Scottish Parliament Equal Opportunities and Human Rights Committee Inquiry into Destitution, Asylum and Insecure Immigration Status in Scotland

Written evidence from the British Red Cross

March 2017
1 Who we are

1.1 We help people in crisis, whoever and wherever they are. We are part of a global network that responds to conflicts, natural disasters and individual emergencies. We enable vulnerable people in the UK and abroad to prepare for and withstand emergencies in their own communities, and when the crisis is over we help them to recover and move on with their lives. Our vision is of a world where everyone gets the help they need in a crisis.

1.2 The British Red Cross is part of the International Red Cross and Red Crescent Movement, which comprises:

> The International Committee of the Red Cross
> The International Federation of Red Cross and Red Crescent Societies, and
> 190 National Red Cross and Red Crescent Societies worldwide.

1.3 As a member of the Red Cross and Red Crescent Movement, the British Red Cross is committed to, and bound by, its Fundamental Principles. These are: humanity, impartiality, neutrality, independence, voluntary service, unity and universality.

1.4 Volunteers are at the core of the Red Cross. Our motivated and skilled body of volunteers continue to provide help and assistance to those in need, whoever and wherever they may be.

2 What we do

2.1 The British Red Cross provides advice, assistance and practical support to asylum seekers and refugees across the UK. In 2016 we helped over 30,000 people through Red Cross Refugee Support and Restoring Family Links Services in 56 towns and cities across the UK.

2.2 In 2016 the Red Cross in Scotland assisted over 2,500 refugees and asylum seekers through our support services in Glasgow. These services provide a range of support including screening and triage services, youth services, specialist women’s services, international family tracing, family reunion and family integration work.

2.3 As part of this we supported 820 people who were destitute and 366 dependents. This figure only captures those who accessed our services for the purpose of destitution
support. It does not capture people who were destitute but accessed our services for another reason and did not disclose that they were destitute.

2.4 Furthermore, this figure only captures those who accessed Red Cross services. It is likely that levels of destitution in Scotland are in fact far higher than the figures presented suggest.

3 Response to Call for Evidence

3.1 The British Red Cross welcomes the opportunity to submit written evidence to the Committee’s Inquiry into Destitution, Asylum and Insecure Immigration Status in Scotland. We are encouraged by the Committee’s decision to consider the issue of destitution and the ways in which public services can mitigate the impact.

3.2 As previously outlined the Red Cross provides advice, assistance and practical support to asylum seekers and refugees in Scotland and indeed throughout the UK. Our contributions to this inquiry is based on our experiences of supporting this group, particularly those who are destitute.

3.3 The Red Cross has in recent years witnessed a significant increase in the numbers of people accessing our services. In particular, there has been an increase in the numbers presenting who are destitute or at risk of destitution. The table below highlights both the increase in people presenting at our office and the increase in destitution advice and support since 2014. As previously stated these figures do not represent the total number of refugees or asylum seekers requiring advice, assistance or support, only those who presented at Red Cross offices and received help.

![Total Service Users (Jan - Nov 2013-2016)](chart.png)
3.4 The Red Cross believes that there are a number of reasons why destitution has increased over the past 3-4 years. There have been a number of changes to the way in which asylum support and advice has been delivered which have arguably led to gaps in provision, more inaccessible systems of support and greater fragmentation within the sector. Our operational experience suggests that this has made it harder for individuals to effectively engage in the asylum process and access the support that they are entitled to.

3.5 In addition to this, the impending implementation of the Immigration Act 2016 taken together with the likelihood of asylum dispersal widening in Scotland beyond Glasgow, creates further risks for increasing levels of destitution, ultimately leaving people, including children in vulnerable and potentially dangerous situations.

3.6 It is for this reason that we welcome the Committee Inquiry into this issue to gain a deeper understanding of the needs of this group, the challenges that they face and the potential solutions that could be put in place to mitigate the negative impact that destitution has on the individual, and where applicable their children, taking into account the holistic needs of the person.

3.7 It is important to note that the risk of destitution is present at numerous points within the asylum and refugee system. The British Red Cross assists people who are destitute pre-asylum application, during the asylum process, post decision whether positive or negative and after family reunion.

3.8 In each of these stages some individuals are entitled to support either from the Home Office or from Department of Work and Pensions, depending on where the individual or family is in the process. However, due to difficulty accessing support systems and/or delays in processing support claims, individuals and their families become destitute.

3.9 In the case of someone who has been refused protection the system of advice and support is more complex and increasingly inconsistent resulting in many of these people being destitute and presenting at organisations such as the Red Cross for help.

4 What assistance do you think is required to help address the issue of destitution

4.1 We believe that there needs to be a Scotland wide approach to tackling destitution which mitigates the harmful impacts that it has on individuals, communities and public services and takes ownership over the existence and prevalence of this group which has not previously been adequately reflected in Scottish public policy.

4.2 From our operational experience working with destitute asylum seekers we believe that in order to mitigate the impact of destitution on individuals and on Scottish public
bodies/agencies including but not limited to GPs, Specialist health teams, Accident and Emergency Departments, Social Work, Police and third sector organisations which receive statutory funding there needs to be an approach which:

> helps to prevent individuals becoming destitute
> assists them during a crisis or emergency and
> ensures that regardless of immigration status an individual and family’s needs are fully assessed using a rights based approach which protects their human rights and reduces the risk of placing them in dangerous or exploitative situations.

4.3 Evidence from our client group suggests that individuals who are destitute also hold a number of additional vulnerabilities including, experience of trauma or torture, mental health problems, physical health problems, violence and/or sexual violence, trafficking, pregnancy, exploitative and/or abusive relationships.

4.4 Furthermore, many of the clients we support have children who have their own set of rights which should not be compromised due to the status of their parent.

4.5 Red Cross operational staff have witnessed a changing and inconsistent approach from social work when they are engaging with families who do not have a clear immigration status. On several occasions families with young children, including a baby who was being breastfed by her mother, have been told by social workers that they have no duty to offer support or assistance to the parent, and will meet their duties to the child by removing them from their parent and placing them in care, despite there being no protection concerns for the child. Red Cross is deeply concerned by this situation and believes it to be fundamentally against the approach of placing the “best interest of the child” at the heart of all decisions.

5 Independent advocacy support

5.1 The Red Cross believes that access to independent advocacy has a clear role in helping to prevent people becoming destitute or finding a route out of destitution. We provide a number of services which offer intensive casework to individuals and advocacy is a key element of this support.

5.2 In our experience it appears that the asylum support system is becoming increasingly more challenging to engage in with the level of support on offer through the Home Office contracted asylum support advice.

5.3 As a result many of the destitute clients that we see should be receiving some form of Home Office support, but due to the challenges both engaging in the system and
providing the high levels of evidence required, they are unable to access it and therefore remain destitute.

