



T : 0300 244 4000

E : scottish.ministers@gov.scot

Joe FitzPatrick MSP, Convener
Equality, Human Rights and Civil Justice
Committee

ehrcj.committee@parliament.scot

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Dear Convener,

The Equalities, Human Rights and Civil Justice Committee agreed amendment 115 to the Gender Recognition Reform (Scotland) Bill at Stage 2 which includes a person who is seeking asylum in Scotland within the definition of ordinarily resident.

We are sympathetic to the concerns that have been raised that an asylum seeker living in Scotland might not meet the requirement of being ordinarily resident if unable to satisfy the tests involved and, following the Committee's agreement to this amendment, we have looked at this matter again to consider potential avenues. I had also highlighted this matter in correspondence to UK Ministers. As I set out to the Committee a few weeks ago, the issue is that an asylum seeker does not seek asylum in Scotland but in the UK through immigration laws and those matters are reserved.

"Ordinarily resident" is an established concept in law and an individual asylum seeker may not meet the test of being ordinarily resident if they are not living here on a settled basis, lawfully and voluntarily. This will depend on their particular circumstances, as with any other person applying for a GRC and they are not treated any differently in this regard. There is however a difference in treatment in respect of failed asylum seekers, who have had their asylum application refused, because there is case law which has confirmed that a failed asylum seeker is not ordinarily resident because they do not meet the requirement that the residence must be lawful.

Section B6 of schedule 5 of the Scotland Act 1998 provides that "Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens" are matters which are specifically reserved.

Further consideration of this matter has not diminished our concerns that the provision resulting from this amendment agreed at Stage 2 could be challenged on the basis that it relates to the matters reserved by Section B6 of schedule 5 of the Scotland Act. I explained in Committee at stage 2 that the connection with Scotland is tenuous in the amendment as drafted. The provision could in theory cover those who apply for a GRC in Scotland but who



have no other or no substantial connection to Scotland. Removing “in Scotland” from the provision would not remove the concerns.

We consider therefore that there is a serious risk that this provision could be found to be outwith the legislative competence of the Scottish Parliament.

Retaining this provision could put the Bill as a whole in jeopardy or significantly delay implementation if a legal challenge were to be brought, whatever the result of such a challenge. I therefore intend to lodge an amendment at Stage 3 to remove this provision from the Bill to ensure its competence and that the aims of the Bill as a whole are not compromised.

Yours sincerely,



SHONA ROBISON