Legal Briefing

Ending Destitution in Scotland – A Road Map for Policymakers

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About the author

This report is authored by Jen Ang, for Lawmanity, a legal and strategic consultancy, based in Scotland, which aims to tackle inequalities in the law by working with people-led movements to secure positive change.

Unless otherwise stated, the opinions, interpretations and conclusions expressed are those of the author and do not reflect the views of the organisations comprising the Fair Way Partnership or the individuals or organisations who contributed to this report.

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Most of all, the author would like to thank the people who are supported by the Fair Way Partnership for their participation in I-SPHERE's groundbreaking research, which has given us a strong evidence base for highlighting the inequality created by a cruel and inhumane legal system that aims to enforce destitution by design for migrants in the UK.

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Ending Destitution in Scotland – A Road Map for Policymakers

As part of Fair Way Scotland partnership

FAIR WAY SCOTLAND

Foreword

No-one, regardless of where they are from, should be made destitute or homeless and **forced to endure the serious risks and acute harms associated with these experiences.** Yet that is precisely what people are enduring today in Scotland, despite a clear national ambition to end both extreme forms of hardship.

It is this simple proposition that underpins why I-SPHERE and JRF have commissioned this legal briefing, to explore where the Scottish Government and local councils could do more to reduce the alarming rise in destitution and homelessness amongst people coming to Scotland to work, study, join family or seek safety.

We should be clear that this briefing is responding to an urgent humanitarian and welfare issue [1, 2]. If we want different immigration outcomes in future, we should improve the immigration system, not deny the people already living in our communities access to the essentials we all need to survive.

All the evidence shows that the hostile environment has failed as a deterrent for decades, but it has caused widespread harm to those directly affected, with knock-on costs for communities and public services. Meanwhile, a negative public discourse towards small numbers of people coming to the UK to seek safety has been co-opted by those seeking to inflame division and hatred, jeopardising local safety and cohesion. We stand against such blatant racism. Local communities deserve better.

During COVID, we all recognised the public health imperative to accommodate everyone regardless of status, to ensure everyone could self-isolate, could access essential vaccination and receive treatment – that none of us were protected, unless all were protected. As Scotland's public services and voluntary sector organisations feel the strain all year round, how is the need to protect health any less important today?

While the UK Government could end the need for Fair Way Scotland by opening up access to mainstream benefits, homelessness assistance and other support to all who need it, this briefing shows we don't have to wait for those changes to make progress.

Families with children and adults with very high levels of care needs can be and already are being supported by local authorities, but the presumption has been that immigration law prevents that protection being accessible to other groups. **This briefing challenges that view.**

Scottish and local government have, through the Ending Destitution and Ending Homelessness strategies explicitly committed to mitigate the impacts on those with No Recourse to Public Funds or restricted or uncertain eligibility (NRPF/RE). To make meaningful progress, we need a further step change in the scale and ambition. This briefing clarifies the legal basis on which action is possible and provides the degree of specificity required on what will make the difference: improving access to emergency financial assistance; increasing the availability of housing accessible to this group and boosting the wraparound support that helps people as they seek to escape crisis and regularise their status – language, legal advice and advocacy, transport, employability support, education and, crucially, better access to health and social care.

In broad terms, this briefing argues that to fulfil their commitment to end homelessness and destitution, Scottish and local government should and can do the following:

1. All devolved policy, both national and local should be urgently reviewed and, if necessary, re-designed explicitly to open up access to groups currently excluded;
2. Specific parallel systems of financial support can (and should) be established and scaled up for the small group of people that cannot adequately be supported any other way (including destitute migrants with NRPF/RE but likely to be of benefit to other groups, too);
3. Frontline workers must be enabled and equipped to offer the right help at the right time, every time. This needs a change of emphasis and practice locally – pivoting from spending time assessing eligibility and gatekeeping (complex and unclear immigration status makes that very hard) to designing pathways for those with insecure status, in the knowledge that social welfare powers and the protection of human rights is a strong legal basis to rely on, given the systemic exclusion experienced by destitute migrants with NRPF/RE.
4. A clearer framework needs to be agreed between UK and Scottish Governments governing which Scottish programmes are added to the 'Public Funds' list and guidance, under what circumstances and with what rationale.

We are excited by the clarity and specificity Jen Ang has brought to this briefing and the route-map to reducing destitution in Scotland she has laid out.

We recognise it comes at a challenging time for both Scottish and local Government finances but the case for prioritising access to essentials for this most disadvantaged group is unequivocal – they are experiencing extreme and persistent harm with negative impacts for them, their families, communities and public services. We look forward to working with all partners to operationalise it.

The new UK Government has signalled its intention to work more constructively with devolved and local government, as well as significantly improve the functioning of the migration, European Union Settlement and asylum systems. Part of demonstrating that shift must be to properly resource local areas to protect people to whom they have a clear statutory duty and remove any remaining barriers for supporting all people at risk, including destitute migrants.

Scotland's determination to take a different approach in protecting migrants – as other parts of the UK are trying to do, too – offers valuable learning, as the UK Government considers how to build a more compassionate, competent and coherent system. Hostility and state neglect has failed on its own terms – but this briefing shows how Scotland can protect a group described as 'the most destitute of the destitute' now.

Deborah Hay, Senior Policy Adviser JRF
Professor Beth Watts-Cobbe, I-SPHERE

Introduction

I-SPHERE at Heriot-Watt University and Joseph Rowntree Foundation (JRF) have been appointed as learning partners to Fair Way Scotland, a partnership of third sector organisations seeking to prevent homelessness and destitution among those with No Recourse to Public Funds (NRPF) in Scotland.

This year's evaluation report, *Destitution by Design: Righting the wrongs of UK immigration policy in Scotland* (Watts et al., 2024) has called for all governments to end destitution by design by taking simple, actionable steps to break the link between immigration status and destitution, in immigration policies and also in pathways to accessing essential support services across Scotland.

This legal briefing, commissioned by I-SPHERE and funded by JRF as part of the Fair Way Scotland partnership (Fair Way), will **clearly outline how Scottish Government and local authorities can take positive steps to end "destitution by design" today** in the following areas:

- Access to social security and financial support
- Access to housing
- Access to transport
- Access to health and social care
- Access to justice and legal aid
- Access to education
- Access to work

The briefing is written principally for policymakers, but will also be of interest to funders, local strategic partners and third sector organisations.

Background and Context

Understanding the legal landscape: devolution, NRPF and the pursuit of a fairer, more equal Scotland

The *Destitution by Design* report illustrates the breadth of the challenges faced by people seeking to address migrant destitution and homelessness in Scotland by providing a detailed analysis of the experiences of migrant people supported by Fair Way, and the frontline practitioners who work with them.

To be eligible for support through Fair Way, an individual must be an adult (not living with children) who is unable to access other forms of support to prevent destitution and homelessness. This includes people who have claimed asylum, but whose claims have been refused (Appeal Rights Exhausted, or ARE asylum seekers), EU citizens who do not have settled status[3], and other people who are NRPF because they do not have leave to remain, or they are undocumented. In this briefing, we will describe the immigration status of people supported by Fair Way as people with No Recourse to Public Funds (NRPF), or other Restricted Eligibility (RE).

Devolution

To understand how UK immigration law creates barriers for people with NRPF/RE, and identify who holds the power to dismantle those barriers, it is necessary to briefly explain how the devolution of powers operates in the UK.

Devolution is the transfer of powers from the UK Westminster Parliament to local and regional government, including the Holyrood parliament in Scotland. Under the Scotland Act 1998, the power to legislate in those matters which are not explicitly reserved to the UK Parliament is devolved to the Scottish Parliament.

In Scotland, immigration is a reserved matter, but housing, health and social care, education and training, local government, justice and policing and some areas of social security are devolved matters (Torrance, 2022).

