

Improving the Lives of Refugees in Scotland after the Referendum: An Appraisal of the Options

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Front cover image

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The colours of the Karibu tartan are those of Karibu Scotland. Karibu (meaning 'welcome' in Swahili) was set-up in 2004 by Henriette Koubakouenda in her living room in Glasgow. She saw a need to provide support to the refugees and asylum seekers arriving in Glasgow at that time as part of the Asylum Seeker's Dispersal Programme. Karibu Scotland now has over 100 members, representing 12 African countries, with premises in the Pearce Institute in the Govan area of Glasgow. The organisation runs multiple projects throughout the city to promote the confidence, skills and integration of African women.

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The views expressed in this report are those of Scottish Refugee Council and do not necessarily reflect those of the expert advisory group.

About Scottish Refugee Council

Scottish Refugee Council provides help and advice to those who have fled human rights abuses or other persecution in their homeland and now seek refuge in Scotland. We are a membership organisation that works independently and in partnership with others to provide support to refugees from arrival to settlement and integration into Scottish society. We campaign to ensure that the UK Government meets its international, legal and humanitarian obligations and to raise

awareness of refugee issues. We are also an active member of the European Council on Refugees and Exiles (ECRE), a network of over 70 refugee-assisting organisations across Europe.

Our vision is for a Scotland in which asylum seekers' and refugees' rights are respected and they are welcomed, treated with dignity and empowered to play a full and equal role in their new communities.

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Scottish Refugee Council is Scotland's leading refugee and human rights charity with a vision to ensure that all refugees seeking protection in Scotland are welcomed, treated with dignity and respect and are able to achieve their full potential.

The debate on Scotland's constitutional future and the place of refugees within it are matters of great importance. We are clear that it is not our role to enter into the political debate surrounding the merits or otherwise of the current constitutional settlement or of independence for Scotland. Indeed we published a statement in May 2012 setting out the position that Scottish Refugee Council takes no view on Scotland's constitutional status in relation to the referendum or on which government should exercise competence in refugee and asylum policy.

Nevertheless, the debate on Scotland's future offers an opportunity to put forward and realise our vision for a fair and just asylum system that offers a safe country of refuge, be that as a country within or outside of the United Kingdom.

In keeping with our charitable status Scottish Refugee Council will use its knowledge, experience and evidence to influence this important debate in a non-partisan way for a better outcome for refugees and people in the asylum process in Scotland.

In December 2012 the Carnegie UK Trust published research on the engagement of charities with the constitutional debate in Scotland¹. The findings show that that, to date, engagement has been limited and recommends that charities need to begin to consider what the implications of further constitutional change may mean for the people and causes they work for. This report is our initial contribution to this challenge.



John Wilkes

Chief Executive,
Scottish Refugee
Council

¹ A Charitable Concern? How charities in Scotland and preparing for the potential for constitutional change

Introduction

A referendum on the future of Scotland is planned to take place in 2014.

Scottish Refugee Council takes no view on Scotland's constitutional status following the outcome of the referendum in 2014 nor do we have a view on which government should exercise competence in the differing aspects of asylum and refugee policy.

In the event of Scotland becoming an independent state, a future Scottish Government will need to consider and implement policies currently within the responsibility of the UK Government.

If the outcome is for the status quo, increased powers may still come to the Scottish Parliament. Thus, the UK Government may also have to reconsider the manner and extent of the Scottish Government's involvement in many policies.² Asylum and refugee policy is one such area.

The aims of the report are to:

- stimulate and inform debate on asylum and refugee policy within the context of the Scottish referendum on independence in 2014;
- set out Scottish Refugee Council's key principles of a fair and humane refugee protection system;
- explore, through the prism of these principles, a range of policy options under each of the potential outcomes of the referendum: the status quo, changes to the current division of powers, independence for Scotland; and
- propose recommendations.

The study

We assess particular asylum and refugee policies within the following six areas: *access to the territory and asylum procedure; assessing the asylum claim in a fair and efficient asylum process; reception and integration of asylum seekers; refugee integration; responsibility-sharing; and return.*

The list of specific policies discussed should not be read as exhaustive. It is acknowledged that these areas are in no way discrete and that changes to one area would likely impact on others.

Our assessment of policies is based on Scottish Refugee Council's principles for a fair and humane refugee protection system as well as a variety of research sources.

The policy options we present have been also informed by in-depth study of institutional arrangements in ten countries (Germany, Austria, Switzerland, Belgium, Sweden, Norway, Ireland, Canada, the US and Australia).

The study was supported by a small expert advisory group.

The primary focus of the report is on principles and how these relate to the potential constitutional outcomes. A full costing audit was beyond the scope of this report. Where costs are mentioned they are indicative.

Principles

Our principles for fair and human asylum and refugee policy are set out in Chapter Two. They are consistent with the Refugee Convention; European legislation relating to refugees; international human rights instruments and human rights principles of: *humanity and dignity; universality; equality and non-discrimination; and solidarity.*

² In February 2012, Prime Minister David Cameron offered to consider more powers for Scotland, in the event of a 'no' vote in the referendum. (See <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20253390> and <http://www.guardian.co.uk/politics/2012/feb/16/freedoms-scotland-no-independence-cameron>). Considering policy options under increased powers in no way should be implied that we endorse increased powers to the Scottish Parliament beyond those in the Scotland Act or that this should be an option in the referendum. As is clearly stated throughout this report, we take no view on the outcome of neither the referendum nor the division of competences between the two governments.

Equality of opportunity; inclusion; compassion; adherence to and promotion of universal human rights principles and democratic values; and shared responsibility are values and principles, relevant to refugee policy, that have been championed by all governments in Scotland since devolution and enjoy substantial cross-party consensus in the Scottish Parliament.

Empowering individuals and communities; partnerships to integrate services; preventing negative outcomes; and efficiency are principles underpinning the Christie Commission review into the future of public service delivery in Scotland. The review has received broad political support in Scotland.

The treatment of asylum seekers and refugees in Scotland should reflect these principles and values.

Context

The current UK Government has announced that one of its primary objectives in the field of migration is to reduce net migration to 'tens of thousands'. In relation to asylum, the UK Government has introduced a number of measures aimed at improving the quality, efficiency and fairness of the asylum procedure and reducing its cost.

In relation to migration, the current Scottish Government is primarily concerned with the demographic situation. It also wants to address the problem of the ageing population and skills and workforce shortages in some sectors.

The Scottish Government stated vision for refugee policy in an independent Scotland involves an asylum system based on integrating people seeking asylum from day one of their arrival and operated in line with international and European standards, designed to reflect Scotland's tradition of offering refuge and its approach to the welfare and rights of children.

The number of people seeking protection in the UK is comparable to that in other EU Member States. If factors such as Gross Domestic Product and population size are taken into account, the UK's 'share' of asylum applications in the EU is considerably lower than that of many other EU Member States, including Germany, France, Belgium, Sweden, and Italy.

In 2011, 13,330,000 people outside the European Economic Area and Switzerland were granted leave to enter the UK but only 25,898 asylum requests were lodged. Whilst numbers of asylum seekers fluctuate according to the situation in their country of origin such as war, conflict or persecution, it is reasonable to assume that people seeking asylum constitute a very small proportion of all new migrants to the UK.

The number of people seeking asylum in Scotland over the last decade has equated to approximately 10% of the UK's asylum population. The vast majority of this population has been sent to Scotland to be accommodated under the UK Government's asylum dispersal scheme.

Based on the total population in the UK of concern to the UN High Commissioner for Refugees in 2011, Scottish Refugee Council estimates there to be approximately 20,000 refugees, asylum seekers and others of concern in Scotland.

In the event of Scottish independence and Scotland becoming a separate state, it may be assumed that the number of direct international flights to Scotland would increase. This would be unlikely to lead to a significant rise in the number of people seeking asylum and indeed may fall as other European Union member states would likely have responsibility for assessing their asylum claims (Dublin II Regulation).

In the event of Scottish independence it is also unlikely that the system of dispersing asylum applicants from other parts of the UK would continue in its current form, if at all. This would also potentially lead to a fall in the asylum population in Scotland.

Ireland, the closest European member state to the UK and part of the Common Travel Area, received 1,290 asylum applications in 2011. The number of asylum seekers in receipt of financial support from the UK Border Agency in Scotland in 2011 was 2,101.

A National Audit Office (NAO) report in 2009 found that the total cost of the UK asylum system amounted to approximately £176 million in 2007/2008.

Based on current asylum figures predicated at 10% of UK total, the cost of processing asylum requests and financially supporting applicants in an independent Scotland per annum could therefore be estimated at approximately £17.6 million, but could be significantly less based on a likely smaller population.

The NAO also estimated that processing the historic backlog of asylum cases cost the UK Government £600 million in 2007-08. Both Governments would need to negotiate the inheritance of the current Scottish share of the UK backlog of cases resident in Scotland at the time of independence. Without a significant backlog in place, a future Scottish Government in an independent Scotland would not incur this large expense.

Apparent attitudes to immigration are difficult to disentangle from broader issues such as race relations, globalisation and the European Union. Research from the German Marshall Fund finds that people tend to drastically overestimate the proportion of the population that is 'foreign born' and become less hostile towards immigration if they are told the real figures.

