Joint written evidence from:

- British Red Cross (Scotland)
- Children and Young People’s Commissioner Scotland
- Scottish Refugee Council

Endorsed by:

- Scottish Women’s Aid
- Engender

Recommendation to the Equalities and Human Rights Committee:

The Committee conduct an inquiry into the human rights-compatibility of the current arrangements in Scotland for assessment, decision-making and support of persons with insecure immigration status subject to No Recourse to Public Funds (NRPF) conditions.

Destitution

1. Destitution is a human rights violation, especially the right to adequate shelter, and it corrodes socio-economic rights notably health. It afflicts many with insecure immigration status in the UK and Scotland. This includes (a) those with no legal right to stay in the UK; (b) those who potentially have that right but need to establish it; or (c) those that have such a right but have lost documents to prove it. One group at acute risk of suffering destitution is women, men and children refused asylum by the UK government and who are no longer entitled or practically able to access publicly-funded assistance. But there are other groups affected including women and children survivors of domestic abuse who have insecure immigration status, including those from European Economic Area countries, or those who do not qualify for access to public funds under the Destitution Domestic Violence concession.

2. The predicaments of these women, men and children in Scotland were captured in Trapped: destitution and asylum in Scotland (October 2012). From April 2015 to August 2016, the Destitute Asylum Seeker Service (DASS) has worked with 238 individuals. Over half of the men and women accessing DASS have mental or physical health diagnosis or concerns; 142 were either street homeless, "sofa-surfing", staying with "friends", or in a night-shelter; and one-third are women and two-thirds men. British Red Cross (BRC) estimate over 700 people presented as destitute in Glasgow in 2015. In July 2016, BRC reported that 5,600 destitute asylum seekers and refugees had used their services from June to January 2015.

3. Destitution is deeply harmful. To have no home means having no stability or certainty. Without safe and reliable accommodation and the means to meet essential living needs,
people’s mental and physical health deteriorates enormously. Those rendered destitute have to rely on "friends" or charities or, at worst, persistent rough sleeping and are compelled by their predicament to make ‘survival decisions’ that actually are abusive relationships: such as when women or children are sexually exploited "in exchange" for accommodation, or when one is taken by organised criminals who cultivate psychological and financial dependency and exploit ruthlessly, causing immense suffering and undermining community safety in the process.

No Recourse to Public Funds (NRPF)

4. One factor behind insecure immigration status is having a NRPF condition. These conditions apply to those refused asylum and appeal rights exhausted, with no asylum support who are fearful or unable to return to their country of origin and the human rights abuse or persecution or re-trafficking that may entail. They are categorised by the UK government as "over-stayers" with NRPF. Significantly, over the past three years around 15-20% have been recognised as needing protection after a fresh claim for asylum. Many others fall into despair living in destitution trapped between absolute poverty here or the same or worse in their country of origin.

5. It is important to note that NRPF derives its meaning only in terms of "public funds" in the Immigration Rules and from nowhere else. The Immigration Rules are the executive policy of the Home Secretary detailing the circumstances where leave to enter or remain in the UK will be conferred on a person subject to immigration control. The definition of "subject to immigration control" is set out at s115 (9) Immigration and Asylum Act 1999. It applies to persons that require leave to enter or remain in the UK but who do not have it and those with such leave but it is subject to a NRPF condition. As noted above, NRPF applies to those persons deemed as "subject to immigration control".

6. s115 (1) of the 1999 Act sets out the public funds that persons "subject to immigration control" are excluded from receiving. This exclusion was extended by Schedule 3 to the Nationality, Immigration and Asylum Act 2002, with further restrictions being added to that Schedule since 2002, including for example the Scottish Welfare Fund in 2015. Through both s115 (1) and Schedule 3 those "subject to immigration control" have been denied entitlement to most social security benefits, local authority housing and homelessness assistance.

