the police.

Although often described as safety net support, UK data on NRPF service provision shows that the average time a person or family would spend in receipt of social services' support is just under 2.5 years. Local authorities must therefore ensure that they are administering support correctly by establishing need in line with social care legislation, taking account of immigration legislation where this is applicable. Additionally, services will need to be delivered as cost-effectively as possible.⁴⁵

Accommodation and financial support is typically provided to people with NRPF under the following legislation:

- Section 22 of the Children (Scotland) Act 1995 - to a family to meet a child's needs
- Sections 29 & 30 of the Children (Scotland) Act 1995 - to a young person eligible for aftercare
- Sections 12 or 13A of the Social Work (Scotland) Act 1968 – to an adult in need
- Section 25 of the Mental Health (Care and Treatment) (Scotland) Act 2003

For more information, see:

- 8 Social services' support – children within families
- 9 Social services' support – adults
- 10 Young people leaving care
- 14 NRPF service delivery

5.2 Common misunderstandings

The UK immigration system is very complex as people can be issued with many different types of immigration status and documents. Misunderstandings can often arise about how

<https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2017/5/22/Hidden-Lives---New-Beginnings--Destitution--asylum-and-insecure-immigration-status-in-Scotland>; *R (on the application of HC) (Appellant) v Secretary of State for Work and Pensions and others (Respondents)* [2017] UKSC 73 <https://www.supremecourt.uk/cases/uksc-2015-0215.html>

⁴⁵ NRPF Connect annual report 2017-18 <http://www.nrpfnetwork.org.uk/Documents/NRPF-connect-annual-report-2017-18.pdf>

the law applies to different migrant groups and what their entitlements are, for example, what assistance social services can provide to people with no recourse to public funds (NRPF).

Some common misconceptions about entitlement to social services support and the actual legal position that the local authority must adhere to are set out in the table below.

Misconception	Actual legal position
<p>People cannot be assisted by social services when they have no recourse to public funds (NRPF).</p>	<p>The NRPF condition is only a restriction on access to mainstream benefits, homelessness assistance and a local authority allocation of social housing. Social services' support is not a public fund for immigration purposes and assistance should not be refused for this reason alone.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 2 Immigration status and eligibility for public funds • 3 Public funds for immigration purposes • 4 Eligibility for other publicly funded services
<p>Social services only have a duty to assist a child in an NRPF family, so can only accommodate the child and not the parent.</p>	<p>Section 22 of the Children (Scotland) Act 1995 requires the local authority to promote the upbringing of the child with the parent, which it has the power to do by providing accommodation and financial support to the family as a whole. Offering to accommodate the child alone or taking the child into care is not an appropriate response in the absence of any safeguarding concerns additional to the risk to the child arising from the parent's lack of housing and income, and is likely to give rise to a breach of Article 8 ECHR (the right to respect for a person's family life).</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 8 Social services' support – children within families
<p>Social services cannot help because the local authority does not get funding to provide support to people with NRPF.</p>	<p>Although the local authority is not under a duty to meet all formally assessed needs and may take into account its resources in determining which needs are to be met, it is under an obligation to ensure that an individual's human rights are not breached by a failure to provide support, or the provision of inadequate support. A decision to meet some – but not all – assessed needs must therefore be reached rationally and the local authority must act reasonably in the circumstances.⁴⁶</p> <p>For more information, see:</p>

⁴⁶ *R(G) v Barnet LBC* [2003] UKHL 57
<http://www.publications.parliament.uk/pa/ld200203/ldjudgmt/jd031023/barnet-1.htm>

	<ul style="list-style-type: none"> • 8 Social services' support – children within families • 9 Social services' support – adults
<p>Social services cannot help a person who is without leave because they have not made an application for leave to remain to the Home Office.</p>	<p>A local authority's obligation to conduct a GIRFEC assessment, a carer's assessment, or a community care assessment arises independently from any consideration of the type of immigration status a person or family may have.</p> <p>A person's immigration status does not prevent a GIRFEC or community care assessment from being undertaken with respect to a child or young person, or adult, respectively.</p> <p>The absence of a pending immigration application should not prevent an assessment being carried out or interim support being provided when this is necessary. However, the adult or parent's immigration status, and whether any applications have been made, will be relevant factors when determining whether the Schedule 3 exclusion to social services' support apply.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 7 Social services' support – exclusion • 8 Social services' support – children within families • 9 Social services' support – adults • 10 Assessments when the exclusion applies
<p>A pregnant woman with NRPF who has no other children in her care cannot be provided with support until her child is born.</p>	<p>A local authority may need to consider whether a pregnant woman is in need of assistance and therefore can be provided with accommodation and support under section 12 of the Social Work (Scotland) Act 1968, until her child is born, at which point duties under the Children (Scotland) Act 1995 may be engaged.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 9.13 Social services' support – adults
<p>In families where the parent has leave to remain with NRPF, the local authority does not have to provide support because the parent can work.</p>	<p>A local authority can only refuse to provide support when a child is not to be found to be in need following a GIRFEC assessment. Where a parent has NRPF and has permission to work, one aspect of the assessment will involve considering whether employment is a viable option for them, as a conclusion about whether a child is in need must be made by evaluating all the available information about the family's circumstances. Parents with NRPF are</p>

	<p>often prevented from working due to unaffordable childcare and housing costs.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 8 Social services' support – children within families
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5.3 Social work approach

The legal basis for providing accommodation and financial support to people with NRPF stems from children's and social care legislation, so standard social work assessments will need to be carried out in line with the applicable statutory guidance in order to establish an adult's or child's needs, and therefore eligibility for support.

As well as following the statutory guidance, practitioners will need to ensure that considerations are made within social care assessments that do not usually apply to other groups, for example:

- Establishing how a parent's financial circumstances and lack of access to employment/ benefits impacts on the welfare of their child in a GIRFEC assessment (family cases)
- Whether the destitution exception applies in community care assessments (adult cases)
- Establishing how a carer's financial circumstances (or that of the person being cared for) and lack of access to other forms of mainstream benefits might apply in a carer's assessment

Additionally, practitioners will need to be alert to the different backgrounds and experiences of migrant children and adults and should draw on various elements of their practice experience to inform their approach to this group.

For example, in assessing, designing and delivering services to migrant children and adults, it is appropriate to consider a model of practice which adopts:

- An **anti-discriminatory approach** to social work practice, takes as a starting point the idea that our views of others are all partial and affected by our social position and background. An anti-discriminatory approach then asks us to critically examine our own views, as well as to consider how discrimination may colour the decisions and actions of others, in formulating an approach to work which seeks to combat and reduce discrimination as an element in decisionmaking. An anti-discriminatory approach to social work practice, in the context of working with migrant children and families, might result in social workers identifying and challenging policy and practice which appears to discriminate on the basis of race, cultural difference or migration status.
- A **human rights based approach** to social work practice, is associated with a child-centred, or person-centred, model of service provision, and seeks to provide services in a manner tailored to meet the needs of the individual, as identified and articulated by that individual. A human rights based approach also proceeds from the

proposition that individuals have rights which the state has a positive obligation to meet, rather than looking at organisational policy or available resource as the starting point for identifying appropriate services. This approach is linked to a model of work which highlights the role of social workers in educating individuals about their rights, and empowering them to attain those rights.

- A **trauma informed approach** to practice requires social workers to bear in mind that individuals may have suffered traumatic experiences, and to provide services in a way that is sensitive to this fact, regardless of whether the trauma has been identified in the course of their work together. Therefore, all social workers should initially approach all service users as if they have a trauma history. A trauma informed approach has been described as taking a set of universal precautions, designed to be both preventive and rehabilitative, which take into account the relationship among environment, triggers and perceived dangers which could make it more difficult for individuals to engage with services.

In households where an adult and child may be in need of assistance under different statutory provisions, the respective social services departments would need to work together and may need to undertake an integrated joint assessment.

For more information, see:

- 7 Social services' support – exclusion
- 8.3 GIRFEC assessment
- 9.6 Destitution exception

Good practice example

A local authority develops internal guidance on supporting NRPF cases. The protocol is communicated to all social workers and additional training is made available. The guidance aims to help staff understand what NRPF means in practice, and how to identify and support people with NRPF who are at risk of homelessness or are otherwise in need.

When working with people with NRPF, staff are expected to adhere to an ethos of social inclusion, be mindful of confidentiality obligations, and be aware that a person may have experienced trauma.

Interviews and assessments are carried out in a culturally sensitive way, using female staff and female interpreters where requested. Staff understand the additional challenges that having NRPF can create for vulnerable groups and take these considerations into account as part of their social work assessment.

Staff take additional steps to improve their knowledge and understanding of how to support someone with NRPF by seeking additional advice, for example from the local authority's legal team or NRPF advice service, where they are unclear about what response will be appropriate.

5.4 Use of interpreters

Working with migrant children, families and adults often requires the use of interpreters in order to ensure full participation and understanding, especially during key appointments in which evidence is gathered for assessments, or where individuals are being provided with advice or the results of an assessment.

Interpretation should be provided to people that require this free of charge, and upon request, when engaging with statutory services. It is particularly important that a careful assessment be made of the need for an interpreter, which goes beyond a determination that an individual's English proficiency might be 'good enough' for purposes of conducting a meeting.

It can be challenging, in Scotland, to source an interpreter who speaks an appropriate language and dialect, due to the relatively small pool of available interpreters. This can be frustrating for social workers, and for people requiring assistance, as it can lead to delays or the need to reschedule meetings when interpretation is necessary, but not available. Whilst the in-person attendance of an interpreter is best practice for face-to-face meetings, it is possible to use a telephone interpretation service via a speakerphone, in the alternative.

Using an interpreter effectively at work is a skill that requires practice, and conscious effort.

Best practice tips for using an interpreter:

- **Select an appropriate interpreter.** Ensure that you specify the appropriate language and dialect, aiming always to provide an interpreter in the person's first language. Consider whether you require to specify the gender of the interpreter (for example, where there has been gender-based violence) and also whether the person has a preferred interpreter or interpreters they would rather not work with (evaluating whether or not this is for good reason). **It is not appropriate to allow a friend or family member of an individual being interviewed to interpret on their behalf.**
- **Introduce yourself to the interpreter.** If possible, arrange some time before the meeting to introduce yourself and discuss the subject matter of the meeting. Check the interpreter's level of English proficiency and professional training and request that the interpreter interpret everything into the first person (to avoid 'he said, she said').
- **At the start of the interview, check the interpreter and person understand each other, and are happy to proceed.** There are many different dialects of some languages, and it may be the case that the person cannot understand the interpreter well enough to proceed. It may also be the case that the interpreter and the person know each other – and this has not been identified previously – which might be a legitimate reason not to proceed with the meeting.
- During the meeting, **speak directly to the individual**, not to the interpreter.
- **Speak more slowly** rather than more loudly.

- **Speak at an even pace in relatively short segments.** Pause so the interpreter can interpret.
- Assume, and insist, that **everything** you say, everything the individual says, **is interpreted**. If you are aware this is not happening, pause the meeting to discuss this directly with the individual and the interpreter.
- Be aware that many concepts you express **have no linguistic or conceptual equivalent in other languages**. The interpreter may have to paint word pictures of many terms you use. This may take longer than your original speech. Use simple direct English to help the interpreter in this task.
- Remember that the person may have experienced torture or trauma. This may also be true for the interpreter. If you need to ask questions that may be extremely **personal or sensitive**, explain that doing so is part of your evaluation and reiterate that the information will remain confidential.
- Ask the person to **repeat back** important information that you want to make sure is understood.
- **Check the quality of interpretation.** If possible, seek to speak to the person after the meeting, privately, to ask whether the interpretation was of a good standard and if they were otherwise satisfied with the service.

5.5 Data sharing when administering NRPF support

Personal information can only be collected, stored and shared with other organisations in compliance with the Data Protection Act 2018 and the EU General Data Protection Regulation (GDPR), including when a local authority is seeking to obtain or share information about migrant individuals and families. Local authorities must therefore ensure that they adhere to this legislation when a person's information is shared with the Home Office or any other organisation, and it is advisable to have a clear and reasoned policy that sets out when any exemptions to obtaining consent may be relied on.⁴⁷

Local authorities need to ensure that statutory duties are correctly enacted in order to safeguard the welfare of vulnerable people and children with NRPF and must ensure that resources are being correctly used to alleviate presenting need.

In many cases, the fulfilment of statutory duties will not require data sharing with the Home Office at all, for example, in order to meet urgent needs whilst assessments are being undertaken, protecting vulnerable children, conducting a needs assessment and establishing a support or care plan.

⁴⁷ <http://www.legislation.gov.uk/ukpga/2018/12/contents>;
https://ec.europa.eu/commission/priorities/justice-and-fundamental-rights/data-protection/2018-reform-eu-data-protection-rules_en

In some circumstances, however, the local authority may need to obtain data held by the Home Office or other central government departments, in order to fulfil its statutory duties when a person with NRPF requests support, for example:

- To check a person's immigration status to establish what support options the person has, and whether they have recourse to public funds or not.
- To establish whether the Schedule 3 exclusion to social services support applies and whether the provision of support is subject to a human rights assessment.
- To find out the progress of a pending application of a person being provided with social services' support.

It may be counter-intuitive for a local authority not to share data with the Home Office, for example, where achieving a more expedient resolution to a person's immigration status would be in the best interests of a child as well as being in the public interest by saving tax payers' money.

Decisions about whether to share data or not are likely to face scrutiny, and such decisions have been the subject of two Local Government Ombudsman (LGO) investigations in England:

- A family complained that Hertfordshire County Council had failed to provide appropriate support to them under section 17 of the Children Act 1989 and had not provided sufficient information to the Home Office about the local authority's involvement in the family's care. The LGO found the Council to be at fault for failing to advise the Home Office of the subsistence allowance being paid to the family or that the family remained in hotel accommodation it was funding. The family also wanted the Home Office know that their child had special educational needs but the local authority failed to pass on this information. The LGO found that: *'The family needs to know the Home Office has all the relevant information about them and their circumstances. The council's failure to provide this has caused them distress.'*⁴⁸
- Thurrock Council was found to be at fault for sharing information about a family's immigration status, without the parents' consent, with the children's schools.⁴⁹

For the above reasons, it is advisable that local authorities have clear policies on data sharing, which are regularly reviewed to take account of legislative developments, to ensure consistent practice across teams. Any policy would need to be established in conjunction with the local authority's legal and information governance teams, and the policy would need to recommend that social workers and other officers consult with their legal team if there are any doubts about whether data can be shared in a particular instance.

Local authorities would need to ensure that people requesting a service are provided with information about how their data will be held and when it may be shared, including situations where explicit consent may not be required. An interpreter must be used to explain this

⁴⁸ Local Government Ombudsman investigation: Hertfordshire County Council (16 010 518) (17 March 2017), paras. 26 to 28 & 47 <https://www.lgo.org.uk/decisions/children-s-care-services/child-protection/16-010-518%20->

⁴⁹ Local Government Ombudsman investigation: Thurrock Council (16 012 994) (15 March 2017) <https://www.lgo.org.uk/decisions/children-s-care-services/other/16-012-994>

where necessary. Local authorities should also consider whether to provide this information within consent forms, information leaflets and/or on the public website.

If a local authority believes processing of data is necessary without explicit consent being provided, then careful consideration must be given as to whether such activity is justified in light of governing legislation and the administration of services being provided.

Social workers and other officers would need to refer to their local authority's internal guidance and the Information Commissioner's Office website for more information on data protection requirements.⁵⁰

For more information, see:

- 6.4 Establishing immigration status
- 7 Social services' support – exclusion

⁵⁰ <https://ico.org.uk/>

6 Social services' support – referrals

Social workers are required to assess the needs of migrant children and adults in the same way that they would for any other child or adult requiring assistance. However, the local authority will additionally need to take steps to establish a person's immigration status in order to decide what form of support can be provided, and to help inform any other actions that may need to be taken.

This chapter sets out the key information that the local authority will need to acquire as early as possible on receipt of a referral for support.

Later chapters set out the circumstances in which a person might be excluded from support and specific considerations to take account of when working with children, adults with disabilities and other vulnerable groups.

Key points

- To ensure that practice is not discriminatory, local authorities will need to put in place processes to ensure that a consistent approach is taken when assessing eligibility and providing social services' support to a family or person with no recourse to public funds (NRPF).
- When a person or family with NRPF is at risk of homelessness, it may be necessary to provide interim accommodation and financial support whilst a community care or GIRFEC assessment is being carried out.
- Social workers will need to be familiar with UK immigration documentation in order to identify a person's immigration status and know how to verify this with the person's legal representative or the Home Office, in line with data protection requirements.

6.1 Initial information

Local authorities will need to obtain initial information about any person who requests support from social services in order to understand their immigration status and establish their eligibility for assistance. To ensure practice is not discriminatory, these questions would need to be asked of everybody requesting a service, and it is a good idea to include them on referral forms or telephone screening scripts. The table below sets out what information is required and why the local authority will need to obtain this.

A local authority may still be required to undertake social care assessments or intervene to provide temporary support to prevent homelessness and destitution, even when some of this information is not immediately available.

Information required	Reason
Language(s) spoken	To find out whether an interpreter is required
Current address and recent address history	<p>To determine which local authority will be responsible for assessing and meeting need.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 8 Social services' support – children within families • 9 Social services' support – adults
<p>Nationality, immigration status (if known) and what identity or immigration documents they have</p> <p>Nationality and immigration status (if known) of any dependants in the household</p>	<p>The person or parent's nationality and immigration status will determine whether they are:</p> <ul style="list-style-type: none"> • Able to work, claim benefits, access homelessness assistance or Home Office asylum support. • In an excluded group which means that a person or family may only receive support from social services if this is necessary to prevent a breach of their human rights or EU treaty rights, and therefore whether a human rights assessment will need to be completed in addition to social work assessments. • Only able to receive support where their needs have arisen for reasons other than solely destitution (adults in need of community care). • Prevented from being able to work or claim benefits, which may be relevant factors in the GIRFEC assessment when determining how a parent's immigration status impacts on their ability to accommodate and support their child (family cases). <p>For more information, see:</p> <ul style="list-style-type: none"> • 2 Immigration status and eligibility for public funds • 7 Social services' support – exclusion • 8 Social services' support – children within families • 9.5 Destitution exception

<p>Urgency of the potential homelessness/ destitution situation that the person or family are facing and whether they have any documentary evidence to confirm this</p>	<p>To establish whether emergency support needs to be provided whilst assessments are being carried out.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 6.2 Meeting urgent need – families • 6.3 Meeting urgent need – adults
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6.2 Meeting urgent need – families

Local authorities will need to explore the family’s financial and housing circumstances to establish whether the family will be eligible for support under 22 of the Children (Scotland) Act 1995.

Under section 22, the local authority has the power to provide emergency housing and/or financial support to a family when a child’s welfare is at risk whilst assessments or enquiries are being carried out. The statutory guidance followed by local authorities in England states:

‘Whatever the timescale for assessment, where particular needs are identified at any stage of the assessment, social workers should not wait until the assessment reaches a conclusion before commissioning services to support the child and their family. In some cases the needs of the child will mean that a quick assessment will be required.’⁵¹

Additionally, refusing to provide support to a family who would otherwise be homeless and destitute would be a breach of Article 3 of the European Convention on Human Rights (ECHR) (the right to be free from torture, inhuman and degrading treatment) or Article 8 (the right of respect for private and family life). To leave a family without accommodation or any financial support, when there is no alternative support available whilst assessments are being undertaken is likely to be unlawful.⁵²

For more information, see:

- 8 Social services’ support – children within families

6.3 Meeting urgent need – adults

Section 12A(5) of the Social Work (Scotland) Act 1968 allows for the local authority to provide community care services where such services are required as a matter of urgency. Although this is a discretionary power, where a person with NRPF would otherwise be homeless and destitute were they not provided with interim support by the local authority, then this could again give rise to a breach of Articles 3 or 8 of the European Convention on Human Rights (ECHR). The local authority may therefore need to consider providing

⁵¹ Department for Education, *Working together to safeguard children* (July 2018), paragraph 76. <https://www.gov.uk/government/publications/working-together-to-safeguard-children--2>

⁵² *Secretary of State for the Home Department v Limbuela & Ors* [2004] EWCA Civ 540. <http://www.bailii.org/ew/cases/EWCA/Civ/2004/540.html>

accommodation whilst its assessments are carried out, if there appears to be no other housing options available to the person.⁵³

For more information, see:

- 9 Social services' support – adults

6.4 Establishing immigration status

The local authority will need to establish the person or parent's immigration status at an early stage in the referral process to find out what support options they may have and also whether the Schedule 3 exclusion to social services' support applies.

It may be possible to obtain information from the person or parent to confirm their immigration status, for example, if they have a Biometric Residence Permit (BRP) or another Home Office document.

However, European Economic Area (EEA) nationals who obtain indefinite leave to remain or limited leave to remain under the new EU Settlement Scheme will not be issued with a physical document to confirm their status. Instead this will be recorded by the Home Office electronically. The EEA national can use an identity document and code to access this information online.

There will be instances when a person who has been issued with a document may not be able to provide their original documentation, for example, where they have submitted their passport and/or BRP to the Home Office with a pending application, or where the Home Office has retained documentation following a refusal of an application, or if they do not have evidence of their status. In such cases, the person's legal representative may be able to provide confirmation or the local authority may seek to confirm the person's status with the Home Office.

As there are limitations on what information can be shared with the Home Office, the local authority must consider carefully how this is done to ensure the rights of people requesting support are upheld in accordance with the Data Protection Act 2018 and General Data Protection Regulation (GDPR).

Methods of immigration status checking through the Home Office include:

- Home Office Status, Verification, Enquires and Checking services (chargeable services need to be arranged directly with the Home Office)
 - Free email status checking service:
ICESSEVECWorkflow@homeoffice.gsi.gov.uk – the local authority will be required to explain the statutory basis for requesting information
 - Telephone checking service (chargeable)
 - On-Site Immigration Official (chargeable)
- The NRPF Connect database – for local authorities to receive immigration status information from the Home Office, including updates on pending claims. Local

⁵³ *SSHD v Limbuela & Ors* [2004] EWCA Civ 540.

authorities using the database will pay an annual fee and sign an access agreement that sets out the lawful basis for data sharing, with the system being designed to enable the local authority to share the minimum information necessary for the statutory purpose of administering NRPF support. The database is project managed by the NRPF Network and hosted by Islington Council, with its operation governed by a working group consisting of local authorities and the Home Office.⁵⁴

Local authorities should also be aware that using ad-hoc and insecure methods of data exchange with individuals at the Home Office may not be compliant with the Data Protection Act 2018 and related legislation.

For more information, see:

- 5.5 Data sharing
- 5.6 Data sharing when administering NRPF support

⁵⁴ <http://www.nrpfnetwork.org.uk/nrpfconnect/Pages/default.aspx>

7 Social services' support – exclusion

UK immigration laws exclude certain migrants and their families from being provided with accommodation and financial assistance by social services, unless refusing to provide support would result in a breach of human rights.

This chapter explains which families, adults or young people leaving care may only be able to receive accommodation and financial support from social services where this is necessary to prevent a breach of their human rights.

Later chapters set out specific steps that must be taken when assessing eligibility for providing social services' support for children, adults with disabilities and other vulnerable groups.

Key points

- Assistance provided by social services is not a public fund for immigration purposes and cannot be automatically refused to a person solely on that basis.
- However, the provision of accommodation and financial support is subject to the 'Schedule 3' exclusion, which means that such assistance can only be provided to certain people when this is necessary to prevent a breach of human rights.
- The Schedule 3 exclusion applies to adults, young people leaving care (age 18+), and families where the person or parent is a European Economic Area (EEA) national or non-EEA national who is without leave in the UK.
- When the exclusion applies to a person or family, the local authority would need to undertake a human rights assessment to consider whether there are any legal or practical barriers preventing the person or family from returning to their country of origin to avoid a situation of destitution in the UK.
- For adults in need, the exclusion also applies to the provision of community care services.

7.1 Schedule 3 exclusion

Assistance provided by social services is not a public fund for immigration purposes and should not be refused on the basis that the person has no recourse to public funds (NRPF).

However, Section 54 and Schedule 3 of the Nationality Immigration Asylum Act 2002 contains an exclusion that may limit whether accommodation and financial support can be provided by social services to certain people depending on their nationality and immigration status. Support or assistance may only be provided to a person who is in an excluded group when this is necessary to prevent a breach of their human rights or EU treaty rights.

The purpose of Schedule 3 is to restrict access to support when a person is in an excluded group and they are either without leave to remain in the UK, or can no longer support themselves and their family, and instead can avoid a situation of destitution in the UK by returning to their country of origin, where they are not subject to restrictions on employment and services.

When a person is in an excluded group, the local authority has a legal obligation to consider return to country of origin as an alternative to spending scarce resources on supporting people who have not been able to successfully establish a right to remain in the UK. The local authority will usually undertake a human rights assessment, considering whether return to country of origin is possible or whether there is a legal or practical barrier preventing this. This will involve having regard to decisions made by the Home Office or appeal courts, and the local authority will be required to provide support whilst any human rights claims remain outstanding.

The Schedule 3 exclusion applies to at least two-thirds of households supported by local authorities across the UK, a significant proportion of whom will go on to obtain leave to remain. This shows that many adults, young people and families receiving accommodation and financial support from social services have a legal or practical barrier preventing them from returning to their country of origin and must be supported despite being in an excluded group. When the exclusion is applied correctly, the local authority will ensure that they are considering all options available to a person to avoid remaining in the UK in a situation of destitution.⁵⁵

Assistance cannot automatically be refused when a person is in an excluded group because social services’ support can be provided when this is necessary to prevent a breach of human rights. The local authority will need to undertake a human rights assessment to establish whether or not support can be provided.

7.2 Type of assistance subject to Schedule 3

The Schedule 3 exclusion only applies to the types of social services’ assistance listed in the table below.

Support or assistance	Legislation
Accommodation and financial support provided to a family to meet a child’s needs	Section 22 of the Children (Scotland) Act 1995
Aftercare, including accommodation, provided to a young person leaving care who is age 18 or older	Sections 29-30 of the Children (Scotland) Act 1995
Care and support, including accommodation, provided to an adult in need	Sections 12 or 13A of the Social Work (Scotland) Act 1968

⁵⁵ NRPF Network data for 50 local authorities, NRPF Connect annual report 2017-18 <http://www.nrpfnetwork.org.uk/Documents/NRPF-connect-annual-report-2017-18.pdf>

Additionally, temporary accommodation provided under Part II of the Housing (Scotland) Act 1987 to a person who has requested that the local authority reviews its decision on a homeless application is subject to the exclusion.