5.4 The case study below highlights the impact that having independent advocacy can have on the client’s ability to receive the Home Office support they are entitled to.

Case Study

The client presented at the office with her ten month old baby, she had no money and no nappies for her baby. The client had a bad cough and the baby’s skin was dry and red. The client explained that she had applied for s98 through Migrant Help in May but it had been refused, at that point her baby was five months old. MH had text her an address of where to go for help when the s98 was refused, the client went to the address which turned out to be the local authority homeless housing centre, despite the fact that there is an out of hours social work office based there, the client was turned away as she was an asylum seeker and was told they could not help her. The client was now street homeless, for three days she walked her baby around the streets and at night walked constantly around a 24 hour Asda to stay warm.

Migrant Help made a s95 application for the client and the client begged her old flatmates to take her in, they did, thinking that she would get support in a couple of weeks. The client was sleeping in the living room with her baby, dependant on foodbanks for food and nappies, which were the wrong size.

The client received two further information requests from the Home Office, and attempted to reply as best she could. When the client came to our office months later she was still without support. She was spending all day walking in the park with her baby so as not to disturb her hosts which was why her cough was so bad and she had not been able to give her baby babymilk for three months. She had called Migrant Help to ask for help and had been directed to our offices.

We provided the client with nappies and made her an appointment for the next day where we were able to get her s98 support. The first thing the client bought was babymilk.

5.5 Without Red Cross assistance it is unclear how much longer this client and her baby would have been destitute, arguably she should not have been destitute for the period of time that she was, particularly with a baby.

5.6 Implementing this form of independent advocacy in Scotland could provide a preventative approach to destitution by ensuring that clients such as the one above get the independent support needed to assist with applications for financial assistance much earlier in the process, therefore avoiding destitution completely.

5.7 In cases where the client has been unable to make a successful application for financial assistance, despite being entitled to it, this type of approach provides a clear route for clients to get assistance. It would limit the length of time the client is destitute.
and reduce the negative impact that it can have on the client, their family and indeed other public services that are left responding to the escalating needs.

6 Crisis Response

6.1 Through our work we know that those who are destitute or facing destitution often need some form of immediate assistance to alleviate the crisis, and prevent an individual being placed in a potentially unsafe or dangerous situation.

6.2 We recently launched research into the experience of pregnant refugee and asylum seeking women in partnership with University of Strathclyde Centre for Health Policy. The report, “A Healthy Start? Experiences of pregnant refugee and asylum seeking women in Scotland”¹ recommended that the Scottish Government consider establishing a Crisis Fund to provide essential support to pregnant women to encourage a safe and healthy pregnancy.

6.3 While this report focussed on the needs of pregnant refugee and asylum seeking women, a crisis fund would provide a much needed safety net for anyone who is destitute or facing destitution.

6.4 Indeed, there is already an established Crisis Fund for minority ethnic groups who need emergency assistance in Northern Ireland. The Red Cross administers this fund which has been running for approximately 3 years following a successful pilot in 2012.

6.5 The Crisis Fund in Northern Ireland is a good example of how a devolved government could help to mitigate the impact of destitution for those individuals who have nowhere else to go.

6.6 In its current form the fund runs from September to March and works through voluntary and community groups already working with vulnerable minority ethnic groups, including Red Cross and Women’s Aid.

6.7 It gives out predominantly small amounts (most of the total amounts paid were for between £1 - £50) of money to applicants to assist with essential living needs such as accommodation, clothing/footwear, personal hygiene items and food.

6.8 From Red Cross experience of administering the fund on behalf of the Northern Ireland Executive we believe that it provides a lifeline to people and the voluntary and community organisations who deliver it believe that it also enables them to use their time

with clients more effectively as they are able to concentrate on the reasons they have found themselves in crisis.

6.9 Introducing a fund such as this in Scotland would provide some of the most vulnerable people with a safety net and reduce the pressure on the voluntary and third sector organisations that are left trying as best as they can to provide some form of help to this often vulnerable group.

7 Rights based approach

7.1 Finally the Red Cross believes that it is essential that Scotland develops a strong rights based response to individuals and families facing destitution in line with the many other wider rights based policy developments being taken forward in Scotland.

7.2 From our experience the clients that we support who are destitute can often have a number of additional vulnerabilities that our current approach to provision of care and support does not adequately take into account.

7.3 The point outlined earlier in this response regarding parents being advised that their children will be taken into care as a way for the local authority to meet their duties towards the child is an example of how the rights of individuals and families in this context are not currently adequately or consistently protected.

7.4 As part of the research we undertook into the experience of pregnant refugee and asylum seeking women we sought a legal opinion to explore the duties of local authorities in relation to pregnant women and their children for those who have an insecure immigration status. It outlined that in cases where the human rights of the women or the children were at risk, the local authority did have a duty to act to prevent the violation of rights. In this instance support could be provided by the local authority through either Section 12 of the Social Work Scotland Act (1968) or Section 22 of the Children (Scotland) Act 1995.²

7.5 The opinion also indicated that unlike other parts of the UK, there appeared to be no guidance adapted to the Scottish context to assist local authorities on the use of human rights assessments in making decision on the provision of support in a way which ensured they were complying with their international human rights obligations.

7.6 This appears to be an area which could be further developed within Scotland to ensure that there is a consistent, fair, transparent and rights based approach to the provision of care and support for people who are destitute in Scotland which protects their

² A full copy of the legal opinion provided by Janys Scott QC is provided as an appendix to this submission
human rights, but also protects local authorities from potential legal challenge and claim for damages.

8 Final Remarks

8.1 From our experience of working with destitute refugees and asylum seekers in Scotland we know that destitution is an ever present risks for the individuals we help and support.

8.2 Currently we believe that there is a response gap which means that the impact of destitution is not fully understood, acknowledged or reflected within Scottish public policy. This is ultimately leaving people who are destitute with inadequate responses while also negatively impacting on the resources of Scottish public bodies, who are often dealing with the impact of destitution without fully comprehending the issue.

8.3 We believe that this Inquiry can play a pivotal role in addressing this response gap and look forward to continuing to work with you to explore what can and should be done to mitigate the harmful impact of destitution on individual, families, communities and public services in Scotland.

For further information on our written evidence or any other aspect of our work please contact:

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Appendix one

OPINION OF SENIOR COUNSEL

For

BRITISH RED CROSS

Re

SUPPORT FOR PREGNANT MIGRANT
WOMEN

[1] The British Red Cross are engaged in a study in respect of pregnant migrant women in Scotland who are seeking asylum and/or have no access to public funds or cash support. I am asked to advise on the responsibility of local authorities to provide support to this group of women.