The distinction between reserved and devolved matters is not straightforward, and difficulties arise where legislation or executive powers are exercised in areas of mixed competence (McHarg, 2023). For example, there are some areas where the UK Parliament – in the exercise of its immigration powers (by legislation or executive decision of the Secretary of State for the Home Office) – has restricted the exercise of devolved powers or disapplied obligations of Scottish local authorities towards specific groups of people: NRPF/RE is one of those areas.

Where there is a conflict between the exercise of reserved and devolved powers in areas of mixed competence – for example, where a devolved authority seeks to mitigate the impact of a UK Government policy or proposes to adopt different or higher standards of human rights protections for people living in Scotland — it can be difficult to predict whether or not an exercise of devolved powers will be challenged, and if challenged, whether that challenge will succeed.

One reason for this is the relatively few examples of legal challenge around the exercise of devolution powers over the past two decades. The other reason is that the decision by the UK Government to challenge or allow the exercise of devolved powers in areas of mixed competence is inescapably a political decision, and therefore, no legal certainty can be read from a decision by the UK Government not to bring legal challenge.

Case Study: Successful Challenge of the Provisions of the UNCRC (Incorporation) (Scotland) Bill

The UNCRC (Incorporation) (Scotland) Bill was unanimously passed by the Scottish Parliament in March 2021, in order to strengthen and protect the rights of all children. The Bill required the UK Parliament to read all legislation, insofar as possible, compatibly with the UNCRC, and gave Scottish courts the power to strike down Acts of the UK Parliament that are incompatible with the UNCRC and declare incompatible proposed legislation of the UK Parliament.

However, following a referral by UK Law Officers to the UK Supreme Court, all of the provisions were found to be outwith the legislative competence of the Scottish Parliament because they would modify certain parts of the Scotland Act, which preserve the unqualified power for the UK Parliament to make laws for Scotland. In brief, the Scottish Parliament does not have the power to prevent Scottish children from a breach of their rights caused by UK Parliamentary legislation, for example, the harsh and punitive "hostile environment" UK immigration laws which force NRPF/RE children and families into destitution by design.[4]

As a result, the UNCRC (Incorporation)(Scotland) Bill had to be amended and was passed by the Scottish Parliament in 7 December 2023, finally coming into force in July 2024.[5]

In contrast, in other areas of mixed competence, the exercise of Scottish parliamentary powers to mitigate harsh or punitive UK Government policies has not been challenged, and has, in some cases, led to further devolution of powers.

Case Study: Use of Discretionary Housing Payments to Mitigate the Impacts of Austerity Welfare Policies and Devolution of Social Security Powers in the Scotland Act 2016

Following the passage of the Welfare Reform Act 2012, which implemented a "bedroom tax" policy that penalised people living in social housing with a "spare" room by reducing their Housing Benefit and also imposed a "benefits cap" for people in receipt of certain mainstream benefits, the Scottish Government significantly increased access to discretionary housing payments, explicitly to mitigate the impact of these policies in Scotland (Scottish Government, 2024b).

This was followed by negotiation and passage of the Scotland Act 2016, which enshrined powers to create new Scottish benefits in devolved areas and powers to top-up reserved benefits, as well as transferring other social security powers previously reserved from the UK Parliament to the Scottish parliament.[6] The Social Security (Scotland) Act 2018, which followed, created the legal framework for the exercise of these powers in Scotland.[7]

In summary, devolution of powers in the UK operates in such a way as to create opportunities for progressive change as well as barriers to progress at both national and regional levels.

Whilst legal challenges to the exercise of devolved powers in areas of mixed competence are rare, those that have succeeded have resulted in significantly shifting our understanding of the legal framework and created some uncertainty over whether, and why, the exercise of devolved powers by the Scottish Government in an area of mixed competence will be successfully challenged.

Pursuing a vision for a fairer and more equal Scotland

Turning now from devolution to the political vision pursued by the Scottish Government for people in Scotland, the nation has, over the past two decades, pursued a progressive vision for creating and publicly funding essential services for people living in Scotland, with the overall aspiration that they will be free at the point of access, and tailored to reduce barriers faced by individuals due to inequality, exclusion or discrimination.

For context, here are the Scottish Government's vision statements, across the seven areas of public services examined in this briefing:

Housing: Housing to 2040: Everyone to have access to a warm, safe, affordable and energy efficient home that meets their needs, in a community they feel part of and proud of [8] and Ending Homelessness Together: Everyone should have a home that meets their needs.[9]

Financial Support: Ending Destitution Together: No one in Scotland is forced into destitution and everyone has their human rights protected, regardless of their immigration status.[10]

Transport: National Transport Strategy: Our vision is for a sustainable, inclusive, safe and accessible transport system helping deliver a healthier, fairer and more prosperous Scotland for communities, businesses and visitors.[11]

Health and Social Care: Vision: A Scotland where people live longer, healthy and fulfilling lives.[12]

Justice and Legal Aid: Vision: Our vision is for a just, safe, resilient Scotland. Issues of justice affect us all. We must be able to exercise our human and civic rights, in order to live in a just and fair society.[13]

Education: All Learners in Scotland Matter: *All learners* are supported in inclusive learning environments which are safe, welcoming, caring, and proactively address any barriers to learning and inequities that exist or arise.[14]

Work: No One Left Behind: A responsive and aligned approach that helps people of all ages who face the greatest barriers to progress towards, into and to sustain work.[15]

In pursuing these visions, Scottish public authorities must comply with the Public Sector Equality Duty, meaning that when they take decisions which impact people with protected characteristics under the Equality Act 2010, they must have due regard to the need to **eliminate unlawful discrimination, advance equality of opportunity and foster good relations** between people with protected characteristics and others.[16]

They are also bound by the Fairer Scotland Duty, which requires Scottish public bodies to have due regard to how they can **reduce inequalities of outcome caused by socio-economic disadvantage** with every strategic decision they make.[17]

Left behind: The experience of migrant and NRPF/RE people living in Scotland

The *Destitution by Design* report highlights the myriad ways in which people with NRPF/RE are left behind – despite the bold visions articulated in these Scottish Government strategies – and unseen by, or excluded from, the work that is underway to successfully implement them.

They are systematically locked out of many forms of essential support that should be accessible to all, when they need it, and this happens in a number of different ways:

- **Direct legal exclusion:** Restrictions on receiving benefit because of NRPF/RE status
- **Direct and indirect legal exclusion:** Eligibility criteria linked to other statuses that overlap with NRPF/RE status, for example, proof of lawful residence
- **Indirect legal exclusion:** Eligibility or access criteria linked to other statuses (such as receipt of Universal Credit, or access to a UK current account) that cannot be accessed by people who are NRPF/RE
- **Direct unlawful exclusion:** People with NRPF/RE are eligible to receive services but are not able to do so because of misinformation, lack of training, discrimination and unlawful gatekeeping by frontline workers

The fact that NRPF/RE people face barriers that arise from both intentional, and unintentional, forms of exclusion contributes to the challenge of finding solutions that promote their inclusion.

This is because, in seeking to understand the issue, it can be difficult to get to the core issues at stake, and simpler for policymakers as well as frontline professionals to stick to the simple formulation that NRPF/RE people must be legally excluded, because of their migration status, and because immigration is a reserved issue.

The truth is more nuanced, and more difficult to unearth. But understanding that nuance also allows a broader and more confident understanding of where positive change is possible, and illuminates the many different concrete actions that local and national governments could take today to redress the discrimination, inequality and exploitation that people with NRPF/RE experience every day, because of our failures to mitigate the impact of the UK Government's hostile environment policies.

Therefore, this briefing will now outline some of the ways in which NRPF/RE people are excluded from different forms of essential support in Scotland, with specific examples to illustrate the practical impact on their lives.

