



HUMAN RIGHTS FOR ALL: A Legal Analysis of Economic and Social Rights for Migrants in Scotland

Introduction

This brief contribution aims to assess to what extent the current legal framework which ensures rights for migrants living in Scotland meets the economic and social standards set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR). For the purpose of this briefing, migrants are broadly defined as anyone living in Scotland who was not born here and is not a British citizen. This, of course, includes people from very diverse backgrounds, circumstances and migration statuses, and this is referred to where relevant below.

Devolution and Migrant Rights in Scotland

To understand the legal framework which secures rights for migrants in Scotland, it is important to note at the outset that the Scottish Government is a devolved nationality authority, and that certain matters – notably the exercise of immigration

powers – are reserved to the UK Government and not for the Scottish Parliament.

The UK Government has, in the past decade, sought to exercise those reserved immigration powers in ways that link lawful migration status to access to services or to the right engage in an increasing range of activities as part of its “hostile environment” policies, which seek to deter migrants from remaining in the UK if they do not have leave to remain. For example, lawful migration status is linked by UK immigration legislation to access to employment, UK social security benefits and eligibility for support under social work legislation, including in devolved administrations.

Many links between migration status and access to services or activities lie within areas of competence devolved to the Scottish Parliament, or areas of mixed competence. Examples include: the franchise (right to vote), access to reserved and devolved social security benefits, social housing and access to education, including educational funding.

Devolution and Migrant Rights in Scotland

In the following sections, we set out key economic and social rights which are guaranteed by ICESCR, and provide a brief description of the current position for migrants living in Scotland, as well as an analysis of gaps in protection for migrants. We conclude by making brief recommendations for areas where reserved or devolved powers could be exercised to close those gaps and bring rights for migrants in Scotland closer in line with the protections outlined for all in ICESCR.

Legal Analysis of ICESCR Rights for Migrants in Scotland

The Right to Work

Availability – tailored services to help people to identify employment opportunities and find work.

Accessibility – involves three key elements: non-discrimination, physical accessibility (for disabled people), and information accessibility about employment opportunities.

Acceptability and quality – includes the right to choose and accept work freely, just and favourable conditions of work e.g. decent wages & paid leave, safe working conditions, and the right to form trade unions.

Right to Work. The right to work in Scotland is restricted by immigration status, that is, migrants either require to hold a category of leave to remain that permits unrestricted access to employment (such as refugee status or indefinite leave to remain or pre-settled or settled status) or they require specific leave linked to employment (such as a work permit). Some categories of leave have restrictions on the number of hours of work permitted, such as student visa categories.

Asylum seekers are not permitted to work whilst their claim for asylum is pending, although it is possible for asylum seekers to apply for permission under certain limited conditions. This prohibition has been criticised as both economically inefficient and also as reducing the dignity of asylum seekers in the UK and is subject of an active campaign led by Refugee Action and a coalition of third sector organisations called [Lift the Ban](#).

The right to work is a reserved matter and change would therefore require to be led by the UK Government.

Discrimination and conditions of work. Migrants with permission to work in Scotland enjoy the same protections under employment law as non-migrants, and must not be discriminated against in employment decisions or conditions of work because of their migrant status.

However, UK Home Office enforcement of restrictions of the right to work have created a system whereby employers are held accountable for employing workers who do not have the right to work – and they face fines and even criminal sanctions for knowingly doing so. Employers require to conduct ‘right to work’ checks in compliance with Home Office guidance, and this practice can lead to unlawful discrimination against migrants where employers have applied guidance wrongly, or they seek to discontinue employment of migrants altogether to minimise risk of immigration enforcement sanctions.

Exploitation and risk of abuse. It is important to note that ICESCR protections for workers are not limited to those who are working lawfully – and the impact of the “hostile environment” and of Brexit has been a steady increase in the numbers of people living in Scotland who are without leave to remain and therefore without permission to work. If these people are, in fact, working, they are at heightened risk of exploitation and abuse in the workplace, because of their insecure immigration status.

Even workers who have leave to remain – such as seasonal migrant workers and workers sponsored on limited work permits – are similarly at risk of exploitation, where an employer can effectively leverage control over an individual’s immigration status, for economic gain. This is a gap in terms of the protections offered to migrant workers in Scotland which could be addressed with a more targeted approach to identifying vulnerable workers in key sectors, and providing targeted support.