Legislation relating to local authority powers and duties

[2] The relevant duty of a local authority is set out in the Social Work (Scotland) Act 1968 which provides, in section 12(1) and (2) as follows:

12. — General social welfare services of local authorities.

(1) 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, and such assistance may, subject to subsections (3) to (5) of this section, be given in kind or in cash to, or in respect of, any relevant person.

(2) A person is a relevant person for the purposes of this section if, not being less than eighteen years of age, he is in need requiring assistance in kind or, in
exceptional circumstances constituting an emergency, in cash, where the giving of assistance in either form would avoid the local authority being caused greater expense in the giving of assistance in another form, or where probable aggravation of the person's need would cause greater expense to the local authority on a later occasion.

[3] Section 12A sets out a duty to assess the needs of individuals. Where it appears to a local authority that a person for whom they are under a duty, or have a power, to provide or secure the provision of “community care services” may be in need of any such services then the authority is obliged to make an assessment of the needs of that person for those services and then to decide, having regard to the results of that assessment whether the person’s needs call for the provision of any such services. “Community care services” include services, other than services for children, which a local authority is under a duty or has a power to provide, or to secure the provision of, under section 12.

[4] However in relation to the group of women with whom this opinion is concerned, section 12 continues:

(2A) 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.

[5] Eligibility for section 12 assistance is thus linked to the Immigration and Asylum Act 1999, where section 115 provides:

115. — Exclusion from benefits.
(1) No person is entitled to universal credit under Part 1 of the Welfare Reform Act 2012 or to income-based jobseeker's allowance under the Jobseekers Act 1995 or to state pension credit under the State Pension Credit Act 2002 or to income-related allowance under Part 1 of the Welfare Reform Act 2007 (employment and support allowance) or to personal independence payment or to—
(a) attendance allowance,  (b) severe disablement allowance, (c) carer's allowance,  (d) disability living allowance, ...(h) a social fund payment, or (i) child benefit, ... under the Social Security Contributions and Benefits Act 1992 while he is a person to whom this section applies....

(3) This section applies to a person subject to immigration control unless he falls within such category or description, or satisfies such conditions, as may be prescribed.

(9) “A person subject to immigration control” means a person who is not a national of an EEA State and who—
(a) requires leave to enter or remain in the United Kingdom but does not have it....

The groups ineligible for assistance under section 12 are specified in paragraph 1 of schedule 3. They are:

- Non EEA nationals granted refugee status by an EEA state other than the UK and their dependents (paragraph 4);
- EEA nationals other than UK nationals and their dependents (paragraph 5);
- Failed asylum seekers who have failed to co-operate with removal directions, and their dependents (paragraph 6);
- A person who is unlawfully in the United Kingdom, who is not an asylum seeker (paragraph 7);
- A person treated as an asylum seeker by virtue of having dependent children (see below) but who the Secretary of State has certified has failed to leave the United
Kingdom voluntarily or to put himself or herself in a position to leave, once 14 days have elapsed since receiving a copy of that certificate (paragraph 7A).

These provisions do not prevent the exercise of a power or performance of a duty if this is necessary for avoiding a breach of a person’s rights under (inter alia) the European Convention on Human Rights (paragraph 3, of which more below).

[7] The Children (Scotland) Act 1995 allows a local authority to provide services for children in need, and their families, which may result in a mother receiving services with her child. Section 22 is in the following terms:

22.— Promotion of welfare of children in need.

(1) A local authority shall—

(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…

(3) Without prejudice to the generality of subsection (1) above—

(a) a service may be provided under that subsection—

(i) for a particular child;

(ii) if provided with a view to safeguarding or promoting his welfare, for his family; or

(iii) if provided with such a view, for any other member of his family; and

(b) the services mentioned in that subsection may include giving assistance in kind or, in exceptional circumstances, in cash.

Section 93(4) contains the definition of a child “in need”:

Any reference in this Part of this Act to a child—

(a) being “in need”, is to his being in need of care and attention because—
(i) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless there are provided for him, under or by virtue of this Part, services by a local authority;

(ii) his health or development is likely significantly to be impaired, or further impaired, unless such services are so provided;

(iii) he is disabled; or

(iv) he is affected adversely by the disability of any other person in his family…

[8] An adult who by virtue of his or her immigration status is ineligible for support under section 12 of the Social Work (Scotland) Act 1968 is also ineligible for support under section 22 of the Children (Scotland) Act 1995, but paragraph 2 of schedule 3 to the Nationality, Immigration and Asylum Act 2002 provides that paragraph 1 does not apply to prevent the provision of support or assistance to a child. This is consistent generally with the overarching duty imposed on the Secretary of State by the Borders, Citizenship and Immigration Act 2009, section 55, in exercising any function in relation to immigration or asylum to make arrangements for ensuring that such functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. Article 3 of the United Nations Convention on the Rights of the Child commits states parties to regard the best interests of the child as a primary consideration.

Legislation relating to support by central government

[9] The Immigration and Asylum Act 1999 imposes limited responsibilities on the Secretary of State in respect of asylum seekers. Persons seeking asylum are eligible for support under section 95 of the 1999 Act as follows:

95. — Persons for whom support may be provided.
(1) The Secretary of State may provide, or arrange for the provision of, support
for—
(a) asylum-seekers, or
(b) dependants of asylum-seekers,
who appear to the Secretary of State to be destitute or to be likely to become destitute within such period as may be prescribed...

(3) For the purposes of this section, 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.
(4) If a person has dependants, subsection (3) is to be read as if the references to him were references to him and his dependants taken together.

[10] Definitions for the purposes of this section are found in section 94:

“asylum-seeker” means a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined;

“dependant”, in relation to an asylum-seeker … means a person in the United Kingdom who—
(a) is his spouse; (b) is a child of his, or of his spouse, who is under 18 and dependent on him; or (c) falls within such additional category, if any, as may be prescribed; …

And:
(5) If an asylum-seeker’s household includes a child who is under 18 and a dependant of his, he is to be treated (for the purposes of this Part) as continuing to be an asylum-seeker while—
(a) the child is under 18; and (b) he and the child remain in the United Kingdom.

[11] The provision in section 95 is thus limited to persons whose claim for asylum is pending and persons whose applications have been unsuccessful but who at the time the claim for asylum was refused already had children who were under the age of 18. It is implemented by provision of basic accommodation on a ‘no choice’ basis and cash payments to asylum seekers at a rate of £36.95 per person per week with an extra payment of £3 per week to pregnant mothers and a lump sum of £300 per child claimable
8 weeks before the expected date of the birth or for up to six weeks after birth.

Additional weekly payments will be made of £5 per week for babies and £3 per week for children between the ages of 1 and 3. These are substantially reduced rates applicable from 10 August 2015.