The Schedule 3 exclusion does not prevent the local authority from undertaking a needs assessment, meeting urgent needs whilst assessments are being carried out, or providing services that are administered under legislation that is not listed in the table above.

For more information, see:

- 3.3 Homelessness assistance
- 8 Social services' support – children within families
- 9 Social services' support – adults
- 10 Young people leaving care

7.3 Excluded groups

A person will be in an excluded group when they are:

- A person who is without leave*, for example:
 - Visa overstayer,
 - Illegal entrant
 - Appeal rights exhausted (ARE) asylum seeker (who claimed asylum in-country)
- A European Economic Area (EEA) national (not a British citizen)**
- A person granted refugee status by another EEA State
- An ARE asylum seeker who has not complied with removal directions set by the Home Office to leave the UK on a specific date
- A dependant of a person who falls under these groups, for example, a spouse

***This category does not apply to a person without leave who has claimed asylum and is waiting for a final decision to be made on their asylum application to be made by the Home Office or appeal courts.**

****Local authorities will need to be aware of the changes that will apply to the residence rights of EEA nationals after the UK leaves the European Union on 29 March 2019 and consider how this may impact on implementing the exclusion.**

The Schedule 3 exclusion will only apply to children under 18 when they are within families who require accommodation and financial support. As the local authority has general duty to promote the upbringing of children by their family, local authorities are required to resolve

the situation of the family as a whole, for example, by providing accommodation and financial support or considering return to the parent's country of origin.⁵⁶

The Schedule 3 exclusion does not apply to children under 18 receiving other forms of social services' support or looked after children under 18, but will apply to a young person leaving care when they are age 18 or older and are in an excluded group.

7.4 Human rights assessment

The Schedule 3 exclusion does not prevent the provision of support (whether under a power or duty), where this is necessary to avoid a breach of the person or family's human rights or rights under EU treaties - for example, where a person would otherwise be homeless or destitute, resulting in a breach of Articles 3 or 8 of the European Convention on Human Rights (ECHR).⁵⁷

This exception means that support can only be withheld in instances where the person or family can avoid a breach of human rights, which may occur if they remain destitute in the UK, by returning to their country of origin where they may be able to access employment and receive services.

In practice this means that, along with establishing whether an adult or child is in need through social care assessments, the local authority must undertake a human rights assessment in order to identify whether there are any legal or practical barriers preventing the person or family's return to their country of origin. It will be up to each local authority to decide whether social workers or other officers will be responsible for undertaking these assessments and it will be important for staff that do so to be appropriately trained and supported.

For more information, see:

- 11 Assessments when the exclusion applies
- 14 NRPF service delivery

7.5 When the exclusion does not apply

The Schedule 3 exclusion will not apply to everyone that requests support from the local authority, so it is important that such people are correctly identified.

The exclusion does not apply to a person with one of the following types of immigration status:

- Leave to remain with no recourse to public funds (NRPF)
- Leave to remain in the UK that has been extended by section 3C of the Immigration Act 1971
- Derivative right to reside under European Union law, for example:
 - Primary carer of a British (or other EEA national) child (Zambrano carer)
 - Primary carer of a child (in education) of an EEA worker

⁵⁶ Section 22(1)(b) of the Children (Scotland) Act 1995; *M v London Borough of Islington & Anor* [2004] EWCA Civ 235. <http://www.bailii.org/ew/cases/EWCA/Civ/2004/235.html>

⁵⁷ Paragraph 3 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

- Primary carer of a self-sufficient EEA national child
- Asylum seeker (waiting for the Home Office or appeal courts to decide their asylum claim)
- Appeal rights exhausted (ARE) asylum seeker who claimed asylum at port of entry rather than in-country⁵⁸

Such people are not excluded from social services' support and would need to be provided with assistance if they are eligible following a GIRFEC or community care assessment. A human rights assessment is not required to determine whether support can be provided.

This means that local authorities will often be required to provide support to families where the parent is lawfully present, for example, has limited leave to remain with NRPF, or a derivative right to reside under European Union law as a Zambrano carer. These types of immigration status are commonly held by single parents who are caring for a British child, or child who has lived in the UK for seven years. When a parent can work but is unable to claim benefits to top up a low income, such as housing benefit and tax credits, and cannot access more affordable social housing, they will face difficulties funding childcare and sustaining employment that enables them to afford accommodation and provide for their family's living needs.⁵⁹

For more information, see:

- 2 Immigration status and eligibility for public funds
- 15 EEA nationals and family members

7.6 Duty to inform the Home Office

Paragraph 14 of Schedule 3 requires a local authority to inform the Home Office when a person requesting support is, or may be, excluded from receiving support or assistance because one of the following excluded groups applies to them:

- A person who is without leave, for example:
 - Visa overstayer,
 - Illegal entrant
 - ARE asylum seeker (who claimed asylum in-country)
- An ARE asylum seeker who has not complied with removal directions set by the Home Office, for example, to leave the UK on a specific date

This requirement must be considered in line with local authorities' duties to comply with relevant data protection legislation, including the Data Protection Act 2018 and the GDPR, particularly in circumstances in which people require social work assistance but do not consent to sharing of their data with the Home Office. It is advisable for social workers and

⁵⁸ This distinction is set out in the case: *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (QB). <http://www.bailii.org/ew/cases/EWHC/QB/2005/2950.html>

⁵⁹ NRPF Network factsheet, Zambrano carers: local authority duties and access to public funds <http://www.nrpfnetwork.org.uk/Documents/Zambrano-Factsheet.pdf>

other officers to consult their legal teams and for the local authority to set out its approach within data sharing policies.

For more information, see:

- 5.5 Data sharing
- 5.6 Data sharing when administering NRPF support
- 6.4 Establishing immigration status

8 Social services' support – children within families

Local authorities have a duty to safeguard and promote the wellbeing of children, regardless of the child's or parents' immigration status. This chapter sets out how a local authority will determine whether it has a duty to provide accommodation and financial support to a family with children under 18 who have no recourse to public funds (NRPF) and are in need of assistance, and, when that duty is engaged, how to establish what support needs to be provided.

Later chapters look at specific considerations for pregnant women without dependent children, care leavers, and Unaccompanied Asylum Seeking Children (UASCs) who are looked after by the local authority.

Key points

- Local authorities should ensure that their decisions are consistent with the rights of the child and should seek to mitigate adverse impacts of growing up with insecure immigration status on the child's mental health, wellbeing and integration.
- The requirement to undertake a GIRFEC assessment is based on an appearance of need and is not dependent on the parent's immigration status or whether the parent has a pending immigration application. The absence of a pending immigration application should not prevent an assessment being carried out or interim support being provided when this is necessary. The parent's immigration status and whether any applications have been made will be relevant factors when determining whether the Schedule 3 exclusion applies.
- Section 22 of the Children (Scotland) Act 1995 requires local authorities to assist the family as a whole; offering to accommodate the child alone or taking the child into care will rarely be an appropriate response in the absence of any safeguarding concerns in addition to the risk to the child arising from the parent's lack of housing and income.
- When the local authority identifies that accommodation and financial support is required to meet a child's needs, the authority cannot then refuse to provide these.
- When determining what support to provide to an NRPF family, the local authority should be mindful that the purpose of doing so is to safeguard and promote the child's welfare, by alleviating any risks that may arise due to the parent's exclusion from mainstream social security benefits, and taking proper account of the suitability and sustainability of any informal support being received, for example from friends, family or a third sector organisation.

8.1 Statutory framework

General duty to promote child wellbeing

A local authority's duty to provide accommodation and financial assistance to NRPF families with children who would otherwise be homeless or destitute, arises from general duties to safeguard the welfare of children in need, which are set out in the Children (Scotland) Act 1995.

This Act requires assistance to be provided to a family where there is a child in need and the local authority determines that it must use its power under the Act to provide accommodation and/or financial support to meet the child's assessed needs.

Section 22(1) of the Children (Scotland) Act 1995 sets out the general duty of local authorities to:

- '(a) safeguard and promote the welfare of children in their area who are in need; and*
 - (b) so far as is consistent with that duty, promote the upbringing of such children by their families,*
- by providing a range and level of services appropriate to the children's needs.'*

Section 25(1) goes on to define a 'child in need' who the local authority requires to accommodate to include:

'..any child who, residing or having been found within their area, appears to them to require such provision because—

- (a) no-one has parental responsibility for him;*
- (b) he is lost or abandoned; or*
- (c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.'*

Section 22 also requires local authorities in so doing, to promote the upbringing of children by their families, and gives powers to local authorities to provide financial support to both children and their families.

This means that in fulfilling its duties arising under Section 25 to children within an NRPF family, the local authority should seek to accommodate and financially support an intact family together, unless doing so would not safeguard the welfare of the children.

Children with disabilities or affected by disabilities

In addition to a child being in need due to the family's situation of destitution, there may be other needs that must also be properly addressed where a child has a disability.

A child is considered to have a disability if they have a mental or physical disability, or a chronic health problem. A child may also be affected by the disability of another family member.

Section 23 requires local authorities, in supporting a family with disability under Section 22, to design the provision of services so as to minimise the effect of disability on the lives of the

children in that family, in order to give those children the opportunity to 'lead lives which are as normal as possible'. This applies to both minimising the effect of the disability of a child, or the disability of any other person in her family, if the child is adversely affected.

Therefore, when such a situation is identified in an NRPF family and the parent's resources are not sufficient to minimise the effect of disability on a child within the family, then the local authority must consider how the child's needs can be met through the provision of accommodation and/or financial support, as well as any physical adaptations to the premises and help accessing other services.

Unborn children

The local authority may need to consider whether a pregnant woman with NRPF is in need of assistance and therefore can be provided with accommodation and support under section 12 of the Social Work (Scotland) Act 1968, until her child is born, at which point duties under the Children (Scotland) Act 1995 may be engaged.

For more information, see:

- 9.13 Pregnant women with NRPF

8.2 Duty to undertake an assessment

Taken together, the legislative framework of the Children (Scotland) Act 1995, and the planning arrangements that the Children and Young People (Scotland) Act 2014 requires local authorities to have in place, means that local authorities may have a duty arising under their child welfare obligations, to provide accommodation and support to NRPF families in their area that are at risk of destitution and homelessness.

To assess whether that duty applies, with respect to a particular child, a local authority will require to undertake a child in need assessment (or child wellbeing assessment), where there is a concern that a child is aged under 18 and:

- needs local authority services to achieve or maintain a reasonable standard of health or development, or
- needs local authority services to prevent harm to their health or development, or
- is disabled, or
- is affected by the disability of another family member, or
- is 'at risk' of becoming a 'looked after' child either for the first time or perhaps a second or third time and so on because they are not in a settled situation.

If a child has a disability, or is affected by disability, the local authority must provide an assessment of the child if their family asks for one. The local authority must also provide an assessment of the child's carer and their ability to provide care for the child.

In instances where responsibility for undertaking an assessment or providing services is disputed, a child's needs should be met whilst responsibility is determined. If a child is 'ordinarily resident' in another local authority, costs of providing services may be recovered under Section 86 of the Social Work (Scotland) Act 1968.

For more information, see:

- 9.1 Community care assessments

8.3 GIRFEC assessment

Getting it Right for Every Child (GIRFEC) is the national policy framework in Scotland aimed at improving outcomes and supporting the wellbeing of children and young people. The framework embeds the principles of the UN Convention on the Rights of the Child (UNCRC) into practice and promotes a rights-based approach. In particular, the GIRFEC approach is built around respect for the views of the child, a right guaranteed by Article 12 of the UNHCR, which embodies the right to be heard and listened to.⁶⁰

GIRFEC is central to all policies in Scotland which support children, young people and their families and is delivered through services and people who work with families.

To make sure everyone – children, young people, parents and the services that support them – has a common understanding of what wellbeing means, GIRFEC describes wellbeing in terms of eight indicators often referred to by their initial letters – SHANARRI:

- SAFE - Protected from abuse, neglect or harm at home, at school and in the community.
- HEALTHY - Having the highest attainable standards of physical and mental health, access to suitable healthcare and support in learning to make healthy, safe choices
- ACHIEVING - Being supported and guided in learning and in the development of skills, confidence and self-esteem, at home, in school and in the community.
- NURTURED - Having a nurturing place to live in a family setting, with additional help if needed, or, where possible, in a suitable care setting
- ACTIVE - Having opportunities to take part in activities such as play, recreation and sport, which contribute to healthy growth and development, at home, in school and in the community.
- RESPECTED - Having the opportunity, along with carers, to be heard and involved in decisions that affect them.
- RESPONSIBLE - Having opportunities and encouragement to play active and responsible roles at home, in school and in the community, and where necessary, having appropriate guidance and supervision, and being involved in decisions that affect them.
- INCLUDED - Having help to overcome social, educational, physical and economic inequalities, and being accepted as part of the community in which they live and learn.

People working in partnership with children and families can draw on these eight wellbeing factors (SHANARRI) and the GIRFEC National Practice Model (NPM) to help understand an

⁶⁰ <https://www.gov.scot/Topics/People/Young-People/gettingitright>; <https://www.unicef.org/crc/>

individual's strengths, needs and risks, what could be supported and how. They are applicable to any issue facing a child or young person in Scotland and can be used by an organisation (such as the NHS or a local authority) or when services need to work together.

GIRFEC values and principles and the National Practice Model are the starting point, therefore, of any child wellbeing assessment conducted under section 22 of the Children (Scotland) Act 1995. The assessment must be undertaken within a 'reasonable' timeframe, having regard to the welfare of the child and the urgency of the matter.⁶¹

Local authorities have developed their own best practice guidance in relation to the use of the GIRFEC values and principles and the National Practice Model in conducting assessments key aspects of which are noted below:

- Using the GIRFEC wellbeing indicators to guide an assessment
- Asking the five questions (set out in the National Practice Model)
- Using the My World Triangle (set out in the National Practice Model) to organise information and, when necessary, to gather more information about the strengths and pressures in the child's world
- Analysing the information, using the Resilience Matrix (set out in the National Practice Model)
- Evaluating risks (for example, using the National Risk Framework)⁶²
- Summarising needs in relation to wellbeing (in the form of a GIRFEC Assessment or Child Plan)

There is no specific statutory guidance on assessing children in NRPF families, however, there are some challenges arising from a parent's immigration status that are worth considering in the context of completing an assessment for an NRPF family, which are set out below:

- Consequences of the parent's lack of access to employment, benefits and social housing due to their immigration status include the child being at greater risk of experiencing poverty and adverse effects on their health, wellbeing and development.
- Limitations on the family's ability to self-support. For example, a person with no current leave to remain is prohibited from opening a new current account, may have had their old bank accounts closed or frozen and will be committing a criminal offence if they undertake employment.
- Whether the family have experienced barriers due to their immigration status when accessing health services or meeting the cost of healthcare, including the cost of

⁶¹ <https://www.gov.scot/Topics/People/Young-People/gettingitright/national-practice-model>

⁶² <https://www.gov.scot/resource/0040/00408604.pdf>

specific treatment, prescribed foods, and transport to and from healthcare appointments.

- The need to establish early on the role of the social worker in the assessment, and the purpose of assessment, and to address lack of familiarity with the operation of a social welfare system, or possibly underlying fear of authority for individuals who have been harmed or persecuted by their own governments or who are living in the UK with insecure immigration status.
- The need for further investigation with respect to physical and mental health, where addressing identification of trauma and untreated physical disability/ mental health needs in the child/ family may be due to a lack of records or access to medical treatment.
- Charitable support or assistance from local communities may be being provided in the absence of any statutory assistance, so a full investigation into the sustainability of such support, and to what extent it meets a child's needs must be undertaken. The availability of such assistance does not negate the local authority's duty to ensure the safety and wellbeing of a child.
- The impact of being a migrant, having a migrant parent or having uncertain immigration status, on children's integration. This may include: the negative impact of multiple moves between short-term accommodation, language barriers in accessing education, exclusion from educational and social opportunities due to lack of financial support, adverse effects on the child or parent's mental health, and experience of discrimination and/or bullying.

There is now a large body of case law in which the English courts have considered assessments of a child's needs when they are living in an NRPF household with a view to determining eligibility for accommodation and financial support under section 17 of the Children Act 1989. The provision to safeguard and promote the welfare of a child in need is very similarly worded to the equivalent duty in section 22 of the Children (Scotland) Act 1995. Therefore, although the scope of section 22 has not been tested in the Scottish courts, local authorities in Scotland should bear in mind the relevant English case law:

The English courts have found that:

- The local authority must undertake an assessment in line with the framework set out in the statutory guidance (English equivalent to GIRFEC) to determine whether support can be provided to an NRPF family.⁶³
- Section 17 empowers the local authority to rescue a child in need from destitution where no other state provision is available.⁶⁴

⁶³ *C, T, M and U, R (on the application of) v London Borough of Southwark* [2016] EWCA Civ 707, paragraph 12 <http://www.bailii.org/ew/cases/EWCA/Civ/2016/707.html>

⁶⁴ *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin), paragraph 42

- Section 17 creates a target duty which provides a local authority with the discretion to decide how to meet a child's assessed need. Local authorities may take scarce resources and other support options available to the family into account and must decide what intervention is required on the facts and evidence of an individual case.⁶⁵
- A child without accommodation will be a child in need.⁶⁶
- Local authorities need to undertake thorough investigations and properly document their findings, ensuring that any judgments on the parent's credibility are based on fact and not feel, and adverse inferences must not be made without first putting such concerns to the parent and providing them with an opportunity to respond, for example, where there are information gaps.⁶⁷
- When a parent has leave to remain allowing them to work, their ability to undertake employment will form one aspect of the assessment. A conclusion about whether a child is in need must be made by evaluating all the available information about the family's circumstances.⁶⁸
- When considering the parent's ability to self-support it is important to be aware of the restrictions that apply to people who do not have any current immigration permission, for example, the inability to open a bank account or work legally. (In England the impact of the right to rent provisions must also be considered).⁶⁹
- Section 17 is an ongoing duty, so when a family's circumstances change the local authority must decide whether this means that the child's needs should be reassessed.⁷⁰

Local authorities must be mindful not to inadvertently encourage or condone criminal activity when determining what alternative support options are available to a family, for example, by concluding that a parent can support their family through employment when they are prevented by their immigration status from doing so legally.

The case law referenced here is set out in the NRPf Network's practice guidance: Assessing and supporting children and families with NRPf (England).⁷¹

⁶⁵ *R (C, T, M and U) v LB Southwark* (2016), paragraph 12.

⁶⁶ *R v Northavon District Council, Ex p Smith* [1994] 2 AC 402

⁶⁷ *O, R (on the application of) v London Borough of Lambeth* [2016] EWHC 937 (Admin)
<http://www.bailii.org/ew/cases/EWHC/Admin/2016/937.html>

⁶⁸ *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin)

⁶⁹ *R (on the application of N) v Greenwich London Borough Council* (2016) QBD (Admin) - extempore judgment; *R (U & U) v Milton Keynes Council* [2017] EWHC 3050 (Admin), paragraphs 27 & 38
<http://www.bailii.org/ew/cases/EWHC/Admin/2017/3050.html>

⁷⁰ *R (U & U) v Milton Keynes Council* [2017] EWHC 3050 (Admin); *AC & SH, R (On the application of) v London Borough of Lambeth Council* [2017] EWHC 1796 (Admin); *R (on the application of CO & Anor) v Lewisham London Borough Council* (16 June 2017) QBD (Admin)

⁷¹ <http://www.nrpfnetwork.org.uk/Documents/Practice-Guidance-Families.pdf>

8.4 Considerations when parents are in an excluded group

When a parent can only receive support or assistance to prevent a breach of human rights because they are in one of the groups of people that are excluded by Schedule 3 of the Nationality, Immigration and Asylum Act 2002, then the local authority must undertake a human rights assessment, in addition to the child wellbeing assessment. In order to determine whether the family can be provided with accommodation and financial support under section 22 of the Children (Scotland) Act 1995, the human rights assessment will consider whether the family can return to the parent's country of origin to avoid a human rights breach that may arise from the family being destitute in the UK.

If return to country of origin is being considered, the child wellbeing assessment should also address the child's needs within the country of origin and how they may or may not be met, as this information would be relevant to the human rights assessment.

For more information, see:

- 11 Assessments when the exclusion applies

8.5 Provision of accommodation and financial support

Local authorities have wide discretion in the type of support that can be provided to families under Section 22(3) of the Children (Scotland) Act 1995.

The Act specifies that services can be provided:

- for a particular child, and
- to any member of the child's family, if doing so safeguards and promotes the welfare of the child.

Section 22(3) also sets out that services can include giving assistance in kind or, in exceptional circumstances, in cash. This means that local authorities can meet assessed needs by providing accommodation, as well as financial support in cash.

In order to adequately safeguard the child's welfare, the local authority would need to provide assistance that is sufficient to reduce any risks to the child that may otherwise arise. For example, if a parent was previously relying on unsuitable caring arrangements for their child in order to undertake additional hours of employment, then the purpose of the local authority's intervention would be to alleviate that risk to the child by providing accommodation and/or sufficient financial support to meet the family's housing and living needs.

Cash support may be a more appropriate option to consider with NRPF families, as compared to other families who require Section 22 support, specifically because of the challenges they face in accessing other forms of cashless support and social security benefits, as well as the prohibition on many such families from access to current account banking facilities. The local authority may choose to use pre-payment cards as an efficient way to administer regular subsistence payments and to empower the individual to access their money as they need it.

As the Children (Scotland) Act 1995 does not proscribe the amount of financial support, or subsistence, that should be provided to meet the needs of a child in an NRPF household, the local authority must determine this.

It is good practice to have internal guidance that sets out basic rates and how additional needs may be met, in order to ensure consistent practice, the fair exercise of the local authority's discretion and a minimal administrative burden on staffing resources.

This process may involve identifying all 'essential' needs for the family, such as food, clothes, toiletries, travel and communication, that are not provided for through other arrangements or that will not be paid directly to the temporary accommodation provider. To inform a decision about the level of support that should be provided, the local authority may have regard to other rates of statutory support, for example, Home Office asylum support or social security benefits, the Office for National Statistics data on household expenditure, and to the Joseph Rowntree Foundation's minimum income standard calculator. The costs of free school meals and school uniform grants may need to be accounted for if they are not available to a child in an NRPF household. When considering other rates of statutory support, it is important to be aware of what this support is intended to cover and to ensure that additional identified needs are met (see points below).⁷²

When establishing internal guidance, the local authority must ensure that it clearly documents the process social workers must follow to decide how much to provide and how any basic rates have been reached. Budgetary constraints within the local authority should be balanced against the need to safeguard and promote the wellbeing of the child. Some points to consider are set out below, including conclusions made by the courts and Local Government Ombudsman in England:

- The GIRFEC assessment must determine the needs of a particular child with proper consideration of the best interests of the child.
- A rational and consistent approach to decision making may involve cross-checking with internal guidance or other statutory support schemes so long as this does not constrain the local authority's obligation to have regard to the impact of any decision on a child's welfare. This means that support should not be fixed to set rates or other forms of statutory support without any scope for flexibility to ensure the needs of an individual child are met.⁷³
- Child benefit is not designed to meet the subsistence needs of children so it would not be rational or lawful to set standard rates in line with these amounts.⁷⁴

⁷² <https://www.gov.uk/asylum-support/what-youll-get>;
<https://www.gov.uk/government/publications/benefit-and-pension-rates-2019-to-2020>;
<https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/expenditure/bulletins/familyspendingintheuk/financialyearending2018>; <https://www.jrf.org.uk/minimum-income-calculator-do-you-earn-enough-decent-standard-living>

⁷³ *C, T, M and U, R (on the application of) v London Borough of Southwark* [2016] EWCA Civ 707.
<http://www.bailii.org/ew/cases/EWCA/Civ/2016/707.html>

⁷⁴ *PO & Ors, R (On the Application Of) v Council of the London Borough of Newham* [2014] EWHC 2561 (Admin). <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2561.html>

- When it is in the child's best interests for the family to remain together, payments for the parents should be made in addition to those considered appropriate to meet the needs of the children, but are not required to exceed what is necessary to avoid a breach of the parent's human rights.
- Home Office support for appeal rights exhausted (ARE) asylum seekers provided under section 4 of the Immigration and Asylum Act 1999 is designed to cover food and toiletries only, therefore any policy aligning subsistence payments with these rates must allow for additional assistance to be provided in order to meet the child's needs. The Court of Appeal has suggested that a level of support considered adequate simply to avoid destitution, in the case of an ARE asylum seeker, is unlikely to be sufficient to safeguard and promote the welfare of a child in need and by extension the essential needs of the parent on whom the child depends for care'.⁷⁵
- Lack of complaint from a family does not mean that the local authority can be satisfied that it is making payments appropriate to meet the child's needs.⁷⁶
- Any changes to subsistence rates must be administered immediately after they are implemented and policies need to be reviewed promptly following relevant case law developments⁷⁷

Due to housing demand, cost and supply, local authorities are presented with very significant challenges and costs in sourcing suitable temporary accommodation for NRPF families. Accommodation can therefore range from private tenancies, where the local authority may have made arrangements with specific providers, to Bed and Breakfast (B&B) or hotel rooms.

Examples of temporary accommodation used to house NRPF families:

- The local authority's Homeless Allocations Team sources accommodation, which is funded through the local area team's Section 22 budget. The family would not have a homeless tenancy agreement.
- Children's Services fund a Women's Aid refuge placement for a family where the mother is fleeing domestic abuse enabling the mother to obtain specialist support provided by the refuge.
- A charity, Praxis, provides temporary accommodation with additional support, including immigration advice, to NRPF families supported by local authorities in

⁷⁵ *Mensah v Salford City Council* [2014] EWHC 3537 (Admin).
<http://www.bailii.org/ew/cases/EWHC/Admin/2014/3537.html>; *R (C, T, M and U) v LB Southwark* (2016), paragraph 43.