Right to highest attainable level of physical and mental health, specifically:

Availability – enough functioning public health and individual health care facilities, safe water and sanitation facilities, trained and fairly-paid medical professionals, and essential medicines.

Accessibility – four key elements: non-discrimination, physical accessibility (within safe physical reach of person), economic accessibility (affordable, with principle of equity so poorer households not disproportionately charged with health costs), and information accessibility (every person has the right to seek, receive and impart information on health).

Acceptability – respectful of medical ethics and the culture of individuals and communities, as well as attentive to gender and life-cycle requirements.

Quality – facilities appropriate and of good quality including the provision of necessary medicines and equipment, skilled medical professionals, and adequate water and sanitation.

Right to Access NHS Healthcare. Some NHS services – such as emergency care in a GP surgery or hospital, treatment for sexual disease and treatment for infectious diseases (such as Covid-19) are free for all people in Scotland, whether they are overseas visitors or ordinarily resident here.

All people ordinarily resident in Scotland have a right to access primary (GP) and secondary (hospital) healthcare. However, some migrants will be eligible to access most NHS healthcare for free – for example, people with settled status or pre-settled status, indefinite leave to remain, asylum seekers and refugees.

Other migrants however, may require to pay an immigration health surcharge (IHS) in order to access healthcare – including students, spouse visa holders and work permit holders.

A person who is not lawfully resident or is an overseas visitor who has not paid the IHS, could be charged a fee for any NHS treatment provided by a GP or in a hospital.

The right to access NHS healthcare is a devolved matter and is determined by the Scottish Government.

Discrimination and equal access to NHS healthcare.

The Patient Rights (Scotland) Act 2011 and the [NHS Scotland Charter of Patient Rights and Responsibilities](#) outline the rights of all patients in accessing NHS Scotland services. These include rights to equal treatment and treatment with consideration, dignity and respect – as well as treatment “taking into account needs, preferences, culture, beliefs, values and level of understanding.”

Migrants accessing healthcare services must, therefore, not be discriminated against in access to treatment or in adequacy or quality of treatment, because of their migrant status. Further, the NHS is required to provide a suitable service to migrants, taking into account their individual needs, including those arising from their migrant status and experience. This means, for example, that an interpreter should be engaged, where necessary, to ensure that a migrant patient fully understands any medical diagnosis and can fully and meaningfully consent to any proposed treatment. However, we continue to see gaps in practice, where patients are not provided with the language or other communications support that they require.

Data Sharing and Charging for Healthcare

The Scottish Government has clearly stated that [NHS Scotland will not share patient information](#) relating to migration with the UK Home Office.

However, the link between migration status to fee charging for NHS healthcare means that migration status may be checked at key points when people seek to access healthcare.

For people who are unlawfully resident and for people who are not otherwise covered by an IHS charge, this means that there continues to be a heightened risk that migrants who require medical care will not seek necessary treatment through the NHS. This could have a broader impact on public health and result in unequal health outcomes for migrant populations.

Right to social security, including:

Availability – social security system provides benefits to address relevant impacts on livelihood. Must be administered or regulated by government.

Social risks and contingencies – should provide for the coverage of the following: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans.

Adequacy – in both amount and duration so that recipients can realise their rights to family protection and assistance, an adequate standard of living, and adequate access to health care. When a person makes contributions to a social security scheme that provides benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions, and the amount of relevant benefit.

Accessibility – five key elements: covers everyone without discrimination on any prohibited ground; eligibility – qualifying conditions must be reasonable, proportionate and transparent; affordability for all & clarity on any contributions well in advance; participation and information; and physical access, particular attention given to disabled people, migrants, and persons living in remote areas.

Right to food, including:

Adequacy – appropriate in the social, economic, cultural, and environmental context.

Availability – everyone should be able to obtain sufficient, quality healthy food. Food should be free from harmful substances and be culturally appropriate.

Accessibility – three key elements: non-discrimination, economic accessibility, and physical accessibility.

Sustainability – practices impacting on food, land or natural resources should not jeopardise the long-term availability and accessibility of food.

Right to access benefits. As set out above, migration status is linked to access to most UK social security benefits and will be assessed at the point of application. People with settled status, refugee status or indefinite leave to remain qualify for access to benefits on equal terms to British citizens – however, people with most other forms of leave to remain will be subject to a condition called “no recourse to public funds.”