[12] The duty is extended where there are dependent children under the age of 18 by section 122 which provides:

(3) If it appears to the Secretary of State that adequate accommodation is not being provided for the child, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, adequate accommodation for the child as part of the eligible person's household.

(4) If it appears to the Secretary of State that essential living needs of the child are not being met, he must exercise his powers under section 95 by offering, and if his offer is accepted by providing or arranging for the provision of, essential living needs for the child as part of the eligible person's household.

[13] For those who are refused asylum, and do not at that time have children under 18 more basic provision may be available under section 4 of the Immigration and Asylum Act 1999. This states:

4. Accommodation.

… (2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a person if—
(a) he was (but is no longer) an asylum-seeker, and (b) his claim for asylum was rejected.

(3) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of a dependant of a person for whom facilities may be provided under subsection (2). ...

(10) The Secretary of State may make regulations permitting a person who is provided with accommodation under this section to be supplied also with services or facilities of a specified kind.

(11) Regulations under subsection (10)— (a) may, in particular, permit a person to be supplied with a voucher which may be exchanged for goods or services, (b) may not permit a person to be supplied with money, (c) may restrict the extent or value of services or facilities to be provided, and (d) may confer a discretion.
Those receiving support under section 4 are given accommodation and non-cash support in the form of an “Azure” card which allows the ‘purchase’ of certain goods and services to a limit of £35.39 per week with an extra £3 per week for pregnant women. The maternity grant in the case of failed asylum seekers is only £250.

The Asylum Support Regulations 2000 (SI 2000/704), regulation 6(4) provide that where it falls to the Secretary of State to determine for the purposes of section 95 whether a person is destitute he must take into account:

(a) any other income which the principal, or any dependant of his, has or might reasonably be expected to have in that period;
(b) any other support which is available to the principal or any dependant of his, or might reasonably be expected to be so available in that period; and
(c) any assets mentioned in paragraph (5) (whether held in the United Kingdom or elsewhere) which are available to the principal or any dependant of his...or might reasonably be expected to be so available in that period.


The sums allowed to asylum seekers and failed asylum seekers are the result of reconsideration by the Secretary of State, following a successful challenge in R (on the application of Refugee Action) v Secretary of State for the Home Department [2014] EWHC 1033 (Admin), [2014] ACD 99. It was argued, successfully, that the Secretary of State had failed to take into account various categories of essential living needs. There was also an argument in that case that the Secretary of State had breached her public sector equality duties with respect to persons suffering from disability. The latter claim failed, although
it was not necessary to address the matter fully, given the decision on failure to take account of certain living needs. No argument appears to have been addressed to whether the Secretary of State had complied with equality duties in respect of pregnant women. However, the reconsideration forced by that case produced the same level of support for single adults (£36.62 per week). This was increased marginally in 2015 (to £36.95 per week) but rates for lone parents and children were reduced (to £36.95 flat rate per person). A further challenge to the rates failed in R (SG, K and YT & RG) v Secretary of State for the Home Department [2016] EWHC 2639 (Admin). It remains to be seen whether there is any further appeal.

[17] A challenge to the financial provision for pregnant asylum seeking women and pregnant failed asylum seekers is likely to be met with the response that consideration has been given to the needs of pregnant women by allowing them an extra £3 per week and a lump sum. The provision for such women is consistent with the general policy position of the United Kingdom government in this area. Such a response was accepted by the majority of the Supreme Court in R (JS) v Work and Pensions Secretary [2015] UKSC 16, [2015] 1 WLR 1449 when the disproportionate effect on women of the cap on housing benefits was challenged. It was accepted in that case that benefit payments could amount to “possessions” for the purposes of article 1 to the First Protocol to the European Convention on Human Rights and that the cap had a disproportionate effect on women, giving rise to a potential claim that it represented a violation of article 14. The benefits cap was however accepted to justified, as it pursued legitimate aims and was proportionate to those aims.
Case law in relation to domestic legislation

[18] The relationship between the duties of a local authority towards persons over the age of 18 and those of the Secretary of State is complicated. It has been elucidated in a number of cases in England, where local authority duties towards persons in need of care and attention were (until implementation of the Care Act 2014) found in section 21 of the National Assistance Act 1948. That section permitted local authorities to make arrangements for providing residential accommodation for persons aged 18 or over who by reason of age, illness, disability or any other circumstances were in need of care and attention which was not otherwise available to them, but prevented such provision being made for persons excluded from receipt of benefits by the Immigration and Asylum Act 1999, if their need for care and attention arose solely from destitution or because of the physical effects or anticipated physical effects of destitution. Section 21 of the 1948 Act was not in identical terms to section 12 of the Social Work (Scotland) Act 1968. Section 12 is in broader terms but contains a similar restriction on local authority provision (see section 12(2A) set out at paragraphs [4] and [5] above).

[19] The leading authority is the decision of the House of Lords in R (Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 1 WLR 2956. In that case the local authority provided accommodation for a Kurdish asylum seeker who was suffering from spinal myeloma. The authority sought judicial review of the refusal of the National Asylum Support Service to pay for the accommodation. The litigation was essentially about the line to be drawn between the responsibilities of local authorities and those of the Secretary of State. Lord Hoffmann gave the main speech. He made the point that the measures introduced in the Immigration and Asylum Act 1999 were designed to exclude able-bodied asylum seekers from the powers and duties of section 21 of the
National Assistance Act 1948 and to transfer responsibility for the able-bodied destitute from local authorities to central government. The legislation had however left an apparent overlap between local government and central government in relation to provision for the infirm.

[20] Lord Hoffman reduced the solution to this dilemma to three questions. The first was whether the asylum seeker concerned came _prima facie_ within section 21 of the 1948 Act. She did. Second was whether she was excluded by the restriction on provision that applied to asylum seekers. She did not. The third question was whether the existence of a local authority duty excluded the person concerned from asylum support under section 95 of the 1999 Act. This question fell to be answered in the affirmative. The key point was that the lady concerned needed assistance as a result of her infirmity. Her need did not arise _solely_ because she was destitute. This meant that the local authority required to provide accommodation under section 21 of the 1948 Act. This was support that the Secretary of State was bound to take into account in deciding whether she was destitute. She was as a result excluded from support under section 95.

[21] There is a material gloss on this decision in the case of provision of residential accommodation for expectant and nursing mothers. An English local authority could provide such accommodation under section 21(1)(aa) of the National Assistance Act 1948. This subsection was not mentioned in section 21(1A) which excluded from section 21(1)(a) persons to whom section 115 of the Immigration and Asylum Act 1999 applied whose needs arose solely from destitution. In _R (Gnezele) v Leeds City Council_ [2007] EWHC 3275 (Admin) Mitting J held that section 21(1)(aa) was not affected by the statutory scheme excluding those with no access to public funds from support. The
ability of the local authority to provide support was not restricted by the women’s immigration status, but was restricted by section 21(8) of the English legislation which excluded provision authorised under other legislation. The Secretary of State was empowered to provide accommodation for these women and had done so. As a result the women concerned were not permitted to insist that the local authority provided them with accommodation. They had to accept the rather more Spartan accommodation provided by the Secretary of State.