Direct legal exclusion: restrictions on receiving public benefits because of NRPF/RE status

NRPF (No Recourse to Public Funds) is a restriction that attaches to an individual's immigration status. Someone can be NRPF either because their leave to remain imposes this as a condition of lawful residence (for example, students or workers), or because they no longer have leave to remain (for example, ARE asylum seekers, visa overstayers, or undocumented people). EU citizens who have pre-settled status but are unable to establish their eligibility will also face restrictions in accessing benefits. They are not NRPF and we refer to them as having restricted eligibility (RE) but they are often referred to (incorrectly) as a person with NRPF.

NRPF is not a prohibition on accessing all public funds. It is only a prohibition on accessing specific funds set out in Home Office's Public Funds immigration guidance. People with NRPF can access any public funds *not* specified in the Home Office Public Funds guidance. That means that they can, for example, access financial benefits, housing, funding for education, and legal aid – as long as the source of the funding is not on that list.[18]

Case Study: Exclusion: Housing Benefit and NRPF

Housing Benefit is a prohibited public fund. Therefore, a woman who has leave to remain with NRPF who is fleeing domestic violence cannot access Housing Benefit, in order to cover the costs of safe refuge or alternative accommodation, even if she would otherwise meet the financial and other eligibility requirements for this benefit.[19]

Case Study: Inclusion: Scottish Legal Aid and NRPF

Publicly funded legal aid and assistance is not a prohibited public fund. Therefore, a person who has suffered a breach of their civil rights in Scotland – even if they do not have leave to remain in the UK (and are therefore NRPF) – has the right to apply for civil or criminal legal aid, so long as they meet the financial and merits eligibility tests for this type of assistance.[20]

NRPF/RE is also not a restriction on the activities of public authorities; it operates, rather, as a prohibition on the actions of individuals. A person with NRPF/RE must not access prohibited funds. If they do so, they risk breaching any valid leave to remain they may have, or they risk a refusal of future immigration applications, even if those applications would otherwise be valid. Therefore, solutions designed to prevent destitution for people with NRPF/RE must be designed carefully to ensure that they do not cause intended beneficiaries to inadvertently breach any immigration restrictions, including NRPF.

Direct and indirect legal exclusion: eligibility criteria linked to proof of lawful residence

There are a range of ways in which people with NRPF/RE are currently excluded from some essential services or entitlements, not because they are restricted by their NRPF/RE status, but because the access criteria are linked to requirements that they cannot fulfil.

This can occur, for example, where "lawful residence" is a criteria for access.

Case Study: Direct Legal Exclusion and The Right to Work

The right to work is linked to proof of lawful residence, and people are required to prove that they have valid leave to remain (without any restriction on working) or that they are a British or Irish citizen, in order to lawfully work. This will exclude people who are NRPF/RE who do not have leave to remain, or pre-settled status, but would permit people who are NRPF with leave to remain (for example, students, workers and their families) as well as people with pre-settled status to access work opportunities.

Case Study: Direct Legal Exclusion and Access to SAAS Student Funding

Eligibility for SAAS student funding requires an applicant to demonstrate "ordinary residence" which is defined as "voluntary" and "lawful" residence. The "lawful" element of this definition will exclude people who are NRPF/RE who do not have leave to remain or pre-settled status, but could include some people who are NRPF with leave to remain and people with pre-settled status.[21]

Case Study: Indirect Legal (Financial) Exclusion and Access to Health Care

The UK immigration system imposes a surcharge called the Immigration Health Surcharge (IHS) on overseas visitors at the time they apply for long-term visas in the UK. People with limited leave to remain pay this surcharge to cover access to NHS services for the duration of their valid visa. The intention is that NHS services will levy a private fee (a "healthcare charge") on any overseas visitors who have not paid the IHS and do not have leave to remain, subject to some exceptions (for example, for refugees and asylum seekers, healthcare workers, and all people seeking treatment for communicable diseases).[22] Although access to health care may in fact be operated free at the point of treatment by NHS Scotland, the risk of incurring a health charge of up to 150% of the cost of treatment – which is frequently levied in England and Wales – can be a deterrent to migrants from seeking necessary medical care, and therefore functions as an indirect legal exclusion to health care for migrants across the UK.[23]

Indirect legal exclusion: eligibility criteria or access requirements linked to other status (such as receipt of Universal Credit) that cannot be accessed by people who are NRPF/RE

Indirect exclusion of people with NRPF/RE from services can also happen if eligibility criteria or an access requirement for a particular service or benefit is linked to another status or benefit, which it is impossible for people with NRPF/RE to access. If the exclusion is not intended, or legally defensible, the eligibility and access pathways for these services or benefits should be reviewed with the aim of making adjustments, where possible, so that people with NRPF/RE can lawfully access them.

Case Study: Indirect Legal Exclusion and Free School Meals and Clothing Grants

Scottish local authorities offer free school meals and clothing grants to families as part of a national effort to tackle child poverty and support children in accessing education. These benefits are not a prohibited public fund and therefore can be accessed by children with NRPF/RE.[24] However, the eligibility criteria established by some Scottish local authorities requires families to submit proof that they are in receipt of a mainstream benefit (such as Universal Credit or Child Tax Credit) or that they are in receipt of asylum support. Families that are NRPF/RE and not seeking asylum can be indirectly excluded from this essential service (possibly unintentionally) – at at a point when they may need it most.

Local authorities should review their eligibility and access pathways to establish whether exclusion is intended, and whether it is justified. Where it is not, they should adjust the criteria to prevent indirect and unintended exclusion of NRPF/RE people.

Direct unlawful exclusion: misinformation, lack of training, discrimination and unlawful gatekeeping

The final barrier – which should not be underestimated – is not directly attributable to the legal framework, although the apparent complexity of these rules may be a significant factor, and one that will require a long-term commitment to reduce.

That is, that migrants and people with NRPF/RE are very often locked out of accessing essential services that they have a right to access because frontline practitioners do not understand their entitlement to these services, are confused or mistaken, or choose to refuse access to services even though they understand that a person might be eligible.

Case Studies: Direct Unlawful Exclusion

An adult with NRPF/RE is refused access to a discounted pass at a leisure centre because the programme is funded by the local authority.

A local authority housing officer refuses to accept a homelessness application from an EU citizen with pre-settled status who is fleeing domestic violence.

A young person with NRPF/RE is excluded from a voluntary programme to build employment skills because the programme is publicly funded (although not prohibited to people with NRPF/RE) and the administrator mistakenly believes that the person is not eligible.

It is also important to remember that migrant communities, and people with NRPF/RE in Scotland do face daily, and direct, discrimination *because they are migrants,*[25] and this needs to be acknowledged and addressed in any policy response that aims to reduce barriers for migrants and promote equal access and inclusion.

Discrimination can arise in myriad ways – because people are non-native speakers of English, for example, or because of a difference in their appearance or manner. People can also suffer discrimination because of more than one aspect of their identity – for example, on grounds of race and religion, and also gender, disability and LGBT+ identity – and in such a case, they can face compounding forms of discrimination and heightened barriers to achieving equality.

Policymakers in Scotland – at local and national level – are increasingly aware that solutions to structural inequality *must* acknowledge the challenge of intersecting inequalities and to succeed, that they must work for the most marginalised and disadvantaged, which includes with relevance to this briefing, migrants in Scotland.[26]

A Road Map for Ending Destitution in Scotland

This briefing will now outline how **Scottish Government and local authorities can take positive steps to end "destitution by design" today** across seven areas that deliver essential services to people: access to social security and financial support, housing, transport, health and social care, justice and legal aid, education and work.

Each section will start with a brief summary of the key barriers faced by people with NRPF/RE, and then will set out workable solutions that Scottish Government and local authorities could pursue to achieve immediate, and positive, change.