⁷⁶ *R (PO) v LB Newham* [2014] EWHC 2561 (Admin)

⁷⁷ Local Government and Social Care Ombudsman, London Borough of Southwark (14 009 121) (12 August 2015) <https://www.lgo.org.uk/decisions/children-s-care-services/other/14-009-121>; London Borough of Croydon (16 011 275) (23 August 2017) <https://www.lgo.org.uk/decisions/children-s-care-services/other/16-011-275>

London. The accommodation was purchased using funds from social investors and the local authority pays for a family's placement.⁷⁸

It is essential that the local authority undertakes regular reviews and checks on the wellbeing of children, and ensures that levels of support are sufficient, in order to reduce the risk of any harm being experienced by children whilst the family remains reliant on social services for all material support.

8.6 Reporting duties

Part 1 of the Children and Young People (Scotland) Act places a duty on public authorities to publicly report every three years on what they have done to 'secure better or further effect within its areas of responsibility of the United Nations Convention on the Rights of the Child (UNCRC) requirements'.

The following articles are of particular relevance when seeking to reduce the impact of poverty and destitution on children whose parents have no recourse to public funds (NRPF) or an insecure form of immigration status:

- Article 2 (non-discrimination)
- Article 3 (best interests of the child)
- Article 6 (life, survival and development)
- Article 9 (separation from parents)
- Article 12 (respect for the views of the child)
- Article 26 (social security)
- Article 27 (adequate standard of living)

Local authorities may also wish to consider duties within the Child Poverty (Scotland) Act 2017 which require local authorities and health boards to jointly prepare and report annually on steps they are taking to reduce child poverty.

⁷⁸ <https://www.commonwealhousing.org.uk/projects/no-recourse-to-public-funds-working-title>

9 Social services' support – adults

Local authorities have responsibilities to safeguard vulnerable adults who are in need of social care. This chapter sets out how a local authority will determine whether it has a duty to provide support to adults who are unable to access public funds, with a focus on when accommodation and financial support may need to be provided.

Later chapters detail considerations for providing support to other vulnerable groups; identifying pathways out of destitution; reviewing and ending support.

Key points

- A person should not be refused an assessment or assistance solely because they have no recourse to public funds (NRPF), because this in itself does not exclude them from social services' assistance.
- The requirement to undertake a community care assessment, or carer's assessment, is based on an appearance of need and is not dependent on the person's immigration status, although this will be a relevant factor when establishing whether the local authority has a duty to meet community care needs and determining whether the Schedule 3 exclusion applies.
- Although the cost of funding residential care or a care package can be considerable, budgetary constraints alone would not be an appropriate ground for refusing to meet the assessed care needs of a person with NRPF who is eligible for social care assistance.
- Where financial support is provided, this would need to be sufficient to mitigate any identified safeguarding risks, for example, the health of a pregnant woman or to a survivor of domestic abuse who may be at risk of returning to a violent partner.
- Where a local authority does not have a duty to provide support to an adult with NRPF, the person should be provided with information which may include: Home Office asylum support, local charities, local immigration advisers and the Home Office Voluntary Returns Service. In order to reduce migrant destitution in communities, the local authority may wish to consider making this information widely available through its website and other communications.

9.1 Section 12 of the Social Work (Scotland) Act 1968

A local authority has a duty and a power to support vulnerable adults (age 18 and over) under Section 12(1) of the Social Work (Scotland) Act 1968, and is required to assess the needs of any person who contacts them who appears to be in need of community care services:

*'It shall be the duty of every local authority to **promote social welfare** by making available advice, guidance and assistance on such a scale as may be appropriate for their area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate'*

A person will be in need of community care services if they:

- Suffer from an illness or mental disorder (a mental illness, personality disorder or learning disability), or are substantially handicapped by a deformity or disability - section 94(1)
- Are in need of care and attention arising out of infirmity, youth or age – section 94(1)
- Are in need of care and attention arising out of drug or alcohol dependence, release from prison or other form of detention – section 12(6)

Section 12A(1) of the Social Work (Scotland) Act 1968 goes on to set out the following duties:

'..where it appears to a local authority that any person for whom they are under a duty or have a power to provide, or to secure the provision of, community care services may be in need of any such services, the authority:

- (a) *Shall make an assessment of the needs of that person for those services; and*
- (b) *Shall then decide...whether the needs of the person being assessed call for the provision of any such services.'*

The Social Work (Scotland) Act 1968 distinguishes between the duty to **provide** community care services to persons within their area who have been assessed as in need and the duty to **fund** them. The duty to **provide** the service arises from the physical presence of the person in the local authority area, however local authorities are only obliged to **fund** community care services for individuals who are 'ordinarily resident' in their area. A local authority that has provided services for someone who is not 'ordinarily resident' can therefore seek to cover the expenditure from another local authority.⁷⁹

9.2 Types of services that can be provided

A list of services that the local authority may be required to provide to meet the assessed needs of an individual who is chronically sick, disabled or has a mental disorder is set out in Section 2(1) of the Chronically Sick and Disabled Persons Act 1970. The Act specifies that assistance may include facilities, cash and residential accommodation.

The Community Care and Health (Scotland) Act 2002 clarifies what aspects of social care constitute 'personal care' and defines in greater detail the types of services that local authorities may charge for or not. Although local authorities are not legally obligated to provide any of the services listed, the Act clarifies that they may not charge if they choose to do so. When a person requires community care services, but does not need accommodation, for example, because they are living with family members, then the local

⁷⁹ Section 86 of the Social Work (Scotland) Act 1968

authority would need to follow its standard practice with regards to assessing whether the person would need to make a financial contribution. Additionally, if the services are being provided under section 12 of the Social Work (Scotland) Act 1968, and the person requiring care is in an excluded group, under Schedule 3 of the Nationality, Immigration and Asylum Act 2002, then assistance may only be provided to prevent a breach of human rights, so a human rights assessment may also be required.

An example of when care may need to be provided is where an elderly parent of an EEA national who is working in the UK lives in the family household and requires assistance with personal care that the EEA national is unable to provide. As the parent would have a right to reside under EU law as the family member of a worker, social services would be required to provide the care that they require, but would be entitled to undertake an assessment of the parent's income and capital in the same way that any other person would be means assessed, in order to establish whether they must contribute towards their care.

For more information, see:

- 7 Social services' support – exclusion

9.3 Providing accommodation and financial support

The Chronically Sick and Disabled Persons Act 1970 does not specify that ordinary accommodation can be provided to meet needs. However, the case of *MacGregor v South Lanarkshire Council* [2001] established that where a need is assessed, and there will be a major or significant risk to a person's independence, health or wellbeing if a service is not provided, then the local authority will have a duty to meet this need if it cannot be met any other way. This principle could therefore be interpreted that where a person requires accommodation in order to receive care or other services to meet their needs, that must also be provided.⁸⁰

When a person with NRPF does not have access to any financial support, the local authority may need to consider providing subsistence payments as part of the care plan in order to meet the person's support needs. The type of accommodation that is provided to meet needs will impact on how much subsistence is also provided.

A publicly funded care home resident is allowed to retain a Personal Expenses Allowance from their income in order to cover the costs of personal items. The weekly rate for 2018/19 is £27.00. Local authorities may wish to refer to this when considering how much subsistence to provide to a person with NRPF who is living in a care home.⁸¹

For people who are living in other types of accommodation, the local authority would need to be mindful of the broad scope it has to meet needs and should take a flexible approach to determine how much a person requires based on their individual needs. For example, where a weekly visit to a day centre that cannot easily be reached by public transport is linked to meeting a person's identified need, then it may be appropriate to ensure that they are

⁸⁰ *MacGregor v South Lanarkshire Council* [2001] S.C. 502; 2001 S.L.T. 233

⁸¹ <https://www2.gov.scot/Topics/Health/Support-Social-Care/Financial-Help/Charging-Residential-Care>

provided with additional funds to do this, on top of a subsistence payment to meet their basic living needs.

The provision of subsistence support would also need to be sufficient to mitigate any identified safeguarding risks, for example, where a survivor of domestic abuse may be at risk of returning to a violent partner.

Social workers and other practitioners working with adults may have regard to the principles established regarding subsistence payments to meet a child's needs when families with NRPF are supported under section 22 of the Children (Scotland) Act 1995.

For more information, see:

- 8.5 Provision of accommodation and financial support (children within families)

9.4 Community care assessments

Local authorities have a duty to assess the community care needs of individuals ordinarily resident within their area and to provide services to those people who require them. This duty may be triggered by obligations under the Social Work (Scotland) Act 1968, the Mental Health (Care and Treatment) (Scotland) Act 2003, or the Carers (Scotland) Act 2016.

There is no statutory definition of 'ordinary residence' under the Social Work (Scotland) Act 1968. However, the Scottish Government has issued a Circular to local authorities which, as a starting point, proposes to follow English legislation as interpreted by the courts in the case of *Shah v London Borough of Barnet* [1983]:

*'unless ... it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.'*⁸²

9.5 Conducting a community care assessment

A community care assessment will normally be conducted in two stages, the first of which is the requirement to conduct **an assessment of need**.

Local authorities will adopt different approaches to assessments, however the assessment must be tailored to the circumstances of the individual.

The Scottish Government has published guidance on conducting adult social care/ community care assessments in relation to the Social Care (Self-directed Support) (Scotland) Act 2013, which requires local authorities to ensure individuals:

- have as much involvement as they wish to, and the opportunity to collaborate, in the assessment;

⁸² Circular CCD 3/2015: Guidance on the recovery of expenditure on accommodation and services under Section 86 of the Social Work (Scotland) Act 1968 <https://www.gov.scot/Topics/Health/Support-Social-Care/Financial-Help/OrdinaryResidence>; *Shah v London Borough of Barnet* [1983] 1 All E.R. 226

- are provided with any assistance reasonably required to express a view and make an informed choice about forms of support, including self-directed support; and
- receive support in a form that facilitates respect for personal dignity and respect for the right to participate in the community.⁸³

The second stage is that the local authority will consider **eligibility for services** to meet the assessed need. When doing so, local authorities must take into account the 2007 National Eligibility Framework, jointly developed by the Scottish Government and COSLA, but can also have regard to their own eligibility criteria.⁸⁴

The Framework states that, in determining eligibility, the local authority must have regard to the following points:

- Once a local authority determines a person's needs fall within its eligibility criteria, it has a duty to meet those needs, always recognising that there are many and varied ways to 'meet a need'. The act encourages creativity and collaboration to widen the scope of support received.
- Eligibility criteria should not shape the identification of 'presenting needs' but it may influence which needs can be met through local authority or partnership funding.
- It is important that assessments are focused on personal outcomes and that a strengths-based approach to assessment is adopted.
- A need should not automatically be seen as a deficit that requires funding or a service.
- In determining eligibility, social workers and other practitioners need to take full account of how a person's needs and risks may change over time, the impact of failure to access support and whether this would lead to more support being required in the future.
- If, after assessment, it is determined that a person does not meet the eligibility for funded support or services they should – minimally – be provided with information and advice about alternative forms of possible assistance.
- There may be a requirement for limited or ongoing involvement with some people even if their needs fall below eligibility criteria thresholds.

The authority can take into account its overall resources when determining eligibility criteria. However, once it has decided that the person's needs are such that they require provision of services (i.e. they are 'eligible needs'), the authority cannot then refuse to meet those needs because of budgetary constraints.

⁸³ <https://www.gov.scot/Publications/2014/04/5438/7>

⁸⁴ <https://www.gov.scot/Publications/2014/08/5212/6>

There is no specific statutory guidance on assessing a person with no recourse to public funds (NRPF), however, there are some challenges that are worth considering in the context of completing an assessment:

- Whether the person's immigration status impacted their ability to access health services or meet the cost of healthcare (including the cost of specific treatment, prescribed foods, and transport to and from healthcare appointments) which may have exacerbated physical or mental health conditions.
- Whether the purpose of the assessment and the identity of the lead assessor been made clear to them.
- Whether there is a need to address a lack of familiarity with the operation of a social welfare system, or possibly an underlying fear of authority, for individuals who have been harmed or persecuted by their own governments.
- Whether there will be a need for further investigation with respect to physical and mental health, and how identifying whether the person has experienced trauma and has untreated physical disability/ mental health needs, will be accomplished where records or access to medical treatment has been lacking.
- Whether an interpreter needed and is there a way of continually assessing the quality of interpretation being offered.
- Whether interim support may need to be provided whilst an assessment is being carried out.

For more information, see:

- 5.4 Use of interpreters
- 6.3 Meeting urgent need – adults
- 11 Assessments when the exclusion applies

9.6 Destitution exception

Local authorities are not required to provide social care services to a person whose needs have arisen due to destitution alone due to an exception that is set out in the following legislation:

- Section 12(2A) of the Social Work (Scotland) Act 1968 – in relation to services provided under section 12 and 13A
- Article 12 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (Consequential Provisions) Order 2005/2078 - in relation to services provided under sections 25-27 of the Mental Health (Care and Treatment) (Scotland) Act 2003

This 'destitution exception' prevents a local authority from providing assistance (whether by way of residential accommodation or otherwise) to some people with no recourse to public funds (NRPF):

‘A person to whom section 115 of the Immigration and Asylum Act 1999 (exclusion from benefits) applies is not to receive assistance under subsection (1) of this section (whether by way of residential accommodation or otherwise) if 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.’

This exception only applies to people who are ‘subject to immigration control’:

A non-EEA national who...	Examples
Requires leave to enter or remain in the UK but does not have it (is without leave)	<ul style="list-style-type: none"> • Visa overstayer • Illegal entrant
Has leave to enter or remain in the UK which is subject to a condition that they have no recourse to public funds (NRPF)	<ul style="list-style-type: none"> • Spouse of a British citizen or settled person • Tier 4 student and their dependants • Leave to remain – family/private life
Has leave to enter or remain in the UK that is subject to a maintenance undertaking	<ul style="list-style-type: none"> • Adult dependent relative of a British citizen or person with settled status (for the first five years of residence in the UK)

This exception does not apply to European Economic Area (EEA) nationals or a person who has the right to reside as the family member of an EEA national.

The definition of destitution that is used when determining claims for asylum support is to be followed:

‘A person is destitute if—

(a) he does not have adequate accommodation or any means of obtaining it (whether or not his other essential living needs are met); or

(b) he has adequate accommodation or the means of obtaining it, but cannot meet his other essential living needs.’⁸⁵

The intention behind this provision is to clarify that local authorities are not required to provide support to an adult *solely for the purpose of alleviating destitution when that person has no additional needs*. For example, where a person cannot maintain a habitable home environment for no other reason than because they are homeless, that need has solely arisen due to their lack of housing, rather than because of an illness or mental disorder or disability. When no other support needs are identified in such a case, the local authority will not have a duty to meet their needs (including by providing accommodation) under the legislation listed above. However, in some cases it may be appropriate to consider whether to use a discretionary power to provide support.

⁸⁵ Section 95(3) of the Immigration and Asylum Act 1999

Proper consideration of the eligibility criteria will involve identifying what has given rise to a person's particular need. When a person's needs arise from a physical or mental impairment, or illness, and are *not solely caused by destitution*, then assistance can be provided when the eligibility criteria is met.

9.7 Schedule 3 exclusion

Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002 contains an exclusion that may limit whether support can be provided by social services to certain people, depending on their nationality and immigration status. Support or assistance may only be provided to a person who is in an excluded group when this is necessary to prevent a breach of their human rights or EU treaty rights.

The exclusion applies to the provision of services, including accommodation and financial support, under sections 12 or 13A of the Social Work (Scotland) Act 1968.

The main groups that this applies to are people who are without leave and EEA nationals. When a person is in an excluded group, the local authority has a legal obligation to consider return to country of origin as an alternative providing social services' support to the person in the UK. The local authority will usually undertake a human rights assessment in order to establish whether return to country of origin is possible or whether there is a legal or practical barrier preventing this. This would need to be conducted in addition to the community care assessment.

The exclusion does not apply when a person is provided with assistance under the Mental Health (Care and Treatment) (Scotland) Act 2003, and does not prevent a community care assessment being undertaken or urgent needs from being met.

For more information, see:

- 7 Social services' support – exclusion
- 11 Assessments when the exclusion applies

9.8 Section 13A of the Social Work (Scotland) Act 1968

Section 13A of the Social Work (Scotland) Act 1968 imposes the duty to make arrangements for:

'..the provision of suitable residential accommodation where nursing is provided for persons who appear to them to be in need of such accommodation by reason of infirmity, age, illness or mental disorder, dependency on drugs or alcohol or being substantially handicapped by any deformity or disability.'

Residential accommodation includes a care home or psychiatric hospital.

The destitution exception applies to this provision so must also be considered.

Additionally, for people who are in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002, residential accommodation under section 13A can only be provided where this is necessary to prevent a breach of their human rights, so the local

authority would also need to undertake a human rights assessment to determine whether support may be provided.

For more information, see:

- 9.5 Destitution exception
- 9.6 Schedule 3 exclusion

9.9 Mental Health (Care and Treatment) (Scotland) Act 2003

The Mental Health (Care and Treatment) (Scotland) Act 2003 sets out a wide range of requirements with regard to the care and treatment of adults with mental health conditions. These must be considered alongside the Code of Practice.⁸⁶

Sections 25 to 27 require the local authority to provide or secure the provision of certain services for persons who are not in hospital and who have or have had a mental disorder.

A mental disorder includes a mental illness, personality disorder or learning disability.

Care and support services under section 25:

- Need to be designed to minimise the effect of the mental disorder on such persons and give such persons the opportunity to lead lives which are as normal as possible – section 25(2)
- Include residential accommodation and personal care and personal support (but not nursing care) – section 25(3)
 - ‘Personal care’ means ‘care which relates to the day to day physical tasks and needs of the person cared for (as for example...eating and washing) and to mental processes related to those tasks and needs (as for example, but without prejudice to that generality, to remembering to eat and wash)’.
 - ‘Personal support’ means ‘counselling, or other help, provided as part of a planned programme of care’ - paragraph 20 of schedule 12 to the Public Services Reform (Scotland) Act 2010.

Services under section 26, which are designed to promote the wellbeing and social development, provide:

- Social, cultural and recreational activities
- Training for such of those persons as are over school age
- Assistance for such of those persons as are over school age (normally 16 years or older) in obtaining and in undertaking employment – section 26(2)

Assistance with travel to enable these services to be used can be provided under section 27.

⁸⁶ <https://www.gov.scot/Topics/Health/Services/Mental-Health/Law/Code-of-Practice>

The Act specifies that residential accommodation can be provided. It is likely that other types of accommodation can also be provided, where this is necessary to minimise the effect of the mental disorder on such a person, and give them the opportunity to lead a life which is as normal as possible. Commentary accompanying the Act at paragraph 4 refers to 'accommodation with appropriate levels of support'. This suggests that there may be circumstances where a person with no recourse to public funds (NRPF) can be provided with accommodation under section 25 in order to reduce the effect of their mental disorder, for example, where supported accommodation is required.

The destitution exception applies to the provision of care and support under sections 25 to 27, so must also be considered when assessing need.

However, the immigration exclusion that applies to some aspects of social services' support does not apply to any services provided under the Mental Health (Care and Treatment) (Scotland) Act 2003. Therefore, services can be provided to a person regardless of their immigration status and must not be refused to an individual on that basis.

If the person's support needs do not engage the need for supported accommodation, then the local authority would need to establish whether they can be provided with accommodation under section 12 of the Social Work (Scotland) Act 1968. However for some people, accommodation can only be provided on this basis if it is necessary to prevent a breach of their human rights, so the local authority would also need to undertake a human rights assessment if the person is in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002.

For more information, see:

- 9.5 Destitution exception

9.10 Discretionary powers

Section 20 of the Local Government in Scotland Act 2003 gives a local authority the power to do anything to promote or improve the wellbeing of its area or persons within its area. This is a wide-ranging power in that it allows the local authority to give financial assistance, including services and accommodation, where the individual circumstances of a case justify its use.

Section 21 of the Act imposes a condition on the exercise of this power, noting that a local authority must have regard to any guidance published by the Scottish government.

Section 22 of the Act places limits on the use of the power where, by virtue of a limiting provision, the local authority's powers are limited in some respect, i.e., there is no limitation of the use of the power of wellbeing unless a statute expressly prohibits, prevents or limits a particular action. This could be interpreted to mean that the wellbeing power cannot be used to circumvent limitations contained in other acts, but can be used in the absence of a statutory limitation.

Section 20 of the Act is therefore a discretionary power that local authorities may be able to use to provide accommodation and financial support to a person with no recourse to public

funds (NRPF) who would otherwise be homeless, when there are no alternative support options available to them, including those set out in this guidance.

Where a person with NRPF requires accommodation but all other support options have been fully considered and do not apply, then, in the absence of any settled case law in Scotland, local authority officers should seek advice from their legal team about how to proceed and are encouraged to get in touch with COSLA.

If support is provided on a discretionary basis under section 20, then the local authority must be clear about the basis on which support is being provided, to enable this to be reviewed when the person's circumstances change.

9.11 Protection duty

The Adult Support and Protection (Scotland) Act 2007 sets out adult safeguarding duties with the aim of protecting and supporting adults who are at risk of being harmed. It also provides measures to identify and protect individuals who fall into the category of 'adults at risk', further set out in the associated Code of Practice.⁸⁷

An 'adult at risk' of harm is defined as a person aged over 16 who is:

- unable to safeguard their own wellbeing, property, rights or other interests, and
- at risk of harm, and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

Harm may include:

- Physical harm
- Psychological harm
- Financial harm
- Sexual harm
- Neglect

The Act requires local authorities to:

- make the necessary inquiries and investigations to establish whether or not further action is required to stop or prevent harm occurring, and
- provide appropriate services, including independent advocacy, to support adults where an intervention under the Act is considered to be necessary.

Working Together to Improve Adult Protection - Risk Assessment and Protection Plan (2007) provides guidance on the completing of risk assessments and the development of adult support and protection plans.⁸⁸

⁸⁷ <https://www.gov.scot/Topics/Health/Support-Social-Care/Adult-Support-Protection;https://www.gov.scot/Publications/2014/05/6492/0>

⁸⁸ https://lx.iriss.org.uk/sites/default/files/resources/60-Adult%20Protection%20-%20Risk%20Assessment%20and%20Protection%20Plan%20Aug%202007_0.pdf

A person's immigration status does not affect the local authority's duty to undertake an enquiry or establish what action needs to be taken to prevent or stop harm. This duty may apply to a person who is a survivor of modern slavery or trafficking, or is experiencing domestic abuse.

Where a person who is subject to this duty has no recourse to public funds (NRPF), the adult support and protection plan must identify how their immigration status impacts on entitlements to services, and what accommodation options they may have. The local authority may need to consider whether accommodation can be provided under sections 12 or 13A of the Social Work (Scotland) Act 1968 or the Mental Health (Care and Treatment) (Scotland) Act 2003.

The local authority may also need to consider whether the person's ability to safeguard their personal and financial welfare is affected by any incapacity under the Adults with Incapacity (Scotland) Act 2000.

9.12 Support for carers

The Carers (Scotland) Act 2016 is designed to support carers' health and wellbeing and help make caring more sustainable.

Since 1 April 2018, relevant local authority duties arising under this Act have included:

- A duty for local authorities to provide support to carers, based on the carer's identified needs that meet the local eligibility criteria, and which cannot be met through support provided to the person being cared for, or through general local services.
- Providing a specific adult carer support plan and young carer statement to identify the carers' needs and personal outcomes. This must be carried out for any carer that requests an adult carer support plan.

The Carers' charter summarises carers' rights under the Act.⁸⁹

The Schedule 3 exclusion that applies to some aspects of social services' support does not apply to any services provided under the Carers (Scotland) Act 2016. Therefore, services can be provided to a carer regardless of their immigration status and must not be refused to an individual solely on that basis.

The adult carer support plan must include information about the carer's personal circumstances. Therefore, it will be relevant to identify and record the carer's immigration status. The plan must include reference to the extent to which the carer is able and willing to provide care, and emergency planning. This could include considering how the carer's immigration status may impact on this, for example, if the carer is without leave and is at risk of being detained and removed from the UK.

⁸⁹ <https://www.gov.scot/publications/carers-charter/>

9.13 Pregnant women with NRPF

When a woman with no recourse to public funds (NRPF) is pregnant but does not have children in her care, then duties to provide support that arise under the Children (Scotland) Act 1995 would not apply to an unborn child. Local authorities would therefore need to consider whether any duties arising in legislation applicable to adults may enable accommodation to be provided, bearing in mind that the lack of appropriate shelter and nutrition may have a detrimental impact on the unborn child's health. As duties under the Children (Scotland) Act 1995 will apply as soon as the child is born, ensuring that the mother is adequately supported through her pregnancy may reduce the level of assistance that is required by her child if it is in need following the birth.

Where a pregnant woman with NRPF does not have accommodation and/or sufficient means to afford to meet her daily living needs and is in need of assistance due to her pregnancy, the local authority may provide support under section 12 of the Social Work (Scotland) Act 1968.

The destitution exception would apply to this provision, so must also be considered, but is unlikely to prevent assistance being provided where a woman is in need due to her pregnancy rather than due to the effects of being destitute.

For some pregnant women, accommodation and financial support can only be provided under section 12 if that is necessary to prevent a breach of their human rights, so the local authority would also need to undertake a human rights assessment if the woman is in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002. Therefore, the stage at which the pregnancy is at in terms of the woman's ability to travel would be a highly relevant factor in determining whether return to country of origin is an option to avoid a situation of destitution within the UK.

For more information, see:

- 9.1 Section 12 of the Social Work (Scotland) Act 1968
- 9.5 Destitution exception
- 9.10 Discretionary powers
- 11 Assessments when the exclusion applies

9.14 Support options for offenders with NRPF

Local authorities in Scotland have a statutory function to establish joint arrangements to assess and manage risks posed by sex offenders and violent offenders. They also have a duty to provide advice guidance and assistance to offenders who are released from prison or another form of detention on licence.⁹⁰

Where an ex-offender has NRPF and requires accommodation, the following options may be considered:

⁹⁰ Management of Offenders etc. (Scotland) Act 2005; section 27 of the Social Work (Scotland) Act 1968

- Whether they are in need of assistance and require accommodation under s12 of the Social Work (Scotland) Act 1968. Where the person is in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002, a human rights assessment would also need to be undertaken.
- Whether they are eligible for Home Office asylum support either under section 95 or section 4(2) of the Immigration and Asylum Act 1999.
- If they are being released following a period of immigration detention, whether they qualify for Home Office immigration bail accommodation under schedule 10 of the Immigration Act 2016.