[22] Section 12 of the Social Work (Scotland) Act 1968 is however framed in terms of a general duty to promote social welfare with a power to give assistance in cash or in kind to a particular person who is in need. It is not limited to accommodation and there is no separate provision for expectant and nursing mothers. The bar on provision of assistance to groups caught by section 115 of the Immigration and Asylum Act 1999 catches all assistance, including assistance to expectant and nursing mothers. While a local authority is bound under section 12(3) of the 1968 Act to have regard to a person’s eligibility for receiving assistance from any other statutory body, and if eligible for such assistance, to its availability, this does not constitute a bar on assistance of the nature found in section 21(8) of the 1948 Act. This means that the reasoning in R (Gnezele) v Leeds City Council does not apply in Scotland. Here a pregnant woman subject to immigration controls can access section 12 assistance if her need has arisen from pregnancy, rather than solely from destitution. Receipt of support under section 12 will however result in withdrawal of support from the Secretary of State under section 95 or section 4 of the Immigration and Nationality Act 1999 if the support results in the woman no longer being destitute (see paragraphs [27] and [28] below).
The Scottish position in relation to pregnant women and nursing mothers is similar to the provisions of section 17 of the Children Act 1989 and section 22 of the Children (Scotland) Act 1995 relating to children. The local authority is obliged to assess needs and decide whether the needs call for provision of services. The position in England was considered by the Divisional Court in *R (VC) v Newcastle City Council* [2011] EWHC 2673 (Admin), [2012] PTSR 546. The issue there was whether local authorities could terminate support provided under section 17 of the Children Act 1989 and direct claimants to the Secretary of State for provision under section 4 of the 1999 Act. The case turned on the same principles as applied in *R (Westminster City Council) v National Asylum Support Service*. Munby LJ (as he then was) gave the substantive judgment. He acknowledged (on the basis of a decision of the House of Lords in *R (G) v Barnet London Borough Council* [2004] 2 AC 208) that section 17 did not impose a duty to provide services, even where the need for those services had been identified in the course of assessment. He referred to the duty to assess, which involved formulating “a realistic plan of action”, addressing the child’s current circumstances and any imminent change in circumstances, and if the child’s needs are to be met by a third party, the authority must demonstrate that the third party is able and willing to meet the needs.

A number of clear points emerge from the decision in *R (VC) v Newcastle City Council*. The first is that the decision as to whether a child is “in need” under the relevant legislation is not a matter for judicial determination. The decision-making function is imposed by the legislation on the local authority. In that case the children concerned had been assessed as being in need but the local authority maintained that the availability of section 4 support meant that this was no longer the case. The Court disagreed. It held
that section 4 represented a residuary power and the availability of section 4 support did not exonerate the local authority of its powers and duties under the Children Act 1989.

Section 4 provided “an austere regime, effectively of last resort...”. It was the minimum support necessary to avoid breach of a person’s rights under the European Convention on Human Rights, as opposed to support provided by reference to assessed needs.

However, part of the reasoning was based on the deliberate exclusion of children from the provisions of section 54 and schedule 3 to the Nationality, Immigration and Asylum Act 2002. Unless the Secretary of State was able and willing (or could be compelled) to provide section 4 support and the section 4 support was sufficient to meet the child’s assessed needs, which was unlikely given the nature of that support, the local authority would be left responsible under the Children Act 1989. That would mean that the family was not “destitute” and so not eligible for section 4 support.

[25] Other cases followed. In *R (O) v Barking and Dagenham London Borough Council* [2010] EWCA Civ 1101, [2011] 1 WLR 1283 the local authority was liable for providing accommodation to a young asylum seeker who had been looked after by the local authority as a child. Responsibility did not transfer to the Secretary of State under section 4 of the 1999 Act. The Court of Appeal did refer to “the impenetrable nature of the legislation”, but relied, by analogy, on the decision of the House of Lords in *R (Westminster City Council) v National Asylum Support Service*. The Court held that the powers of the Secretary of State under section 95 and section 4 of the 1999 Act are residual and cannot be exercised if the asylum seeker, or failed asylum seeker is entitled to (in that case) accommodation under some other provision. Hence a local authority was not entitled, when applying the legislation relating to their powers and duties, to take into account the possibility of support from the Secretary of State. Failure by a local
authority to re-assess the needs of the child of a failed asylum seeker when his mother’s temporary accommodation ceased to be available was held to be unlawful in *R (on the application of ES) v London Borough of Barking and Dagenham* [2013] EWHC 691 (Admin). The attempt by the local authority to maintain that the mother should rely on section 95, or section 4, support and on this basis the child would no longer be “in need” failed.

[26] The cases relating to the Children Act 1989 are of indirect significance given the similarity of the regime for children under section 17 of that Act and the regime for adults in Scotland under section 12 of the Social Work (Scotland) Act 1968. The provisions of the Children (Scotland) Act section 22 are also in similar terms to the English Children Act 1989 section 17, but neither Act will directly avail a pregnant woman who has no children. The law does not regard an unborn child as having rights. This was enunciated in *Paton v British Pregnancy Advisory Service Trustees* [1979] 1 QB 276 and confirmed in *eg. St George’s Healthcare NHS Trust v S* [1998] 3 WLR 936. An unborn child cannot, in England, be made a ward of court (*Re F (In Utero)* [1988] 2 WLR 1288). The same principle applies in Scotland, as set out in *Kelly v Kelly* 1997 SC 285. This does not, as yet, give rise to any issue under the European Convention on Human Rights, as there is no consensus on the nature and status of an unborn child (*VO v France* (2005) 40 EHRR 12). A pregnant woman cannot therefore call upon a local authority to assess the needs of her unborn child. On the other hand the fact that the child may, when born, have needs is potentially relevant under section 12 of the Social Work (Scotland) Act 1968 if probable aggravation of the mother’s need would cause greater expense to the local authority on a later occasion, or because damage done to her unborn child is likely to result in that child being in need under the Children (Scotland) Act 1995.
The case law has generally addressed provision in terms that it is either made by the Secretary of State, or it is made by the local authority. There is no case dealing explicitly with provision being made in one respect by the Secretary of State and in another respect by the local authority. However, the Secretary of State will only provide support for asylum seekers or failed asylum seekers who would otherwise be “destitute” (see paragraph [15] above). Section 95(3) provides that:

“For the purposes of this section, 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.”