Access to social security and financial support

Snapshot from *Destitution by Design*: Destitution, Incomes and Deprivation

"97% of [the participants in the Fair Way evaluation survey] were destitute at the point of survey. Average incomes were exceptionally low, at just under £40 per week, with the vast majority (82%) reporting incomes of less than £60 per week and a third (33%) reporting no income at all.

This destitution is considerably more severe and deeper than that recorded for the overall UK destitute population: just over half of the overall UK destitute population in 2022 had incomes of less than £60 a week, compared to 83% of our survey respondents...

Levels of material deprivation were exceptionally high, with around two-thirds of respondents reporting having gone without meals (66%), clothes (69%) and toiletries (63%) in the last month. ... Those we surveyed with NRPF/RE are 33 times more likely to be deprived of food and 69 times more likely to be deprived of clothing than single people of working age in the general population."[27]

Barriers for People with NRPF

People with NRPF cannot access mainstream financial benefits, such as Universal Credit or Income Support, because these are prohibited public funds designated in the Home Office's Public Funds guidance. This also includes most benefits administered by Social Security Scotland.[28]

The Home Office exercises wide discretion in terms of when and how it updates the Public Funds guidance, and has historically taken the decision to add Scottish funds and benefits to the list without consultation with the Scottish Government – notably when it added the Scottish Welfare Fund to this list.[29] This not only pushes a wider range of people into 'destitution by design' but also restricts the exercise by Scottish Government of its powers to pursue devolved aims, such as the promotion of public health, public safety and public welfare in Scotland.

The Home Office's unilateral and opaque approach to adding benefits (whether reserved or devolved) to the Public Funds guidance is the key barrier to addressing migrant destitution in Scotland at present, because **the most efficient approach to alleviating destitution for people with NRPF is to give them equal access to the same programmes** that prevent destitution for the general UK population.

Barriers for People with Pre-Settled Status

Some EU citizens with pre-settled status can struggle to establish their eligibility for mainstream benefits, due to not being able to prove their "right to reside" in the UK[30] as an EU citizen. Whilst they are not NRPF, they are severely restricted in their access to any alternative form of financial support, also pushing them into destitution and homelessness.

It is open to the UK Government to grant access to the mainstream financial benefits system to all EU Citizens with pre-settled status, without the requirement to prove their "right to reside" in the UK. The refusal of the UK Government to do so is a political choice, and not a legal constraint on their action.

Any other solution to alleviating barriers for people with NRPF/RE requires Scottish policymakers at local and national level to create parallel access pathways or systems of support, specifically to mitigate the financial and social impact of NRPF/RE status.

Actions for Scottish Government

- The most direct way to ensure equal access to Scottish benefits for people living in Scotland is to continue to **lobby the UK Government for an end to the NRPF system and to restrictions on access to benefits for EU citizens with pre-settled status** on the basis that these are inhumane policies, and there is no credible evidence that hostile environment policies, including NRPF, have achieved the aims set out by the UK Government.[31]
- **Engage proactively with the UK Government and lobby for a clear and transparent framework** for adding or removing programmes administered by devolved authorities to the Public Funds guidance.

  A clear policy framework setting out how these decisions are made would guard against arbitrary decision-making and abuse of discretion, and also highlight whether decisions are evidence-based and adequately and lawfully assessed in compliance with the Home Office's Public Sector Equality Duties (PSED).[32]
- Alternatively, **negotiate a framework memorandum of understanding (MOU)** with the UK Government about the use of the Public Funds guidance powers, specifically with respect to the exercise of Scottish devolved powers.
- **Create a new Scottish crisis or hardship grant** administered by Social Security Scotland or local authorities using the powers conferred by Sections 26 and 28 of the Scotland Act 2018. Section 26 empowers Scottish Government to provide: "financial or other assistance to or in respect of individuals who appear to require it for the purposes of meeting, or helping to meet, a short-term need that requires to be met to avoid a risk to the well-being of an individual." Section 28 empowers Scottish Government to provide other social security benefits so long as they are not "connected with reserved matters" or "non-payability as part of an individual's conduct."

The criteria and purpose of the funding could be explicitly designed to mitigate the impact of the hostile environment – in similar terms to the Scottish Government's approach in previous years towards mitigating the "bedroom tax" and "benefits cap"– but need not focus narrowly on alleviating migrant destitution. Rather, such a scheme could be framed more broadly: *"for purposes of promoting and safeguarding the welfare of individuals where, for any reason, other forms of financial or practical support are not available and financial support is required in order to fulfil a duty owed to the individual or to prevent a breach of their human rights."*

- **Create new specific devolved purpose access grants:** It is also possible to create universal "last resort" funds to specifically facilitate access to services delivered by a devolved authority. For example, Scottish Government could create specific funding to support access to transport schemes, access to education and employability skills, access to leisure centres and libraries and/or access to digital devices etc. Whilst specific purpose schemes do not offer as flexible or direct a solution to migrant destitution, they can make a significant contribution to mitigating the impact of destitution for people, and offering routes out of destitution and homelessness.

  Eligibility criteria for these funded schemes can also be framed to offer "last resort" support, but without needing to impose any based on migration status. For example, such a scheme could be established: *"for purposes of promoting equality of access to [transport, education, employability programmes, leisure, libraries, digital infrastructure] in furtherance of [a duty / policy within the relevant devolved area] where, for any reason, other means of reducing barriers to access are not available."*

Actions for Scottish Government and Local Authorities

- **Commission a systematic review** of the social security and other financial benefits available in Scotland to alleviate destitution and homelessness, including locally administered discretionary funds, together with a mapping of eligibility and access requirements, **with a view to either removing barriers to access or making intentional policy decisions about those barriers that remain in place.**[33] This exercise would lead to a more transparent, and therefore fairer, system of benefits and support for people with NRPF/RE, with potentially wider availability of information and understanding of rights, better uptake of services and ultimately, better outcomes for this population.
- **Systematically review the eligibility criteria for other funding and programmes to alleviate destitution, removing barriers to access** where possible, to ensure that people with NRPF/RE are recognised and intentionally included in Scotland-wide initiatives to reduce poverty and inequality. For example, a commitment by Scottish local authorities to review their Free School Meals and Clothing Grant programmes could result in a change that widens access to clothing grants and addition help through the school meals scheme to every child in Scotland with NRPF/RE who needs it – something that we are not confident is the case today.

Access to housing

Snapshot from *Destitution by Design*: Housing and Homelessness

At the point of survey, virtually all (93%) [of the Fair Way survey participants] were experiencing homelessness. Those with NRPF/RE accessing Fair Way services are strikingly more disadvantaged in housing terms than those with a comparable profile, destitute users of crisis services who responded to the Destitution in the UK 2022 survey.

"Most arresting is the finding that survey respondents are 8 times more likely than the [other] destitute cohort to be in temporary housing and 6 times more likely to be sleeping rough, as well as 2.3 times more likely to be staying with friends or sofa-surfing and 1.5 times more likely to be in hostels/shelters or B&B....

Data regarding people's housing experiences over the last year underlines this picture of extreme housing need. Most (58%) participants had had to leave accommodation with nowhere else to go in the last 12 months and more than half (53%) had slept rough."[34]

Barriers for People with NRPF/RE

Immigration legislation also restricts access to social housing and homelessness assistance through the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000.[35] The Order lists classes of people (by describing their migration status) who are entitled to access local authority housing and homelessness assistance, and therefore, people who do not fall into these classes are excluded from assistance.[36]

The Order also contains certain exceptions, for example, for those owed a duty of care under the Social Work (Scotland) Act 1968; or for a child in need, or their parent, carer or guardian where a local authority is under a duty to provide support under Children (Scotland) Act 1995. In these cases, a local housing authority can grant a non-secure tenancy, or licence of housing accommodation.