7. Nothing else, though, constitutes "public funds". Any other monies derived from public expenditure and used for the support of persons subject to immigration control, is not a "public fund" within the meaning of the Immigration Rules or s115(1) in the 1999 Act or Schedule 3 to the 2002 Act. Immigration may be reserved to the competence of the UK parliament and ministers but much of the legislation and policies for those subject to NRPF are in the competence of the Scottish parliament and ministers, for example, social care, preventing and responding to violence against women, children’s services, and housing.

8. Furthermore, it is Scottish local authorities that are responsible for the administration and decision-making in NRPF cases. This is not only in respect of assessing whether an applicant has a NRPF condition or what their destitution, health and other needs are.
Scottish local authorities must also act compatibly with the Human Rights Act 1998 and, in public administrative law terms, ensure that their decision-making must be reasonable, rational and proportionate and is not arbitrary but flows from an agreed policy or procedure.

9. Even if a person is subject to s115 (9) and therefore prohibited from accessing "public funds" set out via s115 (1) in the 1999 Act or through Schedule 3 to the 2002 legislation, Scottish local authorities must still ensure that any decision they make to withdraw or refuse support to a person does not breach Convention human rights, particularly Article 3: "prohibition on torture or inhuman or degrading treatment or punishment" or Article 8: "respect for private and family life". And, for EEA nationals and their family members that such a decision does not breach their rights under the European Community treaties.

**Human rights assessments**

10. In such cases, Scottish local authorities must have and then implement a human rights assessment procedure. This procedure reflects the proactive duties in human rights legislation, the purpose of which are to prevent the risk of breaches occurring. The human rights assessment may be undertaken in conjunction with or after other needs assessments but it must be done. If it is not done the local authority leaves itself vulnerable to a successful public administrative law challenge, most likely through a judicial review that a decision to withdraw or refuse support was irrational or disproportionate. A human rights assessment should also underscore other assessments, notably "child in need" assessments in cases where the NRPF condition applies to the parents in families.

11. Such "child in need assessments" should be done by local authorities pursuant to s22 Children (Scotland) Act 1995 that they safeguard and promote the wellbeing of a "child in need" in their area. As s22 to a child is not a "public fund" it is a critical route to prevent destitution of children (and families) with NRPF conditions. Because the intent of s22 is to secure the best interests of the child. This is in line with the UK government's obligations under the United Nations Convention on the Rights of the Child (UNCRC), in particular the four guiding principles of the convention. Unless safeguarding or care considerations suggest otherwise, s22 support and services - including accommodation - should be directed to keeping the child with and not separated from his or her family. Article 9 of the UNCRC states that children have the right to remain with their parents unless doing so would be harmful to them.

12. We would have very grave concerns about any restrictive and potentially inappropriate interpretation of s22 that, as such, separates children from their parent(s), when there are no safeguarding or care reasons justifying that separation. We are aware of cases and recent media reports, for example refugee families told their children must go into care to get help that appear to document this apparent change in practice around s22. This may be a breach of the child’s rights under Article 9 of the UNCRC. In that press article, Phil Arnold, head of refugee services in Scotland for British Red Cross said:

"In our experience social services have used section 22 of the Children (Scotland) Act [1995] to provide accommodation and financial assistance to families as a unit in order to
prevent the destitution of the children within the family. Recently, we have supported families to seek support from social services and families have been advised that the only type of support they were willing to provide was to take the children into care, despite there being no concerns about the care provided to the children by their parents."

13. A human rights assessment has been recognised by the courts as a legal document in NRPF cases. This is especially in cases of refused asylum seekers who by definition have claimed to have fled persecution in their countries of origin on Refugee Convention grounds but that claim has not been accepted by the UK government. A human rights assessment is necessary as the question of whether it is lawful in Convention human rights terms to return someone to their country of origin is inseparable, in NRPF/refused asylum cases, from the question of whether it is lawful to refuse or withdraw local authority support from them if that is the only source of publicly-funded assistance they have left open to them.