The same definition is adopted in the Immigration and Asylum (Provision of Accommodation to Failed Asylum Seekers) Regulations 2005. Thus support from the Secretary of State is available if either of these conditions is satisfied. Section 96 permits the Secretary of State to provide support in various ways, including provision of accommodation, provision of essential living needs, and in certain other ways such as to enable the person to attend bail proceedings. Support may also be provided under section 4 in the form of accommodation and services or facilities which may be covered by a voucher (Azure card). Provision of support in the form of accommodation does not however necessarily result in provision of support for essential living needs, nor does provision of support for living needs mean that provision of accommodation is going to be necessary.

A pregnant woman who has accommodation provided by the local authority will still be destitute if she does not have the funds to meet her essential living needs and should therefore as a matter of logic still receive an allowance from the Secretary of State.
in the form of cash or a voucher (in accordance with her status). By the same logic, a pregnant woman who has her essential living needs met by the local authority may still be entitled to accommodation provided by the Secretary of State. The difficulty which may arise is if the local authority provide cash support or services designed to address needs specific to pregnancy, and as a result the pregnant woman is no longer regarded as destitute, bearing in mind that the Secretary of State’s position on essential living needs is likely to be restricted to the allowance that would be made for essential living needs of a pregnant woman. This means that if the local authority steps in to assist a pregnant migrant woman under section 12 of the Social Work (Scotland) Act 1968 by providing cash or services this may result in withdrawal of her cash allowance or voucher provided by the Secretary of State. In the result she would not receive any effective benefit from the local authority provision unless the local authority was prepared to meet her living needs in full. The absence of any reported case addressing this particular issue means that it is not possible to tender advice with any particular confidence.

**Human Rights**

[29] Both the Secretary of State and local authorities are public authorities within the Human Rights Act 1998 and should not act in a way that is incompatible with rights under the European Convention on Human Rights, unless bound to do so by primary legislation (1998 Act, section 6). This basic responsibility underlies paragraph 3 of the third schedule to the Nationality, Immigration and Asylum Act 2002. It provides a safety net for the groups mentioned at paragraph [6] above and ensures that neither central, nor local, government is obliged by law to violate their Convention duties. Where a duty to
provide assistance under section 12 of the Social Work (Scotland) Act 1968 or section 22 of the Children (Scotland) Act 1995 is generally excluded by section 54 and paragraph 1 of schedule 3, the exclusion will not apply if the Convention rights of a pregnant woman would thereby be breached.

[30] The general duties of local authorities towards asylum seekers was considered by the English Court of Appeal in R (Clue) v Birmingham City Council [2011] 1 WLR 99. In that case the local authority declined assistance on the basis that there was no impediment to the woman concerned returning to her country of origin, despite the fact that her application for leave to remain was outstanding. The court granted judicial review on the basis that a local authority should not second-guess the outcome of an application for leave to remain. Save in hopeless, or abusive cases, the duty imposed on local authorities is to act so as to avoid a breach of an applicant’s Convention rights. They were not required or entitled to decide how the Secretary of State would determine an application for leave to remain or, in effect, determine such an application themselves by making it impossible for the applicant to pursue it (see para 63). When, however, a woman is heavily pregnant or has just given birth then it has been judicially accepted that she cannot leave the United Kingdom (see e.g R (Gnezele) v Leeds City Council [2007] EWHC 3275 (Admin)) and the arguments will tend to focus on her treatment in the United Kingdom, rather than on expulsion. In practice Convention arguments have most often been raised in response to attempted expulsion from the United Kingdom. The two most relevant articles of the Convention are articles 3 and 8.

[31] Article 3 of the European Convention on Human Rights provides that:

No one shall be subjected to torture or to inhuman or degrading treatment or
punishment.

This is an unqualified provision. Treatment that contravenes article 3 cannot be justified. There can be no question of proportionality. The obligation to refrain from any such conduct is absolute. There is however a distinction between a negative obligation not to inflict article 3 ill-treatment and a positive obligation to take steps to protect persons from forms of suffering sufficiently grave to engage article 3. It has been said that positive obligations are intrinsically less absolute in character (see N v SSHD [2005] 2 AC 296, per Lord Brown of Eaton-under-Heywood at para 88). The case law has tended to focus on potential expulsion from the United Kingdom when a person has been benefitting from health care that he or she would not receive elsewhere. Save in the most exceptional circumstances, such as where a person is in the final stages of a terminal illness (as in D v United Kingdom (1997) 24 EHRR 423), there will be no basis to resist expulsion by reference to article 3, but the European Court of Human Rights has emphasised the need for rigorous scrutiny of all the circumstances surrounding such a case (see Bensaid v United Kingdom (2001) 33 EHRR 10).

[32] The case of R (Q) v Home Secretary [2004] QB 36 is authority for the basic proposition that the regime imposed on asylum seekers within the United Kingdom constitutes “treatment” within the meaning of article 3, but there the decision of the Court of Appeal was that the low level of support offered would only be “inhuman or degrading” if it involved actual bodily injury or intense physical or mental suffering. The court referred to the guidance offered by the European Court of Human Rights in Pretty v United Kingdom (2002) 35 EHRR 1:

As regards the types of ‘treatment’ which fall within the scope of article 3 of the Convention, the court’s case law refers to ‘ill-treatment’ that attains a minimum
level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.

[33] In contrast in R (Limbuela) v Secretary of State for the Home Department [2006] 1 AC 396 claimants who were not provided with accommodation and were reduced to sleeping in the open, or were faced with the imminent prospect of having to do so, succeeded in establishing an article 3 claim against the Secretary of State. Lord Hope of Craighead, in his speech in the House of Lords in that case, referred to the potential for article 3 to require the state, or a public authority, to do something to prevent is deliberate acts which would otherwise be lawful from amounting to ill-treatment of the kind struck at by the article (para 40). He went on to say:

“59 It is possible to derive from the cases which are before us some idea of the various factors that will come into play in this assessment: whether the asylum-seeker is male or female, for example, or is elderly or in poor health, the extent to which he or she has explored all avenues of assistance that might be expected to be available and the length of time that has been spent and is likely to be spent without the required means of support. The exposure to the elements that results from rough-sleeping, the risks to health and safety that it gives rise to, the effects of lack of access to toilet and washing facilities and the humiliation and sense of despair that attaches to those who suffer from deprivations of that kind are all relevant. Mr Giffin for the Secretary of State accepted that there will always in practice be some cases where support would be required – for example those cases where the asylum-seeker could only survive by resorting to begging in the streets or to prostitution. But the safety net which section 55(5)(a) creates has a wider reach, capable of embracing all sorts of circumstances where the inhumanity or degradation to which the asylum-seeker is exposed attracts the absolute protection of the article.”