No recourse to public funds (NRPF) is a prohibition on accessing a range of benefits and services which are defined in immigration legislation and [Home Office guidance](#). *Although*

some of these benefits are funded by devolved administrations in the exercise of devolved powers (such as the Scottish Welfare Fund), the imposition of the restriction on people who are NRPF is the exercise by the Home Office of a reserved power.

Someone whose leave to remain is subject to the NRPF condition will breach the validity of their leave to remain if they access a prohibited public fund. Those who do not have lawful migration status are also NRPF.

The NRPF condition therefore increases vulnerability of migrants to destitution and homelessness and also makes it more difficult for government agencies and local authorities to support migrant individuals and families – who may be lawfully resident and even lawfully working – but struggling on the brink of destitution or homelessness. Examples include: migrants whose employment has been terminated or who are underemployed due to the Covid-19 pandemic not having access to the same range of social security benefits a non-migrant worker would have had in the same employed role, under the same terms of employment; migrants in low paid employment who cannot access council tax benefit or housing benefit; migrants who have additional disability-related costs who cannot access disability-related benefits.

The imposition of the NRPF condition on migrants is a factor that directly interferes with their ability to enjoy an adequate standard of living in Scotland, as well as their ability to access adequate accommodation and, in some cases, adequate and healthy food.

A campaign led by JCWI has called for [a suspension of the NRPF regime during the Covid-19 pandemic](#). The Scottish Government and COSLA have also called for [the removal of NRPF conditions for the most vulnerable](#) and removing the Scottish Welfare Fund from the list of prohibited public funds.

Social work support. It is important to note that in limited cases, children and vulnerable adults will be eligible for support under Scottish social work legislation, and this may include provision of accommodation alongside financial support.

Scottish social security system. The Scottish Government administers some social security benefits which can be accessed by people who are NRPF, and these include the Young Carer Grant and the Covid-19 self isolation support grant. These are examples of ways in which the Scottish Government can exercise devolved powers to mitigate the harmful impact of UK Government immigration policies.

Scottish child poverty and welfare programmes. There are a range of universal programmes in Scotland which are designed to increase the welfare of children and families and to mitigate the impact of poverty on the development of children. These include some programmes sponsored by the Scottish Government which benefit all children in Scotland – for example, the [Scotland Baby Box](#) programme and [Early Learning and Childcare](#) grants. Other programmes, administered by local authorities, are not universal but include a discretion to extend benefits to families regardless of migration status – for example, the provision of school clothing grants and [free school meals](#).

Asylum support. The UK Home Office operates a system for providing financial support and accommodation for asylum seekers, which is separate to the mainstream provision of social security benefits overseen by the DWP. At present, asylum support consists of a no-choice offer of accommodation, along with a weekly payment of £39.63 per person, to cover food, clothing and toiletries. Pregnant mothers and children up to the age of 3 are given an additional uplift of £3 weekly.

This very low level of cash support – together with the prohibition on work and the NRPF condition – means that

people in the asylum support system subsist at destitution levels, sometimes for many years. The low levels of subsistence in the asylum support system arguably themselves breach the ICESCR requirements, with respect to asylum seekers.

The provision of a separate system of asylum support and accommodation is a reserved matter; however the impact of destitution and homelessness in Scotland which can result from the operation of this system is felt in areas of devolved competencies, and this impact can be mitigated through the exercise of devolved powers in the areas of social security and provision of housing.

Right to housing, including:

Legal security of tenure, including no forced or arbitrary eviction, harassment and other threats.

Availability – states must ensure that housing contains the facilities necessary for health, security, comfort and nutrition. This includes sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.

Affordability – housing and housing-related costs should be commensurate with income levels, and at a level that does not compromise other basic needs. Housing subsidies for those unable to afford housing costs, and protections for tenants against unreasonable rents.

Habitability – sufficient space, be safe to live in, and give protection from cold, heat, rain and other elements of nature, and structural hazards.

Accessibility – housing priority to disadvantaged groups including the elderly, children, disabled people, the terminally ill.

Location – adequate housing must be in a location which allows access to employment options, health and education facilities, and other social services. Houses should not be built in unsafe or polluted locations.

Cultural adequacy – home building materials and construction must be connected with the expression of cultural identity and diversity of housing, as appropriate to the communities within the particular context.

Right to housing and discrimination. Migrants have an equal right to own and rent property in Scotland as non-migrants, and they must not be discriminated against as tenants or owners of property on the basis of their migration status.