At present, it is impossible for Scottish Government to achieve its vision of 'ending homelessness' – or even to effectively tackle the most extreme aspects of migrant destitution in the current context – without a solution that addresses this significant exclusion from mainstream homelessness assistance of people with NRPF/RE.

Actions for Scottish Government

- **Support the consistent and fair application of the existing exception for those owed a duty of care under the Social Work (Scotland) Act 1968 across all Scottish local authorities:** Whilst assessment of the duties owed to individuals under the Social Work (Scotland) Act 1968 (and related social work legislation) must be conducted on an individual basis, there are strong evidential and legal arguments[37] to support the conclusion that a failure by Scottish local authorities to support many – if not most – of the NRPF/RE population facing destitution and homelessness in Scotland would lead to a breach of their individual human rights, as well as a failure of social work obligations under relevant Scottish legislation.

  The Fair Way evaluation reports offer new evidence on the systemic barriers faced by this cohort, and makes a compelling case that absent the support provided by Fair Way, or any alternative support delivered by local authorities, these individuals would face individual breaches of human rights.

  Scottish Government, with the support of independent funders, could build on existing good practice and **expand the Fair Way model across Scotland, offering targeted housing and homelessness support for the NRPF/RE population,** with streamlined eligibility criteria which allow for quick identification of the duties engaged and assessment of how and why providing direct accommodation or financial support for accommodation will mitigate the risk of a breach of an individual's human rights.

- **Create a new Scottish crisis or hardship housing fund:** As outlined above, an alternative approach is the creation of a fund of "last resort" to access accommodation for people for whom other interventions are not suitable, or not working.

  This approach, administered flexibly and inclusively, could also dismantle barriers for other populations in Scotland who may struggle to attain equal access and appropriate support. For example, the small group of people with very high or complex needs for whom Housing First models do not appear to be an effective solution, could benefit from a system where providers have flexibility to provide wraparound care until their situation stabilises.

  The criteria and purpose of the funding could be: *"for purposes of promoting and safeguarding the welfare of individuals where, for any reason, other forms of financial or practical support are not available or effective to provide to prevent homelessness, and support is required in order to [achieve a policy][fulfil a duty owed to the individual or to prevent a breach of their human rights]."*

Access to transport

Snapshot from *Destitution by Design*: Travel and Transportation

The cost of transport – even intra-city bus travel – in Scotland is prohibitive for people with NRPF/RE who have limited, or no, income. The Fair Way evaluation findings show that any income that is available is spent largely on food.

The cost of transport is also prohibitive for other migrant populations, such as asylum seekers, with the result that people struggle to access work, education, medical care, legal advice and food banks – or they walk for miles every day – because they cannot afford bus travel. Forms of cash support available to some asylum seekers e,g. the Home Office ASPEN card, are provided in a form that cannot be used on transport services.

Dhruv, a 25–34 year-old asylum seeker, said:

"You can't [use your ASPEN card] on the bus because it's just a tap in... I think it's designed so it's as difficult as possible." [38]

Barriers for People with NRPF/RE

Transport is a devolved matter, and the Scottish Government maintains and exercises wide powers in determining its national transport policy, how charges are levied and who is eligible for concessionary and discounted fares. The key barriers to accessing transportation in Scotland are that the transport system is largely operated on a fee-charging basis, with limited schemes for certain populations who are entitled to access Concessionary or Discounted Travel, and that the infrastructure for public transport also varies significantly across local authorities and geographies in Scotland.

Scottish Government previously committed to set aside £2 million to fund a free bus travel for asylum seekers, following a long running campaign led by asylum seekers with Scottish Refugee Council and Maryhill Integration Network. This plan was shelved in the summer of 2024, but followed by an announcement in October 2024 that a new scheme will be introduced "by 2026."[39] Crucially, however, the commitment only extends to those who have claimed asylum and will therefore exclude many other people with NRPF/RE. Fair Way has supported in roughly equal numbers, destitute people who have come through asylum routes and those who are EU citizens with insecure status.

Actions for Scottish Government

- Extend the use of **national concessionary travel schemes** either to explicitly benefit certain migrant populations, or – as a poverty-alleviation programme for everyone living in Scotland – **for people whose lawful income is restricted to a sum at or below basic Universal Credit benefit rates.** This scheme could benefit people who are receiving mainstream benefits, or could be set below that rate, and would thereby only benefit people who are asylum seekers or destitute people with NRPF/RE, and potentially a handful of people who are destitute and not migrant but are, for example, not yet in receipt of mainstream benefits or those in receipt of benefits but not currently receiving their full entitlement due to deductions or sanctions.

Actions for Local Authorities

- Commit to funding **local concessionary travel schemes,** for example, in similar terms to a pilot scheme to support asylum seekers run by Aberdeen City Council, in coordination with local bus transport providers.

Access to health and social care

Snapshot from *Destitution by Design*: Health, trauma, victimisation and crime

"Those with NRPF/RE and accessing Fair Way support have poorer health than the general population and other disadvantaged benchmark groups on a range of measures covering physical health, mental health and mental wellbeing. The asylum group, the small other group and women appear to have exceptionally poor mental health.

...[S]coring low on a commonly used and validated mental wellbeing scale (the Short Warwick-Edinburgh Mental Wellbeing Survey, WEMWBS) is 2–3 times more prevalent among those with NRPF/RE supported by Fair Way Scotland than the general population (40% compared to 17% for the general population). Scoring in the very low range was 4 times more common among our survey respondents than the overall population (12% vs 3%)....

Despite their much poorer health, survey respondents reported using GP services at levels similar to the population average. Use of other health services, including ambulances, Accident and Emergency services and overnight stays in hospital was much higher than in the general population, however, indicating that members of this group underutilise primary care relative to their needs and rely more heavily on more expensive hospital-based emergency and urgent care."[40]

Barriers to Accessing Health Care for People with NRPF/RE

NHS Scotland administers the health care system in Scotland, and services are delivered through either the primary or secondary health care systems. Health is a devolved matter, and the Scottish Government maintains and exercises wide powers in determining who is eligible to receive state-funded health care, and whether and how charges are levied for accessing care.

All people living in Scotland have a right to access primary health care, free of charge. However, there are some barriers to accessing secondary health care and people with NRPF/RE (as well as some people who have leave to remain or temporary protection) can suffer both lawful and unlawful discrimination in access to treatment.

What is Primary and Secondary Health Care?

Primary health care is the first point of contact by patients with the NHS, and includes GPs, community nurses, dentists and pharmacists. It also includes occupational therapists, midwives and health visitors.[41]

Secondary health care is delivered by specialists to whom a patient has been referred by a primary health care provider and is often delivered in a hospital setting. Specialists in secondary care focus on specific systems of the body, particular conditions or diseases, for example, cardiologists, oncologists and mental health practitioners as well as the A&E nurses and mental health nurses.

Whilst urgent health care should always be available at the point of need within the Scottish NHS, the UK immigration system has imposed a charging system for "overseas visitors" which also applies to some people with NRPF/RE.[42]

There is some lack of clarity as to whether NHS Scotland does systematically levy any charges for health care – and indeed whether the NHS service even collects and processes the migration status of patients in its care. NHS Scotland has clearly stated, for a number of years, that it does not share patient information with the Home Office for purposes of immigration enforcement.[43] However, as mentioned above, the risk of incurring a health charge of up to 150% of the cost of treatment – which is frequently levied in England and Wales – or for someone who is undocumented, of having their details passed to the Home Office, can be a deterrent to migrants from seeking necessary medical care.[44] Deferring access to necessary medical care not only leads to poorer health outcomes for individuals, but is also linked to a greater likelihood of requiring to access emergency care at a later point, which can be more expensive to deliver than early intervention at primary care stage.