Baroness Hale, in the same case, added (at para 78):
“We have to judge matters by the standards of our own society in the modern world, not by the standards of a third world society or a bygone age. If a woman of Mr Adam’s age had been expected to live indefinitely in a London car park, without access to the basic sanitary products which any woman of that age needs and exposed to the risks which any defenceless woman faces on the streets at night, would we have been in any doubt that her suffering would very soon reach the minimum degree of severity required under article 3? I think not.”

[34] It was implicit in these cases that the treatment of women may give rise to exceptional circumstances. In R (Q) v Home Secretary the Attorney General acting on behalf of the Home Secretary cited “the predicament of a heavily pregnant woman” as an instance where article 3 might be engaged. The court agreed that there was a stage at which the dictates of humanity require the state to intervene to prevent any person within its territory suffering dire consequences as a result of deprivation of sustenance. The line of reasoning led to R (Gnezele) v Leeds City Council [2007] EWHC 3275 (Admin) where Mitting J noted (at para 5):

“It is common ground that while in the later stages of their pregnancies, and while they were and are the mothers of young children, by which I mean nursing mothers of young children or mothers of children too young to be carried by a scheduled flight, a duty is owed to them to provide them and their children with accommodation and necessities. The duty is owed to avoid the breach by the United Kingdom of the claimants' rights under article 3 of the European Convention on Human Rights.”

The decision in that case as to which authority is responsible for avoiding a violation of article 3 does not apply in Scotland (see paragraph [21] above), but the reasoning encapsulates the case law where it is accepted that article 3 applies to require provision of accommodation and necessaries for pregnant women and women who have recently given birth.

[35] Turning to article 8 of the European Convention on Human Rights, this article
provides:

“1. Everyone has the right to respect for his private and family life,...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

This article is capable of imposing on a state a positive duty to provide an individual with support in order to ensure respect for his private and family life. It is however subject to qualification. In R (Q) v Home Secretary the Court of Appeal acknowledged that a denial of support could engage article 8 if it impinged on an asylum seeker’s private and family life but did not consider article 8 in any detail. That was left to the Court of Appeal in Anufrijeva v Southwark London Borough Council [2003] EWCA Civ 1406, [2004] QB 1124. There the court held that it was unlikely that article 8 would require an individual to be provided with welfare support when his predicament was not sufficiently severe to engage the article 3 protection against inhuman and degrading treatment. The case related to a claim for support for a family as a whole. In R (G) v Barnet London Borough Council [2004] 2 AC 208 the House of Lords rejected a claim by parents that provision of accommodation for a child necessarily implied provision of accommodation for the parent. However, if a child were provided with accommodation under the Children (Scotland) Act 1995 separately from his or her parent support, issues may arise in relation to the right to respect for family life in terms of article 8.

[36] The scope for the application of article 8 extends to private life. In Bensaid v United Kingdom (2001) 33 EHRR 10 (paras 46 and 47) the European Court of Human Rights commented that its case law did not exclude that treatment which does not reach the
severity of article 3 treatment may nonetheless breach article 8 in its private life aspect where there are sufficiently adverse effects on a person’s physical and moral integrity. They acknowledged that the preservation of mental stability is in that context “an indispensable precondition to effective enjoyment of the right to respect for private life.” This was echoed by Lang J in De Almeida v Royal Borough of Kensington and Chelsea [2012] EWHC 1082 (Admin) where she held that article 8 applied and that the local authority therefore required to justify, by reference to the second part of article 8, its failure to offer support. Looking at whether there were relevant and sufficient reasons to refuse assistance to the Portuguese claimant who was suffering from HIV she said:

“138. In my judgment, the Claimant is justified in submitting that any potential saving to the public purse will be minimal and does not reasonably justify a decision which will have such severe consequences for the Claimant. The Claimant’s terminal illness means that he faces an undignified and distressing end in Portugal, struggling to find any accommodation and means of support, and parted from his existing support network of friends and healthcare professionals.”

[37] As can be seen from the De Almeida case, when a step contemplated by the local authority interferes with family or private life, taking that step requires to be justified. The local authority must ask itself whether the interference in family or private life is necessary and proportionate to the pursuit of a legitimate aim. In MN and KN and London Borough of Hackney [2013] EWHC 1205 (Admin) (at para 87) Leggatt J commented:

“As well as family life, however, article 8 also protects the right to respect for a person’s private life. As the Court of Appeal observed in Clue (at para 27), this entails considerations far wider than the right to family life. The concept of private life extends to those features which are integral to a person’s identity or ability to function socially as a person: R (Razgar) v Secretary of State for Home Department [2004] 2 AC 368, 383 at para 9. In the case of a settled migrant it includes the totality of social ties between the individual and the community in which he or she is living: see e.g. Üner v The Netherlands (2006) 45 EHRR 421 at para 59. Since mental stability is an indispensable condition to enjoyment of the right, where removal from the country in which a person is living is in contemplation, it also requires account to be taken of the
foreseeable consequences of removal on the person’s mental health: see Razgar at para 9.”

[38] This case law is significant in relation to support for pregnant women. Pregnant women are particularly vulnerable. If in this condition the treatment they receive as a result of their immigration status forces them into abusive relationships, or prostitution this brings them into the type of situation considered by the House of Lords in the Limbuela case, or if their health or mental stability is threatened, that is capable of giving rise to issues under article 3 or article 8. Separation from support structures is relevant to article 8, as in De Almeida. There can be no justification for a violation of article 3. In article 8 cases a public authority is required to justify a failure to assist that affects private or family life, considering whether the refusal of support is proportionate.

[39] The United Nations Convention on the Elimination of All Forms of Discrimination against Women is pertinent in this context, particularly if regard is paid to the comments of Baroness Hale in the Limbuela case (paragraph [30] above). The Convention has been ratified by the United Kingdom and provides in article 12(2) that states parties:

…shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

A working group of the Human Rights Council reporting this year referred to violation of women’s rights in this respect by neglecting women’s health needs and failing to make gender-sensitive health interventions. The group note that during pregnancy many women are vulnerable to malnutrition owing to discrimination in the allocation of food, which can result in serious and irreversible deterioration of women’s general health, increased risk of premature delivery, low birth weight and birth defects. There is a
reference to the difficulty for women migrants to access health care. The point is made that equality for women means provision of differentiated services. The Working Group recommended, among other things, the provision of adequate nutrition and free services for pregnant and lactating women. The Convention on the Elimination of All Forms of Discrimination against Women may however serve as an aid to the issues arising under article 3 and 8 of the European Convention on Human Rights, for the reasons expressed by Baroness Hale in Limbuela.

[40] The case law refers repeatedly to “human rights assessments” carried out by English local authorities. These feature in Practice Guidance for Local Authorities (England), Assessing and Supporting Adults who have No Recourse to Public Funds and in Practice Guidance for Local Authorities, Assessing and Supporting Children & Families and Former Looked-after Children who have No Recourse to Public Funds for Support from Local Authorities under the Children Act 1989, produced by the NRPF Network. They are clearly seen as important tools for local authorities upon whom the obligations of articles 3 and 8 of the Convention bear. There is a standard Human Rights Assessment Form produced by the NRPF Network.