When none of the above options apply, the local authority would need to consider whether its public protection duties extend to funding accommodation and financial support.

Where an ex-offender with NRPF requires accommodation, but other support options, including the statutory duties set out in this chapter, have been fully considered and do not apply, then local authority officers should seek advice from their legal team about how to proceed and are encouraged to get in touch with COSLA.

For people seeking release from immigration detention, their options are limited now that the Home Office has repealed section 4(1) of the Immigration and Asylum Act 1999, which allowed for the provision of accommodation for people released from immigration detention or on immigration bail.

The Home Office will only provide accommodation for the purpose of granting immigration bail to a person in 'exceptional circumstances':

- When the Special Immigration Appeals Commission (SIAC) grants bail and imposes exceptionally strict bail conditions, including a residence condition, to control the risk posed by the individual.
- When a person has been assessed as being at a high or very high risk of causing serious harm to the public.
- When a person is at high risk of harmful reoffending against an individual, for example, offences of domestic burglary, robbery, sexual assaults and violence, and has nowhere suitable to live in accordance with their probation licence and/or multi-agency public protection arrangements (MAPPA).⁹¹

Home Office guidance states that when one of the above applies, accommodation would only be provided for a limited period (three to four months), whilst the person makes arrangements either to leave the UK or to move to alternative accommodation, unless there are exceptional circumstances to justify continuing it, for example, public protection issues.

The 'exceptional circumstances' threshold in relation to ex-offenders that is set by the Home Office is not consistent with that which applies in Scotland when public protection duties are engaged. This could result in a situation where a person does not qualify for Home Office immigration bail accommodation when the local authority has a duty to manage any risks posed to the public by their release from immigration detention.

⁹¹ Home Office, Immigration Bail <https://www.gov.uk/government/publications/offender-management>

Bail for Immigration Detainees has produced a useful guide setting out the practicalities of accessing Home Office asylum and immigration bail support for people in immigration detention.⁹²

For more information, see:

- 9.2 Section 12 of the Social Work (Scotland) Act 1968
- 11 Assessments when the exclusion applies
- 16 Asylum seekers

9.15 Housing people with NRPF on public health grounds

When a person requires housing in order to mitigate a public health risk, for example, a person with a diagnosis of active TB who requires to successfully complete a course of TB treatment, then health care professionals will be required to work in partnership with local authorities to establish accommodation and financial support pathways for individuals with NRPF, including whilst assessments are taking place.

The local authority would be required to undertake a community care assessment when a person appears to be in need of community care services, with a view to determining whether any duties are engaged under Sections 12 or 13A of the Social Work (Scotland) Act 1968 or sections 25 to 27 of the Mental Health (Care and Treatment) (Scotland) Act 2003.

If a person is in need due to their illness, or also has a disability or mental health condition, then section 12 of the Social Work (Scotland) Act 1968 may be engaged, and accommodation and financial support are provided in addition to any other community care services that are required.

Where the person is in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002, accommodation and other services can only be provided under section 12 if such support is necessary to prevent a breach of human rights. In such cases the local authority would also need to undertake a human rights assessment to determine whether return to country of origin is possible to avoid a breach of human rights, including considering whether the person's ability to travel is affected by their illness or medical condition. It is likely that a communicable disease that presents a public health risk would be a practical barrier to travel and return.

Where a person is not eligible for assistance under social care or mental health legislation, local authority officers should seek advice from their legal team about how to proceed and may also get in touch with COSLA.

It will be important for health practitioners to signpost patients with NRPF to a legal adviser as soon as it is identified that the person may require immigration advice, rather than waiting until the point of discharge.

For more information, see:

⁹² BID briefing on post detention accommodation (13 June 2018) <http://www.biduk.org/resources/76-bid-briefing-on-post-detention-accommodation>

- 9.2 Section 12 of the Social Work (Scotland) Act 1968
- 9.9 Discretionary powers
- 11 Assessments when the exclusion applies

10 Unaccompanied children & young people leaving care

Local authorities have duties to accommodate and support children in need in their area, up to age 18, regardless of their immigration status. Local authorities also owe leaving care and aftercare duties to former looked after children.

This chapter sets out what a local authority may need to consider when it is responsible for supporting an unaccompanied or separated migrant child and/or young person eligible for aftercare.

Later chapters set out considerations for other groups, including asylum seekers and survivors of human trafficking.

Key points

- Local authorities need to have processes in place to identify a child's nationality and immigration status when their involvement begins or when a child's circumstances change. As a child's immigration status can change, this must be kept under continuous review and recorded in the child's care plan.
- A child with an outstanding immigration issue needs to be referred to specialist legal advice and support urgently, including a referral to the Scottish Guardianship Service where appropriate. (All Unaccompanied Asylum Seeking Children (UASCs) and non-EEA national trafficked children in Scotland are entitled to receive independent advocacy support of a guardian.)
- For children who do not have a form of immigration status that will allow them to settle in the UK permanently, it will be essential to undertake 'triple pathway planning' that accounts for how the different outcomes of their asylum or immigration claim may impact on their ability to access healthcare, education and aftercare support from the local authority, and includes appropriate planning for the possibility of their claim being unsuccessful.
- When a young person is in an excluded group, for example, they become 'appeal rights exhausted' (ARE) following their asylum claim, the continued provision of aftercare support is subject to a human rights assessment that considers whether there are any legal or practical barriers preventing the young person from returning to their country of origin to avoid a situation of destitution in the UK. This exclusion is set out in Schedule 3 of the Nationality, Immigration and Asylum Act 2002 and means that in certain circumstances, support may be withdrawn before a young person turns 26.
- Planning to support a young person in these circumstances must involve establishing a durable pathway out of destitution. This could involve signposting to immigration advice to explore the possibility of pursuing a further claim to remain in

the UK, support into employment when the young person has permission to work, or help with exploring assistance to voluntarily return to country of origin when the young person is an ARE asylum seeker.

- If a local authority withdraws aftercare support to a young person who is ARE, at age 26 or earlier, the young person should be provided with information which may include signposting to: Home Office asylum support, local charities, immigration advisers and the Home Office Voluntary Returns Service.

10.1 Introduction

Local authorities may be required to care for an unaccompanied or separated migrant child. There are many circumstances that may give rise to this situation occurring and local authority officers must be aware of how a child's immigration status may impact on their entitlements, particularly where the child's status is uncertain or unresolved. It will also be an essential element of a child's care planning for local authorities to ensure that outstanding immigration issues are identified early and immigration advice is obtained in a timely manner.

Unaccompanied asylum seeking children (UASC) and separated migrant children under the age of 18 who have been trafficked to Scotland, are looked after and accommodated by local authorities as children in need under Section 25 of the Children (Scotland) Act 1995.

UASCs may have arrived in Scotland of their own accord or been transferred in to the care of the local authority under a formal resettlement scheme, for example, the Vulnerable Children Resettlement Scheme, or from another local authority via the National Transfer Scheme, as set out in the Scottish Protocol.⁹³

The accommodation and support of UASC children whilst they are seeking asylum is partly met through direct payments by the Home Office to local authorities. This is not, however, the case for other migrant children in care, even if they have made an immigration application in order to regularise their immigration status.

In addition, some migrant children – for example, children who are living in Scotland as a dependant of a parent or caregiver who held leave to remain – may be taken into care for their own protection and are also accommodated under Section 25 of the Act. Any migrant child taken into care will require early and urgent immigration advice, which is particularly important if they have leave to remain as a dependant on their parent's status, or if it appears that they do not have any leave to remain. It may also be necessary to establish if the child has an entitlement to apply for British citizenship, for example, if they were born in the UK and have lived here for 10 years.

Finally, children of European Economic Area (EEA) nationals ~~exercising EU free movement rights~~ may also be taken into care for their own protection. For these children, being taken into care can make it harder for them to prove that their parent (from whose activity their right to reside in the UK may derive), continues to exercise European treaty rights in

⁹³ <http://www.migrationscotland.org.uk/uploads/18-04-16%20UASC%20National%20Transfer%20Scheme%20-%20Scottish%20Protocol.pdf>

Scotland. Again, a child in this position requires early and urgent access to immigration advice on this issue and to also explore whether they may have an entitlement to British citizenship and the EU Settlement Scheme.

Section 25 of the Children (Scotland) Act 1995 requires local authorities to accommodate and support children in need in their area, up to age 18, regardless of their immigration status.

Difficulties arise, however, when children turn age 18, and have not yet been granted leave to remain. This may occur, for example, if an asylum seeking child has been refused asylum but granted limited leave to remain until age 17.5, referred to as 'UASC leave'. Such a child will have made an immigration application for further leave to remain which could be pending or might have been refused. This also occurs where a migrant child accommodated by the local authority has not yet made any application for leave to remain, and requires to do so.

In such cases, local authorities still owe leaving care and aftercare duties to formerly Looked After Children (LAC), regardless of immigration status, but these may be withdrawn earlier for a UASC who becomes appeal rights exhausted (ARE) following an unsuccessful asylum claim, and the statutory framework for meeting those duties is more complicated than for children who are British or who have settled status or have been granted leave to remain.

For more information, see:

- 2.1 Common immigration status types

10.2 Statutory Framework

As set out in earlier chapters, Section 25 of the Children (Scotland) Act 1995 establishes the duty of local authorities to accommodate 'children in need' in their local area. Local authorities owe aftercare duties to children who were formerly accommodated by them, under Sections 29 and 30 of the Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014. These are further set out in the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (as amended by the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2015 (SSI 2015/62)) and associated Guidance.⁹⁴

Local authorities have a legal duty to:

- Prepare young people for leaving care or ceasing to be looked after (including preparation of a Pathway Plan).
- Provide advice and assistance to young people who have ceased to be looked after on or after their 16th birthday.
- Provide aftercare support until the care leaver turns 19, and to assess any eligible needs for aftercare support until they turn 26 (or beyond in some cases). This may include accommodation, where this cannot be provided in any other way, for example, through the local authority housing department or social security benefits.

⁹⁴ <https://beta.gov.scot/publications/supporting-young-people-leaving-care-scotland-regulations-guidance-services-young/>

In addition, under the Continuing Care provisions of the Children and Young People (Scotland) Act 2014, young people who are aged 16 or older who are looked after in a foster, kinship or residential care placement are eligible to request to remain in their placement until age 21. A local authority can only refuse such a request in limited circumstances and must prepare a welfare assessment explaining the reasons for such a decision.

10.3 Eligibility for aftercare

The duties of local authorities to formerly looked after children arising under the Children (Scotland) Act 1995 and the Children and Young People (Scotland) Act 2014 apply, although the immigration status of a young person will affect entitlement to aftercare when they are 18 or older.

However, challenges may arise where a formerly looked after child does not have leave to remain, and therefore cannot access mainstream accommodation and benefits, significantly increasing the direct costs to local authorities of meeting these obligations.

For some young people, when they turn 18 they may only be provided with aftercare under sections 29 and 30 of the Children (Scotland) Act 1995 if this is necessary to prevent a breach of their human rights, due to an exclusion set out in Schedule 3 of the Nationality, Immigration and Asylum Act 2002. When a young person is in an excluded group, either when they turn 18, or when they are older, and aftercare duties apply, the local authority would need to undertake a human rights assessment in order to establish whether such support and assistance can be provided, or whether the young person could return to their country of origin to avoid a situation of destitution in the UK. This affects young people who are age 18 or older when their immigration status is one of the following:

- Appeal rights exhausted (ARE) following the refusal of their asylum claim (if made in-country)
- ARE following an unsuccessful application for leave to remain after a period of UASC leave
- Otherwise in the UK without leave, for example, as a visa overstayer
- European Economic Area (EEA) national

For more information, see:

- 7 Social services' support – exclusion
- 11 Assessments when the exclusion applies

10.4 Age dispute and age assessment

There may be instances where the age of an asylum seeking child is disputed, which has implications for whether they are treated as a child or adult for immigration and local authority support purposes.

Local authorities should have regard to the Scottish Government's Age Assessment Practice Guidance for Scotland: Good practice guidance to support social workers, their managers

and others in undertaking and contributing to age assessments in Scotland (March 2018). Those undertaking assessments should be appropriately trained and supported.⁹⁵

When a young person's age is disputed, questions may arise about the local authority's responsibilities regarding the provision of support. The courts in England have established the following points with regards to the provision of accommodation to a looked after child under section 20 of the Children Act 1989 (equivalent to section 25) and leaving care duties (equivalent of aftercare), which may be useful for Scottish local authorities to be aware of:

- Whilst an age assessment is being carried out, the child must be treated as a child and looked after under section 20.⁹⁶
- Leaving care duties cannot apply where a child has not been accommodated under section 20. If a child has been unlawfully refused section 20 accommodation because of an incorrect age assessment, which means that leaving care duties do not apply, the local authority could use its discretion to treat the young person as a former relevant child and provide leaving care support.⁹⁷
- If a young person is age assessed as an adult, the local authority can: terminate support under section 20 immediately after the young person has been informed about this in person, refer the young person to the Home Office for asylum support, and accommodate for a short period to allow the transfer to take place (in this case support was provided for 24 hours).⁹⁸

10.5 Considerations in care planning

There is no specific guidance in Scotland which sets out the criteria for care planning for separated migrant children and young people, and general principles apply, including the application of GIRFEC to the conduct of assessments, service planning and delivery.

However, there are some specific considerations, in working with this group of young people, that should be taken into account. They include:

- The need to identify a child's immigration status early and refer children with uncertain immigration status to specialist legal advice and support urgently. For example, all UASC and non-EEA trafficked children in Scotland are entitled to receive independent advocacy support of a guardian from the Scottish Guardianship Service, so a referral can be made promptly to that service. Furthermore, immigration status can change over time, and therefore should also be kept under continuous review, in the child's care plan.
- Taking account of barriers commonly faced by UASC, trafficked and migrant children, including due to cultural and linguistic differences, trauma (including separation trauma), possible fear of engagement with statutory authorities.

⁹⁵ <https://beta.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/>

⁹⁶ Department for Education Care for Unaccompanied and Trafficked Children Statutory Guidance; *R(S) v London Borough of Croydon & Anor* [2017] EWHC 265 (Admin)

⁹⁷ *R (GE (Eritrea)) v Secretary of State for the Home Department Bedford Borough Council* [2014] EWCA Civ 1490

⁹⁸ *R(KA) & Anor v London Borough of Croydon* [2017] EWHC 1723 (Admin)

- Also considering challenges commonly faced by migrant children with uncertain immigration status, including fear and anxiety arising from an uncertain future, as well as potentially suffering discrimination, bullying or harassment at school, or in accessing services.
- Taking account of how linguistic barriers and experience of a different education system might affect access to education – such as the need for additional support with English and foundational study skills.
- For children with uncertain status, putting in place ‘triple pathway planning’ – meaning a future plan for the accommodation and support of a child, dependent on the outcome of a child’s asylum or immigration application (grant of leave, refusal of leave but not returned to home country, returned to home country).

The Department for Education has recently revised its statutory guidance for local authorities in England, which sets out some helpful guidelines for care planning.⁹⁹

The Local Government Ombudsman in England has found two councils at fault for failing to properly identify and address the immigration issues of children in their care:

- Delaying and refusing to pay for legal advice for a child, who was a visa overstayer, resulted in the child failing to benefit from an Immigration Rule that allowed for children who had lived in the UK for seven years to be granted leave to remain when certain conditions were satisfied. Following failures by the local authority to obtain appropriate advice for her, she made an unsuccessful application by herself after she turned 18 when the rule no longer applied. She had obtained a university place but her immigration status meant that she was unable to undertake higher education.¹⁰⁰
- Not identifying and helping looked after children to obtain British citizenship led to two siblings missing out on opportunities to travel abroad.¹⁰¹

These decisions make it clear that local authorities must have a clear strategy to: identify immigration status, address outstanding issues early on, not delay obtaining legal advice, record advice and ensure that a young person’s expectations reflect any implications or limitations of their immigration status.

Good practice example

Social workers will work with the young person to ensure that they understand their immigration status and any decisions that have been reached about their application to remain in the UK. This includes discussing with the young person the implications of their

⁹⁹ Department for Education, ‘Care of unaccompanied migrant children and child victims of modern slavery’ (November 2017) <https://www.gov.uk/government/publications/care-of-unaccompanied-and-trafficked-children>

¹⁰⁰ LGO complaint 13-019-106 LB Greenwich <https://www.lgo.org.uk/decisions/children-s-care-services/looked-after-children/13-019-106>

¹⁰¹ LGO complaint 15-015-327 Dudley MBC <https://www.lgo.org.uk/decisions/children-s-care-services/looked-after-children/15-015-327>

immigration claim not succeeding, and how this may impact on the support that the local authority may or may not be able to provide in the future, their access to public funds and other services, and their ability to work and study.

The approach to planning would need to be informed by the young person's immigration status:

- Grant of leave to remain in the UK on a settlement route - a long-term perspective plan
- Outstanding immigration or asylum claim/ grant of UASC leave – short term achievable goals and planning for all outcomes, which could include:
 - Grant of leave to remain
 - Refusal with right of appeal
 - Refusal and no further right to appeal (ARE) – return to country of origin
 - Refusal and no further right to appeal (ARE) – sanctions, risks and support options if staying in the UK without leave

The local authority will ensure that the young person has early and continuous access to legal advice to help them to explore and understand the legal options that remain available to them, and guardian, when this is appropriate.

When a young person has received legal advice, which indicates that they have no further basis to pursue their asylum or immigration claim, social workers will work with the young person to consider their choices including return to country of origin and the implications of living in the UK without leave when sanctions to accessing services may apply.

They will **support** the young person to discuss their particular circumstances and seek to identify steps that can help them to achieve a sustainable outcome for the future.

Social workers will be sensitive to how the experience of having uncertain immigration status and/ or being refused asylum within the UK may impact on the young person's physical and mental health and wellbeing.

The local authority identifies training needs for staff to ensure that they are able to support the young person effectively to understand their options.

Where the young person is also supported by an advocate or guardian, social workers will work in partnership to develop a multiagency approach to supporting the young person when they reach 18 without having obtained a form of leave to remain which will enable the young person to settle in the UK.

11 Assessments when the exclusion applies

This chapter provides guidance on how the local authority would undertake a human rights assessment in order to establish eligibility for social services' support when the exclusion under Schedule 3 of the Nationality, Immigration and Asylum Act 2002 applies. When a person is in an excluded group, support might be refused or withdrawn where the person or family can return to their country of origin to avoid a situation of destitution in the UK.

This chapter provides guidance on how the local authority would undertake a human rights assessment to establish whether support can be provided when a person or parent (in a family household) is in an excluded group.

Key points

- The Schedule 3 exclusion requires local authorities to consider whether or not the person or family is subject to a legal or practical barrier that prevents them from returning to their country of origin. This could include an outstanding immigration application or appeal that raises human rights grounds, or a medical condition that means the person is not fit to travel.
- The process of undertaking a human rights assessment provides an opportunity for the local authority to identify whether a person needs specialist legal advice, for example, to make a new immigration application, a fresh claim or to explore their options if they do not have recent decisions from the Home Office or courts that can be referred to.
- Before return to country of origin can be considered, the local authority must be clear that there are no legal or practical barriers preventing return, so will need to establish whether there are any outstanding immigration claims or appeals pending, which may involve obtaining current information from the Home Office.
- Failure to provide assistance to a family, young person, or adult, where social services' duties apply and a legal or practical barrier prevents them from returning to their country of origin, is likely to constitute a breach of human rights.
- In cases where the local authority concludes, following a human rights assessment, that it has no duty to provide support because the person or family can avoid a breach of human rights by returning to their country of origin, the person should be provided with information which may include signposting to: Home Office asylum support, local charities, local immigration advisers and the Home Office Voluntary Returns Service. Where a voluntary return or other support route is being taken up, the local authority would need to consider providing time-bound accommodation and financial support whilst this is being arranged.

- Social workers and other local authority staff who are responsible for undertaking these assessments should be appropriately trained and supported by managers and local authority lawyers.

11.1 Purpose of the human rights assessment

When an adult, young person (age 18+) or parent is in an excluded group, they can only be provided with social services' support where this is necessary for the purpose of avoiding a breach of their rights under the European Convention on Human Rights (ECHR) or European Union (EU) treaties.¹⁰²

In interpreting this, the Court of Appeal in England, in the case of *R(Kimani) v LB Lambeth* (2003), found that:

*'A State owes no duty under the Convention to provide support to foreign nationals who are permitted to enter their territory but who are in a position freely to return home.'*¹⁰³

In the case of *SSHD v Limbuela* (2004), the Court of Appeal found that a decision which compels a person to sleep rough or without shelter and without funds usually amounts to inhuman treatment and therefore engages Article 3 of the ECHR (the right not to be subjected to inhuman or degrading treatment) and Article 8 of the ECHR (right to family and private life).¹⁰⁴

Therefore, where a person can freely return to their country of origin in order to avoid a situation of destitution in the UK, the local authority will not be required to provide support. The High Court in England has determined that the denial of support in such instances does not constitute a breach of human rights.¹⁰⁵

However, where a person cannot freely return to their country of origin because a legal or practical barrier prevents them from doing so, and where the local authority has identified that has a duty to provide support because a child or adult has been assessed as in need by social services, then a failure to provide assistance is likely to give rise to a breach of Article 3.

It is possible that human rights considerations would have been made within the holistic GIRFEC assessment or community care needs assessment, but Schedule 3 requires the local authority to specifically consider the person or family's ability to return to their country of origin. It is therefore recommended that a human rights assessment addressing return is recorded separately from the needs assessment.

¹⁰² Paragraph 5 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002

¹⁰³ *R (K) v London Borough of Lambeth* [2003] EWCA Civ 1150, paragraph 49.

<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1150.html>

¹⁰⁴ *Secretary of State for the Home Department v Limbuela & Ors* [2004] EWCA Civ 540.

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/540.html>

¹⁰⁵ *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

For more information, see:

- 7 Social services' support – exclusion

11.2 Human rights assessment

Although the primary purpose of the human rights assessment is to establish the extent to which the local authority is required to support a person or family when the Schedule 3 exclusion applies, the process of undertaking this assessment also performs other important functions as it:

- places an individual's rights at the forefront of the local authority's decision making;
- explores solutions to the person or family's destitution in the UK;
- facilitates an open conversation about available options;
- seeks an alternative to enforced removal by the Home Office;
- provides transparency in the decision making process;
- enables the local authority to clearly explain why, in many cases, support will need to be provided when the exclusion applies;
- assists the local authority to identify what action to take to help a person or family find a pathway out of dependency on social services' support; and
- enables the local authority to focus resources on the most complex cases rather than those that require a more straightforward assessment.

In order to be able to conclude whether support needs to be provided to prevent a human rights breach, or whether return to country of origin would avoid a human rights breach, the local authority would need to establish the following:

- Whether a legal or practical barrier preventing return applies, such as an outstanding immigration application or appeal that raises human rights grounds, or a medical condition that means the person is not fit to travel.
- What findings have already been made by the Home Office and/or appeal courts on relevant immigration/ asylum decisions.
- When the person last received independent legal advice about their immigration case and whether they have any grounds to pursue further claims.
- Whether return to country of origin would give rise to a breach of human rights.

For European Economic Area (EEA) nationals, the local authority would need to consider whether the person is eligible to apply for indefinite leave to remain or limited leave to remain on a settlement route under the EU Settlement Scheme. As expecting an EEA national to return to their country of origin is inconsistent with the UK Government's commitment to allow EEA nationals to settle in the UK after the UK leaves the EU on 29 March 2019, it would be very difficult for a local authority to recommend return, and if a social worker or other officer is in doubt about how to proceed in such cases, guidance should be sought from the local authority's legal team.

What constitutes a breach of human rights?

The European Convention on Human Rights (ECHR) sets out human rights which people hold in the UK. The Human Rights Act 1998 operates to prohibit statutory authorities,

including local authorities, from breaching a person's human rights by their action or inaction.

Key human rights that are relevant in the context of a human rights assessment include:

Article 2 Right to life

Article 3 Freedom from cruel, inhuman or degrading treatment

- A person may fear return to their own country because they believe they may be killed, tortured or seriously harmed there.

Article 4 Freedom from slavery and forced labour

- Similarly, a person may fear return to their own country because they believe they may be exploited, trafficked or re-trafficked, held in slavery or subjected to forced labour.

Article 8 Right to family and private life

- A person has a right to maintenance of their family life, and this includes a right to live with family members present in the UK, and to contest custody of children in family law proceedings in the UK. A person or family who has resided in the UK for a long time, and has built close personal connections to their community and support workers, may have also established a private life, which is also protected by Article 8.

Not all of these steps need to be followed, so some assessments will be more straightforward than others, for example, where a person who is a visa overstayer is waiting for a human rights application to be decided by the Home Office. In such instances, the assessment would simply confirm that the local authority cannot pre-determine the outcome of an application made to the Home Office and is therefore unable to make further enquiries about return whilst such a legal barrier is in place.

Local authorities may use the NRPF Network's human rights assessment template as a guide to this process. It is recommended that social workers or other local authority staff who are responsible for undertaking these assessments are appropriately trained and supported by their managers and local authority lawyers.

The following flowchart is designed to assist with working through the template:

- Human rights assessment: how to determine eligibility for support when the adult, young person (18+) or parent is a visa overstayer, refused in-country asylum seeker or illegal entrant

When immediate assistance appears to be required, for example, to prevent homelessness, the local authority would need to consider whether it is necessary to provide interim support whilst the social care needs assessment and human rights assessment are being undertaken.

For more information, see:

- 6.2 Meeting urgent need – families
- 6.3 Meeting urgent need – adults
- 6.4 Establishing immigration status

11.3 Possible outcomes

Once the assessment has been completed, the local authority would need to clearly conclude whether support can be provided or whether return is to be recommended.

Potential outcomes and suggestions for what further action may be required depending on the reason for deciding whether to support or not are set out in the table below. Where support is provided, it will be important to undertake regular reviews of this.