Barriers to Accessing Social Care for People with NRPF/RE

In Scotland, local authorities have duties under the Social Work (Scotland) Act 1968 to assess a person's social care support needs and provide services appropriate to those assessed needs. They also have additional duties to protect and support people with mental health conditions under the Mental Health (Care and Treatment) Act 2003 and the Adult Support and Protection (Scotland) Act 2007, as well as a range of specific duties towards children and their families arising under the Children (Scotland) Act 1995 and recently strengthened by the UNCRC (Incorporation)(Scotland) Act 2024.

Local authorities have a duty under all Scottish social work legislation to identify and assess, within their local area, people to whom they owe an obligation, regardless of migration status; however, after a needs assessment has been completed, UK hostile environment immigration legislation then goes on to prohibit local authorities from providing accommodation and financial support under social work powers to certain people (based on migration status), unless providing support is necessary to prevent a breach of their human rights.[45]

In practice, local authorities do routinely support over a thousand people who are NRPF/RE in Scotland under these social work powers, spending £8.3 million in 2022/23 on accommodation and support.[46] However, it is possible that there is a far greater number of NRPF/RE people who are eligible for social work support but are not accessing it from local authorities. Furthermore, third sector practitioners including Fair Way workers continue to report that a significant number of cases referred to Scottish local authorities for needs assessments under social work legislation result in either no assessment conducted or (disputed) findings that no needs require to be met – pointing to the possibility that gatekeeping could be a significant barrier for people who are NRPF/RE and that there is substantial unmet need for social care support for this population.

Actions for Scottish Government

- **End barriers in access to primary and secondary health care** by reviewing the National Health Service (Charges to Overseas Visitors)(Scotland) Regulations 1989 and associated guidance and **removing the link between access to any form of health care to immigration status.** This can be replaced with a simple residence test, similar to the eligibility assessment in place for registration of pupils for primary and secondary education under the Education (Scotland) Act 1980, for example.

  The administration of the NHS charging policy is a devolved matter and the Scottish Government does regularly revise eligibility under the policy. For example, during the COVID-19 pandemic, the Scottish Government added treatment for that condition to the list of treatments exempt from charge, and following the arrival of refugees from Ukraine, by again amending the regulations to add a specific exemption for people who are "lawfully resident in the UK and normally resident in Ukraine."

  The NHS (Overseas Visitors) (Scotland) Regulations 1989 already provides an exemption for some people who have resided lawfully in the UK for a period of not less than one year[47] as well as an exemption for "exceptional humanitarian reasons."[48]

- **Ensure local authorities meet their duties to assess needs for all people with NRPF/RE in their area to whom they owe a duty, and to provide equal access to social care support, in a manner that is consistent across all Scottish local authorities:** Whilst assessment of the duties owed to individuals under the Social Work (Scotland) Act 1968 (and related social work legislation) must be conducted on an individual basis, there are strong evidential and legal arguments[49] to support the conclusion that a failure by Scottish local authorities to support many – if not most – of the NRPF/RE population facing destitution and homelessness in Scotland would lead to a breach of their individual human rights, as well as a failure of social work obligations under relevant Scottish legislation.

- Where individual needs are identified, **ensure that local authorities make fair and transparent decisions about whether or how to meet assessed needs.**

- **Establish minimum Scottish national standards for accommodation and financial support** when people with NRPF/RE are supported by Scottish local authorities under social work duties.

  With respect to social care services, **explore evidence of gatekeeping** in assessing the needs of people with NRPF/RE and based on that evidence, and best practice guidelines, make practical changes – whether to legislation, guidance, or training and monitoring – to ensure equal access to social care services for this population.

- **Commission a systematic review of access pathways for NHS health care and social care services in Scotland,** together with a mapping of eligibility and access requirements, **with a view to either removing barriers to access or making intentional policy decisions about those barriers that remain in place.**[50]

  For example, eligibility criteria for accessing dental treatment, optical treatment and some other health aids (including hearing aids and glasses) can cause barriers for NRPF/RE people. These processes should also be reviewed to ensure eligibility and access pathways do not exclude people with NRPF/RE – intentionally, or unintentionally – without sound reasons. This should also include a review of other financial support and other schemes for accessing health and mental health services, for example, funding for transport to attend medical appointments, as well as broader initiatives, such as social prescribing programmes.

Access to justice and legal aid

Snapshot from *Destitution by Design*:
Access to Legal Support and Professional Legal Advice

"Access to professional legal advice and support is a key enabler of achieving positive outcomes for people with NRPF/RE, especially for those in the asylum and other groups and for EEA nationals with more complex cases. Access to appropriate legal counsel can be challenging given the limited capacity of the sector, particularly outside Edinburgh and Glasgow."[51]

Barriers to accessing justice in Scotland remain substantial for all migrants living in Scotland, and for people who are NRPF/RE in particular, and have been documented in a series of reports produced by civil society organisations working to respond to consultations run by Scottish Government in relation to a proposed Scottish Human Rights Bill.[52]

Key barriers identified in this work include: lack of support to overcome language barriers in navigating legal processes, lack of accessible information on human rights and access to justice, a lack of clarity around how immigration status can lawfully impact access to rights, a failure to address the impact of systemic racism and discrimination in the experience of accessing justice.

Most significantly, whilst legal aid is not a "public fund" and therefore people with NRPF/RE have a right to equal access to publicly funded legal assistance, they still face absolute barriers to accessing legal advice and representation because of a scarcity of legal aid lawyers due to underfunding of the legal aid system.[53]

Barriers to Accessing Justice for People with NRPF/RE

The administration of Scottish courts and tribunals, as well as the regulation of the legal professions and funding for free public legal assistance (legal aid) are all, broadly speaking, devolved matters. This statement is subject to the explanation given above that some complexity can arise in areas of mixed competence, as illustrated by the amendments required to be made to the UNCRC (Incorporation) (Scotland) Act 2024 before it was finally passed.

Actions for Scottish Government

- **Prioritise reform of the current legal aid system** by committing to including this in the 2024-25 Programme for Government[54] – with the aim of expanding the scope of legal aid in order to widen access to justice for individual people who are NRPF/RE as well as supporting NGOs and community groups to take group action on behalf of this population.
- **Approve an urgent uplift of funding for immigration and asylum and housing legal matters,** in line with recent UK Government plans to increase immigration and housing legal aid funding in England & Wales,[55] in recognition of the impact that chronic underfunding has had, and to support a reduction of a considerable backlog that has arisen in Home Office asylum and immigration decision-making and appeals cases – due to lack of legal representation for people awaiting decisions in the asylum and immigration systems.
- **Commission a review of the barriers for migrants** generally, or for people with NRPF/RE in particular, **in accessing justice** and ensure that they are included in any ongoing reviews that will feed into reform of the Scottish civil and criminal justice systems. There are a number of places including, for example, the intersection of criminal detention with immigration detention, where people with NRPF/RE can face breaches of their human rights where there is a failure to consider the impact of decisions on or for them, or a failure to provide prompt access to legal advice.

Access to education

Snapshot from *Destitution by Design*: Education and Training

"No one who participated in the [Fair Way] survey was in education or training, largely reflecting barriers to accessing such opportunities for people with NRPF. Lack of access to such opportunities limits people's ability to engage in meaningful activities and their opportunities for social interaction, especially if they are unable to work. People with NRPF can access English for speakers of other languages (ESOL) classes but face significant under-provision and long waiting lists."[56]

Lack of ESOL provision – particularly for people with NRPF who are not asylum seekers – is a key barrier that can significantly impact the ability of people with NRPF/RE to access to other opportunities and essential services, such as, study, employment, health care and safety and protection from harm.

Barriers for People with NRPF/RE

English for Speakers of Other Languages (ESOL)

The Scottish Government has wide powers, which it exercises, to create funding and programmes to support the integration of migrants, and also provides targeted funding, for example, to local authorities to provide ESOL courses in pursuit of this policy.