Consistent polls show a majority of the British population would like to reduce overall migration numbers. When thinking about migrants, the majority think of asylum seekers (62%) while just 29% think of international students. This despite 2009 figures showing asylum being just 4% of overall migration and students comprising 37%. Most of those wanting migration reduced focus primarily on 'illegal' migration. However, some 56% of those looking to reduce migration also want to reduce asylum numbers, this may in part due to the overall lack of knowledge of actual numbers.

Research in 2006 found Scottish attitudes to asylum seekers to be more positive than those found in England. More recent research on broader migration by British Futures finds Scottish attitudes to be among the most progressive in Britain.

Fewer Scots identify immigration as one of the biggest challenges facing Britain than most other parts of the UK. Fewer Scots blame migrants for the high number of young people out of work than any other part of the UK, and outside of London, fewer Scots than anywhere else in the UK think immigration will damage the country's attempts at economic recovery.

Broader views on migration combined with a general lack of differentiation in views would indicate slightly more favourable public views in Scotland towards people seeking asylum.

Asylum and Refugee Policy in the UK under Current Competences of the UK and Scottish Governments

Under the current constitutional settlement (and status quo if no constitutional changes are made), immigration and nationality are reserved matters under schedule 5 of the Scotland Act 1998. The Scottish Government has competence in a range of areas of social policy, welfare and justice functions which impact on the reception and integration of people seeking asylum and refugees in Scotland but which also relate to the asylum procedure such as child welfare and protection and the provision of legal representation.

There are many aspects of the current asylum system and approaches to refugees that could be greatly improved. With that in mind we make the following policy recommendations to the UK and Scottish Governments:

Access to the territory and procedure

- **The UK Government** should review bilateral readmission agreements and practice to ensure refugees have access to the territory and the asylum procedure in the UK. **The UK Government** should assume responsibility for examining the applications of asylum seekers

in the UK where other EU Member States responsible under the Dublin II Regulation do not treat asylum seekers in accordance with international and EU law obligations;

- **The UK Government** should ensure that refugees newly-arrived in Scotland seeking protection, often destitute, and those residing in Scotland seeking protection can access the UK asylum procedure in Scotland. **The Scottish Government** should press the UK Government on this issue as a matter of equality of access to the asylum procedure;

Assessing the asylum claim in a fair and efficient asylum process

- **The UK Government** should continue to improve training and guidance to asylum decision-makers and tackle the ‘culture of disbelief’ within the UK Border Agency. It should consider establishing an independent agency dealing solely with the assessment of asylum applications;
- **The Scottish Government** should maintain the level of legal aid provision for asylum applicants in Scotland and ensure that all asylum seekers in Scotland access and benefit from early interventions of quality legal advice before the substantive asylum interview. **The UK Government** should extend early legal advice projects in England and Wales and improve access to legal advice in the Detained Fast Track procedures;
- **The UK Government** should ensure the continued provision of and access to independent, competent and professional advice to assist people seeking asylum to navigate the complexities of the asylum and asylum support processes;
- **The UK Government** should end and **the Scottish Government** should resist proposals to restrict appeal avenues to the Court of Session (Inner House) which threaten to undermine the fair and effective procedures that are essential to protect asylum seekers’ fundamental rights and the principle of courts reviewing tribunal decisions;

- **The UK Government** should improve the initial asylum screening process to identify vulnerable applicants early and act on their needs. Assessments should be conducted throughout the asylum procedure at key points;
- **The UK Government** should improve training and guidance on identifying children. Invasive medical interventions should not be used to assess age. **The UK Government** should ensure the best interest of the child is represented and considered throughout the asylum system and develop a system of guardianship. **The Scottish Government** should support and further develop the Scottish Guardianship Service including consideration of placing it on a statutory footing;
- **The UK Government** should abolish the detention of people seeking asylum solely for the purpose of assessing their claim. In the interim, they should stop the arbitrary use of the Detained Fast Track and Detained Non-Suspensive Appeals process. Vulnerable asylum seekers should never be detained;

Reception and integration of asylum seekers

- **The UK Government** should allow people in the asylum process the right to work either after six months if there has been no decision on their application following the screening interview, or subject to cooperation with authorities to establish identity. **The Scottish Government** should continue to express its opposition to the current policy;
- **The UK Government** should introduce cash support throughout the asylum procedure until an asylum seeker has the left the UK or been recognised as a refugee. This should be part of and administered through mainstream welfare support. Support should be provided at equivalence to nationals based on the need to ensure a dignified standard of living;

- **The Scottish Government** should work together with **the UK Government**: to develop reception and integration policies and practice which benefit all people seeking asylum and host communities, for example, by ensuring new communities are prepared for asylum applicants and asylum seekers are informed about and can access services;
- **The Scottish Government** should continue to provide full access to healthcare and ensure people access this right. It should expand ESOL provision to reduce waiting times and facilitate integration;

Refugee integration

- **The UK Government** should grant permanent residence status to refugees upon recognising them as refugees and ensure affordability and accessibility of refugees becoming UK citizens, including a maximum qualifying period of five years. To avoid destitution and improve early integration, **the UK Government** should extend the 28-day period after which the UK Border Agency withdraws financial support and should reinstate dedicated advice and support to assist refugees to engage with mainstream services and rebuild their lives;
- **The UK Government** should have a clear strategy for refugee integration in the UK with responsibility clearly allocated within a UK Government department. **The Scottish Government** should ensure the implementation of the recommendations of the review of its strategy to integrate asylum seekers and refugees in Scotland and raise concerns with the UK Government where reserved competences impact on refugee integration in Scotland;
- To improve refugee integration and ensure refugees can be reunited with their family members, **the UK Government** should expand the definition of 'family' within the immigration rules; allow child refugees the right to be reunited with their families and support refugees unable to meet the travel expenses of family members;

Responsibility-sharing

- **The UK Government** should reappraise its position on not seeking to improve EU-wide asylum standards. **The Scottish Government** should engage more with **the UK Government** on promoting responsibility-sharing and raising standards in the EU;
- **The UK Government** should increase the number of resettlement places, currently 750 per year, it offers to refugees. **The Scottish Government** should identify and reduce barriers to participation of Scottish Local Authorities in the UK Government's refugee resettlement programme and consider and explore other means and possibilities for resettlement in Scotland with **the UK Government**;

Return

- **The UK Government** should grant a legal status to refused asylum seekers who cannot be returned and stop forcing them into destitution;
- **The UK Government** should end the arbitrary use of detention. Detention must be used only if necessary and proportionate in each case, following a careful consideration of available alternatives and should always be for the shortest possible time where removal is imminent. It should never be imposed on vulnerable applicants. **The Scottish Government** should make the case to **the UK Government** to ensure vulnerable asylum seekers are not detained in Scotland and detainees in Dungavel Immigration Removal Centre (IRC) are not moved arbitrarily around the UK detention estate away from the jurisdiction where their legal representatives can act on their behalf; **the UK and Scottish Governments** should clarify their respective powers in relation to Dungavel IRC; and
- **The UK Government** should abolish the outsourcing of enforced returns to private companies and implement early engagement strategies for other groups of refused asylum seekers beyond families with children.

The Role of Sub-State Authorities in Asylum and Refugee Policy

One possible result from a referendum outcome not to support independence may still be for further negotiations between the UK Government and the Scottish Government post the referendum in 2014 on increasing the competences of the Scottish Government. There are potential areas that could be explored in relation to asylum and refugee policy. These are based on comparisons with other sub-state authorities who exercise competence in relation to asylum and refugee policy. In some instances it would not require a change to powers, but a change in working arrangements between the two governments.

Access to the territory and procedure

- Comparing practice in European countries (Germany, Switzerland, Austria, Sweden) people in Scotland seeking protection should be allowed to lodge a claim for asylum with the UK Border Agency in Scotland without having to travel to the Asylum Screening Unit in Croydon. This would not require any change in powers;

Assessing the asylum claim in a fair and efficient asylum process

- Assessing asylum applications is a state obligation and function and as such Scottish Refugee Council believes that the creation of a parallel system in Scotland as a sub-state authority to assess asylum applications (as for example exists in Italy) would be very difficult, contentious and costly to implement. However **the UK Government** should respect, engage and adapt to Scottish authorities who exercise competence in areas which currently support the asylum decision-making procedure, such as the Scottish Legal Aid Board and the Scottish Guardianship Service;

Reception and integration of asylum seekers

- **The UK and Scottish Governments** could consider Scotland playing a greater role in the provision of accommodation and reception of people seeking asylum. Asylum seekers residing in Scotland could be allowed to apply and be granted a work permit in Scotland by an authority in Scotland (Germany, Belgium, Switzerland);

Refugee integration

- The Scottish Government already exercises competence in many of the social policy areas related to refugee integration. Dedicated integration advice support was previously funded by the UK Government but has been withdrawn. Responsibilities in this area could be clearer to ensure a comprehensive refugee integration policy is in place in Scotland;
- Aspects of immigration control related to refugee integration are not devolved, such as the granting of temporary or permanent residence permits. This could potentially be one area to explore, thus **the Scottish Government** could be allowed to issue temporary or permanent residence permits to refugees. However our principled view is that refugees upon recognition should be granted permanent leave to remain whoever were to exercise competence in this area. This would be the best, most cost-effective way to improve refugee integration;

Responsibility-sharing

- **The UK and Scottish Governments** could negotiate greater involvement in the **UK Government's** refugee resettlement programme. Annual quotas and priorities could be established jointly with the UK Government. **The Scottish Government** could be allowed to select the refugees who settle in Scotland, subject to final approval by **the UK Border Agency** (a similar process is in place in Québec). This would not require changes to powers; and

Return

Devolving powers to the Scottish Government as a sub-state authority to execute return and removal measures for people refused asylum (as is the case in Germany and Switzerland) based on immigration decisions made by the UK Government would be difficult, confusing, complex and controversial. Consideration could be given to allow **the Scottish Government or an independent body in Scotland** to refer exceptional cases to **the UK Government** to consider granting a temporary resident permit (Germany, Switzerland).

