

No Recourse to Public Funds

A children's human rights issue

Context

We have been made aware of concerns that children and families with insecure immigration status have been turned away from local authority supports to which they are entitled, due to misunderstanding or misinterpretation of the law and the extent of local authority duties towards children.

This resource is intended to support human rights defenders working with and on behalf of children and families with insecure immigration status. It sets out the office's position on the law and local authority duties. It is based on the opinion of senior counsel and of the office's own legal team.

Key messages

- Local authorities have a **duty** to safeguard and promote the welfare of children in need in their area
- Local authorities **must** assess the needs of a child if they are asked to do so
- That assessment **must** include consideration of the child's needs, wellbeing and human rights
- If the assessment concludes that the child needs support, it can be provided **regardless** of the child or parent's immigration status, or any NRPF condition
- Support **must** be provided to the child if failure to provide it would breach the child's human rights, for instance by making the child destitute
- Support **must** be provided "in the family" unless there are other concerns about the child's welfare or safety
- If those concerns exist, the child can **only** be removed from the parent's care through formal legal proceedings
- These rights and duties can be enforced through the courts by judicial review

Summary

It is the position of the office of the Children and Young People's Commissioner Scotland that:

Local Authorities have a **duty** to assess the needs of a "child in need" in terms of sections 22, 23A and 93(4) of the Children (Scotland) Act 1995.

In making this assessment and then exercising the power to provide services for the child and for their family, a local authority **must** have regard to:

- the nature of the child's needs;
- the child's "wellbeing" (in terms of the matters listed in section 96(2) of the Children and Young People (Scotland) Act 2014);
- the European Convention on Human Rights (ECHR), in particular Articles 3 and 8; and
- the United Nations Convention on the Rights of the Child (UNCRC), in particular Articles 3 and 9

Having made an assessment, local authorities **must** exercise such powers as they have to prevent breaches of a child's human rights.

These powers and duties are **not** affected by the child or parent's immigration status or by any No Recourse to Public Funds Condition that may exist.

Children in need

Section 22 of the Children (Scotland) Act 1995 states that local authorities have a duty to safeguard and promote the welfare of children in need in their area and, so far as is consistent with that duty, to promote the upbringing of children in need by their families by providing a range and level of services appropriate to the children's needs

A child is considered to be "in need" if:

- **He or she is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development unless the local authority provides services for him under Part II of the Act;**
- **His or her health or development is likely significantly to be impaired, unless such services are so provided;**
- **He or she is disabled; or**
- **He or she is affected adversely by the disability of any other person in his or her family.**

The duty applies to the whole local authority and includes not just social work, but education, housing and any other relevant service.

The duty applies regardless of the child or parent's immigration status.

For example, a child who is facing homelessness or living in unsuitable accommodation will qualify as a child "in need" on the basis that he or she is unlikely to achieve or maintain a reasonable standard of health or development, or his or her health or development is likely to be significantly impaired, without the provision of services.

Assessment – duty

However, a local authority will only know if a child qualifies as being “in need” if it carries out an assessment. This duty to assess is implicit in the 1995 Act, and is supported by Scottish Government guidance and by a persuasive line of English case law.

Therefore, where a child or parent request assistance, the local authority must carry out an assessment of the child’s needs. Likewise, if a situation discloses a child’s need for some form of assistance, including accommodation, then an assessment must be carried out by the local authority.

For example, section 23A of the 1995 Act provides that a local authority is required to have regard to the general principle that its functions should be exercised in a way designed to safeguard, support and promote the wellbeing of a child. Suitable accommodation is fundamental to a child being safe, healthy, achieving, nurtured, active, respected, responsible and included.

Assessment - human rights

Local authorities are bound by the Human Rights Act 1998 and must not act in a way that is incompatible with a right under the European Convention on Human Rights (ECHR). The United Nations Convention on the Rights of the Child (UNCRC) is relevant to the interpretation of ECHR rights when a child is involved.

Local authorities must have regard to the best interests of the child as a primary consideration, and to the need to ensure that children are not separated from their parents unless this is necessary in their best interests.

In making an assessment therefore, the local authority must have regard to:

- the nature of the child’s needs;
- the child’s “wellbeing” (in terms of the matters listed in section 96(2) of the Children and Young People (Scotland) Act 2014);
- the European Convention on Human Rights (ECHR), in particular Articles 3 and 8; and
- the United Nations Convention on the Rights of the Child (UNCRC), in particular Articles 3 and 9.

Support and assistance

Where a parent has no entitlement to state benefits and is not eligible in their own right for local authority support, this does not prevent a local authority providing support or assistance to the child.

A NRPF condition does not prevent the exercise of a power or performance of a duty if, and to the extent that, it is necessary for the purpose of avoiding a breach of the child's rights under the European Convention on Human Rights (ECHR).

A local authority should not second-guess the outcome of an application for leave to remain, nor should they decline to make an assessment or provide assistance on this basis.

For example, a child and parent cannot be left to sleep on the streets, as this would be a violation of their rights in terms of article 3 of the ECHR, which protects both the child and his parent from inhuman or degrading treatment. A local authority confronted with a child exposed to sleeping on the street must therefore exercise such powers as it has to provide suitable accommodation.

Local authorities cannot discharge their duty to the child by taking them into care against the wishes of a parent/carer unless there are other legitimate concerns about their welfare and/or safety. This can only be done through formal legal processes and where the relevant thresholds are met.

Support and advice

Legal advice and representation

The Young Scot Law Line offers free advice 24 hours a day for young people between 11-25.

0808 801 0801

The Scottish Child Law Centre provides free legal advice, guidance and information about the law for and about children and young people.

Free call for young people 0800 328 8970 (from a landline), 0300 3301421 (from a mobile)

Clan Childlaw provides free legal advice and representation for children and young people.

0808 129 0522

The Ethnic Minorities Law Centre provides **legal advice and representation** to individuals from Black and Minority Ethnic (BME) communities in Scotland.

0141 204 2888 / 0131 229 2038

JustRight Scotland operates the **StrEEt Aware project**, which provides free, confidential legal advice to EEA nationals who are rough sleeping or at risk of rough sleeping and is a partner in Kids in Need of Defense UK; which offers pro bono legal representation for migrant children and young people.

0141 406 5350

Other forms of advice and support

Children and Young People's Commissioner Scotland Advice line answers questions about children's human rights and will signpost you to organisations that may be able to help you.

0800 019 1179

Scottish Refugee Council

provides a telephone advice service.

0141 223 7979