However, insights from practice highlight that provision of ESOL and other access courses for people with NRPF/RE is severely limited with long waiting lists, with the result that the majority of people who need it do not access timely ESOL support and therefore struggle to access other forms of education, skills training and work. There is a lack of transparency or accountability for how decisions are made about allocating resources to meet this demand, which could be tackled with a stronger commitment from Scottish Government and clearer guidance for Scottish local authorities.

Primary and Secondary Education

Scottish local authorities administer primary and secondary education, which is provided free of charge to all people living in Scotland, based on a simple residence test. This means that there are no barriers for NRPF/RE children who wish to enrol in primary and secondary education up to school leaving age; and indeed, they are required by law to attend education whilst they live in Scotland.

Further and Higher Education

At further and higher education levels, however, some people who are seeking asylum or are NRPF/RE, are restricted by their form of status from enrolling in education. The key barrier at this stage, is access to financial support for study – because people who are destitute with NRPF/RE status will not have other means of funding access to education, and access and eligibility requirements for Scottish government-administered funding for education imposes additional residence requirements.

Funding for further and higher education for individuals in Scotland is a devolved matter. Student Awards Agency for Scotland (SAAS) administers a programme for payment of tuition fees for people whoh are studying full-time for a first degree or equivalent.

The Scottish Funding Council (SFC) waives fees for people seeking asylum attending college to study part-time or on non-advanced courses, including English as a Second Language (ESOL) courses, but many people who require ESOL access, including people who are NRPF/RE, can face practical barriers in enrolling, due to a lack of funded opportunities, as set out above.

What is Further and Higher Education?

Further education is usually completed in school or college, and covers qualifications at the Scottish Credit and Qualifications Framework (SCQF) level 6 and below, such as standard grades, highers, and some access courses. It also covers advanced highers, and vocational courses such as some apprenticeships.

Higher education is any course that takes place above SCQF level 6 and includes degree courses in Scottish colleges and universities as well as postgraduate education.

Actions for Scottish Government and Local Authorities

- **Establish with local authorities and commit to meeting minimum capacity levels for provision of free access to ESOL and access courses for migrants to Scotland in their area,** to remove practical barriers to accessing integration support for which there is a lawful entitlement but no capacity to ensure access to all people who need it.
- **Create a new "support for education access" fund** for people who may otherwise not be able to access education opportunities, ranging from support to attend ESOL classes, through to individual bursaries or funding for living expenses through SAAS, to provide levelling up financial support to maintain equal access to education for migrants.

Actions for Scottish Government

- **Review and reform the SFC waiver policy and the SAAS funding regulations** to remove additional residence from eligibility requirements and to link eligibility to simple residence – this could have a transformative impact for pathways to education and work for adult learners with NRPF/RE.

Access to work

Snapshot from *Destitution by Design*: Work and Exploitation

"Most of those with NRPF/RE and accessing Fair Way Scotland casework support are not permitted to work in the UK (66%), including virtually all in the asylum group. This was a source of deep frustration among those affected. Not only was people's ability to get by affected but also their sense of purpose, identity, relationships, ability to start a family and mental health.

Around one in 7 (15%) survey respondents were unemployed and seeking work. Barriers to work for this group included the challenges of accessing work while experiencing homelessness, language barriers and digital exclusion. A further 9% of respondents were not working due to ill health. These findings suggest that health and employment support for those entitled to work but with restricted access to statutory supports (notable EEA nationals with pre-settled status) may have a role to play in reducing experiences of destitution...

Experience of forced work over the last year was reported by 14% of survey respondents overall, with a higher incidence of 16% for the EEA group. Interviewees expressed extreme wariness about engaging in illegitimate forms of work due to fears this would affect their immigration status, fears of exploitation and a desire not to engage in any criminal activity. However, experiences of such work and exploitation were nevertheless common, as some did not realise the work they were undertaking was illegitimate or/and others felt they had little choice but to engage in such work to survive." [57]

Barriers

Regulating the right to work lawfully in the UK is a reserved matter, and NRPF/RE status is a bar to lawful employment, other than in specified employment (for work permit holders), and general employment (for certain categories of migrants, like spouses).

This restriction does not affect everyone who Fair Way supports in the same way – EU citizens with pre-settled status do have the right to work, and if they are not in employment, access to employability support is itself a route out of homelessness and destitution. For this population, it is particularly important that access to these opportunities is reviewed, and widened, where possible.

The Scottish Government alone does not have the power to confer the lawful right to work on people who do not already have it. However, there is ample work that can immediately be done to better support practical training and employability for NRPF/RE, so that they are ready to join the workforce when they do gain lawful status, and these programmes all fall under devolved areas of competence.

Actions for Scottish Government

- **Lobby the UK Government to establish a Scottish pilot right to work scheme for NRPF/RE people on a path to regularisation of status** – Scottish Government is currently scoping a pilot scheme to give asylum seekers the right to work,[58] and this is a positive step towards alleviating asylum seeker destitution and restoring the opportunity to achieve dignity through work for people waiting for their asylum claims to be decided; however, it would be good to also see a commitment to extending the remit of this scheme to people who are NRPF/RE with other pending immigration applications and who are currently not able to work but on a path to regularisation of status.
- **Commission a systematic review of access pathways for existing employability and professional skills training initiative,** together with a mapping of eligibility and access requirements, **with a view to either removing barriers to access or making intentional policy decisions about those barriers that remain in place.** This is a similar recommendation to previous analysis of current schemes to tackle destitution, homelessness and barriers to accessing health and social care – but with a focus on widening access to mainstream programmes, or **creating access to new, flexible funding and targeted programmes to promote integration of migrants into the workforce.**
- Scottish Government has wide powers in this area, and this exercise should be conducted broadly and imaginatively. For example, NRPF/RE young people are currently excluded from UK Government apprenticeship funding, but must this also be the case for Scottish apprenticeships?

Summary and Conclusion

This briefing has sought to challenge the proposition that Scottish Government and local authorities are powerless to effect positive change for people with NRPF/NE in Scotland, because determination of immigration status (NRPF/RE) is a matter reserved to the UK Government.

The briefing has sought to clarify current legal understanding of the balance of reserved and devolved powers between the UK Parliament and the Scottish Parliament, and then to provide a clear roadmap of simple, actionable steps that lie within the powers of Scottish Parliament and the Scottish Government to reduce destitution for people coming to Scotland to study, work, join family or seek sanctuary.

Change lies within our grasp; despite public commitments to end destitution for all, Scottish Government and local authorities continue to legislate for, and deliver services, in a way that systematically excludes people with NRPF/RE – with the result that they are actively reinforcing and strengthening, rather than helping people to dismantle – a system of destitution by design.

It is hoped that this briefing offers some clear and practical steps that Scottish Government and local authorities – working in partnership with NRPF/RE people themselves, and the civil society and community organisations who support them – can take to end their part in building and reinforcing the UK Government's hostile environment for migrants. The complexity of UK immigration law and the challenges of striking the right balance in the exercise of powers within the devolution settlement must no longer be an excuse for a failure to act on the part of Scottish Government and local authorities in the face of overwhelming evidence of the harms caused to people with NRPF/RE – and to the communities in which they live – by complicity and inaction.

We call on policymakers to now commit to taking practical action that will meaningfully and fully ensure that all migrants, and people with NRPF/RE in particular, are included in the implementation of the broad, progressive visions that Scottish Government is pursuing across essential services for everyone in Scotland.

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Endnotes

1 In fact, only about half of Fair Way's 2,000 clients last year were seeking asylum – exclusion from public funds captures a much bigger group.

2 Watts-Cobbe, B., McMordie, L., Bramley, G., Sims, R., Young, G., & Rayment, M. (2024). *Destitution by Design: righting the wrongs of UK immigration policy in Scotland.* Heriot-Watt University https://doi.org/10.17861/D38D-X029.