Asylum and Refugee Policy in an Independent Scotland

In the event of independence, we assume that the Scottish Government would have responsibility and the competence for all aspects of asylum and refugee policy within its international obligations of being an independent state. We propose what these policies could or should look like based on principles for a fair and humane protection system.

In our analysis we make the assumption that Scotland would be a member of the European Union and would be party to European acquis on asylum. In the context of negotiating EU membership, the Scottish Government would have to consider whether it would join the European Common Travel Area (Schengen Area) or if it would seek to be part of the Common Travel Area with the rest of the UK and Ireland. Both have implications for asylum and refugee policy.

We also recognise that any future changes to, for example, foreign policy or welfare benefits or in particular migration policy, will also impact upon refugees' lives as things stand at present. Thus refugee policy itself should not be seen in isolation but in relation to wider policy and societal change.

Bearing these assumptions in mind, the following recommendations should be seen as Scottish Refugee Council's initial considerations and not a definitive response.

Access to the territory and asylum procedure

- Scottish Refugee Council believes that granting access to the territory to those seeking asylum would constitute a very small part of the role of future border control authorities in an independent Scotland, thus we do not take a view on how this function should be exercised. Nevertheless, **in an independent Scotland** we would consider the option to contract out border control to the UK Border Agency not to be feasible. Looking to other European countries this function could be carried out by the police force or a new agency responsible for border management;

Assessing the asylum claim in a fair and efficient asylum process

- **An independent Scotland** should take full responsibility for granting international protection and should not contract out this core state function to the UK Border Agency. Scottish Refugee Council proposes that the best way to ensure asylum claims are assessed fairly and efficiently by professional and well-trained responsible authorities **in an independent Scotland** would be to establish a small separate asylum agency dealing with asylum applications;

Reception and integration of people seeking asylum

- People claiming asylum in an independent Scotland should have access to cash support sufficient to maintain a dignified standard of living and of an equivalence to a national in need. They should be given the possibility to choose their accommodation which should be in the community. **The government in an independent Scotland** could provide information about job and housing opportunities in different areas of Scotland to help people seeking asylum make an informed choice and ensure integration happens from day-one of arrival and benefits both refugees and the host community;
- Asylum seekers **in an independent Scotland** should be granted immediate access to the labour market. In some cases, access could be conditional upon cooperation with the authorities responsible for the asylum procedure;

Refugee Integration

- Refugees **in an independent Scotland** should be granted permanent residence permit upon receiving protection;
- Frontloading of individual integration plans drafted together with the refugee and mainstreaming integration in all public services is the best and most cost-effective way to facilitate the process;
- Refugees should be given the opportunity to choose whether to apply for citizenship after a period of permanent residence. This period should be no longer than five years and time spent in the asylum procedure should be included in the qualifying for citizenship. When developing Scotland's citizenship policy, **the government in an independent Scotland** should take into account the particular situation of refugees to ensure that no additional barriers are created;

Responsibility-sharing

- Scottish Refugee Council believes that **an independent Scotland** should establish its own refugee resettlement programme, which could consist of a mixture of government-sponsored and community-sponsored schemes as exists in Canada;

Return

- Those asylum seekers whose claims have been refused after a fair and efficient process in Scotland but who cannot be returned or where there are barriers to return could be granted a temporary residence status [with the option of being granted permanent residence or citizenship at a later date if there is no substantive change to their situation];
- Asylum seekers whose claims are refused should be allowed to submit an application for a work permit without leaving Scotland and be granted or refused in line with whatever rules are created for migration policy;
- Voluntary return should always be prioritised over forced return measures. Given issues of accountability and the controversies surrounding the current UK practice of enforced return, Scottish Refugee Council does not believe the UK Border Agency should have any role in such process, should it be introduced **in an independent Scotland**; and
- One institution should be responsible for return policy to ensure that all voluntary return options and alternatives to detention have been exhausted before enforced return and/or detention is considered. Asylum seekers whose claims have been refused should never be detained in prisons.

The future of Scotland and the place of refugees within it are important matters. We hope that this report makes a critical contribution to, and helps inform the important discussions and debates that are taking place and will continue to take place over the next few years.

A referendum on the future of Scotland will be held in 2014. Regardless of the outcome, the referendum will have an impact on the relationship between the UK and Scottish Governments. In the event of Scotland becoming an independent state, a future Scottish Government will therefore need to consider and implement policies which have so far fallen within the responsibility of the UK Government. Should the Scottish public decided to retain the constitutional status quo, increased powers, beyond those currently in the Scotland Act, may still come to the Scottish Parliament.³ Thus, the UK Government may also have to reconsider the manner and extent of the Scottish Government's involvement in many policies. Refugee policy is one such area.

As an independent charity, Scottish Refugee Council takes no view on Scotland's constitutional status following the outcome of the referendum in 2014. We are very clear that it is not our role to enter into the political debate surrounding the merits or otherwise of the current constitutional settlement or of independence for Scotland nor, specifically, suggest which government should exercise competence in the differing areas of refugee policy. Our sole aim is to influence change around policy and practice to the benefit of refugees whoever has responsibility to implement these improvements.

The debate around the constitution therefore affords us the opportunity to inform, advocate and attempt to influence the UK and Scottish Governments and other key stakeholders to effect the changes that are needed to achieve our vision.

The aims of this report are to: stimulate and inform debate on asylum and refugee policy within the context of the Scottish referendum on independence in 2014; set out Scottish Refugee Council's key principles of a fair and humane refugee protection system; explore, through the

prism of these principles, a range of policy options under each of the potential outcomes of the referendum: the status quo, changes to the current division of powers, or independence for Scotland; and propose recommendations.

1.1 Overview

This report consists of nine chapters. Following the Introduction which details UK and Scottish Government concerns regarding asylum, asylum numbers and public attitudes to asylum, Chapter Two sets out the key principles on which Scottish Refugee Council believes fair and humane refugee policy in Scotland should be based. These principles serve as a benchmark to assess current and future policy options in Chapters Six to Eight.

Chapter Three provides a brief overview of international, European and EU refugee and asylum legislation, policy and practice. Chapter Four describes existing international human rights law and outlines basic principles which should underpin any public policy, including asylum and refugee policy. Chapter Five focuses on the Scottish Parliament's and Scottish Government's domestic legal obligations and distils the values and principles underlying both and their visions for Scotland.

Chapter Six focuses on the current division of competences between the UK and Scottish Governments, assesses existing asylum and refugee policy against Scottish Refugee Council's principles and makes recommendations to both governments. The following chapter, Chapter Seven, provides examples of countries where sub-state authorities are responsible for various aspects of asylum and refugee policy, and explores various policy options should the division of competences between the UK and Scottish Governments change. We consider each option against Scottish Refugee

³ This project began before the Edinburgh Agreement between the Scottish Government and UK Government was signed on 15 October 2012 which agreed that there would be a single question on independence. Proposals on a second question putting forward increased powers to the Scottish Parliament were not taken forward. In February 2012, Prime Minister David Cameron offered to consider more powers for Scotland, in the event of a 'no' vote in the referendum. (See <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-20253390> and <http://www.guardian.co.uk/politics/2012/feb/16/freedoms-scotland-no-independence-cameron>)

The inclusion of a chapter considering policy options under increased powers (Chapter 7) in no way should be implied that we endorse increased powers to the Scottish Parliament beyond those in the Scotland Act or that this should be an option in the referendum. As is clearly stated throughout this report, we take no view on the outcome of neither the referendum nor the division of competences between the two governments.

Council's principles, and consider some potential administrative and financial costs and political implications. Chapter Eight explores asylum and refugee policy options in an independent Scotland, assesses them against Scottish Refugee Council's principles and highlights their administrative, financial and political implications. The latter two Chapters do not cover all aspects of asylum and refugee policy; rather, they focus on key areas which are currently problematic in Scotland and should be prioritised. Moreover, our analysis in the final two Chapters is based on some assumptions, such as an independent Scotland being a member of the European Union and so should be seen as Scottish Refugee Council's initial thoughts and not our definitive response.

The primary focus of the report is on principles and how these relate to the potential constitutional outcomes. Thus, a full costing audit was beyond the scope of this report and so where costs are mentioned they are indicative rather than comprehensive. Wherever possible we have identified where a proposed option looks low or high cost, or may offer compensatory savings.

The policy options developed in this paper have been informed by in-depth research of the institutional set-up, policy and practice of asylum and refugee policies in seven European countries - Germany, Austria, Switzerland, Belgium, Sweden, Norway and Ireland - as well as Canada, the US and Australia.⁴ The choice of countries was guided by a number of considerations including geographical proximity, population size, number of asylum requests, constitutional set-up as well as being a country of destination.