14. It is of course in the best interests of Scottish local authorities that their decisions are lawful. We suggest that decisions to withdraw or refuse support to an individual or family refused asylum and appeal rights exhausted with a NRPF condition and no other options for publicly-funded assistance, may not be lawful in so far as it is not backed up by a human rights assessment. Such an assessment must be reasoned and transparent in terms of why the individual or family (a) can avoid destitution by returning to their country of origin, (b) that there are no legal or practical barriers to return, and (c) if returned their human rights won’t be breached. If an assessment cannot justify a withdrawal or refusal, support should follow, as not to will probably breach certain Convention human rights.

**Freedom of information requests to Scottish local authorities**

15. In July 2016, requests were sent to Scotland’s 32 local authorities under the Freedom of Information (Scotland) Act 2002. The objective was to learn more about existing awareness, policy and procedure, and any statistics in Scottish councils around NRPF cases including the place of human rights assessments in these matters. 3 requests for information were made: (a) a copy of your policy or procedure on No Recourse to Public Funds (NRPF); (b) a copy of your policy or procedure for conducting human rights assessments for deciding whether to support persons subject to immigration control who have a NRPF condition; and (c) any statistics on numbers of applications made and decisions reached on these from persons subject to immigration control who have a NRPF condition, for year end March 2016?

16. To date, 27 of the local authorities answered the 3 questions and 5 have not yet responded despite receiving 2 reminders. Of the 27 that have provided information:

(a) None had a dedicated policy or procedure on NRPF but 3 were drafting them;
(b) 4 mentioned NRPF in certain policy areas and 1 had integrated it across the key areas;
(c) 1 local authority mentioned the CoSLA strategic migration partnership guidance (2012);
(d) None had an operational human rights assessment tool but 2 were drafting them;
(e) 1 stated it embedded human rights assessment into other needs assessment tools;
(f) 10 stated they had received applications from persons with a NRPF condition; and
(g) Statistics provided was incomplete and it was difficult to draw conclusions from these.
17. These results are concerning. They indicate low awareness of NRPF and human rights assessments, limited policy and procedure, and a lack of robust statistics. In so far as these translate into practice, this may carry significant legal risk for local authorities, not to mention the women, men and children whose only source of support may be denied to them. The legal risk is public administrative law challenges to decisions, such as judicial review and / or on Convention human rights grounds in so far as decisions breach Article 3, Article 8 or Article 6.

18. Decisions to provide (or not) support to those with a NRPF condition could hardly be more significant: they may mean housing and protection or destitution and exploitation. It is in the interests of all parties, therefore, that decisions in NRPF cases in Scotland are made against a clear, well-understood and humane anti-destitution standard developed here in Scotland reflecting Scottish parliament legislation and Scottish ministers’ policy. These must include human rights assessment and be implemented by involving those personally affected and to promote consistently reasoned, transparent and therefore lawful decisions.

19. The only guidance in Scotland is from CoSLA strategic migration partnership - Establishing migrants’ access to benefits and local authority services in Scotland (March 2012). This guidance must be updated. One concern is that in its advice to local authorities on human rights assessment of whether to provide support or not in NRPF cases, it focuses on what no support would mean in terms of a human rights breach in the UK, and does not consider risks that may be faced if returned. The No Recourse to Public Funds Network in England - Practice guidance for local authorities assessing and supporting adults who have No Recourse to Public Funds (April 2016) - advises that assessing risk (and possible breaches) on return is integral to human rights assessments and to inform decisions on support.

20. The need for such a national NPRF standard and human rights assessment tool has been given further impetus considering two recent developments, both of which may increase destitution of refused asylum seekers across Scotland. The first is the Home Office’s unprecedented drive to persuade (and if need be seek to enforce) asylum dispersal on Scottish local authority areas; Glasgow being the only such dispersal area at present. The second is the forthcoming harsher asylum support regime for individuals and families refused asylum that is due to be introduced throughout the UK via Immigration Act 2016 regulations from spring next year.