3 "Settled status" is a form of indefinite leave to remain granted to EU citizens who were living in the UK before 31 December 2020 and who have lived continuously in the UK for 5 years, and who meet certain suitability requirements. "Pre-settled status" is a form of limited leave to remain which is granted to those EU citizens who have lived continuously in the UK for less than 5 years. People with pre-settled status have the right to live and work in the UK but their access to housing, social security, education funding and other essential services can be limited by their migration status. See further, these factsheets produced by JustRight Scotland: Ang, J. (2023). *Rights of EU Citizens in Scotland* https://justcitizens.scot/EU/.

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18 UK Visas and Immigration. (2025). Pu*blic Funds (Accessible) Guidance.* Retrieved from https://www.gov.uk/government/publications/public-funds/public-funds-accessible.

19 The UK immigration "hostile environment" creates significant barriers for migrant survivors of domestic violence to flee their abusers and achieve safety because of this link between migration status and eligibility to access temporary housing (refuge) and financial support. As a result, the UK Home Office and UK Department for Work and Pensions (DWP) offer limited discretionary concessions for some migrant survivors to access temporary support for limited periods of time. The Domestic Abuse Commissioner for England & Wales points out that these concessions still legally exclude a significant number of migrant women at risk, and maintains that these concessions do not go far enough to address the harms. See further, Domestic Abuse Commissioner. (2023). *Migrant Survivors: Safety before status.* https://domesticabusecommissioner.uk/migrant-survivors/.

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See further, Scottish Government. (2023b). *Ending Destitution Together: Progress Report Year 2: 2022-23.* (9781835213063). Retrieved from https://www.gov.scot/publications/ending-destitution-together-progress-report-year-two-2022-2023/pages/3/ .

30 In this context, "right to reside" does not refer to immigration status, but to a legal test under the UK's EU free movement regulations that exempted EU citizens from immigration control, before the UK's exit from the European Union. EU citizens with pre-settled status have the right to live and work in the UK, but not being able to meet the "right to reside" test – *despite retaining the right to live in the UK* – means that destitute and homeless EU citizens in this situation must choose destitution if they wish to remain in these circumstances.

31 Bulman, M. (17 June 2020). Home Office still has no evidence to show hostile environment policy is working, report finds. *The Independent.* https://www.independent.co.uk/news/uk/home-news/home-office-hostile-environment-windrush-immigration-national-audit-office-a9569481.html; UK National Audit Office. (2020). *Home Office: Immigration enforcement.* (9781786043122). Retrieved from https://www.nao.org.uk/wp-content/uploads/2020/06/Immigration-enforcement.pdf; and Qureshi, A., Morris, M., & Mort, L. (2020). *Access denied: The human impact of the hostile environment*. https://www.ippr.org/articles/access-denied.

32 The Equality and Human Rights Commission (EHCR) conducted an assessment of the Home Office's compliance with the PSED duties in 2020, with respect to developing, implementing and monitoring hostile environment policies, and concluded that their actions were clearly in breach of this duty. Equality and Human Rights Commission. (2020). Public sector equality duty assessment of hostile environment policies https://www.equalityhumanrights.com/sites/default/files/2021/assessment-public-sector-equality-duty-assessment-of-hostile-environment-policies.pdf.

33 COSLA's Migrants' Rights and Entitlements guidance is, at present, the most comprehensive attempt to date, in Scotland; however, it requires to be updated and does not cover a number of different areas that should also be considered in address migrant destitution and homelessness. See further, Ang, J., & Houlcroft, C. (2023). *Migrants' rights and entitlements to local authority services in Scotland* COSLA. https://migrationscotland.org.uk/migrants-rights-and-entitlements/foreword/.

34 Watts-Cobbe et.al. (2024), pg 61-63.

35 The Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) Order 2000. specifies classes of persons subject to immigration control for purposes of sections 118 and 119 of the Immigration and Asylum Act 1999. and then lists classes of people (by migration status) who are entitled to access social housing and homelessness assistance.

36 It is important to note, however, that housing associations are free to grant tenancies to people who are NRPF/NE and this is one solution to migrant homelessness that merits further exploration. See further The No Accommodation Network (NACCOM). (2023, 17 October 2023). *Working with Housing Associations: A Toolkit.* https://naccom.org.uk/new-resource-working-with-housing-associations-a-toolkit/.

37 Whilst the lawfulness of the Home Office's NRPF policy itself has been successfully challenged a number of times over the past few years by human rights firm, Deighton Pierce Glynn, the Home Office has continuously made changes to bring the policy in line with court orders, but chosen nevertheless to maintain the policy. This, in turn, places a burden on local authorities to assess and support individual people with NRPF/RE for whom a lack of support leading to destitution and homelessness will cause a breach of their human rights – this assessment taking place in a context in which English courts have repeatedly upheld the principle that statutory authorities (including local councils) must provide to support to prevent destitution and homelessness where a failure to do so will result in a breach of human rights (usually, Articles 3 and 8 of the European Convention on Human Rights) **(*R (Limbuela) v. SSHD* [2006] 1 AC 396).** In the recent case of ***R (W, a child) v SSHD* [2020] EWHC 1299** the court found that requiring Home Office caseworkers to lift the NRPF condition only when an applicant can demonstrate they are presently destitute and not *before* they become destitute, was "a breach of the common law of humanity as well as Article 3 ECHR… to deliberately deny food, shelter or the basic necessities of life."

The same standards would apply to a local authority's failure to act to prevent such a breach; and the Fair Way *Destitution by Design* evaluation report provides compelling evidence that, absent Fair Way accommodation and support, a number of people supported by the programme could demonstrate such a breach of Article 3 ECHR, if local authorities refused alternatively to provide support. For a summary of these cases, see Deighton Pierce Glynn. (20 June 2022). *Home Office's NRPF policy found unlawful for the third time in as many years* https://dpglaw.co.uk/home-offices-nrpf-policy-found-unlawful-for-the-third-time-in-as-many-years/ and Deighton Pierce Glynn. (6 March 2024). Home Office's '*No recourse to public funds' (NRPF) policy found unlawful for the fifth time in five years.* https://dpglaw.co.uk/home-offices-no-recourse-to-public-funds-nrpf-policy-found-unlawful-for-the-fifth-time-in-five-years/.

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40 Watts-Cobbe et.al. (2024), pg 14-15.

41 See Scottish Government. *Primary Care Services*. Retrieved 30 January 2025 from https://www.gov.scot/policies/primary-care-services/.

42 The National Health Service (Charges to Overseas Visitors)(Scotland) Regulations 1989. (https://www.legislation.gov.uk/uksi/1989/364/regulation/4) sets out a charging scheme for overseas visitors in Scotland, as well as providing exemptions for certain categories of migrants, for example, international students, workers, those joining a spouse or civil partner, and people who have made a claim for asylum.

43 See, for example, Scottish Government. (16 May 2024). *NHS Inform: Healthcare for overseas visitors.* https://www.nhsinform.scot/care-support-and-rights/health-rights/access/healthcare-for-overseas-visitors/ which states: "NHS Scotland does not pass patient details to the Home Office for purposes of immigration enforcement."

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48 See Section 6A of the National Health Service (Charges to Overseas Visitors)(Scotland) Regulations 1989.

49 See Endnote 37.

50 COSLA's Migrants' Rights and Entitlements guidance is, at present, the most comprehensive attempt to date, in Scotland; however, it requires to be updated and does not cover a number of different areas that should also be considered in address migrant destitution and homelessness. See further, Ang, J., & Houlcroft, C. (2023). *Migrants' rights and entitlements to local authority services in Scotland.* COSLA. https://migrationscotland.org.uk/migrants-rights-and-entitlements/foreword/).

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About Lawmanity

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