For the purpose of this study, asylum and refugee policy has been broken down into six separate categories:

- access to the territory and procedure (how people can claim asylum);
- assessing the claim in a fair and efficient asylum process (how decisions on asylum claims are made and who makes them);
- reception and integration of asylum seekers (how women, men and children seeking asylum are supported and helped to integrate into society pending their asylum decision);
- refugee integration (how those people who are recognised as refugees are supported to rebuild their lives);
- responsibility-sharing (the role states should play in supporting refugees in Europe and globally); and
- return (the return of those refused asylum and those recognised as refugees).

It is acknowledged that these areas are in no way discrete and that changes to one area would likely impact on others. However, for reasons of simplicity they are separated in this report. It is further recognised that any future changes to, for example, foreign policy or welfare benefits or in particular migration policy, will also impact upon refugees' lives as things stand at present. Thus refugee policy itself is not seen in isolation but in relation to wider policy and societal change.

⁴ Based on European Migration Network Reports on Germany, Austria, Belgium, Sweden, Norway and Ireland available under http://emn.intrasoft-intl.com/Downloads/prepareShowFiles.do?sessionId=8C9797EE945674587075F3FA1CA7601F?entryTitle=11_The%20ORGANISATION%20OF%20Asylum%20and%20Migration%20POLICIES%20in%20the%20EU%20Member%20States

The websites of national authorities responsible for the asylum procedure as follows: Germany (<http://www.bamf.de>), Austria (http://www.bmi.gv.at/cms/bmi_asylwes/en/); Ireland (<http://www.orac.ie/website/orac/oracwebsite.nsf/page/index-en>) and information provided by the Irish Refugee Council; Belgium (<http://www.cgra.be/en/>) and information provided by UNHCR; Sweden (http://www.migrationsverket.se/info/skydd_en.html); Norway (<http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Protection/>); Jesuit Refugee Service (JRS) (2010) Becoming vulnerable in detention.

Information about the asylum system in Switzerland was obtained from the Federal Office for Migration (<http://www.bfm.admin.ch/content/bfm/en/home/themen/asyl.html>) as well as UNHCR.

For Canada, information is based on Citizenship and Immigration Canada (<http://www.cic.gc.ca/english/refugees/index.asp>) and Immigration and Refugee Board of Canada (<http://www.irb-cisr.gc.ca/eng/pages/index.aspx>).

Concerning the US, US Citizenship and Immigration Services (<http://www.uscis.gov/portal/site/uscis/menuitem.b1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextoid=1f1c3e4d77d73210VgnVCM100000082ca60aRCRD>) was used.

Australia: Department of Immigration and Citizenship (<http://www.immi.gov.au/visas/humanitarian/>)

The report proposes recommendations on each policy option by taking into account the best interests of refugees as well as, where possible, the concerns of Scottish and UK Governments. In some cases this does not entail positively coming down in favour of one option, but instead simply ruling out options that do not meet the criteria of what is in the best interests of refugees.

We do not consider in this report other displaced persons who are of interest and concern to Scottish Refugee Council such as persons who have been trafficked or those who are stateless.

1.2 Immigration and Asylum - Concerns of the Scottish Government

The current Scottish Government is primarily concerned with the demographic situation, especially in some under-populated parts of the country. It also wants to address the problem of ageing population and skills and workforce shortages in some sectors. At the same time, the Scottish Government intends to develop inclusive policies which benefit everyone living in Scotland and contribute to the creation of a just and fair society.

The Scottish Government has also stated its vision for refugee policy in an independent Scotland. It involves an asylum system based on integrating people seeking asylum from day one of their arrival and operated in line with international and European standards, designed to reflect Scotland's tradition of offering refuge and its approach to the welfare and rights of children. For example, it proposes an asylum system in an independent Scotland would allow asylum seekers to work in Scotland while awaiting the results of their claim.

This issue alongside opposing the detention of children, enforced removals conducted at dawn,

and ensuring people seeking asylum are treated fairly and humanely was also raised in a Cabinet Memo published in 2007.⁶

The Scottish Government would also seek to both stay within the European Union and abide by its treaties, and maintain a Common Travel Area⁷ with other nations in what would remain of the United Kingdom and with Ireland.

These would both lead to a certain number of institutional constraints on what the Scottish Government would or could do within broader migration policy.

1.3 Immigration and Asylum – Concerns of the UK Government

The current UK Government has announced that one of its primary objectives in the field of migration is to reduce net migration to 'tens of thousands'.

In relation to asylum, the Coalition Agreement in 2010 stated that the UK Government aimed to "explore new ways to improve the current asylum system to speed up the processing of applications." The UK Government has subsequently introduced a number of measures aimed at improving the quality, efficiency and fairness of the asylum procedure and reducing its cost.⁸

1.4 Numbers of Asylum Applications

The number of people seeking protection in the UK is comparable to that in other EU Member States. If factors such as Gross Domestic Product (GDP) and population size are taken into account, the UK's 'share' of asylum applications in the EU is considerably lower than that of many other EU Member States, including Germany, France, Belgium, Sweden, and Italy (see Table 1).

⁵ Scottish Government (2009) *Europe and Foreign Affairs: Taking Forward our National Conversation*

⁶ Scottish Government (2007) *Cabinet Memo on Asylum Issues*; <http://www.scotland.gov.uk/News/News-Extras/asylum-issues>

⁷ "The Common Travel Area (CTA) comprises the UK, the Republic of Ireland, the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man. The CTA is an immigration arrangement, and it does not regulate the movement of goods." "The UK does not make routine immigration checks on passenger travel within the CTA, and passengers are not required to carry a passport or national identity document for immigration purposes. The CTA is a 'free movement' zone, based on the principle that a person who has been allowed to enter one part of the CTA will not normally require permission to enter another part of it while that permission is extant (provided they do not leave the CTA). However, there are exceptions to this principle - for example, a visa national will need to have a visa if they enter the UK from another part of the CTA." Home Office website: <http://www.ukba.homeoffice.gov.uk/customs-travel/Enteringtheuk/arrivingatukborder/travellingtocommontravelarea/>

⁸ UK Border Agency (2011) *Asylum Improvement Project: Report on Progress* <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/asylum-improvement-project/aip.pdf?view=Binary>

Table 1: Asylum Applications in EU Member States, Canada, the US and Australia. Source: UNHCR Asylum Levels and Trends in Industrialised Countries, 2011

	Asylum Applications		
	2011	Per thousand inhabitants	Per 1USD/GDP
EU 27	277,470	0.6	
Belgium	25,980	2.4	0.7
Bulgaria	890	0.1	0.1
Czech Republic	490	0.0	0.0
Denmark	3,810	0.7	0.1
Germany	45,740	0.6	1.3
Estonia	70	0.1	0.0
Ireland	1,290	0.3	0.0
Greece	9,310	0.8	0.3
Spain	3,410	0.1	0.1
France	51,910	0.8	1.5
Italy	34,120	0.6	1.2
Cyprus	1,770	1.6	0.1
Latvia	340	0.2	0.0
Lithuania	410	0.1	0.0
Luxembourg	2,160	4.3	0.0
Hungary	1,690	0.2	0.1
Malta	1,850	4.4	0.1
Netherlands	11,590	0.7	0.3
Austria	14,430	1.7	0.4
Poland	5,190	0.1	0.3
Portugal	280	0.0	0.0
Romania	1,720	0.1	0.1
Slovakia	450	0.1	0.0
Slovenia	310	0.2	0.0
Finland	3,090	0.6	0.1
Sweden	29,650	3.2	0.8
UK	25,420	0.4	0.7
Canada	25,350	0.7	0.6
Australia	11,510	0.5	0.3
USA	74,020	0.2	1.6
Scotland	2,101 ⁹	0.0004 ¹⁰	0.0 ¹¹

Despite public perceptions to the contrary, only a small percentage of migrants entering the UK seek asylum. In 2011, 13,330,000 people outside the European Economic Area and Switzerland were granted leave to enter in the UK but only 25,898 asylum requests were lodged (See Table 2). Although it has been widely recognised that the number of asylum seekers fluctuates according to the situation in their country of origin such as war, conflict or persecution, it is reasonable to assume that people seeking asylum constitute a very small proportion of all new migrants to the UK.

Table 2: Total Number of Arrivals for 2011 in the UK (excludes EEA and Switzerland)

Source: Home Office, *Immigration Statistics: Admissions Data Tables July-September 2012*¹² and *Asylum Data Tables July-September 2012*¹³

Employment	149,000
Study	529,000
Family	32,200
Other (includes visitors)	12,600,000
Total	13,330,000
Asylum Applications	25,898

It is difficult to obtain the exact number of refugees and people seeking asylum currently living in Scotland, however it is generally accepted that

the number of asylum seekers in Scotland over the last decade has equated to around 10% of the UK's asylum population.^{14 15} The vast majority of this population has been sent to Scotland to be accommodated under the UK Government's dispersal scheme which was introduced in the Immigration and Asylum Act 1999.¹⁶ Using this figure of 10% against the total population in the UK of concern to the UN High Commissioner for Refugees in 2011, Scottish Refugee Council estimates there to be approximately 20,000 refugees, asylum seekers and others of concern in Scotland (See Table 3).

Table 3: Total Population of Concern to UNHCR in selected EU Member States, Canada, the US and Australia (refugees and asylum-seekers), end of 2011.