Conclusion	Reason	Further action
The local authority will be required to provide accommodation and financial support to prevent a breach of Article 3, which may occur if the person or family are destitute in the UK	A legal or practical barrier to return is identified	Regularly review the status of the barrier, for example, if there is a pending immigration application/ appeal: <ul style="list-style-type: none"> • Request an update from the Home Office and/or legal representative • Signpost to an immigration adviser if the person is unrepresented
	Immigration advice is required and/or a new immigration claim needs to be made	Signpost to an immigration adviser Regularly review the person's circumstances and request updates from the immigration adviser/ Home Office
	Return to country of origin would give rise to a breach of EU treaty rights	Regularly review the person's circumstances Signpost to an immigration or benefits adviser to help document their right to reside Send a query to the AIRE Centre if the matter is complex Help the person access employment or evidence this to enable them to claim benefits

<p>The local authority will not be under a duty to provide accommodation and financial support because the person or family can freely return to their country of origin in order to prevent a breach of Article 3, which may occur if they are destitute in the UK</p>	<p>No legal or practical barrier has been identified, there are recent decisions from the Home Office/ courts or a legal opinion to rely upon, and return to country of origin would not give rise to a breach of human rights or EU treaty rights</p>	<p>Offer assistance with return - funded by the Home Office or local authority</p> <p>Time-bound support may need to be provided if return is being taken up</p> <p>Provide information about Home Office asylum support, local charities, immigration advisers and voluntary return</p>
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Case examples

Support provided to prevent a breach of human rights

A Czech national has high level care needs following a brain injury. His consultant has advised that he is currently not fit to travel and a capacity assessment is being undertaken. He is 'in need of assistance' under section 12 of the Social Work (Scotland) Act 1968 and is provided with a residential care home placement. The local authority determines that there is a barrier to return in place and so it will be necessary to provide support to prevent a breach of human rights. Additionally, he is likely to qualify for leave to remain or indefinite leave to remain under the EU Settlement Scheme.

It is thought that he has been living in the UK for at least four years and has been in and out of work. He does not appear to have any family in the UK. The local authority is seeking specialist advice to find out whether he may have a right to reside in the UK under EU law, in order to establish any entitlement to benefits. His social worker is also trying to help him to document his residence in the UK in preparation for making an application under the EU Settlement Scheme.

Assistance with return provided to prevent a breach of human rights

A South African mother entered the UK in 2006 as a visitor and overstayed. Her three-year old child was born to a South African father, who it is believed was also an overstayer and has since returned to South Africa. The child has been found to be in need under section 25 of the Children (Scotland) Act 1995. The mother applied to the Home Office for leave to remain on the basis of her family and private life. The application was refused, her subsequent appeals were unsuccessful and she has recently become appeal rights exhausted. The local authority has confirmed via the Home Office that there are no further outstanding applications or appeal rights. The mother has been provided with the opportunity to seek legal advice and is not pursuing another type of application. There are no medical issues preventing travel. The local authority has regard to the recent Home Office and court determinations and considers that there are no other legal or practical barriers preventing return. It concludes that the family could avoid a breach of human

rights by relocating to South Africa where their needs could be met. The Home Office or local authority can provide assistance with return and time-bound accommodation and financial support is provided whilst the family's return is arranged.

For more information, see:

- 13 Pathways out of destitution

12 Reviews and ending support

Local authorities play an important role in alleviating destitution by providing vulnerable adults and children who have insecure immigration status with support when social services' duties are engaged. Once support is provided, it is important that appropriate interventions take place to help the person or family to resolve their immigration status, for example, obtaining a form of leave to remain that enables them to access mainstream benefits and housing services.

This chapter sets out what a local authority may need to do to help a person or family who is supported by social services and has no recourse to public funds (NRPF). It sets out good practice steps to follow when reviewing support arrangements and when support needs to be withdrawn.

Key points

- When support is provided to an adult or family, it is important that regular reviews are undertaken to identify any change of circumstances which might affect their eligibility for continued support; the person should be advised from the outset on what basis support has been provided, and how this might change.
- Proactive steps should be taken to help the person or family resolve their situation of destitution and need for social services' support. By finding a sustainable solution to prevent an ongoing or future need for social services' support, the local authority will be acting in the best interests of a child and promoting a vulnerable adult's wellbeing, as well as reducing costs incurred by the local authority.
- A decision to withdraw support may only be made following an assessment that finds the person or family not to be in need of assistance because they are either no longer eligible under the relevant social care legislation, or they are in an excluded group under Schedule 3 of the Nationality, Immigration and Asylum Act 2002 and the local authority, through conducting a human rights assessment, has concluded that they are able to return to their country of origin to prevent a human rights breach arising from their situation of destitution in the UK.
- When support is withdrawn, a reasonable notice period should be provided along with assistance in accessing alternative support arrangements, where this is appropriate, such as help with applications for social security benefits or local authority housing.

12.1 Reviews

When support is provided, it is important that regular reviews are undertaken to identify any change of circumstances which might affect eligibility, and to ensure that proactive steps are taken to help the person or family establish a pathway out of dependency on social services'

support. By doing this the local authority will be acting in the best interests of a child or promoting a vulnerable adult's wellbeing, as well as reducing overall support costs.

According to UK data on no recourse to public funds (NRPF) service provision, the average time an NRPF household is supported for is just under 2.5 years. Additionally, in 2017-18, just under 70% of households exited social services' support following a grant of leave to remain with recourse to public funds, which demonstrates that, for the majority of households with NRPF, their need for accommodation and financial support to be provided by social services will reduce when they secure a change in immigration status. This can only be achieved more expediently when the local authority works in partnership with local legal advice providers and the Home Office.¹⁰⁶

The review checklist provides a summary of issues that need to be considered when a case is being reviewed.

For more information, see:

- 13 Pathways out of destitution

12.2 Ending support

A decision to withdraw support may only be made following an assessment that finds the person or family not to be in need of assistance because they are either no longer eligible under social care legislation or they are able to return to their country of origin to prevent a human rights breach arising from being destitute in the UK.

It is good practice for conversations to have already taken place to prepare the person or family for such an outcome and what their options will be, particularly if they are in a group excluded under Schedule 3 of the Nationality, Immigration & Asylum Act 2002 and are being supported to prevent a breach of human rights, as the basis upon which they are provided with support could regularly change.

Any decision to end support should be confirmed in writing, setting out the reason for ending support, and other organisations assisting the family should also be informed of the decision, subject to the person's consent.

12.3 Transfer to mainstream benefits

When support is terminated because there has been a change of circumstances that means that a person can now claim benefits and homelessness assistance, they will need to be given a notice period and help with making these claims. Steps should be taken to avoid any interruption to any care or support package an adult or family with NRPF may be receiving.

Social services staff should aim to establish good partnerships with their local housing authority and those in any other areas where they might provide NRPF households with temporary accommodation. Flexibility regarding the notice period may be required to allow for support to continue if there are delays in benefits being issued, or if it appears that the housing authority can prevent homelessness by enabling the family to remain in their current

¹⁰⁶ NRPF Connect annual report 2017-18 <http://www.nrpfnetwork.org.uk/Documents/NRPF-connect-annual-report-2017-18.pdf>

home or by securing a private tenancy for them, and a short extension of the notice period would enable this to take place.¹⁰⁷

Local authorities also need to consider what information they may need to provide to people exiting support in order to prevent future requests for housing and financial assistance. A person may re-present, for example, if they fail to apply to extend their leave to remain because they could not afford the application fee, or if they are granted leave to remain with the NRPF condition imposed, and as a consequence lose access to benefits and become at risk of homelessness.

Good practice example

Example of an information leaflet provided by a local authority to a person granted leave to remain with recourse on the 10-year settlement route when their support ends.

You are advised to:

- Seek advice from an immigration adviser in good time before you need to apply to the Home Office to extend your leave.
- Find out how much the application will cost to make (note that fees usually increase every April) and consider how you will save up for this.
- Ensure that your immigration adviser includes submissions about your financial circumstances when you apply to extend their leave if you still need to have recourse to public funds.
- Seek advice immediately from benefits, housing or immigration advisers, as required, if you are granted leave to remain with NRPF and this causes any benefits you are receiving to stop and you start accruing rent arrears.

12.4 Return to country of origin

When the provision of accommodation and financial support is refused following a human rights assessment concluding that the person or family can return to their country of origin, then assistance with return must be offered. This could be provided by the Home Office or the local authority.

It will normally be appropriate for the local authority to provide accommodation and financial support to a person or family whilst return is being arranged. In the English High Court case of *R (O) v London Borough of Lambeth* (2016), the Judge found that the local authority had made 'sensible, humane and appropriate undertakings' in agreeing to provide interim accommodation for a reasonable period pending the return on the condition that the parent signs a formal undertaking in which she accepts that she and her child can be returned to Nigeria and takes steps to co-operate with the local authority in arranging a facilitated return.¹⁰⁸

¹⁰⁷ Under Section 32 of the Housing (Scotland) Act 1987, the local authority has a duty to take steps to prevent homelessness when a person is threatened with homelessness within two months.

¹⁰⁸ *O, R (on the application of) v London Borough of Lambeth* [2016] EWHC 937 (Admin), paragraph 52. <http://www.bailii.org/ew/cases/EWHC/Admin/2016/937.html>

When the local authority has lawfully determined, following a human rights assessment, that a person or family can freely return to their country of origin, the courts in England have found that any hardship or degradation suffered if the person does not do this will be a result of the person's decision to stay in the country and not as a result of any breach of human rights by the local authority.¹⁰⁹

It is good practice for the local authority to involve the person in the assessment process and to be clear from the outset on what basis support could be refused or withdrawn, with staff undertaking a sensitive approach to such conversations. If a decision is reached that will result in the refusal of support, this should be communicated in person, with an interpreter if necessary. Information about any notice period (where interim support is being provided) and their options will also need to be provided. These may include voluntary return, a referral to the Home Office for asylum support, and information about any sanctions that may apply to the person if they stay in the UK without leave.

If the person indicates that they will not be taking up a voluntary return, it is good practice to make appropriate referrals to local third sector organisations working to prevent migrant destitution and provide the person with information about their emergency options should they stay in the area, including details of immigration advisers, local charities, night shelters etc.

For more information, see:

- 13.4 Home Office Voluntary Returns Service
- 13.5 Local authority funded return

¹⁰⁹ *AW, R (on the application of) v London Borough of Croydon* [2005] EWHC 2950 (Admin), paragraph 35. <http://www.bailii.org/ew/cases/EWHC/Admin/2005/2950.html>

13 Pathways out of destitution

This chapter sets out what a local authority may need to do to help a person or family with NRPF establish a pathway out of dependency on social services' support.

It can also be referred to by local authorities and other organisations to advise people at the point of presentation to a service, where there may be an opportunity to take immediate steps to prevent a situation of homelessness.

Key points

- It will be necessary to explore and discuss the full range of options that may be available to a person who has no recourse to public funds (NRPF) and is at risk of destitution, in order to prevent homelessness or to reduce their current or future need for social services' support.
- In most cases, establishing a pathway out of destitution will involve accessing specialist immigration advice. It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory bodies for solicitors and barristers, or is an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC). Local authorities must therefore ensure that staff do not provide immigration advice to individuals unless they are accredited to do so with the OISC, and should consider establishing lists of local regulated immigration advice services to signpost people to.
- Locally, there may be charities and voluntary sector organisations that can provide advocacy or other forms of holistic support which may facilitate or improve access to legal advice, particularly for vulnerable people. It is good practice for social workers to consider signposting or referring to local third sector organisations that work to prevent migrant destitution at the same time as they assist people or families to access legal advice.
- Where a person has leave to remain with NRPF and is able to work, or is an European Economic Area (EEA) national who can access benefits if they become economically active, then they may be provided with help accessing employment and other forms of support they may be entitled to, such as publicly funded early learning and childcare, and advice about maximising their income.
- The Home Office can fund and arrange travel for people who wish to return to their country of origin, and in some cases can provide additional assistance, or alternatively, the local authority may fund a return. The local authority would need to check whether a person has received legal advice about the consequences of undertaking a voluntary return and signpost a person for advice if they wish to receive this before making a decision to take up return.

13.1 Options based on immigration status

The table below sets out what appropriate action can be taken depending on the person or parent's immigration status.

Immigration status	Whether the Schedule 3 exclusion applies to social services' support	Suggested steps to resolve the case or to prevent a situation of destitution arising
<p>Leave to remain with NRPF</p> <p>Granted under FM family/private life 10-year settlement route or outside of the rules</p>	No	<p>Signpost to a legal representative to find out whether they can apply to Home Office for leave to be varied to remove the NRPF condition by making a change of conditions application.¹¹⁰</p> <p>Provide guidance and support with accessing employment.</p>
<p>Leave to remain with NRPF</p> <p>Granted as the spouse or partner of a British citizen or person with settled status (under 5 or 10-year settlement routes)</p>	No	<p>Signpost to a legal representative to find out what immigration options they have, including whether they can apply for indefinite leave to remain under the domestic violence rule and therefore apply for the destitution domestic violence concession.¹¹¹</p> <p>Provide guidance and support with accessing employment.</p>
<p>Derivative right to reside under EU law as a Zambrano carer</p> <p>Primary carer of a British (or other EEA national) child</p>	No	<p>Signpost to a legal representative to find out if they can make an application for leave to remain under the Immigration Rules with a view to gaining recourse to public funds and obtaining a form of immigration status that will allow them to settle permanently in the UK.</p> <p>Provide guidance and support to access employment.</p>
EEA national	Yes – unless there is a legal or practical barrier	If there is a practical barrier to return in place, e.g., a medical condition, ensure

¹¹⁰ <https://www.gov.uk/government/publications/application-for-change-of-conditions-of-leave-to-allow-access-to-public-funds-if-your-circumstances-change>

¹¹¹ <https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence>

	<p>in place preventing the person/family from leaving the UK, or the local authority has otherwise determined that support is necessary to prevent a breach of human rights or EU treaty rights.</p>	<p>the status of the barrier is regularly reviewed.</p> <p>Signpost to a specialist benefits or immigration adviser to establish whether the parent is exercising a right to reside and therefore can access benefits.</p> <p>Provide guidance and support accessing employment.</p> <p>Support the person to make benefit applications if they appear to be eligible.</p> <p>Make them aware of the EU Settlement Scheme.¹¹²</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 11.2 Human rights assessment • 15 EEA nationals and family members
<p>Asylum seeker</p> <p>Has a pending asylum application or is appealing a refusal of their asylum claim</p>	<p>No</p>	<p>Make a referral to a third sector organisation to assist the person or family to apply for section 95 asylum support and chase up the progress of the asylum support application; with the Home Office.</p> <p>NB Some adults cannot be referred to the Home Office for accommodation.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 16 Asylum seekers
<p>Visa overstayer</p> <p>Illegal entrant</p> <p>ARE asylum seeker (who claimed asylum in-country)</p>	<p>Yes – unless there is a legal or practical barrier in place preventing the person/family from leaving the UK, or the local authority has otherwise determined that support is necessary to prevent a breach of human rights or EU treaty rights.</p>	<p>If there is a barrier to return in place, ensure the status of the barrier is regularly reviewed.</p> <p>Signpost to an immigration adviser for advice about options.</p> <p>Chase up the progress of pending immigration applications with the Home Office.</p>

¹¹² <https://www.gov.uk/guidance/status-of-eu-nationals-in-the-uk-what-you-need-to-know>

		<p>Make them aware of voluntary return options, including information about the Home Office Voluntary Returns Service.</p> <p>In-country ARE asylum seekers only– find out whether asylum support may be available from the Home Office, but note that a family can only be referred for section 4 support when this is available and will be sufficient to meet the needs of the child.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 11.2 Human rights assessment • 16 Asylum seekers
ARE asylum seeker (who claimed asylum at port of entry)	No	<p>Signpost to an immigration adviser for advice about options to pursue asylum case or other claims.</p> <p>Make them aware of voluntary return options, including information about the Home Office Voluntary Returns Service.</p> <p>For more information, see:</p> <ul style="list-style-type: none"> • 6.4 Establishing immigration status • 16 Asylum seekers

Good practice examples

EEA family

An EEA national mother is helped to get back into employment following a referral to the Council's employment service. The NRPF worker helped her to find childcare close to her place of employment and to document her wages for three months in order to make a successful benefits claim, so she was no longer reliant on social services' to fund their accommodation and living needs.

Non-EEA family

The local authority was informed directly by the Home Office through NRPF Connect that a parent had been granted leave to remain with recourse to public funds. The social worker could then help the family to access social security benefits and homelessness assistance as soon as the immigration documentation was issued, reducing the delay that often occurs when families transfer to mainstream benefits.

13.2 How to find a legal aid lawyer or OISC adviser

It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory bodies for solicitors and barristers or is an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC).¹¹³

Therefore, it is not appropriate for a social worker or other local authority officer to advise a person about the specifics of their immigration case, or to make a judgement on whether they have grounds for a particular type of application and the merits of such an application. Instead, they will need to signpost the person to a legal aid lawyer or OISC regulated adviser.

To find a local legal aid lawyer, local authority staff may refer to:

- The Law Society of Scotland's register of lawyers who are registered to practice in Scotland, which can be searched by the area of law in which they practice. Please note however that not all lawyers on this register will necessarily accept legal aid in payment for services.¹¹⁴
- The Scottish Refugee Council's register of legal aid lawyers who are specialists in immigration, asylum and asylum support law.¹¹⁵

To find an OISC registered adviser, local authority staff may refer to:

- The OISC's a register of accredited advisers. Note that there are relatively few OISC registered advisers in Scotland who offer independent advice, as most of this work is undertaken by legal aid lawyers.¹¹⁶

For more information, see:

- 4.8 Legal aid

13.3 Other advocacy support and free advice providers

Locally, there may be charities and voluntary sector organisations that provide advocacy or other forms of holistic support which can facilitate or improve access to legal advice, particularly for vulnerable people.

It is good practice for social workers to consider signposting or referring to these organisations at the same time as they assist people or families to access legal advice.

13.4 Home Office Voluntary Returns Service

Local authority staff will need to be aware of services available to a person who expresses an intention to return to their country of origin, or where this may be an option if social

¹¹³ <https://www.gov.uk/government/organisations/office-of-the-immigration-services-commissioner>

¹¹⁴ <https://www.lawscot.org.uk/find-a-solicitor/>

¹¹⁵ http://www.scottishrefugeecouncil.org.uk/get_help/i_have_not_made_a_claim_for_asylum

¹¹⁶ http://home.oisc.gov.uk/how_to_find_a_regulated_immigration_adviser/adviser_finder/finder.aspx

services' support is refused or withdrawn on the basis that a person who is in an excluded group can avoid a breach of human rights by returning to their country of origin.

It is a criminal offence to provide immigration advice that is specific to a person's matter unless the adviser is a member of the appropriate regulatory bodies for solicitors and barristers, or is an immigration adviser regulated by the Office of the Immigration Services Commissioner (OISC). A person may need to be signposted to an immigration adviser if they are considering return, or if the local authority has determined through a human rights assessment that there are no legal or practical barriers preventing return.

The Home Office can fund and arrange travel for people who wish to return to their country of origin, and in some cases can provide additional assistance.¹¹⁷

Any person who is living in the UK without leave or has been refused leave to enter or stay in the UK can apply to undertake a voluntary return. The Home Office will organise and fund the flight, but will expect the person to arrange their own documentation if they do not already have this. The Home Office can normally only provide additional support in obtaining documentation when a person has a vulnerability which means that it would be difficult for them to do this by themselves.

Most people and families supported by the local authority should be eligible to receive more assistance with their return.

An assisted return may be available to:

- Families with children under 18
- People who have claimed asylum and have been refused or wish to withdraw their application
- Children under 18 travelling alone
- Survivors of trafficking or modern slavery
- People who previously had discretionary leave to remain that has since expired
- People who need more help with their return, for example, due to a medical condition

European Economic Area (EEA) nationals will not be eligible for an assisted return unless they have been confirmed to be a victim of trafficking or modern slavery through the National Referral Mechanism.

An assisted return involves the Home Office arranging and funding flights, a financial reintegration package and additional support on a case by case basis. The method by which the reintegration package is provided depends on which country the person is returning to.

The Home Office administers all voluntary returns and, although will be able to answer questions about the returns process, does not provide independent and confidential advice to people who are considering return.

It is important to note that non-EEA nationals undertaking a voluntary return that is funded by the Home Office (with or without a reintegration package), will be subject to a re-entry ban of two or five years, depending on how long they were in the UK after being issued with a liability to removal notice or becoming appeal rights exhausted. This is an important

¹¹⁷ <https://www.gov.uk/return-home-voluntarily>

consideration for a person when they are deciding whether or not to take up a voluntary return, for example, where a person is in a relationship with a British Citizen they may be able to apply under the Immigration Rules to re-enter the UK in future. A person would need to be signposted to an immigration adviser to find out how long the re-entry ban will be, and what the effect of such a ban might be on their prospects of any future route of return to the UK.

Home Office Voluntary Return Service contacts:

- People can apply online or contact the helpline: 0300 004 0202 ¹¹⁸
- Email: voluntaryreturns@homeoffice.gsi.gov.uk

13.5 Local authority funded return

If return is not possible with assistance from the Home Office, local authorities have a power to fund a family's return to country of origin. Again, a person may need to be signposted to an immigration adviser if they are considering return, or if the local authority has determined through a human rights assessment that there are no legal or practical barriers preventing return.

For EEA nationals and people with refugee status granted by another EEA state, the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 provide a power to:

- purchase travel tickets to enable the person to return to their country of origin, and
- provide time-bound interim accommodation pending the return to country of origin, but not cash payments.

Alternatively, national embassies may be able to assist with arranging return for EEA nationals.

As expecting an EEA national to return to their country of origin is inconsistent with the UK Government's commitment to allow EEA nationals to settle in the UK after the UK leaves the EU on 29 March 2019, it would be very difficult for a local authority to conclude that return would avoid a breach of a person's human rights, and if a social worker or other officer is in doubt about how to proceed in such cases, guidance should be sought from the local authority's legal team. It will be necessary to signpost an EEA national who is considering return to an immigration adviser to find out how any periods outside of the UK may impact on their ability to qualify under the EU Settlement Scheme, so they can make a fully informed choice about whether to return.

For more information, see:

- 19.1 Arrangements for EU nationals after the UK leaves the EU

¹¹⁸ <https://visas-immigration.service.gov.uk/product/vrs>

14 Social services' support - NRPF service delivery

Local authorities need to ensure that effective approaches are in place to manage social service responses to destitution. This chapter sets out what a local authority would need to put in place to ensure that the provision of accommodation and financial support to families or adults with no recourse to public funds (NRPF) is targeted, cost-effective and safeguards the welfare of children and vulnerable adults.

Key points

- It is recommended that a specialist and targeted response is put in place to manage eligibility assessments and support, in order to ensure this essential safety net is administered robustly, lawfully, consistently and cost-effectively. This will require clear procedures, practices and appropriate levels of specialist staff training.
- The investment in staff training and procedures for preventing and responding to destitution experienced by people with NRPF may need to be balanced against the savings that can be gained in by applying an early intervention and preventative approach.
- Although there are statutory requirements with regards to who may undertake social care assessments, local authorities are free to decide how other elements of NRPF support provision are administered. Specialist NRPF workers who are not registered social workers may therefore have an advisory role and/or be responsible for some aspects of case management.
- It is recommended that local authorities put in place policies and procedures for managing NRPF cases, based on the basic principles and learning from service models outlined in this guidance. Internal processes may need to be reviewed to ensure cases are managed effectively from start to end by the local authority.

14.1 Basic principles

Local authorities deliver services in different ways in order to be able to best meet the needs of their residents. There will be a significant difference in levels of demand for assistance from people with NRPF across Scottish regions, which may change over time, and local authority staff will have different levels of experience of dealing with such cases. Therefore, each local authority will take a different approach to administering support to people with NRPF. Even where a local authority currently receives no or a low number of referrals for support, local, national or UK-wide changes could give rise to new demand for services. Local authorities would also need to consider how they can adhere to the Fairer Scotland Duty by reducing inequalities through the provision of NRPF support and establishing sustainable outcomes for destitute migrants living within communities.

There are some basic principles that can be incorporated within a local authority's approach, regardless of its size, demand for services and internal operating arrangements. Having worked with local authorities across the UK for over a decade, the NRPF Network recommends that a specialist and targeted response is required from the point that people with NRPF may approach the local authority, to the time that support ends, in order to ensure this essential safety net is administered robustly, lawfully, consistently and cost-effectively. This does not necessarily require a specialist team or workers, but staff will require clear procedures, practices and appropriate levels of specialist training. The allocation of resources may need to be balanced against the savings that will be gained, for example, where proactive action from the local authority will result in support ending earlier than it might have otherwise done.

Although there are statutory requirements with regards to who may undertake social care assessments, local authorities are free to decide how other elements of NRPF support provision are administered. Specialist NRPF workers who are not registered social workers may therefore have an advisory role and/or be responsible for some aspects of case management that includes some or all of the tasks below.

For a summary of the overall support process see 'NRPF service provision – at a glance'.