[41] In this context the Nationality Immigration and Asylum Act 2002, schedule 3 paragraph 3 applies to Scotland as well as England and so Scottish local authorities are not prevented from exercising their powers or performing their duties in so far as necessary to avoid a breach of a person’s Convention rights. The relevant services to pregnant women will be provided under section 12 of the Social Work (Scotland) Act 1968. Where it appears that a person may be in need of ‘community care services’ the Scottish local authority is required to make an assessment under section 12A of the
person’s needs and whether those needs call for the provision of any such services. The duty to assess is therefore triggered by awareness of potential need. The local authority should not wait for a request for an assessment. They require to make assessments in order to ensure that they act in a manner which is Convention compliant. There does not however appear to be any form adapted for the Scottish context, to assist Scottish local authorities in complying with their Convention duties.

[42] Failure to have regard to Convention rights may be addressed in a number of ways. As explained at paragraph [26] above, it is unlawful under section 6 of the Human Rights Act 1998 for a public authority to act in a way that is incompatible with a Convention right. This section underpins the provision in paragraph 3 of schedule 3 to the Nationality, Immigration and Asylum Act 2002 that paragraph 1 of the schedule does not prevent the exercise of a power or performance of a duty if, and to the extent that, its exercise is necessary for the purpose of avoiding a breach of a person’s Convention rights. A decision by a local authority in relation to provision, or non-provision of support under section 12 of the Social Work (Scotland) Act 1968 that violates the article 3 or article 8 rights of a pregnant woman would be open to judicial review. It is also possible to claim damages under sections 7 and 8 of the Human Rights Act 1998 in the event of injury caused by an act that is unlawful because it is in violation of Convention rights.

**Immigration Act 2016**

[43] The Immigration Act 2016 received the Royal Assent on 12 May 2016. It is not yet fully in force. When in force section 66 and Schedule 3 will replace section 4 support with support under a new section 95A of the Immigration and Asylum Act 1999. This
will provide:

**95A Support for failed asylum-seekers, etc who are unable to leave UK**

(1) The Secretary of State may provide, or arrange for the provision of, support for a person, for such period or periods as may be prescribed, if—

(a) the person is a failed asylum-seeker, or a dependant of a failed asylum-seeker, (b) an application for support under this section is made in respect of the person which meets such requirements as may be prescribed, (c) it appears to the Secretary of State that the person is destitute, or is likely to become destitute within such period as may be prescribed, and (d) the person faces a genuine obstacle to leaving the United Kingdom.

A failed asylum seeker will be as defined in section 94(2D), ie:

(2D) A person is a failed asylum-seeker for the purposes of this Part if—

(a) the person is at least 18 years old,

(b) the person — (i) was an asylum-seeker, or (ii) would have been an asylum-seeker at any time if the person had been at least 18 years old at that time,

(c) the person's protection claim has been rejected, and

(d) the person is not an asylum-seeker.

[44] A “protection claim” under the 2016 Act will be a claim that removal would breach the United Kingdom’s obligations under the Refugee Convention or the United Kingdom’s obligations to persons eligible for humanitarian protection. The full effect of section 95A is not yet known. What is to be regarded as a genuine obstacle to leaving the United Kingdom is to be specified in regulations made by the Secretary of State. There may also be regulations prescribing other criteria to be used in determining whether or not to provide or arrange provision for support, or continue to do so and whether there should be conditions for support. There may be temporary support provided pending a decision on support under section 95A. Schedule 12 of the 2016 Act sets out more detailed restrictions on support that may be offered by local authorities in England, but there are no provisions changing the legislation relating to support by Scottish local authorities as this is likely in the future to be treated as a devolved matter.
Application of the law

[45] The effect of these complex provisions on pregnant asylum seeking women can be summarised as follows.

[46] Pregnant women eligible for local authority assistance under Social Work (Scotland) Act 1968, section 12. On the basis that a pregnant woman requires assistance as a result of her pregnancy (as opposed to requiring assistance solely as a result of destitution) then the following pregnant women will, in ordinary course, be eligible for support under section 12 of the Social Work (Scotland) Act 1968:

- A woman who has applied for asylum and is awaiting the outcome of her application;
- A woman whose asylum application has been refused, but who has not failed to co-operate with removal directions;
- A woman whose asylum application has been refused, but who has one or more dependent children, provided the Secretary of State has not issued a certificate that she has failed to leave the United Kingdom voluntarily or to place herself in a position where she is able to leave voluntarily, or if there is such a certificate less than 14 days have elapsed since she received a copy.

Receipt of support under section 12 will result in withdrawal of support from the Secretary of State under section 95 or section 4 of the Immigration and Nationality Act 1999 if the support results in the woman no longer being destitute. If she is provided with accommodation by the local authority, she will no longer be entitled to accommodation provided by the Secretary of State. If she her essential living needs are met by the local authority she will no longer be entitled to income support under section
95 or section 4. Provision by the local authority of some support may raise difficult issues
as to whether she remains eligible for support from the Secretary of State (see paragraph
[28] above).

[47] Pregnant women lacking accommodation and necessities. Section 12 assistance cannot be
given in ordinary course to failed asylum seekers who have failed to co-operate with
removal directions, failed asylum seekers with dependent children where the Secretary of
State has issued a certificate that they have failed to leave the United Kingdom
voluntarily or to place themselves in a position to leave voluntarily and 14 days have
elapsed since a copy of the certificate was received and to persons unlawfully in the
United Kingdom. A full list of those ordinarily ineligible for section 12 support is set out
at paragraph [6] above. In such cases section 12 support is only available to avoid a
breach of the person’s Convention rights. A pregnant woman, particularly one in the
later stages of pregnancy, who lacks accommodation and necessities, is likely to be owed
a duty to provide these to her in order to avoid a violation of her rights under article 3
and potentially article 8 of the European Convention on Human Rights.

[48] Pregnant women with children. The local authority may provide services designed to
safeguard and promote the welfare of children under the Children (Scotland) Act 1995.
This may incidentally have the effect of conferring benefits on a pregnant parent. The
women excluded from assistance under section 12, save on human rights grounds,
cannot be given assistance under section 22 of the Children (Scotland) Act 1995 (save on
human rights grounds), but their children may be assisted. In such cases the parent may
be able to argue that accommodation of the child without allowing the parent
accommodation with the child could be a violation of the right to respect for family life in terms of article 8 of the Convention.

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21 November 2016

OPINION OF SENIOR COUNSEL

For
BRITISH RED CROSS
Re
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