Source: UNHCR Global Trends 2011

Canada	206,735
Germany	658,818
Sweden	115,097
UK	208,885
US	276,484
Australia	28,676
Ireland	13,688
Scotland	20,000 ¹⁷

⁹ This is not the actual number of asylum applications but an estimate based on the number of asylum seekers in Scotland receiving support from UKBA.

¹⁰ Estimate based on latest available data on population size of Scotland.

¹¹ Estimate based on GDP data provided by the Scottish Government.

¹² See: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q3-2012/admissions-q3-2012-tabs?view=Binary>

¹³ See: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q3-2012/asylum2-q3-2012-tabs?view=Binary>

¹⁴ From each year since 2003 between 7% -12% of the UK's asylum population have been accommodated and / or supported in Scotland. This averages at approximately 10%. (Source: Home Office asylum support statistics by region).

¹⁵ In relation to unaccompanied asylum-seeking children, a survey of Scottish Local Authorities conducted in autumn 2012 by Scottish Refugee Council estimates that they have accommodated and supported 150 children over the last three years.

¹⁶ Applications for asylum are either made 'at port' on arrival into the UK or 'in-country.' The majority are in-country applications (In 2011, only around 10% (2,319) asylum applications were registered at port Source: UKBA). In-country applications can only be registered at the UK Border Agency's Asylum Screening Unit in Croydon (unless the person has vulnerabilities and may be screened and a claim registered locally in Scotland by negotiation). Scottish Refugee Council has submitted a Freedom of Information request in order to obtain more precise data on the number of port applications made in Scotland and the number of claims screened and registered in Scotland.

¹⁷ Scottish Refugee Council estimate.

In the event of Scottish independence it may be assumed that the number of direct international flights to Scotland would increase. It is unlikely however that this would lead to a significant increase in the number of people seeking protection in Scotland without other European Union member states having responsibility for assessing their asylum claims¹⁸ (see Dublin II Regulation in Chapter Two). Furthermore without a system of dispersing people seeking asylum from other parts of the UK in place as exists at the moment, this would also potentially lead to a fall in the asylum population in Scotland. Ireland, the closest European member state to the UK and part of the Common Travel Area, received 1,290 asylum applications in 2011. The number of asylum seekers in Scotland in 2011 was 2,101.¹⁹

It is also unlikely that the cost associated with providing protection to those fleeing persecution would be disproportionately high. A National Audit Office (NAO) report²⁰ in 2009 found that the total cost of the New Asylum Model introduced in 2007 amounted to nearly £176 million (2007-2008). Using the current asylum population in Scotland as a basis to project an estimated future cost, the cost of processing asylum requests and financially supporting applicants would amount to 10% of this figure, £17.6 million or less given a smaller asylum population.²¹ Costs related to the reception and integration of asylum seekers and refugees as well as the provision of legal aid in Scotland are currently incurred by the Scottish Government. However, we would not expect that

introducing a full-fledged asylum processing system in an independent Scotland would lead to significant additional expense. It is also important to note that the National Audit Office estimated that processing the historic backlog of asylum cases cost £600 million in 2007-08,²² of which £430 million was accounted for by welfare support and accommodation. Both Governments would need to negotiate the inheritance of the current Scottish share of the UK backlog of cases resident in Scotland at the time of independence. Without a significant backlog in place, a future Scottish Government in an independent Scotland would not incur this large expense.

1.5 Public attitudes to asylum

Determining public attitudes to asylum and to migration more generally is a complex task. Part of the reason for this concerns difficulties in disentangling apparent opinions about immigration from broader issues such as race relations²³ or even globalisation and the European Union.²⁴ The other difficulty concerns the knowledge base from which people respond. Recent work from the German Marshall Fund²⁵, for example, finds that views on immigration change substantially when the respondents are informed of the true scale of immigration. That is, respondents tend to drastically overestimate the proportion of the population that is 'foreign born' and become less hostile towards immigration if they are told the real figures.²⁶

¹⁸ A caveat to this is that Scotland could exercise the 'sovereignty clause' with the Regulation, (Article 3.2) and take responsibility even if the UK or any other Member State is responsible

¹⁹ See footnote 8.

²⁰ National Audit Office *The Home Office: Management of Asylum Applications by the UK Border Agency*, 2009

²¹ This is of course an oversimplified method of estimating the cost and would be subject to many other variables. It is provided as solely as for indicative purposes

²² National Audit Office *The Home Office: Management of Asylum Applications by the UK Border Agency*, 2009

²³ Crawley, H. (2009) *Understanding and Changing Public Attitudes: A Review of Existing Evidence from public Information and Communication Campaigns*, London: The Diana, Princess of Wales Memorial Fund

²⁴ Ibid

²⁵ Ziebarth, Astrid *Transatlantic Trends in Perceptions of Migration* paper presented at the 16th Annual Metropolis Conference September 2011

²⁶ Ibid

Nevertheless, bearing these caveats in mind there are a few key things to be said about public opinion about immigration and asylum. Taking overall migration first, consistent polls show a majority of the British population would like to reduce overall migration numbers. When thinking about migrants, the majority think of asylum seekers (62%) while just 29% think of international students. This is despite 2009 figures showing asylum being just 4% of overall migration and students comprising 37%. Most of those wanting migration reduced focus primarily on 'illegal' migration. However, some 56% of those looking to reduce migration also want to reduce asylum numbers, perhaps due to the overall lack of knowledge of numbers alluded to above.²⁷

Research conducted back in 2006 found Scottish attitudes to asylum seekers to be more positive than those found in England. More recent research on broader migration conducted by British Futures

finds Scottish attitudes to be among the most progressive in Britain²⁸. Fewer Scots identify immigration as one of the biggest challenges facing Britain than most other parts of the UK. Fewer Scots blame migrants for the high number of young people out of work than any other part of the UK, and outside of London, fewer Scots than anywhere else in the UK think immigration will damage the country's attempts at economic recovery.

Since the research in 2006, there has been little work undertaken that compares Scottish views on asylum to other parts of the UK. However, as mentioned above, broader views on migration combined with a general lack of differentiation in views would indicate slightly more favourable public views of people seeking asylum.

²⁷ Blinder, Scott (2011) *Thinking Behind the Numbers: Understanding Public Opinion on Immigration in Britain* Migration Observatory <http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Report%20-%20Public%20Opinion.pdf>

²⁸ British Future (2012) State of the Nation Poll <http://www.britishfuture.org/wp-content/uploads/2012/02/British-Future-State-of-the-Nation-Poll.pdf>

This Chapter sets out Scottish Refugee Council's principles for fair and humane refugee policy in Scotland. These principles are based on Scottish Refugee Council's extensive experience in providing services to refugees in Scotland for more than 25 years and advocating for refugees rights in Scotland, in the UK and Europe.

Our principles are consistent with the Refugee Convention and European legislation relating to refugees (Chapter Three); and human rights instruments and principles (Chapter Four). They also reflect the underpinning obligations, values and principles of the Scottish Parliament and the Scottish Government (Chapter Five).

Access to the Territory and Procedure

- Protection from refoulement, including non-rejection at the border; and
- Access to the territory and an asylum procedure for the purpose of determining international protection needs.

Assessing the Asylum Claim in a Fair and Efficient Asylum Process

- Trained and professional responsible authorities;
- Access to publically-funded and quality legal representation;
- Access to organisations providing information and support;
- Access to quality interpretation;
- The right to appeal an asylum decision and to remain in the country until this has been determined. Effective remedies to challenge asylum decisions through tribunals and courts (with appropriate legal aid) should be equivalent to those in other areas where decision-making determines a person's fundamental rights;
- Procedures and resources aimed at making better decisions early in the asylum procedure (front-loading);

- Procedures and resources aimed at identifying and taking into account the situation and needs of vulnerable applicants and particular equality groups;
- Procedures and resources ensuring that in all matters concerning children the best interest of the child is a primary consideration and that the child's views are taken into account in accordance with their age and maturity; and
- Respect for liberty, security and freedom of movement: people seeking asylum should not be detained for administrative convenience and should be allowed to move freely on the territory while their claim is being processed.

Reception and Integration of People Seeking Asylum

- People seeking asylum should be supported to integrate in the host country from the moment of their arrival to the benefit of both the individual and the community;
- Access to appropriate accommodation and financial support sufficient to ensure a dignified standard of living and of an equivalence to a national in need;
- Full access to healthcare;
- Full access to education;
- Immediate access to English language courses;
- People seeking asylum should be given access to the labour market to support themselves;
- Services should be designed to meet the needs of vulnerable persons and equality groups. Additional services should be provided if required to address individuals' special needs;
- Holistic assessments to identify the needs of vulnerable people seeking asylum should be made repeatedly at key intervention points throughout the asylum procedure;

- All services should be personalised;
- All unaccompanied minors should have access to appropriate accommodation and be appointed a guardian; and
- Access to and the withdrawal of reception conditions, such as welfare support, should not be used as coercive measures to enforce immigration control of people seeking asylum.

Refugee Integration

- Integration is a two-way process that involves positive change in both the individuals and the host communities and which leads to cohesive, multi-cultural communities;
- Upon recognition, refugees should be granted secure residence status, conferring them rights similar to those of nationals;
- Refugees should be supported in realising their right to family reunion; and
- Refugees should be allowed to choose whether they wish to acquire the citizenship of the host country. Barriers should not be put in their way if they choose to do so.