Internal processes need to be reviewed to ensure cases are managed effectively from start to end by the local authority:

- Identify the points by which a person or family with NRPF may approach the local authority – staff will need to be trained to understand what support options the person has, particularly where social services support may apply.
- Set up internal referral routes so that people approaching services, e.g. housing or welfare rights can be promptly referred to social services or the NRPF workers
- If there are specialist workers within or outside of social services' teams, ensure there are protocols in place so that all cases are identified and referred to them consistently.
- Consider how NRPF support will be accounted for within budgets, and whether this will be separate to the wider social care budget.
- Use council legal teams on an advisory basis for guidance on complex cases and human rights assessments
- Ensure there is a mechanism in place to monitor caseloads and expenditure.
- Ensure there is a mechanism in place for identifying when cases need to be reviewed.
- Provide effective management oversight to ensure that assessments (including human rights assessments) are approached consistently and correctly.
- Enable partnership working between council departments, e.g., legal teams, housing departments and fraud officers.
- Build external partnerships with voluntary sector organisations providing advocacy and support to migrants and families, to identify gaps in services, agree referral routes and ensure effective coordination and signposting
- Take proactive action to reduce a person or family's need for social services' support, for example, partnership working with immigration advisers and the Home Office to

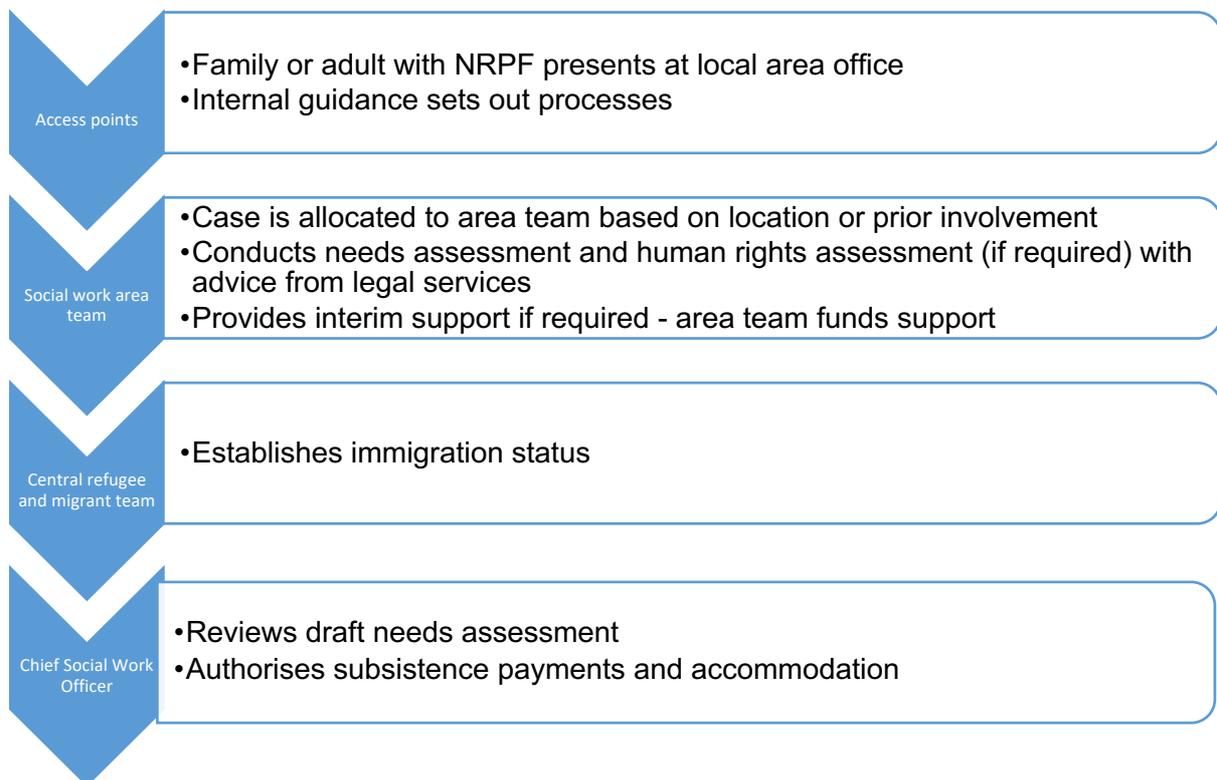
achieve a change in immigration status that confers recourse to public funds, for example, an application for a Change of Conditions to remove the NRPF condition.

- Consider how the local authority's voluntary sector funding streams can be used to provide services for people with NRPF who are supported by social services or who are in the community and may be at risk of homelessness e.g. funding immigration advice provision.
- Where gaps are identified regarding the above, then the local authority may need to support one or two staff to develop the knowledge and skills to ensure these tasks are covered.

14.2 Examples of service models

The service models outlined below are followed by four local authorities in Scotland that may experience different levels of demand for support, with an evaluation of each model's benefits.

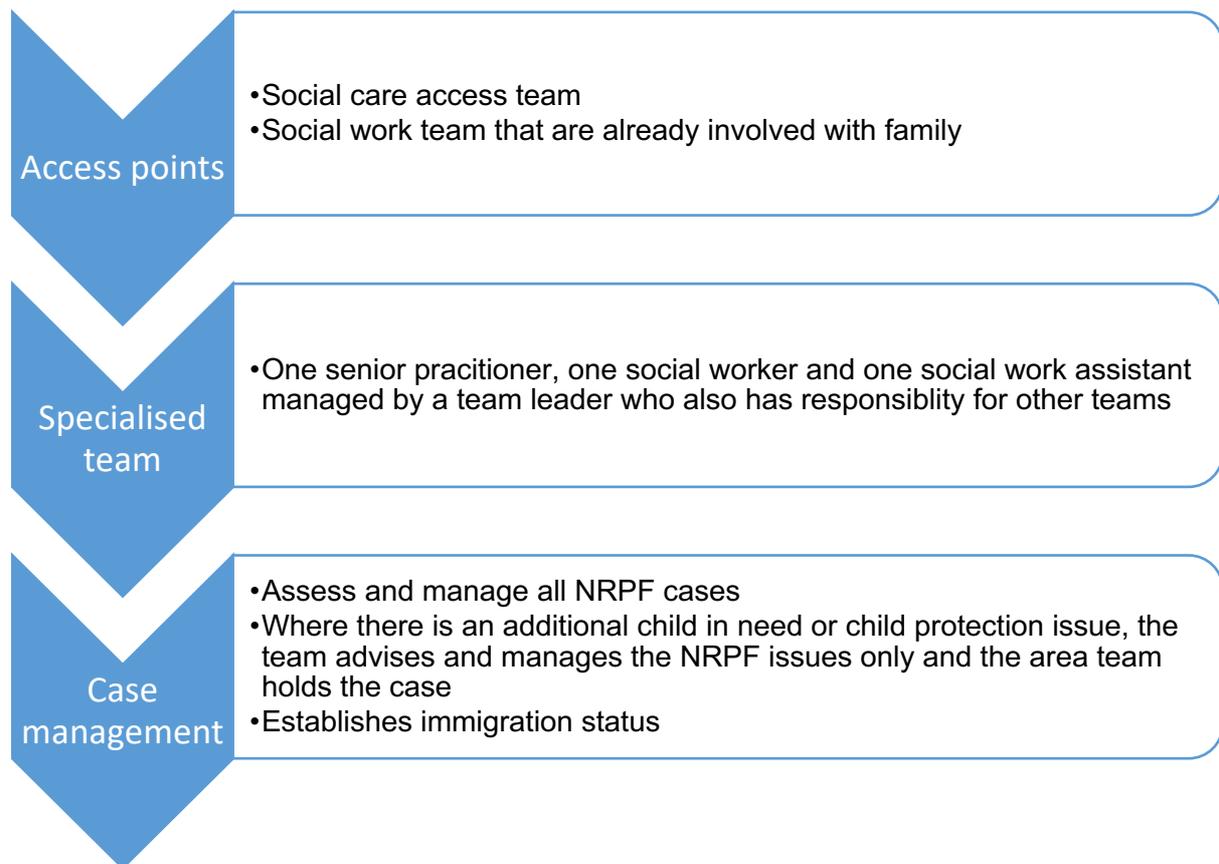
Example 1: Local area social work teams manage cases



Benefits:

- A social worker who is an expert in their locality will be responsible for managing assessments and allocating resources, promoting equality and fairness in decision making
- Chief Social Worker has oversight of cases that are referred to them leading to consistent decisions being made

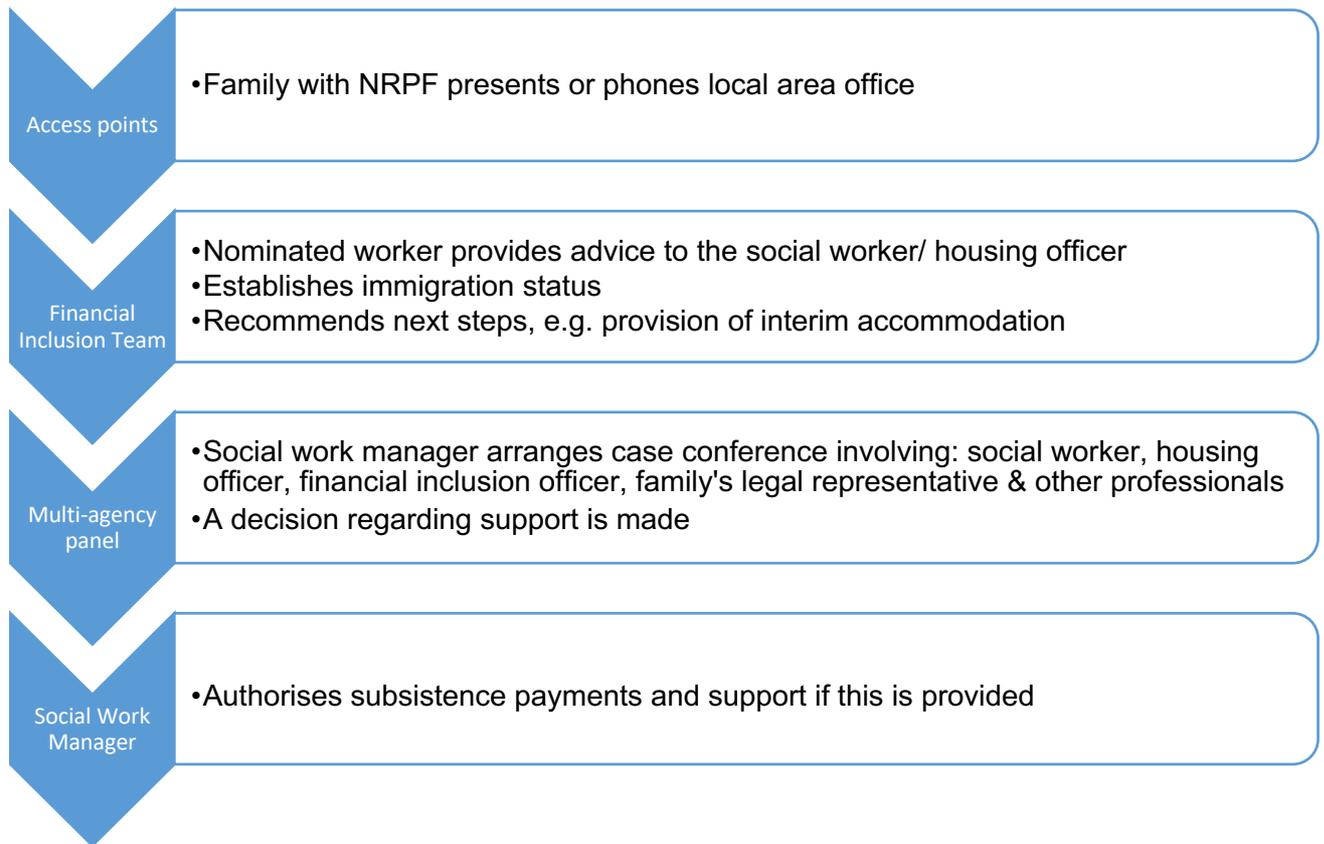
Example 2: Specialised NRPF team (families)



Benefits:

- Specialist workers will be responsible for assessments and reviews
- Central oversight of caseload to manage spend
- Consistent approach with regards to the support that is provided

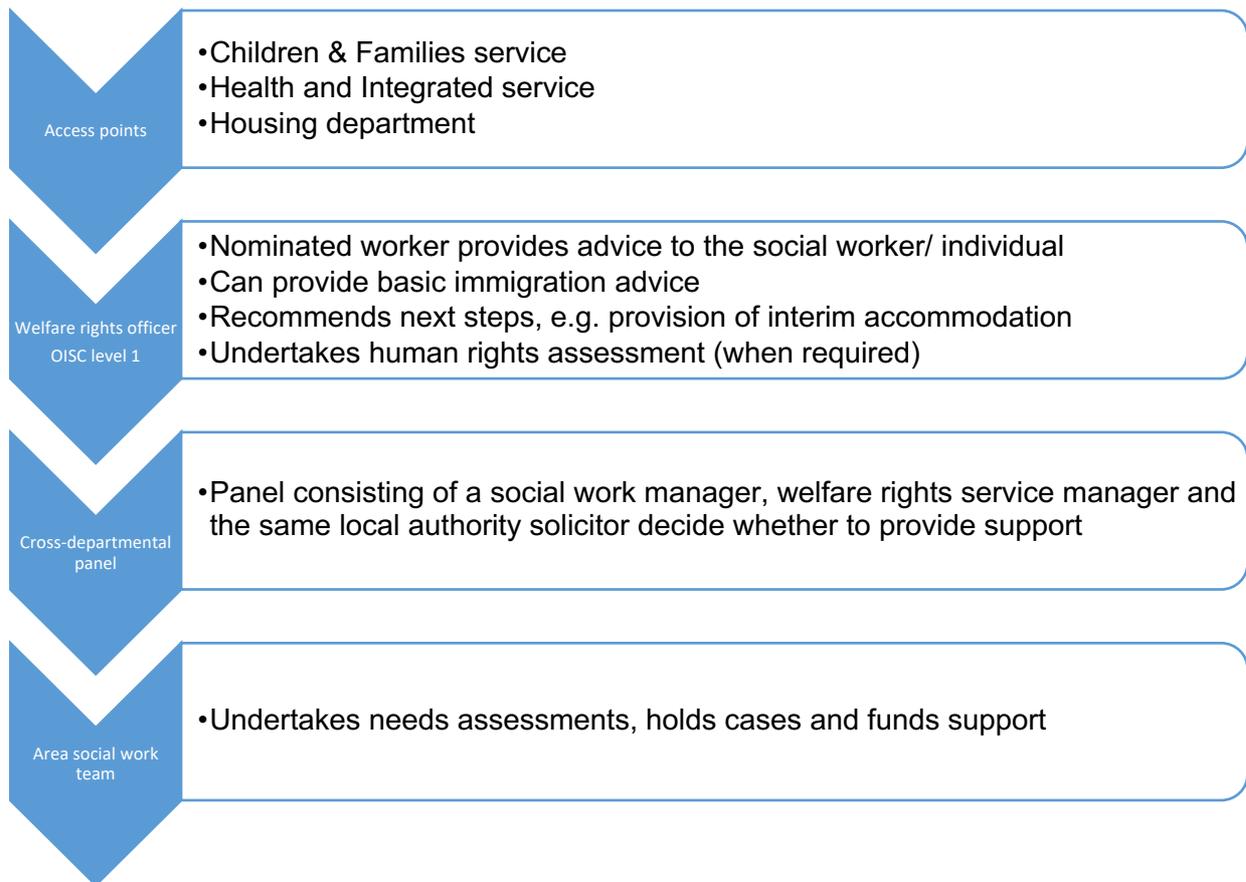
Example 3: Centralised advice & case panel process (families)



Benefits:

- Social worker will be responsible for assessments and reviews.
- Central oversight of caseload to manage spend.
- Multi department/agency approach to case panel will achieve holistic response.

Example 4: Specialist OISC- registered immigration adviser with cases held by social work teams



Benefits:

- OISC level 1 adviser can provide advice to prevent homelessness in some instances and guide social workers on immigration matters
- Multi-department approach to case panel will promote cooperation between departments and consistency in decision making

15 EEA nationals and family members

Local authorities may need to provide support to people from countries in the European Economic Area (EEA nationals) and their family members who are unable to access certain social security benefits.

This chapter provides some basic information to help guide local authorities in assisting EEA nationals and their family members. It is not to serve as a comprehensive guide to rights under European Union (EU) law and benefit eligibility, so further information may need to be referred to or specialist advice obtained.

The UK is due to leave the EU on 29 March 2019. The UK Government and EU have yet to reach a final agreement on the full terms that will apply to the UK when it leaves. The UK Government is proposing that EU free movement rights that currently allow EEA nationals and their family members to live and work in the UK will continue until 31 December 2020. EU nationals and their family members present in the UK by that date must apply under the new EU Settlement Scheme if they wish to stay here. This arrangement will be different in the event of a 'no deal scenario'. If that applies, free movement is expected to end on 29 March 2019, and temporary immigration requirements will be introduced for EEA nationals who arrive in the UK after 29 March 2019, although those that are living in the UK by that date will be able to apply to stay in the UK under the EU Settlement Scheme. The information contained in this chapter will be updated to reflect any significant changes.

Key points

- Currently, EEA nationals and their family members do not require leave to enter or to remain in the UK. Their rights to enter, live and work in the UK are governed by European law, and are commonly referred to as 'EU treaty rights' or 'free movement rights'.
- Benefit and housing entitlements for EEA nationals can be complex and usually depend on the EEA national being economically active or having a permanent right of residence, or a person being the family member of an EEA national who this applies to.
- In the absence of a requirement for an EEA national and most family members to make an application to the Home Office to clarify their status, social services, the local housing authority and the DWP, will need to make their own determination of this for the purpose of determining eligibility for services. This means they will need to establish whether a person has a relevant right to reside based on their employment or family circumstances. Local authority officers will therefore require training and support in order to be able to correctly assess EEA national's eligibility for services, and when another agency may have made an incorrect decision that can be challenged.
- Local authorities need to undertake proactive action to ensure EEA residents are aware of the new EU Settlement Scheme and know what they may need to do to

protect their rights after the UK leaves the EU on 29 March 2019. Local authorities will need to play a role in reducing any negative impacts on communities that may arise if EEA nationals lose their entitlement to benefits and employment by failing to successfully apply under the scheme.

15.1 European Economic Area (EEA) countries

The European Economic Area (EEA) is comprised of all European Union (EU) countries and some non-EU members.

EEA member states			
EU countries			
Austria	Estonia	Italy	Portugal
Belgium	Finland	Latvia	Romania
Bulgaria	France	Lithuania	Slovenia
Croatia	Germany	Luxembourg	Spain
Cyprus	Greece	Malta	Slovakia
Czech Republic	Hungary	Netherlands	Sweden
Denmark	Ireland	Poland	UK*
Non-EU member states			
Iceland	Norway	Lichtenstein	

* For the purpose of this guidance the term 'EEA national' does not include UK nationals but does include Swiss nationals, who also enjoy similar free movement rights as a result of bilateral treaties.

15.2 Rights of residence

EEA nationals and their family members do not require leave to enter or to remain in the UK. Their rights to enter, live and work in the UK are governed by European law, and are commonly referred to as 'EU treaty rights' or 'free movement rights'. These rights are transposed into UK law through the Immigration (European Economic Area) Regulations 2016.

The free movement rights that are documented here are expected to continue until 31 December 2020 if the UK reaches a deal regarding its exit from the EU. If the UK leaves without agreeing a deal with the EU, then free movement rights will be retained in UK law and continue to apply until the UK government enacts legislation to repeal these, which could be as early as 30 March 2019.

An EEA national's right to reside is acquired on the basis of their circumstances **and there is no requirement in law for an EEA national or most family members to obtain confirmation of this**, although they may apply for documentation from the Home Office if they choose to do so. This can make it difficult for an EEA national to establish their right to benefits in the UK and for local authority officers who are advising them.

All EEA nationals have an initial right of residence for up to three months. They may stay in the UK beyond this period if they are 'exercising a treaty right', which means being a 'qualified person.'

An EEA national must be undertaking one of the following specified activities that are set out in the 2016 Regulations in order to be a qualified person:

- Jobseeker
- Worker (including a worker who recently stopped working)
- Self-employed person (including a former self-employed person)
- Self-sufficient person
- Student

To be recognised as a qualified person, an EEA national must satisfy specific requirements that are set out in the 2016 Regulations.

EEA nationals will acquire the right of permanent residence after five years' continuous residence in the UK as a qualified person under the 2016 Regulations, or if they meet the criteria as a worker or self-employed person who has ceased activity because of a permanent incapacity to work.¹¹⁹

However, nationals of recent accession countries may need to have complied with any additional arrangements during the transition period, such as worker registration, in order for any employment during that time to count towards permanent residence.

Certain family members of EEA nationals, whether they are EEA nationals themselves or non-EEA nationals, also have the right to reside in the UK where the EEA national is a 'qualified person'. Family members may also acquire permanent residence.

The Immigration (EEA) Regulations 2016 define who is considered to be a family member:

- Spouse or civil partner*
- Child under 21 of the EEA national or their spouse/civil partner
- Dependent child age 21 and older of the EEA national or their spouse/civil partner
- Dependant relatives in the ascending line i.e. a parent or grandparent of the EEA national or their spouse/civil partner¹²⁰

* Following a separation, a person will continue to be considered as a spouse or civil partner until the marriage or civil partnership is legally terminated. After that point, they may retain their right of residence if they meet certain conditions set out in the Regulations.¹²¹

Extended family members of EEA nationals also have the right to reside, including a partner who is in a durable relationship with the EEA national, and other relatives who may be dependent on the EEA national or the EEA national's spouse or civil partner.¹²²

It is also possible for a person to acquire a derivative right to reside under EU law when one of the following situations apply:¹²³

¹¹⁹ Regulation 6(7), Immigration (EEA) Regulations 2016

¹²⁰ Regulation 7, Immigration (EEA) Regulations 2016

¹²¹ Regulation 10, Immigration (EEA) Regulations 2016

¹²² Regulation 8, Immigration (EEA) Regulations 2016

¹²³ Regulation 16, Immigration (EEA) Regulations 2016

- The non-EEA national primary carer of a British (or EEA) national adult or child, where failing to permit the carer to stay and work in the UK would lead to the British (or EEA) national leaving the EEA. A person with this right is often referred to as a '**Zambrano carer**'.
- The primary carer of a child of an EEA national worker, or former worker, where that child is in education in the UK, and where requiring the primary carer to leave the UK would prevent the child from continuing their education in the UK. This is often referred to as a **Teixeira/ Ibrahim** case.
- The primary carer of an EEA national child who is exercising free movement rights in the UK as a self-sufficient person, where requiring the primary carer to leave the UK would prevent the EEA national child exercising those free movement rights. This is often referred to as a **Chen** case.

For more information, see the Home Office Modernised Guidance:

- EEA and Swiss nationals: free movement rights ¹²⁴
- Free movement rights: direct family members of EEA nationals ¹²⁵

15.3 Benefit entitlement

The table below sets out benefit entitlement based on a person's right to reside under EU law.

Right to reside	Eligible for benefits? (See note A)	Eligible for homelessness assistance/ social housing allocation?
Initial right of residence for three months following entry to the UK by EEA national or their family member	May only be eligible for: <ul style="list-style-type: none"> • Child Benefit • Child tax credit 	Yes (see note B)
EEA jobseeker or their family member	May only be eligible for: <ul style="list-style-type: none"> • JSA (IB) • Universal Credit • Child benefit • Child tax credit 	Yes
EEA worker (including a person who has retained worker status) or their family member	Yes	Yes
EEA self-employed person (including a person who has retained self-employed status) or their family member	Yes	Yes

¹²⁴ <https://www.gov.uk/government/publications/eea-and-swiss-nationals-free-movement-rights>

¹²⁵ <https://www.gov.uk/government/publications/direct-family-members-of-european-economic-area-eea-nationals>

EEA self-sufficient person or their family member	Yes (see note B)	Yes
EEA student or their family member	Yes (see note B)	Yes
EEA permanent right of residence	Yes	Yes
Derivative right to reside: Teixeira and Ibrahim	Yes	Yes
Derivative right to reside: Zambrano	No	Yes
Derivative right to reside: Chen	Yes (see note B)	Yes

Notes

- A.** The benefits referred to for these purposes are those with a right to reside requirement: Child benefit (claimed on or after 1 May 2004); Child tax credit (claimed on or after 1 May 2004); Council tax reduction; Housing benefit; Income- based Jobseeker's Allowance; Income related Employment and Support Allowance (from 31 October 2011); Income support; State pension credit and Universal credit.

To claim most benefits and housing assistance the person must have been living in the Common Travel Area (UK, Republic of Ireland, Channel Islands and Isle of Man) for a period of three months prior to the claim.

- B.** A benefits assessor or housing officer will consider whether the claim does not amount to an unreasonable burden on the social assistance system of the UK in order to determine whether the person is fulfilling the requirements to be exercising their right to reside. Claiming benefits does not mean a person will fail this test, and it is arguable that if the assistance required is only for a short period, they would not be an unreasonable burden.

Due to the challenges and complexities of establishing whether a person has a right to reside, and difficulties with regards to evidencing this, there may often be differences in opinion between social services and the local housing authority or the DWP. These authorities may even make inconsistent or conflicting decisions. It is important, in this context, to remember that whilst the Home Office is the agency responsible for determining whether a person has a right to reside, in the absence of any requirement for a person to make an EEA application to the Home Office, social services, the local housing authority and the DWP will have to make their own determination of this, before applying assessing eligibility for services or benefits.

The points made here are to help local authority officers identify when an EEA national or their family member may be able to challenge a refusal of assistance.

- In order to determine whether an EEA national is a worker, is self-employed, or has retained worker or self-employed status, the DWP and local authority housing benefit department will apply the 'minimum earnings threshold'. This is a two-part test which is not set out in legislation and requires a person to have regularly earned a specified amount of money over a three-month period, set at what someone working 24hrs/week at minimum wage would earn. When a person does not satisfy the minimum earnings threshold, the benefits assessor must consider whether the employment is 'genuine and effective'. Note that it is not a legal requirement for a person to demonstrate that they meet the minimum earnings threshold.¹²⁶
- There is no requirement for work to have been legal so a person receiving cash in hand payments can be a worker, but this may be difficult to evidence. This principle also applies to an EEA national who is a survivor of modern slavery or trafficking as work undertaken, despite it being exploitative, may mean they have a right to reside as a worker or have retained worker status.
- When a person has separated from an EEA national spouse or partner due to domestic abuse, and they are unable to provide evidence of their former partner's employment to support an application to the Home Office to confirm that they have a right to reside as a family member of an EEA national, or have a retained their right of residence, then the Home Office has the power under section 40 of the UK Borders Act 2007 to obtain evidence directly from HMRC, and has a policy setting out details of this.¹²⁷
- When an EEA national has resided in the UK for five years or more then they may have a permanent right of residence; an immigration adviser can help to establish this and apply for documentation from the Home Office.

When an EEA national is having difficulty establishing their right to reside, they have the following options:

- Obtain advice from a benefits adviser with a good understanding of EU law
- Apply for Home Office documentation to confirm their right to reside - an immigration adviser with experience of EU law should be able to advise and assist with such an application – legal aid may be available, in some cases

Local authority officers may obtain advice on a query about an EEA national's right to reside by contacting:

- Child Poverty Action Group (CPAG) in Scotland's [advice line](#)
- The AIRE Centre – written advice will be provided based on the information given, which may then assist a welfare rights adviser to prepare a benefits claim or appeal, but it may take several weeks to receive a response.

¹²⁶ Department for Work and Pensions, HB Circular A3/2014: Minimum Earnings Threshold. <https://www.gov.uk/government/publications/hb-circular-a32014-minimum-earnings-threshold>

¹²⁷ Home Office, *European operational policy notice 10/2011 for caseworkers to process EEA nationals' applications*. <https://www.gov.uk/government/publications/european-operational-policy-notice-102011-for-caseworkers-to-process-eea-nationals-applications>

15.4 EEA nationals who are ineligible for benefits

When an EEA national is not eligible for benefits and has no other sources of support available, then the local authority would need to establish what assistance may be provided to them.