In England and Wales, the UK Home Office operates a “right to rent” scheme, which imposes duties on private landlords to check the migration status of prospective tenants – this is similar to the duties imposed on employers as part of the “right to work” requirements. This scheme was successfully legally challenged in England & Wales as having led to increased discrimination against migrants in the private rented accommodation market.

Although the “right to rent” scheme does not apply in Scotland, the UK Home Office has the powers to make these provisions enforceable here. Furthermore, there are reports of discrimination against migrants in the private rented accommodation market in Scotland – which could be due in part to a lack of clarity on the part of landlords as to whether the “right to rent” scheme might apply, and a desire to avoid any risk of Home Office enforcement fines in renting to a migrant.

Access to social housing. The right to apply for an allocation of local authority social housing in Scotland is linked to migration status and is limited with reference to immigration legislation. The overall impact is that migrants who are prohibited from accessing public funds (NRPF) and migrants who do not have leave to remain are also not eligible for allocation of social housing. In limited cases, children and vulnerable adults will be eligible for support under Scottish social work legislation, and this may include provision of accommodation alongside financial support.

Asylum support accommodation. As set out above, the UK Home Office operates a system for providing financial support and accommodation for asylum seekers, which is separate to the mainstream provision of social security benefits overseen by the DWP. Asylum support accommodation across the UK – including in Scotland – has been widely criticised as offering a **substandard quality of accommodation** and as often being entirely unsuitable to the requirements of inhabitants. More recently, during the Covid-19 pandemic, asylum seekers have been housed for lengthy periods of time in hotel accommodation – and again, this has been criticised as unsuitable and dangerous for the welfare of inhabitants. **Refugees for Justice** is a refugee-led campaign for safe, dignified accommodation for asylum seekers in Scotland.

The impact of the NRPF condition, as well as the provision of a separate system of asylum support and accommodation is a reserved matter; however the impact of destitution and homelessness in Scotland which can result from the operation of this system is felt in areas of devolved competencies, and this impact can be mitigated through the exercise of devolved powers in the areas of universal programmes to address poverty and disadvantage, social security and provision of housing.

Right to education

Availability – provision of enough educational infrastructure (institutions and programs) for everyone. These should be equipped with all the materials and facilities needed to function properly in the particular context, such as buildings, teaching equipment and materials, trained and fairly-paid staff, protection from natural elements, sanitation facilities for both sexes, and safe drinking water.

Accessibility – access to education involves three key elements: non-discrimination including on citizenship or residence status, physical accessibility, and economic accessibility.

Acceptability – subject to the overarching aims of education and to minimum educational standards set by the State, education should be relevant to the child's context, needs and evolving capacities, and should be of good quality and culturally appropriate.

Adaptability – education should be flexible enough to adapt and respond to changing societies and the needs of students within diverse social and cultural settings.

Right to education. All children living in Scotland have the right to a free primary and secondary education, as long as they are enrolled in education before reaching school leaving age (usually around 15/16 years old).

Some migrants have an unrestricted right to post-school study – for example, people with settled status, pre-settled status and indefinite leave to remain. Some migrants have a right to study linked to their leave to remain – for example, people with student visas to pursue a specific course at a specific institution.

Other migrants are prohibited from studying – for example where the UK Home Office has placed a “no study” condition on their leave to remain.

Funding for education. Fees can be a barrier for accessing further and higher education, and eligibility for “home fees” tuition, as well as access to student grant schemes are often linked to residency, which means that migrant people can struggle to fund education as compared to non-migrants in Scotland.

The fact that the right to study at further and higher education level – as well as access to educational funding opportunities – does vary in Scotland depending on migration status means that provision for migrant rights to education in Scotland falls short of ICESCR standards which require non-discrimination in access and economic accessibility for all people.

Prohibitions on the right to study are imposed by the UK Home Office as an exercise of reserved powers; however, funding for further and higher education is a matter wholly devolved to the Scottish Parliament.

JustRight Scotland
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From 2020-2021, the Paul Hamlyn Foundation funded Amnesty International to enable the Human Rights Consortium Scotland to explore collaborations between human rights and migration sectors around the upcoming enhanced Scottish human rights framework. As part of this project, the Consortium commissioned JustRight Scotland to carry out this legal analysis to increase clarity and understanding of current law around migrants' economic and social rights in Scotland.

Find out more about JustRight Scotland at:
<https://www.justrightscotland.org.uk/>

Find out more about the 'Human Rights for All' project and other resources at:
<https://hrcscotland.org/human-rights-incorporation-in-scotland/>