Responsibility-sharing

- Based on the principle of intra-EU solidarity and responsibility-sharing within the Common European Asylum System, there should be participation in the relocation of refugees from other EU countries and in efforts to improve the treatment of people seeking asylum and refugees across the EU; and
- Based on the principle of solidarity and global responsibility-sharing, a long-term future for refugees should be offered through resettlement.

Return

- Return, if necessary, should be safe, dignified and sustainable;
- Voluntary return must be prioritised over forced return;
- People seeking asylum found not to be in need of protection should only be returned after a fair and thorough examination of their asylum claim and taking all humanitarian circumstances into consideration;
- People seeking asylum whose claims have been rejected but who cannot return should be granted temporary legal status; and
- Detention pending return must not be arbitrary, and should only be used if necessary and proportionate in each case, following a careful consideration of available alternatives. It should always be for the shortest possible time where removal is imminent and should be subject to regular review and judicial oversight. It should never be imposed on children or vulnerable people.

Scottish Refugee Council does not believe that the state's legitimate concerns about preventing abuse should be addressed by curtailing individuals' human rights.

This Chapter gives an overview of international, European and EU legislation relating to refugees and their protection.

3.1. Refugee Convention

The 1951 Convention Relating to the Status of Refugees (Refugee Convention)²⁹ is the key legal document defining who is a refugee, establishing what their rights are and delineating the responsibilities of state parties.³⁰

The Refugee Convention defines a refugee as a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

According to international law, everyone who fulfils this definition is a refugee. The Convention does not prescribe a specific mechanism through which states should determine refugee status. Therefore, the recognition of refugee status is declaratory, not constitutive (i.e. a person does not become a refugee because they are recognised; rather, they are recognised because they are refugees).

Although international law does not distinguish between refugees and people seeking asylum,

states often do so. An asylum seeker is a person who has not yet received decision on their claim for refugee status. The UN Declaration on Human Rights³¹ states that everybody is entitled to seek and enjoy asylum.

The 1951 Convention contains a number of rights to which refugees are entitled. The most important one, which has attained the status of customary international law³², is '*non-refoulement*' contained in Article 33. According to this principle, no refugee should be returned to a country where their life or freedom may be threatened. This general principle entails an obligation on states to examine an asylum request submitted at their border, within their territory or jurisdiction.

In addition to legal instruments, state practice has an important impact on the treatment of refugees. In some cases, states may decide that they are not responsible for providing international protection to a refugee on the grounds that they have obtained or could have obtained protection in another country. The former is usually referred to as 'first country of asylum' and the latter is a 'safe third country'. In both cases, the obligations under the *non-refoulement* principles apply, that is to say, even if states refuse to examine an asylum application in substance, they should have at least a preliminary procedure to ensure that an applicant is not removed to a country where their life or freedom may be endangered. This obligation applies regardless of whether the removal takes place directly to such country or via a third country.

²⁹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

³⁰ The 1951 Convention was drafted shortly after the end of World War II and focused on people who became refugees as a result of events in Europe occurring before 1 January 1951. Following the outbreak of various crises throughout the world in 1950s and 1960 it became necessary to remove the temporal and geographical restrictions of the Convention. This was done in 1967 through a separate Protocol.

³¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

³² This means that even states which are not signatories of the Refugee Convention are also bound by it. The principle is not limited to refugees.

In ‘first country of asylum’ cases, protection can be denied to an applicant who has already been granted protection in another country provided that this protection continues to be available. Concerning safe third countries, where it is claimed that the person seeking asylum could or should have sought protection, a simple passage through a safe country en route does not mean that a state could argue that that state is responsible for protecting the applicant: a number of other conditions must be met first. The applicant should have meaningful links or connections with this country; there should be a guarantee that the applicant should be admitted, will be able to claim asylum, will be protected against *refoulement*, and will be treated in accordance with international standards. The assessment whether the country is safe for a particular applicant should be made individually and she should be given the opportunity to rebut the presumption of safety.

In addition to the concepts identified above, states have also used the concept of ‘safe country of origin’, i.e. a country where in general there is no risk of persecution. Applications from such countries may be routed through special procedures but should nevertheless be examined individually on their merits, ensuring that the presumption of safety is rebuttable.

Recognised refugees enjoy the rights: not to be expelled, not to be punished for illegal entry, access to the labour market, housing, education, public relief and assistance, freedom of religion, access to court, freedom of movement within the territory and the right to be issued identity and travel documents. Under the terms of Refugee Convention, the states are also obliged to facilitate access to citizenship. Refugees also benefit from the principle of family reunion enshrined in a number of international and European legal instruments as well as in the Final Act of the UN

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons adopting the Refugee Convention.³³

Certain categories of individuals are excluded from refugee protection: those who have committed a crime against peace, a war crime, a crime against humanity or a serious non-political crime outside their country of refuge; or those who are guilty of acts contrary to the purposes and principles of the United Nations.

The Refugee Convention also envisages the cessation of refugee status if the refugee voluntarily re-avails themselves of the protection of their country of nationality or if the circumstances under which she was recognised as a refugee no longer exist. This usually requires a significant and non-temporary change in the country of origin.

In addition to the Refugee Convention, a number of soft law instruments and UNHCR guidelines have shaped the content of refugee protection.

3.2. Subsidiary Protection

The Refugee Convention contains very strict criteria defining who is a refugee. However, states have recognised that a number of people who do not fall within the tight scope of the Refugee Convention may nevertheless be in need of protection. Such kind of protection is known as ‘complementary protection’. The term itself is not defined in international law but has been used to describe evolving state practice developed on the basis of various legal obligations and humanitarian considerations.

This report focuses on the law and practice of complementary protection in Europe which reflects states’ obligations under the European Convention on Human Rights, EU law and EU Charter of Fundamental Rights.

³³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1

Since the adoption of the EU Qualification Directive^{34 35}, all EU Member States created a ‘subsidiary protection’ status under Article 2 of the Directive, stating:

a person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.

Article 15 of the Directive defines ‘serious harm’ as:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Articles 15a and 15b reflect Member States obligations under European and international law; the prohibition of torture or inhuman and degrading treatment or punishment is enshrined in Article 3 ECHR. Article 15c derives from Member State practice of providing protection to individuals fleeing from armed conflict. Nevertheless, the Directive limits the scope of beneficiaries of subsidiary protection in such situations by specifying a particular kind of threat and limiting it to individual threats.

The Directive also specifies the grounds for exclusion from subsidiary protection status which are wider than those found in the Refugee Convention.

3.3. Other Protection Statuses

There may still be instances where an applicant would not qualify for humanitarian protection but could nevertheless be granted protection under Article 3 of the European Convention on Human Rights (ECHR). For example, not every civilian in an armed conflict would meet the strict definition of Article 15c but they may nevertheless be protected from return.

As mentioned above, both the Refugee Convention and the Qualification Directive contain a number of provisions excluding people from refugee or subsidiary protection status. At the same time, the prohibition of subjecting someone to torture or inhuman and degrading treatment under Article 3 is absolute, providing a broader basis for protection from removal.

Article 8 of the ECHR protects the individual’s right to respect for their family and private life. Unlike Article 3, this is a qualified right which states can interfere, provided that they do so proportionately and in a pursuit of a legitimate aim. Thus, it will only be in certain cases that a removal of a foreigner to another country would constitute a breach of Article 8 and merit protection by the state.

States can also grant protection in cases where a removal would breach any of the other provisions of the ECHR.

States are also free to grant protection on compassionate grounds, depending on the individual’s circumstances.

In some countries individuals whose return would be contrary to the states’ obligations under international law may not receive a protection status but a ‘tolerated’ or discretionary leave which normally entails less rights for the applicant and can be revoked at any time.

³⁴ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as Refugees or as Persons who otherwise need of international protection and the content of the protection granted

³⁵ The Qualification Directive was recast in 2011: Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast) [2011] OJ L 20.12.2011, p. 337/9

3.4. The Common European Asylum System

Since 1999, EU Member States have been taking steps to build a Common European Asylum System (CEAS), consisting of common standards on the reception of asylum seekers, qualification for refugee and subsidiary protection status and asylum procedures. In addition, they have also established the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in an EU Member State.

Following the adoption of these minimum standards on reception, qualification and procedures, Member States started negotiating a recast version of each Directive, aiming to move from minimum to common standards in each area. Most of these instruments are still being negotiated. The UK Government has decided not to opt into the recast Directives.³⁶

In addition, EU Member States have also adopted a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals³⁷ (Return Directive) which regulates issues such as return decisions, voluntary and forced returns and detention pending removal. The UK Government has opted out of this Directive and is consequently not bound by its provisions.

The Directives establishing minimum standards are discussed below:

Reception Conditions Directive³⁸

The Directive establishes the minimum reception conditions to which asylum seekers are entitled while their claim is being processed. These include the right to be informed promptly of their rights and responsibilities in a language that they may be reasonably supposed to understand and to be issued a document confirming their status as an asylum applicant. Asylum seekers should generally be entitled to freedom of movement within the territory of the state or parts thereof but this may be limited under certain conditions.

Member States must guarantee the availability of material reception conditions including accommodation, food and clothing. These may be provided in cash or in kind and may be limited to applicants who do not have sufficient means to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.