This situation could arise in a number of circumstances, for example:

- An EEA national applies for Universal Credit and is found to be ineligible, leading to their housing benefit stopping and rent arrears accruing.
- An EEA mother with children in her care has separated from her EEA spouse due to domestic abuse and her claims for benefits have been refused on the basis that she does not have a right to reside.
- An EEA national came to the UK six months ago and has not managed to find work. His JSA has stopped as he could not show that he met the genuine prospect of work test and he is not eligible for housing benefit.

An overview of responsibility for providing support is set out in the assessment tool: support options for EEA nationals which can be referred to in conjunction with this section.

15.5 Housing duties

The local authority is required to provide temporary accommodation, under the Housing (Scotland) Act 1987, to an EEA national who is eligible and may be homeless. The local authority has a duty to take reasonable steps to prevent the EEA national's current accommodation from being lost, where the EEA national is at threat of homelessness within two months and the threat of homelessness is unintentional.¹²⁸

However, there are some circumstances when an EEA national will be eligible for homelessness assistance but unable to claim housing benefit, for example, where they have an initial right of residence or have a right to reside as a jobseeker. This situation may also arise for a non-EEA national who has a derivative right under EU law as the primary carer of a British child.

In such cases, the local authority would not be able to refuse to provide temporary accommodation under the Housing (Scotland) Act 1987 and, if appropriate, would need to refer the person for a social services' needs assessment to establish whether they can fund the accommodation and living costs. In these circumstances, the person can also be assisted to negotiate a 'reasonable' (lower) charge for the temporary accommodation, and the local authority cannot unreasonably refuse this request.

If an EEA national is not exercising a right to reside then they would not be eligible for homelessness assistance. The local authority should issue the person with a written decision setting out the basis on which the EEA national is not found eligible, and best practice would include making a referral to social services where this is appropriate.

¹²⁸ Section 24 of the Housing (Scotland) Act 1987

15.6 Social services' duties

When the housing authority has found that an EEA national is not eligible for homelessness assistance, or can be provided with temporary accommodation but is not eligible for housing benefit and has no other means to pay their rent, then a referral to social services will be necessary if there is a child under 18 in the household or the EEA national is a vulnerable adult.

For former looked after children receiving aftercare, social services would already be involved in providing support and would need to fund their accommodation and living costs whilst aftercare duties apply.

For families, social services would need to undertake a GIRFEC assessment to establish whether the child is in need. For adults, social services would need to undertake a community care assessment to establish whether the person is in need of assistance and any statutory duties are engaged.

However, accommodation and financial support can only be provided to an adult, young person (age 18+) or family if this is necessary to prevent a breach of human rights or rights under the EU treaties, due to the exclusion set out in Schedule 3 of the Nationality, Immigration and Asylum Act 2002. Social services would therefore also need to consider whether the person can return to their country of origin to avoid a human rights breach arising from their destitution in the UK. However, where an EEA national is likely to be eligible for leave to remain under the EU Settlement Scheme, then it would be very difficult for the local authority to recommend return as this would be in conflict with the UK Government's commitment to preserve the rights of EEA nationals to live in the UK after the UK has left the EU, and guidance on how to proceed in such cases may need to be obtained from the local authority's legal team.

Social services have powers to meet urgent needs whilst assessments are undertaken, so may be able to provide or fund accommodation and financial support on an interim basis.

The local authority will be required to provide accommodation and financial support to prevent a breach of Article 3, which may occur if the person or family are destitute in the UK when:

- return to country of origin would give rise to a breach of EU treaty rights, i.e., support is necessary to enable the person to exercise their right to reside under EU law;
- a legal or practical barrier to return is identified; or
- return to country of origin would give rise to a human rights breach (for example, where return would lead to being unable to qualify under the EU Settlement Scheme).

When support is provided, the local authority may need to:

- Regularly review the EEA national's circumstances.
- Signpost to an immigration or benefits adviser to help document their right to reside or appeal a benefits refusal.
- Send a query to the AIRE Centre if the matter is complex.

- Help the person to access employment and evidence this to enable them to claim benefits.

When no legal or practical barrier preventing return has been identified and the local authority has established that return to country of origin would not give rise to a breach of human rights or EU treaty rights, then the local authority will not be under a duty to provide accommodation and financial support because the person or family can freely return to their country of origin in order to prevent a breach of Article 3, which may occur if they are destitute in the UK. In such cases assistance with return to country of origin should be offered.

Given the complexity of establishing whether an EEA national has a right to reside, the local authority may wish to take a proportionate and pragmatic approach, as illustrated in the case example.

For more information, see sections:

- 9 Social services' support – children within families
- 10 Social services' support – adults
- 11 Young people leaving care

15.7 Return to country of origin

An EEA national may approach the local authority requesting assistance with return, or this may be recommended following an application for social services' support. An EEA national should be advised to seek immigration advice so they are fully informed about the consequences of a return on their ability to meet the requirements of the EU Settlement Scheme, now or at a future date.

Return can be arranged by:

- The local authority under the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002
- A national embassy
- The Home Office Voluntary Returns Service may be able to assist an EEA national who is a victim of trafficking or modern slavery

Accommodation may need to be provided whilst return is being arranged.

Case example – EEA family

Polish family (mother and two children) present to the housing department at their local council after the friend they were staying with has asked them to leave. The mother is found to be eligible for homelessness assistance on the basis that she has the right to reside as a jobseeker. The family are provided with temporary accommodation whilst their homelessness application is being investigated but cannot claim housing benefit to pay for the rent. The housing officer refers them to Children's Services for a GIRFEC assessment. The children are found to be in need because their mother has only been able to claim

Jobseeker's Allowance for a short period and has no friends or family who are able to provide support in the UK.

The mother has lived in the UK for six years and worked on and off but is not currently considered to have a right to reside as a 'worker' or been able to evidence to the DWP that she has a permanent right of residence. She hopes to work again when she has more settled accommodation and is actively seeking employment. Given that she intends to find work, and as she is likely to qualify under the EU Settlement Scheme, social services agree to pay for her rent for a three-month period, subject to review. The social worker refers the mother to a benefits adviser and an employment advice service, and helps her to find out about local childcare options. After two months the mother finds a part time self-employed cleaning job. The social worker agrees to continue to fund the rent and financial support for another three months, helps the mother to register with HMRC and to collate evidence of her earnings in order to make a successful claim for benefits. Social services' support is withdrawn once the family are in receipt of benefits and the mother is given information about the EU Settlement Scheme and where she can seek advice about that to secure her status after the UK has left the EU.

15.8 Rights of EEA nationals after the UK leaves the EU

The UK Government has confirmed that that EEA nationals and their family members living in the UK will be able to apply for settled status (indefinite leave to remain) or pre-settled status (limited leave to remain) under a new EU Settlement Scheme if they wish to stay after the UK leaves the EU on 29 March 2019.

If a deal is secured between the UK Government and the EU, then it is likely that EEA nationals living in the UK by 31 December 2020, will be able to apply and must do so by the end of June 2021. Free movement rights will continue to apply until 31 December 2020.

In the event of a 'no deal scenario', only EEA nationals living in the UK by 29 March 2019 will be able to apply and must do so by 31 December 2020. Temporary immigration requirements will be introduced for EEA nationals who arrive in the UK after 29 March 2019.

Many residents will be directly affected by the UK leaving the EU and, as a consequence, local authorities will need to play a role in reducing any negative impacts on communities that may arise if EU nationals lose their entitlement to benefits and employment.

There are several actions a local authority may consider undertaking in order to ensure EU residents are aware of the process and what they may need to do to protect their rights:

- Communicate information about the EU Settlement Scheme to staff and residents.
- Explore options for providing residents with advice on their rights, for example, advice clinics in partnership with legal representatives. The Law Centres Network can provide a lawyer for information sessions run by community groups and the UK Government is operating a grant scheme to fund community groups assisting EU nationals.¹²⁹

¹²⁹ <http://www.lawcentres.org.uk/lcn-s-work/eu-citizens-rights-information-service>;
<https://www.contractsfinder.service.gov.uk/Notice/dcc90ff7-c416-465a-ad92-9dd7f15bcce7>

- Identify vulnerable EU nationals and their family members (including children) who are engaged with council services in order to make them aware of the process and consider how they may be helped to overcome any barriers in making an application.

For EU nationals that are being supported by social services, including children in care:

- Signpost to obtain immigration advice now for the following reasons:
 - A child may have an entitlement to British citizenship.
 - A person with a derivative right to reside will not be able to apply under the Settled status scheme and will only be able to obtain a temporary form of status, and so will need to explore alternative options under the Immigration Rules that may confer leave to remain on a settlement route.
- Check that people who will need to apply for settled status (including children) have a valid passport or national ID card, and if they do not, help them to obtain identity documents from their national embassy. If a document cannot be obtained, help the person to evidence this e.g. by keeping correspondence with the embassy.
- Help people to document their residence in the UK for the period prior to being assisted by social services.
- If support is withdrawn, for example, because the EU national has obtained employment and access to benefits, signpost them to information about the EU Settlement Scheme so they can prepare for this application.

For more information, see:

- 19.1 Rights of EU nationals after the UK leaves the EU

16 Asylum seekers

This chapter sets out what the local authority would need to consider when a person who is seeking asylum or has become 'appeal rights exhausted' (ARE) following the refusal of their claim, requests assistance. It also sets out the rules regarding responsibility for providing support and whether this lies with the local authority or Home Office.

Currently Glasgow is the only asylum dispersal area in Scotland, although talks are ongoing with regards to widening dispersal across the country. Serco is currently contracted by the Home Office to manage asylum support accommodation in Scotland. Mears will be taking over the contract as of September 2019. Migrant Help provide support and advice to asylum seekers through the current related contract and also will continue to deliver this through the AIRE Home Office contract from September 2019.

There may be asylum seekers living in alternative accommodation in Scotland and it is possible for them to be supported by the Home Office on a subsistence only basis.

Key points

- Responsibility for providing accommodation and financial support to asylum seeking families or individuals will depend on the status of their asylum claim and whether they would be eligible for Home Office asylum support under section 4, section 95 or section 98 of the Immigration and Asylum Act 1999.
- The Home Office is responsible for providing accommodation and financial support to asylum seeking families, including when the parent's claim is unsuccessful and they are 'appeal rights exhausted' (ARE).
- Local authorities may be responsible for providing accommodation and financial support to asylum seeking adults with care needs who require residential accommodation, and to some ARE asylum seekers who are assessed as having community care needs. Care packages and other assistance may need to be provided to adults with care needs who are accommodated by the Home Office.
- Although the Home Office should, in the first instance, provide emergency support, where there are delays in accessing this and a family or vulnerable adult has no alternative funds or housing available, it may fall to the local authority to provide accommodation and financial support to people seeking asylum, so a GIRFEC or community care assessment will need to be carried out in order to determine eligibility under section 22 of the Children (Scotland) Act 1995 and sections 12 or 13A of the Social Work (Scotland) Act 1968.
- There are no restrictions on providing social care services to a child within an asylum-seeking family, for example, to meet any needs arising from a disability.

16.1 Responsibility for providing support – families

Responsibility for providing accommodation and financial support to asylum seeking families depends on the status of the parent’s asylum claim and whether they would be eligible for Home Office asylum support under section 4 or section 95 Immigration and Asylum Act 1999. Details are set out in the table below.

The local authority would need to establish the status of the parent’s asylum claims in order to determine which type of support is available to them. It will be important to obtain confirmation that the parent has claimed asylum, the current status of the claim, and, if it has been refused, the date of the initial refusal, any appeal decisions and date the parent became appeal rights exhausted if they have received a final determination by the courts.

Even when a family can be referred to the Home Office for support, either because they are eligible for section 95 support, or section 4 support has been assessed as being sufficient to meet a child’s needs, it may fall to the local authority to provide accommodation and financial support under 22 of the Children (Scotland) Act 1995 if there are delays in accessing Home Office support and the family has no alternative funds or housing available. In such cases a GIRFEC assessment will need to be carried out.

Status of parent’s asylum claim	Home Office support	Local authority position: section 22 Children (Scotland) Act 1995 support
Asylum seeker with pending application or appeal	Section 95	Section 122 of the Immigration and Asylum Act 1999 prevents the local authority from providing financial support and/or accommodation to a child who is eligible for or receiving section 95 support.
Appeal rights exhausted (ARE) asylum seeker with a child under 18 in the household at time the parent became appeal rights exhausted	Section 95	Such families who approach the local authority need to be assisted to apply for section 95 support or referred to a local third sector organisation that can help with that.
ARE asylum seeker with no child under 18 in the household at time the parent became appeal rights exhausted, e.g. child is born after this date	Section 4	When a parent has their child after becoming appeal rights exhausted, section 95 support will not be available to the family. Instead, the local authority must undertake a GIRFEC assessment under section 22 of the Children (Scotland) Act 1995. The local authority may only refer the family to the Home Office for support if it has confirmation that section 4 support is available and would adequately meet the

		<p>child's needs, so this should be considered within the GIRFEC assessment.¹³⁰</p> <p>Note that accommodation and financial support can only be provided by social services when the parent is an in-country ARE asylum seeker if support is necessary to prevent a breach of human rights, and there is a legal or practical barrier preventing return to the parent's country of origin. A human rights assessment would also be required in addition to the GIRFEC assessment.</p>
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For more information, see:

- 7 Social services' support – exclusion
- 8 Social services' support – children within families

16.2 Social services' assistance for children

When an asylum seeking family do not require accommodation from the local authority, for example because they are receiving section 95 support from the Home Office, there is no restriction on providing social care services to a child, for example, to meet any needs arising from a disability.

Case example

An asylum seeking family was accommodated by the Home Office in asylum support accommodation. One of the children suffered from a serious physical disability, and also suffered from seizures, which required the family to travel for numerous health care appointments weekly, and to make adaptations to their accommodation. The local authority conducted a disability/ carer's assessment, and documented the additional support needs arising from the child's disability. The local authority then committed to meeting some of these needs, including paying for adjustments to the property, access to medically required furnishings, and providing a modest cash allowance for travel to health care appointments.

General good practice is for the local authority to work with the accommodation provider to ensure that they understand the needs of the family/ child and have fulfilled their contractual duties. The local authority will then consider any other steps that may need to be taken to provide appropriate support.

¹³⁰ *VC & Ors, R (on the application of) v Newcastle City Council* [2011] EWHC 2673 (Admin) <http://www.bailii.org/ew/cases/EWHC/Admin/2011/2673.html> & *R (C, T, M and U) v LB Southwark* (2016)

16.3 Responsibility for providing support – adults

When an adult asylum seeker is referred to the local authority and presents with an appearance of need, they must be assessed in the usual way with a view to determining whether they need to be provided with any social care services under sections 12 or 13A of the Social Work (Scotland) Act 1968.

The Home Office has published updated guidance to clarify its role in helping asylum seekers with care needs access support from the local authority as well as confirming which organisation will be responsible for providing accommodation. The guidance applies to Scotland but refers to legislation which applies in England (the Care Act 2014). This has a very different eligibility criteria and framework for providing care to that which applies in Scotland. Local authorities can therefore refer to this guidance but must also ensure all decisions comply with their duties under the Social Work (Scotland) Act 1968.¹³¹

If the adult has not yet accessed support from the Home Office, the local authority would be required to undertake a community care assessment to establish what assistance they require, and whether residential accommodation is necessary to meet the person's needs. Whilst assessments are being carried out the local authority may need to provide interim accommodation if the adult has no alternative housing available to them.

If residential accommodation is required, then the local authority will need to provide and fund this. If the person requires care which can be provided within the community, then the Home Office guidance states that suitable asylum support accommodation will be sourced, and any care required can be provided by the local authority.

An asylum seeker or ARE asylum seeker who has presented with an appearance of need, should only be referred to the Home Office for support when the community care assessment has been completed, the local authority has identified whether they are eligible for assistance, and if so, what kind of support will be required. If interim support, including housing, has been provided pending the outcome of the assessment, then it would be good practice for the local authority to assist the person to apply for asylum support if residential care is not required.

If the adult has been referred to the local authority when they are already living in Home Office accommodation, then a community care assessment should be carried out as usual. The local authority should disregard the availability of Home Office accommodation and identify whether residential accommodation is in fact required. If non-residential care is required, then the local authority must consider whether the Home Office accommodation suitably allows for the adult's care needs to be met, and if not, would need to request that the Home Office sources more appropriate accommodation in line with the guidance.

The provision of support under sections 12 or 13A of the Social Work (Scotland) Act 1968 is not limited by Schedule 3 of the Nationality, Immigration and Asylum Act 2002 for adults with a pending asylum claim which has not been finally determined, or for adults who claimed asylum at port of entry, even if they have been refused and appeal rights exhausted.

¹³¹ <https://www.gov.uk/government/publications/asylum-seekers-with-care-needs-process>

However, the Schedule 3 exclusion will apply to ARE asylum seekers where the adult:

- claimed asylum after they entered the UK (rather than at the port of entry), or
- has failed to comply with removal directions.

In such cases, care and support, including accommodation, may only be provided where this is necessary to prevent a breach of the person's human rights, i.e., there is a legal or practical barrier preventing them from returning to their country of origin. The local authority will need to undertake a human rights assessment to establish this, as well as community care assessment.

For more information, see:

- 7 Social services' support – exclusion
- 9 Social services' support – adults

16.4 Section 95 Home Office support

A person with a pending asylum or Article 3 human rights application (or appeal) may apply for support from the Home Office under section 95 of the Immigration and Asylum Act 1999 when they are destitute (i.e., they have no accommodation and/ or cannot afford to meet their essential living needs).

They can also apply for emergency support from the Home Office under section 98 of the Immigration and Asylum Act 1999 and may receive this support whilst the Home Office make a final decision on their application for section 95 asylum support.

The Home Office can provide housing and financial support (subsistence) through a card, which can be used in shops and to withdraw cash. A person who already has accommodation may request subsistence support only.

The asylum seeker's dependants will also be provided with support. If the person's asylum claim is unsuccessful and they become appeal rights exhausted, then support will end following a short notice period unless there is a child who was part of the household before the claim was finally determined. In such instances, support will continue until the youngest child turns 18 or they no longer meet the requirements, for example, the Home Office has evidence that they are not destitute. Due to this, most ARE asylum seeking families remain supported by the Home Office and do not require local authority support.

An ARE asylum seeking family will not be eligible to receive support from the Home Office under section 95 when the first child was born after the asylum claim was finally determined by the Home Office or courts, but instead may be able to apply for section 4 support. However, if a child under 18 was part of the household prior to the asylum claim being finally determined, the family should be able to access section 95 support when they have not previously claimed this.¹³²

Section 95 accommodation will usually be terminated when:

- A single adult or family are granted leave to remain – 28-day notice period

¹³² Section 94(5) of the Immigration and Asylum Act 1999

- A single adult is refused asylum and becomes ARE – 21-day notice period

In some cases, an asylum seeker or family may receive a notice of termination of support in error, or a refusal to grant Section 95 support after receipt of Section 98 support. In these cases, they may be able to exercise a right of appeal against the decision and should be signposted to an asylum support advice provider for advice and information on their rights to do so.

16.5 Section 4 Home Office support

In certain circumstances, destitute ARE asylum seekers may be provided with support from the Home Office under section 4 of the Immigration and Asylum Act 1999. They need to show that they:

- are taking all reasonable steps to leave the UK;
- are unable to leave the UK due to physical impediment;
- have no safe route of return;
- have been granted leave to appeal in an application for judicial review in relation to their asylum claim; or
- require support to avoid a breach of their human rights, for example they have made further submissions for a fresh asylum claim.

The support provided comprises of accommodation and subsistence, which is intended to cover the costs of food, clothing and toiletries, through a card which can be used in shops but not to withdraw cash. Subsistence support cannot be provided independently of accommodation.

Eligibility for section 4 support is subject to complex rules. A person or family must prove that they are destitute or at risk of destitution (within the next 14 days) and also furnish evidence that they meet the requirements of the appropriate rule (set out above). Destitute ARE asylum seekers should be referred to organisations for specialist advocacy and support in making these applications. In some cases, the person or family's immigration solicitor may be willing to make the asylum support application.

Delays by the Home Office in determining Section 4 support applications have lengthened significantly in the past few years. In addition, the Home Office has increasingly used the practice of using 'further information requests' to prolong the period before a final decision to grant asylum support is made. Therefore, even if a person or family is assessed to be eligible for section 4 support and signposted to an advisor for assistance, regard should be given to the possibility that there might be a delay in receiving this entitlement for up to 1-2 months, and an appropriate plan to prevent destitution during this period should be put in place.

The following organisations provide more information about asylum support:

- Home Office¹³³
- Migrant Help (assistance with applications)¹³⁴

¹³³ <https://www.gov.uk/asylum-support>

¹³⁴ <https://www.migranthehelpuk.org/about-asylum-services>

- British Red Cross
- Govan Community Project
- Scottish Refugee Council
- Asylum Support Appeals Project (assistance when support is refused)¹³⁵
- Destitute Asylum Seekers Support (DASS) Project ¹³⁶

¹³⁵ <http://www.asaproject.org/>

¹³⁶

http://www.scottishrefugeecouncil.org.uk/get_help/advice_services/destitute_asylum_seeker_service

17 Survivors of trafficking and modern slavery

All local authorities in Scotland will require to protect and assist victims of human trafficking, some of whom will also be subject to immigration control and may therefore also require accommodation and support.

This chapter sets out what local authorities must consider when they suspect a child or adult may be a victim of human trafficking or slavery, servitude and forced or compulsory labour, and when a confirmed victim who has NRPF requires accommodation or support.

Key points

- Local authority duties towards survivors of human trafficking or modern slavery, servitude and forced or compulsory labour who require support are the same as for any other vulnerable adults or families with children who have no recourse to public funds (NRPF), however, there are some additional considerations which need to be taken into account.
- Some survivors may choose to enter the National Referral Mechanism identification framework, which will also provide access for a temporary period of time to an alternate statutory form of support, funded advice and guidance, and may be able to go onto apply for discretionary leave to remain. Adults will need to consent to be referred to this form of support. Consent is not required if the potential victim is a child.
- Child survivors of trafficking should be referred to the Scottish Guardianship Service (SGS) who can provide independent advice, information and advocacy.
- The local authority will need to provide accommodation and support under Section 25 of the Children (Scotland) Act 1995 to unaccompanied children who have been trafficked.
- For adult victims of trafficking who have NRPF, the local authority's protection duties may be engaged and a community care assessment may be required when a survivor appears to be in need of social care assistance, which may include accommodation and financial support where this is not available through the NRM.
- To achieve best practice in working with victims of human trafficking and modern slavery, there are some key considerations that local authorities should take into account including: the safety and suitability of accommodation, awareness of the effects of trauma, and the need to safeguard the person's decision making and communications.

17.1 Human trafficking in Scotland

Human trafficking in Scotland is often referred to as crime that is 'hidden in plain sight', with widespread acceptance that the incidence and scale of human trafficking is as yet unknown, due to underreporting and a lack of familiarity by many people of the many forms that human trafficking can take. Many people in Scotland think that human trafficking is a crime mostly confined to major cities; however, survivors of human trafficking have been found in every Scottish local authority, including many rural areas.

All local authorities in Scotland are required to protect and assist survivors of human trafficking, and should have protocols in place for identifying survivors and signposting them to appropriate services. Many survivors will be British citizens and therefore a social work response will not require to take into account restrictions on access to support based on migration status. However, some survivors will also be subject to immigration control and could have no recourse to public funds (NRPF). Local authorities may therefore need to consider their obligations to provide accommodation and support, as part of a wider package of support needs.

17.2 National Referral Mechanism (NRM)

The National Referral Mechanism (NRM) is a UK-wide framework for identifying survivors of human trafficking or slavery, servitude and forced or compulsory labour and ensuring they receive the appropriate support.

A potential survivor of human trafficking or slavery, servitude and forced or compulsory labour in Scotland can only be referred to the NRM by a 'First Responder'.

In Scotland the following organisations are First Responders for the purposes of the NRM:

- Police Scotland
- British Transport Police
- UK Government Agencies – UKVI, Border Force and Immigration Enforcement
- Trafficking Awareness Raising Alliance (TARA)
- Migrant Help
- Gangmasters and Labour Abuse Authority (GLAA)
- Local Authorities

Adult survivors of human trafficking or slavery, servitude and forced or compulsory labour must provide active, informed consent for a referral to be made, and best practice includes providing access to information, and early confidential legal advice, if necessary, about the decision to consent, before entering the NRM process.

Consent is not required if the potential survivor is a child; however, it is still important to ensure early access to legal advice so that children and young people understand the consequences of identification, and how to effectively participate and make informed decisions during the evidence gathering process.

Most child survivors in Scotland are referred to the NRM by Border Force, Police Scotland and the British Transport Police. However, in some cases, the local authority may act as First Responder. If taken by a local authority, the decision to refer a child as a potential

survivor of trafficking under the NRM falls within child protection duties of local authorities and should be taken within the relevant frameworks.

When a referral is made under the NRM, the Competent Authority will make an initial determination as to whether there are “reasonable grounds” to believe whether the individual is a survivor of trafficking (the ‘Reasonable Grounds’ decision). If the Reasonable Grounds decision is positive, the individual is given a period of up to 90 days of access to support and assistance, or until such time as a ‘Conclusive Grounds’ decision is taken as to whether or not the individual is a survivor of trafficking.

The National Crime Agency provides more information on the NRM framework.¹³⁷

17.3 Local authority duties and NRM support

Local authority duties towards survivors of human trafficking or slavery, servitude and forced or compulsory labour who require support are the same as those outlined in previous chapters towards NRPF individuals and families, with some additional considerations which require to be taken into account.

It is important to recognise that these duties arise as soon as statutory obligations are triggered, and are not dependent upon a survivor’s subsequent decision to enter into the NRM identification framework (or not).

As mentioned above, if adult survivors do choose to enter the NRM identification framework, and they are not entitled to statutory accommodation and support on other grounds, they become eligible to access an alternate statutory form of support (NRM support) for a temporary period of time.