All applicants are entitled to necessary medical care which should include at least emergency care and essential treatment of illness while applicants with special need should receive medical or any other assistance. Asylum seekers should be granted access to the labour market if they have been waiting for an initial decision on their claim for more than a year, subject to conditions laid down by Member States. Children have access to education. Reception conditions may be reduced or withdrawn under certain conditions.

³⁶ "The Government do not support the creation of a Common European Asylum System (CEAS) as a whole. We believe that this focuses member states on "paper based" legislative solutions for problems which really need to be addressed through practical co-operation. Nonetheless we support two elements of CEAS: the Dublin and EURODAC Regulations and have opted in to both. These reduce abuse of the asylum system by tackling "asylum shopping." Mark Harper MP, Minister of State for Immigration; HC Deb, 11 December 2012, c199W

³⁷ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

³⁸ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers

Qualification Directive³⁹

The purpose of the Directive is to establish minimum standards for the qualification of third country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within EU Member States, and also the minimum levels of rights and benefits attached to the protection granted. The Directive outlines the respective duties of applicants and Member States during the process of assessment of facts and circumstances, provides guidance concerning applications submitted *sur place*⁴⁰, defines what constitutes actors of persecution and protection, and sets out when an 'internal protection alternative'⁴¹ may be reasonably considered to be available. It sets out the qualifications for being a refugee and defines what qualifies as acts of and reasons for persecution. It outlines the conditions under which a person may be excluded from refugee status, and when refugee status may cease or be revoked. It sets out the qualification for subsidiary protection and outlines what constitutes 'serious harm'. The Directive establishes when a person may be excluded from subsidiary protection or when that status may cease or be revoked.

In terms of the benefits attached to international protection, the Directive details the conditions under which persons with refugee status and subsidiary protection have rights to residence permits, travel documents, access to employment, education, social welfare, health care, accommodation, and integration facilities. It also sets out provisions for maintaining family unity.

Procedures Directive⁴²

The purpose of the Directive is to establish minimum standards for procedures within EU member states for granting and withdrawing refugee status. It details basic principles and guarantees, including access to the asylum procedure, the right to remain in the Member State pending the examination of an asylum claim, requirements for the examination of asylum applications, and obligations for conducting a personal interview. The Directive includes provisions on legal assistance and representation, and a prohibition on detaining asylum applicants for the sole reason that they have claimed asylum.

It sets out provisions on asylum procedures at first instance, including on the examination procedure, inadmissible applications, the first country of asylum concept, safe third countries, and safe countries of origin, subsequent applications, border procedures and the exceptional application of the safe third country concept.⁴³

The Directive covers procedures for the withdrawal of refugee status, and includes provisions on appeals, confirming the right to an effective remedy (i.e. being able to challenge the decision in court).

³⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as Refugees or as Persons who otherwise need of international protection and the content of the protection granted

⁴⁰ Where the person was not a refugee when they left their country of origin but claims fear of persecution due to changes in the situation in the country.

⁴¹ Where it is deemed that another part of the country which the person fled from is safe for them to return to.

⁴² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status

⁴³ For a critical analysis of the highly controversial nature of some of these provisions, see S Craig and M Fletcher, '*Deflecting Refugees: A Critique of the EC Asylum Procedures Directive*' in P Shah (ed) *The Challenge of Asylum to Legal Systems* (London, Cavendish Publishing, 2005) 53; and C Costello, *ILPA Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (30 April 2004) (London, ILPA, July 2004), <http://www.ilpa.org.uk/data/resources/13178/04.07.00-ILPA-Analysis-Critique-EC-directive-Granting-Withdrawing-Refugee-Status..pdf>

Dublin II Regulation⁴⁴

The aim of the Regulation is to ensure that one Member State is responsible for the examination of an asylum application, to deter secondary movements and multiple asylum claims and to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure.

Hierarchical criteria are defined in order to identify the Member State responsible for each asylum application. This is predominantly the State through which the asylum seeker first entered, or the State responsible for their entry into the territory of the EU Member States, Norway, Iceland and Switzerland.

The application of the Dublin Regulation is facilitated through EURODAC: a database containing the fingerprints of all asylum applicants over the age of fourteen as well as those of foreign nationals apprehended in connection with an irregular crossing of an external border.

Temporary Protection⁴⁵

Temporary protection is a procedure of an exceptional character during an emergency situation that involves a mass influx of displaced persons. Individual refugee status determination is not immediately practicable in such a situation, because of the time and evidence required to do a full and fair evaluation of protection needs. Under such conditions it may be necessary to provide a generalised form of protection to all members of a large group, until they are able to enter a regular refugee status determination process.

The EU Temporary Protection Directive aims to harmonise temporary protection for displaced persons in cases of mass influx on the basis of solidarity between Member States. The Directive has so far not been used in practice.

In addition to the Directives and Regulations of the Common European Asylum System, the Charter of Fundamental Rights⁴⁶ contains a number of provisions relevant for the protection of refugees. In addition to the prohibition of *refoulement*, it states that the right to asylum should be guaranteed in accordance with the Refugee Convention and EU law. The charter is binding on all EU institutions and on EU Member States when implementing EU law.⁴⁷

⁴⁴ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

⁴⁵ Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof

⁴⁶ Charter of Fundamental Rights of the European Union 2010/C 83/02

⁴⁷ For more detail of the Charter of Fundamental Rights in relation to the protection of the rights of asylum seekers and refugees, see S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 *European Journal of Migration and Law* 141-169.

⁴⁸ Reynolds, S. Muggeridge, H. (2008) *Remote Controls: How UK border controls are endangering the lives of refugees* London: Refugee Council <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/researchreports/Remote%20Controls.pdf>

3.5. The Common European Asylum System in Practice

One of the major criticisms of the Common European Asylum System is that it places a considerable strain on countries at the European Union's eastern and southern external borders, forcing these states to cope with a disproportionately large number of refugees seeking protection in the EU. Most of these countries were previously transit countries who had not introduced efficient asylum procedures designed to deal with a large number of refugees and increased flows of migrants and refugees have further undermined their capacity to improve them. This situation has arisen as a result of the confluence of a number of factors including the lack of legal route to enter the EU in order to seek protection (so-called externalisation), among them restrictive visa regulations, carrier sanctions, immigration liaison officers and the provisions of the Dublin Regulation.⁴⁸ One of the goals of the Dublin Regulation was to ensure that asylum seekers are distributed fairly among the Member States and that their application for protection is examined by one Member State. The system operates on the assumption that all Member States adhere to similar standards when receiving people seeking asylum, examining their requests and granting protection as provided by European and international law. This is also reflected in the legal provisions in most EU Member States which generally allow only non-suspensive appeals against a removal under Dublin⁴⁹ as they operate under the presumption that each state complies with the Refugee Convention, the European

Convention on Human Rights and the EU Charter of Fundamental Rights. In a recent judgement on the return of an asylum applicant to Greece, however, the European Court of Justice has ruled that such presumption can never be conclusive and Member States cannot transfer a person to a Member State *"where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment."*⁵⁰ Previously, the European Court of Human Rights had ruled that a return of an asylum seeker from Belgium to Greece amounted to a violation of Article 3 of the ECHR.⁵¹ As a result of these judgements, EU Member States have suspended returns to Greece.

Criticisms levied against Greece and other EU Member States point to serious shortcomings of their asylum systems, the extremely low rate of recognising asylum seekers as refugee (and disparity among Member States), inadequate and difficult to access judicial remedies and inadequate conditions for the reception of people seeking asylum. The automatic detention of asylum seekers and risk of chain *refoulement* are also seen as grounds for concern.

In order to alleviate the pressure on countries at the external borders, EU member states have agreed to provide financial and administrative assistance, facilitate practical cooperation through Frontex⁵² and EASO⁵³ and establish a pilot project on the re-location of refugees granted protection on a voluntary basis.⁵⁴

⁴⁹ An appeal does not suspend the removal.

⁵⁰ Court of Justice of the European Union, Judgment in Joined Cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform

⁵¹ European Court of Human Rights, *M.S.S. v. Belgium and Greece* (no. 30696/09)

⁵² European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

⁵³ European Asylum Support Office

⁵⁴ Pilot Project for Intra-EU relocation from Malta, EUREM; <http://www.mjha.gov.mt/page.aspx?pageid=202>

Refugees and people seeking asylum, just like any other human beings, are entitled to be treated in accordance with international human rights standards. Therefore, refugee policy should reflect global human rights and principles as established by international law. This Chapter will describe existing international human rights law and will outline basic principles which should underpin any public policy, including asylum and refugee policy.

The Universal Declaration of Human Rights (UNDHR) is the foundational document of the UN human rights system, setting out fundamental human rights to which all human beings around the world are entitled simply by virtue of their humanity. While the declaration itself is not legally binding, the principles and rights which it proclaims have been accepted as a common standard, with a number of its provisions having the status of customary international law.

The UNDHR has inspired the creation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights which effectively translated the rights proclaimed by the charter into binding international law. These three instruments have established what is known as the International Bill of Human Rights.

Currently, there are nine core international treaties⁵⁵ dealing with specific human rights: the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Convention on the Rights of the Child, the International Convention on the Protection of All Migrant Workers and Members of Their Families, the International Convention on the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities.

These international human rights treaties, along with customary international law, soft law measures and state practice have established the following general principles which should underpin any public policy, including refugee policy, if this policy is to comply with international human rights standards.