In addition, positive conclusive identification as a survivor of trafficking – whether a child or an adult – may result in a discretionary grant of limited leave to remain (NRM leave or trafficking leave), in the form of a renewable residence permit. A residence permit will normally be granted with recourse to public funds, allowing full access to mainstream benefits and accommodation.

Finally, whether or not survivors choose to enter the NRM, local authorities should bear in mind best practice in working with survivors of trafficking, when applying practice standards (whether in the vulnerable adult or child protection context) to assessing need, and designing and delivering services for survivors of human trafficking.

Adults

Individuals referred as a potential survivors of trafficking under the NRM are eligible for funded advocacy and guidance as well as accommodation and support, for a limited period of time.

¹³⁷ <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>

For adults, NRM support is provided from the date of a positive Reasonable Grounds decision and ends on the earlier of a period of 90 days or the date on which there is a Conclusive Decision that the adult is or is not a survivor.

In Scotland, the following organisations provide support to adult survivors of trafficking or slavery, servitude and forced or compulsory labour:

- Trafficking Awareness Raising Alliance (TARA) – for potential adult female survivors of commercial sexual exploitation only ¹³⁸
- Migrant Help – for all other potential adult survivors of human trafficking or slavery, servitude and forced or compulsory labour ¹³⁹
- Local Authorities – providing guidance, accommodation and support for certain vulnerable adults under statutory duties

The support and assistance available to potential survivors includes (but is not limited to) the following:

- Accommodation
- Day to day living
- Medical advice and treatment (including psychological assessment and treatment)
- Language translation and interpretation
- Counselling
- Legal advice
- Information about other services available to the adult
- Repatriation

However, if the individual has additional needs, other than as a result of being a survivor, for example drug or alcohol addictions, NRM support will not meet these additional needs, and local authorities may require to do so under their statutory duties.

In addition, local authorities retain a statutory duty to assess risk and provide support in line with their safeguarding duties and adult protection legislation. Therefore, NRM support should be taken into account as a service for meeting needs, and reducing risk, for a temporary period, but is not a substitute for an independent local authority assessment of its own responsibilities towards survivors in their area.

There is, at present, no national Scottish guidance for local authorities on working with survivors of trafficking; however, the Local Government Association has recently published a guide which local authorities might find helpful to consult. ¹⁴⁰

Where a Competent Authority makes a positive Conclusive Decision, with a grant of leave to remain, support can continue to be provided for at least two weeks. However, in some cases, a Competent Authority may make a negative conclusive grounds decision, or a positive decision with no grant of leave to remain, which the individual may wish to appeal.

¹³⁸ <https://www.communitysafetyglasgow.org/what-we-do/supporting-victims-of-gender-based-violence/%EF%BF%BC%EF%BF%BCtara/>

¹³⁹ <https://www.migranthelpuk.org/pages/category/slavery-and-human-trafficking>

¹⁴⁰ <https://www.local.gov.uk/modern-slavery-council-guide>

If NRM support is then withdrawn, local authorities will then become responsible for accommodation and support, where statutory obligations are engaged.

For more information, see:

- 9 Social services' support – adults

Children

In Scotland, trafficking and exploitation of children is recognised as child abuse and triggers a child protection response. In similar terms to the principles set out above in working with adults, local authorities require to protect and support potentially trafficked children by working through existing child protection frameworks.

Local authorities and other statutory partners will provide guidance and support to all trafficked children as necessary. Where trafficked children are also separated, then the local authority will provide accommodation and support under Section 25 of the Children (Scotland) Act 1995.

Trafficked unaccompanied children who are also non-EEA nationals are referred to the Scottish Guardianship Service (SGS), a statutorily-funded service which provides independent advocacy to support children and young people to effectively navigate the NRM system.

The Scottish Government has set out Inter-Agency Guidance for Child Trafficking, and local authorities should have regard to this guidance in designing their own policies and procedures.¹⁴¹

For more information, see:

- 10 Young people leaving care

17.4 Best practice in supporting survivors of human trafficking

To achieve best practice in working with survivors of human trafficking, there are some key considerations that local authorities should take into account:

- Safety and suitability of accommodation (including gender-specific accommodation, and whether single or shared accommodation is appropriate)
- Access to appropriate support services (including NRM support services, legal representation, specialist mental health services, etc.)
- Access to interpreters, and suitability of interpreters (including whether interpreters in the community pose risks if potentially linked to traffickers)
- The impact of potentially heightened fear of authorities, particularly government bodies, on how survivors access government support services
- Safeguarding decision making that may require to be made around access to communications, contact with relatives or potential traffickers and freedom of movement

¹⁴¹ <https://www2.gov.scot/resource/0043/00437636.pdf>

18 Useful information and other services

18.1 Asylum seekers, refugees and destitute migrants

British Red Cross, Refugee Support, Glasgow

- Provides help with urgent needs, as well as a casework and advice service
<https://www.redcross.org.uk>

Glasgow Asylum Destitution Action Network (GLADAN)

- Links up local organisations that support migrants
<https://destitutionaction.wordpress.com/>

Glasgow Night Shelter

- A night shelter for destitute asylum seekers and for non-EU migrants who are not allowed into other accommodation
<https://glasgownightshelter.org/>

Migration Scotland (COSLA Strategic Migration Partnership)

- Policy issues relating to migration in Scotland
<http://www.migrationscotland.org.uk/>

Migrant Help

- Information about Home Office asylum support and assistance with making applications
<http://www.migranthelpuk.org/>

Positive Action in Housing

- Advice and support for asylum seekers and refugees in Glasgow
<http://www.paih.org/>

Scottish Refugee Council

- Advice, information and advocacy to asylum seekers and refugees, including families and children
- Telephone advice service and casework service
- Destitute Asylum Seeker Service
<http://www.scottishrefugeecouncil.org.uk/>

18.2 Benefits and housing

Child Poverty Action Group Scotland

- Second-tier advice line (for frontline advisers and support staff only) **0141 552 0552**
<http://www.cpag.org.uk/scotland>

Citizen's Advice Scotland

- Information on benefits, debt, housing and a range of other issues
<https://www.citizensadvice.org.uk/scotland/>

Housing Rights Information

- Information for the public and practitioners including detailed information for EEA nationals
<https://www.housing-rights.info/scotland/index.php>

Shelter Scotland

- Free housing advice and homelessness helpline **0808 800 4444**
- Information for professionals:
<http://scotland.shelter.org.uk/legal>
- Information for the public:
<https://scotland.shelter.org.uk/>

18.3 Domestic abuse, forced marriage and FGM

Hemat Gryffe Womens Aid

- Glasgow drop-in centre for women, children and young people experiencing domestic abuse
- Outreach service can provide culturally sensitive support to children and young people up to the age of 18 who have experienced domestic abuse
<http://www.hematgryffe.org.uk/>

Ruby Project, Rape Crisis Glasgow

- Support and advocacy service specialising in working with women from black and ethnic minority communities
<https://www.glasgowclyderapecrisis.org.uk/content/ruby-project/>

Saheliya

- Specialist mental health and wellbeing support organisation for black, minority, ethnic, asylum seeker, refugee and migrant women and girls in Edinburgh
<http://www.saheliya.co.uk>

Scottish Women's Aid

- Safe to Speak – Domestic abuse and forced marriage helpline **0800 027 1234**
<http://sdafmh.org.uk/>
- Information, advice and support for women who have survived domestic abuse
<http://womensaid.scot/>

Scottish Women's Rights Centre

- Free legal advice and information for women who have survived gender-based violence - Helpline: **08088 010 789**

<https://www.scottishwomensrightscentre.org.uk>

Shakti Women's Aid

- Help for black minority ethnic (BME) women, children and young people who are experiencing, or who have experienced, domestic abuse.
<http://shaktiedinburgh.co.uk/>

18.4 Education and student finance

Student Awards Agency Scotland (SAAS)

- Information about Scottish government funded financial support for higher education in the UK.
<https://www.saas.gov.uk>

UK Council for International Student Affairs (UKCISA)

- Information about student fees and finance eligibility criteria, immigration requirements, and a helpline for students.
<http://www.ukcisa.org.uk/>

18.5 EEA nationals

AIRE Centre

- Advice on the rights of EEA nationals including email enquiry service
<http://www.airecentre.org/>

Civil Society Brexit Project

- Factsheets and a guide to the rights of EU citizens in Scotland
<https://hrcscotland.org/brexit-resources-and-information/eu-eea-citizens/>

18.6 Employment programmes

Fair Start Scotland

- A Scottish Government funded programmes to help people into work
List of providers: <https://beta.gov.scot/policies/employment-support/fair-start-scotland-employment-support-service/>

Skills Development Scotland

- Scotland's national skills agency – resources for skills development and support in seeking employment
<https://www.skillsdevelopmentscotland.co.uk>

18.7 Health

Anchor (Glasgow Psychological Trauma Service)

- Specialist mental health service working with survivors with a history of complex trauma, that has led to a complex PTSD diagnosis
<https://www.nhs.uk/your-health/health-services/glasgow-psychological-trauma-service/>

Freedom from Torture Scotland (Glasgow)

- Support, counselling, advocacy and legal advice for survivors of torture
https://www.freedomfromtorture.org/about_us/freedom_from_torture_scotland_in_glasgow

NHS Inform

- The NHS Inform overseas visitors' helpline was established by the Scottish Government to provide advice on overseas visitors' issues. **0800 22 44 88 (textphone 18001 0800 22 44 88)**
<https://www.nhsinform.scot/>

18.8 Legal advice

List of Legal Representatives in Scotland – Asylum Law (Scottish Refugee Council)

http://www.scottishrefugeecouncil.org.uk/get_help/i_have_not_made_a_claim_for_asylum

Ethnic Minorities Law Centre

- Offices in Glasgow and Edinburgh
- Provides advice and legal representation in asylum, immigration and human rights law
<http://emlc.org.uk>

JustRight Scotland

- Offices in Glasgow and Edinburgh
- Provides advice, information and legal representation to asylum seeking, refugee and migrant children and young people, women who have been subject to gender-based violence, individuals who have been trafficked or exploited
- Advice casework support for refugee family reunion applications, and settled status applications for EU citizens.
<http://justrightscotland.org.uk/>

Legal Services Agency

- Law centres in Edinburgh, Glasgow and Greenock
- Legal representation and telephone advice for migrant young people under 25 and migrant women, as well as practitioners working with them
<http://www.lsa.org.uk/>

18.9 Migrant children

Coram Migrant Children's Project

- Information and advice resources
- <https://www.coram.org.uk/how-we-do-it/upholding-childrens-rights/migrant-childrens-project>

JustRight Scotland

- Legal advice and representation (Glasgow and Edinburgh)
<http://justrightscotland.org.uk/>

Legal Services Agency

- Legal advice and representation (Glasgow)
<http://www.lsa.org.uk/>

Migrant and Refugee Children's Legal Unit

- Information and advice resources
<https://miclu.org>

Scottish Guardianship Service

- Independent advice, information and advocacy service for separated children and trafficked children
<https://www.aberlour.org.uk/services/scottish-guardianship-service/>

18.10 No recourse to public funds & social services' support

NRPF Network

- Information and guidance for local authorities on NRPF support
<http://www.nrpfnetwork.org.uk>

Web tool: Support for migrant families

- Online tool that provides information about a family's support options
- Can be used by social workers and other local authority staff to find out what they would need to consider if a family requests social services' support
<https://migrantfamilies.nrpfnetwork.org.uk/>

18.11 Trafficking and Exploitation

JustRight Scotland

- Provides advice information and legal representation to individuals who have survived trafficking or exploitation
<http://justrightscotland.org.uk/>

Migrant Help

- Independent advice, information and advocacy service for men and women (over 18) (other than women who have survived commercial sexual exploitation)
<https://www.migranthehelpuk.org/supporting-survivors>

Scottish Guardianship Service

- Independent advice, information and advocacy service for trafficked children (up to age 18)
<https://www.aberlour.org.uk/services/scottish-guardianship-service/>

Trafficking Awareness Raising Alliance

- Independent advice, information and advocacy service for women (over 18) who have survived commercial sexual exploitation
<https://www.communitysafetyglasgow.org/what-we-do/supporting-victims-of-gender-based-violence/%EF%BF%BC%EF%BF%BC tara/>

18.12 Voluntary return

Home Office Voluntary returns service

<https://www.gov.uk/return-home-voluntarily>

19 Upcoming legislative changes

This chapter sets out some changes which have been legislated for but have not yet been implemented in Scotland.

Local authorities must comply with the law that currently applies, as set out in this guidance. Local authority officers can stay up to date about these and other changes through COSLA.

19.1 Rights of EU nationals after the UK leaves the EU

The UK is due to leave the European Union (EU) on 29 March 2019 but the UK Government and EU have yet to reach a final agreement on the full terms that will apply to the UK when it leaves, and a 'no deal' scenario may apply.

Under the Draft Withdrawal Agreement that has been agreed with the EU (but not yet confirmed), the UK Government has set out its proposals for the future rights of European Economic Area (EEA) and Swiss nationals who are currently living in the UK. After the UK has left the EU on 29 March 2019, there will be a transition period until 31 December 2020, so free movement and the rights currently enjoyed by EEA nationals and their family members to live and work in the UK will continue during this time. EEA nationals and their family members living in the UK by the end of the transition period will need to take action before 30 June 2021 and apply for either settled or pre-settled (temporary) status under the EU Settlement Scheme if they wish to stay here. EEA nationals and family members who arrive after 29 March 2019 and people who have already obtained a permanent residence document will also need to apply. The Government has indicated that a person who fails to apply by the end of June 2021 may have no lawful basis to remain in the UK. The EU Settlement Scheme is currently open to certain people and is due to be fully implemented by the end of March 2019.¹⁴²

If the UK does not reach a deal with the EU, then the UK Government has confirmed that EEA nationals and their family members living in the UK by 29 March 2019 will be able to apply under the EU Settlement Scheme but must do this by 31 December 2020. It is expected that free movement rights will end on 29 March 2019, and a temporary scheme will be introduced for EEA nationals who come to the UK after this date, until a new immigration system is introduced, as expected on 1 January 2021.¹⁴³

Many residents will be directly affected by the UK leaving the EU, therefore local authorities will need to play a role in reducing any negative impacts on communities that may arise if EU nationals fail to secure their status or their entitlements are misunderstood. It is therefore necessary for councils to raise awareness of the procedures the Government is proposing

¹⁴² EU Settlement Scheme statement of intent (SI) (21 June 2018) <https://www.gov.uk/government/publications/eu-settlement-scheme-statement-of-intent>; Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (November 2018) <https://www.gov.uk/government/publications/progress-on-the-uks-exit-from-and-future-relationship-with-the-european-union>

¹⁴³ <https://www.gov.uk/government/publications/policy-paper-on-citizens-rights-in-the-event-of-a-no-deal-brexite>

amongst EEA nationals in communities as well as identifying and assisting vulnerable residents to prepare for this process, including those receiving support from social services.

It is currently unclear how leaving the EU will impact on other legislation, such as Schedule 3 of the Nationality, Immigration and Asylum Act 2002, and reciprocal benefit and healthcare arrangements.

Resources for local authorities:

- NRP Network factsheet, 'Preparing European Union residents for Brexit' ¹⁴⁴
- EU Settlement Scheme: community leaders toolkit ¹⁴⁵

For more information, see:

- 15.8 Rights of EEA nationals after the UK leaves the EU

19.2 Social Security (Scotland) Act 2018

The Social Security (Scotland) Act 2018 received royal assent on 1 June 2018. The Act allows the Scottish Government to set up a new social security system to administer some benefits that are currently issued by the UK Government's Department of Work and Pensions (DWP) to people living in Scotland.¹⁴⁶

The benefits that will be administered by the Scottish Government are:

- Disability Living Allowance
- Personal Independence Payment
- Attendance Allowance
- Severe Disablement Allowance
- Industrial Injuries Disablement Benefit
- Carer's Allowance
- Best Start Grant (a Scottish replacement for Sure Start Maternity Grants)
- Funeral Expenses
- Cold Weather Payments
- Winter Fuel Payments
- Discretionary Housing Payments administered by local authorities

The Scottish Government has set up Social Security Scotland to administer these benefits. The Scottish Government also has the ability to create new forms of assistance, meaning that additional benefits may be created or that existing ones will be renamed or replaced, for example, Sure Start Maternity Grants is being replaced by the Best Start Grant.

The Scottish Government has started to administer Carer's Allowance Supplement, which is a supplementary payment to people who are receiving Carer's Allowance as an interim

¹⁴⁴ <http://www.nrpfnetwork.org.uk/News/Pages/EU-settlement-scheme.aspx>

¹⁴⁵ <https://www.gov.uk/government/publications/eu-settlement-scheme-community-leaders-toolkit>

¹⁴⁶ <http://www.legislation.gov.uk/asp/2018/9/contents/enacted>

measure.¹⁴⁷ The first payments of the Best Start Pregnancy and Baby Grant will be made before Christmas 2018.

The Scottish Government states:

*'We are using these powers to create a Scottish social security system based on dignity, fairness and respect, which will help to support those who need it, when they need it.'*¹⁴⁸

Although the Scottish Government will be able to determine its own rules for eligibility for each of the benefits it administers, the UK Government retains responsibility for deciding whether a particular benefit is a public fund for immigration purposes. The Scottish Government is currently discussing this with the Home Office, but the likelihood is that the UK Government will add devolved benefits to the list of restricted public funds, meaning that the guidance may not change for people with NRPF.

For more information, see:

- 3.1 Social security benefits

19.3 The Fairer Scotland Duty

The socio-economic duty forms Part 1 of the Equality Act 2010. This duty has not been commenced by the UK Government, however, following the transfer of relevant powers under the Scotland Act 2016, this has been commenced in Scotland.

The duty – now called the Fairer Scotland Duty – came into force in April 2018 and focuses on socio-economic inequality issues such as low income, low wealth, and area deprivation. It requires public bodies to actively consider socio-economic disadvantage and how inequalities can be reduced in any strategic decision made.

The duty applies to all public sector decision making and will be subject to a three-year implementation phase to ensure that it works in practice. During this implementation phase, the Scottish Government is providing funding to the Improvement Service to offer support to public bodies around the duty, help share best practice, and deliver training.

Interim guidance for public bodies defining key terms and to help decide if a Fairer Scotland assessment is needed was published in March 2018.¹⁴⁹

19.4 Immigration Act 2014 – right to rent scheme

The Immigration Act 2014 contains the 'right to rent' provisions, which prevent private landlords from legally renting a property to a person who is without leave to remain in the UK. Landlords are required to conduct immigration status checks to establish whether a person has an unlimited right to rent, a limited right to rent or no right to rent. This requirement also applies to people sub-letting properties, people who are accommodating paying lodgers and to Housing Associations that operate their own allocations lists. The right

¹⁴⁷ <https://beta.gov.scot/policies/social-security/benefits-for-carers/>

¹⁴⁸ <https://beta.gov.scot/policies/social-security/>

¹⁴⁹ <https://www.gov.scot/publications/fairer-scotland-duty-interim-guidance-public-bodies/>

to rent scheme does not apply to most hostels and refuges, Home Office asylum accommodation, or when local authorities are using properties in the private sector as temporary accommodation for people with NRPF.¹⁵⁰

The right to rent scheme was initially piloted in the West Midlands (Birmingham, Wolverhampton, Dudley, Walsall and Sandwell), and has been implemented across England since 1 February 2016.

The Immigration Act 2016 introduced further provisions that mean a landlord does not have to obtain a court order for possession of the property in order to evict a tenant without leave by not having to obtain a court order. These came into force in England on 1 December 2016.¹⁵¹

The right to rent scheme has been legislated to also apply in Scotland but has not yet been implemented.

If introduced in Scotland, the right to rent provisions would mean that people without leave may not be able to accommodate themselves and their families within the community, even if they have funds to do this. People who are British or have a form of immigration status may also face difficulties securing housing where they struggle to evidence their status due to lack of documentation. The scheme could therefore give rise to more requests to local authorities for support and increase pressure on voluntary sector services. Its implications must also be properly considered when local authorities are establishing whether a person or family has any alternative housing options to being accommodated by the local authority.¹⁵²

19.5 Immigration Act 2016 – asylum support

The Immigration Act 2016 contains significant changes that affect the support options of ARE asylum seekers, and, in England, families and young people leaving care who are without leave and require local authority accommodation and financial support.¹⁵³

The asylum support reforms are legislated to apply in Scotland and across the rest of the UK:

- Section 95 Home Office asylum support will no longer continue for an ARE asylum seeking family after they become appeal rights exhausted.

¹⁵⁰ Sections 20-37 & Schedule 3 of the Immigration Act 2014

<http://www.legislation.gov.uk/ukpga/2014/22/contents/enacted>; the Home Office Code of practice on illegal immigrants and private rented accommodation

<https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice>

¹⁵¹ Sections 39-40 of the Immigration Act 2016 <http://www.legislation.gov.uk/ukpga/2016/19/contents>

¹⁵² The courts in England have been clear that local authorities must consider how the right to rent scheme impacts on a parent's ability to access housing in the private sector if they are relying on this to conclude that a child is not in need for the purpose of providing support under section 17 of the Children Act 1989: *R (on the application of N) v Greenwich London Borough Council* (2016) QBD (Admin) - extempore judgment; *R (U & U) v Milton Keynes Council* [2017] EWHC 3050 (Admin), paragraphs 27 & 38 <http://www.bailii.org/ew/cases/EWHC/Admin/2017/3050.html>

¹⁵³ Sections 66 & 68; Schedules 11 & 12 of the Immigration Act 2016
<http://www.legislation.gov.uk/ukpga/2016/19/contents>

- Section 4 asylum support for ARE asylum seekers (singles and families) will be abolished.
- If an ARE asylum seeker (single or family) can demonstrate that there is a 'genuine obstacle to leaving the UK', they may be eligible for the new section 95A Home Office asylum support, which will only be available for a limited period following the final decision on their asylum claim.

These changes are not currently in force and the UK Government has not provided any indication about when they will be implemented, although has previously informed local government that adequate notice will be given to allow councils to prepare. Additionally, regulations will need to be made and passed by the UK Parliament before the legislation can be implemented.

Glossary

Appeal rights exhausted (ARE)	A person will become ‘appeal rights-exhausted’ when their asylum or immigration claim and any subsequent appeals have been unsuccessful, the time to lodge an appeal has passed, or they have no further right to appeal.
Asylum seeker	A person who has made a claim to the UK government for protection (asylum) under the United Nations Refugee Convention 1951 and is waiting to receive a decision from the Home Office on their application or from the Court in relation to an appeal.
ARE asylum seeker	A person who has made an unsuccessful claim for asylum which has been finally determined by the Home Office and/or courts, has no further right to appeal, and has not been granted any leave to remain.
Calais leave	Limited leave to remain granted to an asylum seeking child who was reunited with family in the UK following the Calais camps clearance between 17 October 2016 and 13 July 2017. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after ten years.
Country of origin	Usually the person’s country of nationality but if this is unclear then local authorities would need to find out from the Home Office which country the person may be removed to or whether the person is stateless.
EEA national	A person who is a national of a European Economic Area (EEA) country or Switzerland: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Spain, Slovakia, Sweden & the UK. When the term EEA national is used in this guidance this does not include the UK.
GIRFEC assessment	Getting It Right for Every Child (GIRFEC) is the policy framework under which a child wellbeing assessment is conducted to establish what assistance may be provided to a child and their family under the Children (Scotland) Act 1995. The assessment is a holistic assessment of a child’s needs using the National Practice Model, including consideration of the indicators of wellbeing, the My World Triangle and the Resilience Matrix, in accordance with the GIRFEC approach.

Home Office	The government department that is responsible for maintaining immigration control, including: <ul style="list-style-type: none"> • UK Visas and Immigration (application casework) • Border Force (border control) • Immigration Enforcement (enforcement within the UK including the Intervention and Sanctions Directorate which undertakes immigration status checking for local authorities)
Humanitarian Protection	A person who has been recognised as having a real risk of serious harm or well-founded fear of persecution in their country of origin, but not for any reason set out under the UN Refugee Convention 1951. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after five years.
Illegal entrant	A person who has entered the UK without the correct immigration permission, has used deception to gain entry, has not passed through immigration control, or who re-enters the UK before their deportation order is revoked.
Immigration Rules	The statutory instrument which sets out the categories under which people can apply for leave to enter or remain in the UK, the requirements which need to be met, the length of leave which will be granted and conditions attached to the leave.
Indefinite leave to enter Indefinite leave to remain	Immigration permission with no time limit on the length of stay in the UK. Also referred to as 'settled status.' There are no conditions attached to this type of leave so a person may undertake employment and can access public funds (unless they were granted as an adult dependant relative and have lived in the UK for less than five years).
Leave to enter	Immigration permission issued by an Immigration Officer when a non-EEA national enters the UK. Most people are required to apply for prior entry clearance at a visa application centre abroad, which will be provided as a vignette in the person's passport.
Leave to remain	Immigration permission issued by the Home Office, which is applied from within the UK, usually by completing a form and submitting this online, by post or in person.
Leave to remain outside of the rules	Leave to remain granted outside of the Immigration Rules on the basis of a person's family or private life in the UK.
Limited leave to enter	Immigration permission issued for a time limited period; conditions may include restrictions on employment and access to public funds.
Limited leave to remain	

No recourse to public funds (NRPF)	A condition that prevents a person from being able to claim most social security benefits, homelessness assistance and social housing because of their immigration status.
Primary carer	When a person, who is the parent, grandparent, or legal guardian, either has primary responsibility for the child's care or shares this responsibility equally with another person.
Refugee	A person who has been recognised as having a well-founded fear of persecution in their country of origin for reasons of race, religion, nationality, membership of a particular social group, or political opinion under the UN Refugee Convention 1951. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after five years.
Section 67 leave	Limited leave to remain granted to an Unaccompanied Asylum Seeking Child who came to the UK under the 'Dubs scheme'. They will be granted five years limited leave to remain, may work and claim public funds, and can apply for indefinite leave to remain after five years.
UASC Leave	Limited leave to remain granted to an Unaccompanied Asylum Seeking Child who does not have adequate reception arrangements in their country of origin. Leave will be granted for 30 months or until the child is 17.5 years old, whichever is shorter. This type of leave does not provide a route to settlement.
Visa overstayer	A person who had leave to enter or remain in the UK for a limited period and is currently without leave because they: <ul style="list-style-type: none"> • did not make an application to extend their leave before their previous leave expired, or • made an application which was refused after their previous leave expired.