- **Humanity and Dignity:** UNDHR proclaims the fundamental role of recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. Consequently, all human beings are entitled to be treated with humanity and respect for their dignity.
- **Universality:** Human rights apply to every human being, anywhere in the world.
- **Equality and Non-discrimination:** Every human being has the same rights; all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
- **Solidarity:** This is a broader concept and principle that includes sustainability in international relations, the peaceful coexistence of all members of the international community, equal partnerships and the equitable sharing of benefits and burdens.⁵⁶

Despite the existence of various instruments enshrining the principles identified above, it has been recognised that certain groups have not been able to exercise and enjoy their fundamental rights effectively. Therefore, specific instruments aimed at ensuring that women and persons with disabilities have equal opportunities and are not discriminated against have also been developed. The particular vulnerability of children and the need to safeguard and promote their welfare and rights has also been acknowledged.

⁵⁵ See: <http://www2.ohchr.org/english/law/>

⁵⁶ UN Human Rights Council, A/HRC/21/L.19, 24 September 2012.

This Chapter sets out the domestic legal obligations of the Scottish Parliament and Scottish Government. It also considers the values and principles underlying both the Scottish Parliament and Scottish Government's visions for Scotland.

In addition to international human rights obligations, states are also bound by domestic laws and values which underpin, constrain and guide their public policies. With regard to fundamental rights, two documents are of particular importance in the UK: the Human Rights Act 1998,⁵⁷ which codified the protection of the rights enshrined in the European Convention on Human Rights in domestic law and the Equality Act 2010⁵⁸ which consolidated existing anti-discrimination legislation and introduced a public sector equality duty.⁵⁹ The duty requires public authorities to have due regard to the need to eliminate discrimination, harassment and victimisation; advance equality of opportunity between persons who share a relevant protected characteristic and those who do not; and foster good relations between these groups. The relevant 'protected characteristics' under the Act are: age, disability, gender reassignment, pregnancy and maternity; race; religion or belief; sex; sexual orientation.⁶⁰

The Scottish Government and the Scottish Parliament are bound by the provisions of the Human Rights Act and the Equality Act. Concerning the former, under the Scotland Act 1998, actions by members of the Scottish Government and legislation passed by the Scottish Parliament must be compatible with ECHR. Any legislation or actions found to be incompatible by the courts are liable to be declared invalid.⁶¹

While according to the Scotland Act 1998⁶² "equal opportunities" is a reserved matter, the Scottish Parliament has the power to encourage equal opportunities and compliance with equality law with a wider definition of equality than contained in primary UK equality legislation.⁶³ In addition, it has the power to impose duties on Scottish public bodies or cross-border bodies with responsibility for devolved matters, and can require them to make arrangements to ensure they operate with due regard to the need to meet equality law.

Equality is one of the founding principles of the Scottish Parliament⁶⁴ and has been consistently promoted as a cornerstone of the Scottish Government's policy.

In a number of policy documents issued since devolution the Scottish Government has set out its vision for Scotland, and the values and principles on which this vision is based.⁶⁵ These values and principles have been championed by all governments since devolution and enjoy substantial cross-party consensus in the Scottish Parliament. Therefore, it can be expected that the policies of any Scottish Government, regardless of its political composition, will reflect these genuinely *Scottish* values. The following general principles, relevant to refugee policy, have been distilled from these documents:

- **Equality of opportunity;**
- **Inclusion;**
- **Compassion; and**
- **Adherence to and promotion of universal human rights principles and democratic values, and shared responsibility.**

⁵⁷ See: <http://www.legislation.gov.uk/ukpga/1998/42/contents>

⁵⁸ See: <http://www.legislation.gov.uk/ukpga/2010/15/contents>

⁵⁹ s. 149 of the Equality Act 2010.

⁶⁰ s. 149 (7) of the Equality Act 2010.

⁶¹ Unlike Acts issued by the UK Parliament which are not invalidated by a declaration of incompatibility.

⁶² See: <http://www.legislation.gov.uk/ukpga/1998/46/contents>

⁶³ Scotland Act 1998, Schedule 5, L2. For a detailed analysis of equal opportunities legislation and devolution see O'Cinneide, C. (2009) *The Place of Equal Opportunities in the Devolution Settlement: A Legal Analysis*, Equality and Human Rights Commission.

⁶⁴ The principles are: participation, openness, power-sharing and equality.

⁶⁵ See for example: *Europe and Foreign Affairs: Taking forward our National Conversation; Working for Scotland: the Government's Programme for Scotland 2012-2013*.

Further to these values and principles, the Scottish Government has also broadly endorsed the views of the Christie Commission,⁶⁶ a review into the future of public service delivery in Scotland. Key principles underpinning the Commission's recommendations are:

- **Empowering individuals and communities;**
- **Partnerships to integrate services;**
- **Preventing negative outcomes; and**
- **Efficiency.**

In order to ensure that there is no discrepancy between the publicly expressed commitment to the above values and principles and the treatment of asylum seekers and refugees in Scotland, the Scottish Government's policy and practice towards these groups must reflect these general principles.

⁶⁶ Commission on the Future Delivery of Public Services, 29 June 2011; <http://www.scotland.gov.uk/Resource/Doc/352649/0118638.pdf>

This Chapter describes current competences of the UK and Scottish Governments⁶⁷ in relation to asylum, and thus also the status quo in 2014 if no constitutional changes are made after the referendum. Against these competences, it critically assesses aspects of current asylum and refugee policy in light of the principles identified in the previous chapter.

We assess particular policies within the following six areas:

- Access to the territory and procedure;
- Assessing the asylum claim in a fair and efficient asylum process;
- Reception and integration of asylum seekers;
- Refugee integration;
- Responsibility-sharing; and
- Return.

The assessment is based on a variety of sources, including research reports and evaluations by government, UNHCR, academics and NGOs, as well as Scottish Refugee Council's own research and experience in assisting refugees.

Following the assessment, a number of recommendations on how to rectify the problems or improve on practice are made. As the aim of this Chapter is to evaluate the *policies* of the UK and Scottish Governments in light of their *current competences*, recommendations are made to each government, taking into account the existing division of powers.

The list of policies included is not meant to be exhaustive and does not represent a comprehensive assessment of asylum and refugee policy in the UK. Rather, it highlights a number of areas which we have identified as problematic.

	Competence	Policy / Practice	Policy Recommendations
Ensuring access to the territory and procedure			
Protection from non-refoulement	UK Government ⁶⁸ ; Competence exercised through the Secretary of State for the Home Department (SSHD), (Home Office) and UK Border Agency (UKBA)	No legal route to the UK to seek asylum Externalisation practices (visas, juxtaposed border controls, Immigration Liaison Officers, carrier sanctions) impede access Refusal of entry and return under (informal) bilateral readmission agreements may result in chain <i>refoulement</i>	UK Government: Review bilateral readmission agreements and practice to ensure refugees have access to the territory and procedure
Access to UK territory and procedure for the purpose of determining protection needs	UK Government	Asylum seekers returned under 'safe third country' provisions (Dublin II) do not have their claims examined in substance and may be exposed to (chain) <i>refoulement</i>	UK Government: Assume responsibility for examining the applications of asylum seekers in the UK where the Member State responsible under the Dublin II Regulation does not treat asylum seekers in accordance with international and EU law obligations
		Apart from families and unaccompanied minors, people in Scotland seeking protection must travel to Croydon to register a claim for asylum, the only Asylum Screening Unit (ASU) in the UK; vast majority of claims for asylum are 'in-country' applications	UK Government: Ensure all asylum seekers in Scotland can lodge a claim in Scotland Scottish Government: Urge UK Government to allow asylum seekers in Scotland to be able to lodge a claim in Scotland ⁶⁹

	Competence	Policy / Practice	Policy Recommendations
Assessing the asylum claim in a fair and efficient asylum process			
Assessment of asylum claim by trained and professional responsible authorities	UK Government	Detailed guidance for case workers and training available but 'culture of disbelief' may have a negative impact on decisions	UK Government: Improve training and guidance; tackle 'culture of disbelief'; consider establishing an independent agency dealing only with asylum applications
Access to legal representation and organisations providing information and support	UK Government but access to legal aid competence of Scottish Government ⁷⁰	Difficult for asylum seekers detained under fast track (DFT) ⁷¹ despite access to legal aid; ⁷² legal aid not available at the initial stage in normal asylum procedures in England and Wales ⁷³ but may be available in Scotland through Scottish Legal Aid Board; voluntary sector agencies are funded to provide independent advice to assist them to navigate the asylum and asylum support system	UK Government: Extend 'early legal advice project' in England and Wales; claims for asylum should not be heard in detention - in the interim improve access to legal aid for DFT; ensure continued provision and access to independent, competent and professional advice Scottish Government: Maintain legal aid provision in Scotland; improve quality of legal advice
The right to appeal an asylum decision and to remain in the country until this has been determined.	UK Government but access to legal aid competence of Scottish Government;	Limited in 'safe third country' (mostly Dublin II) cases (judicial review); non-suspensive appeal in safe country of origin cases ⁷⁴ ; legal aid on appeal subject to merits test ⁷⁵ in England and Wales;	UK Government: All asylum seekers should have access to appeals with suspensive effect
Effective remedies to challenge asylum decisions through tribunals and courts (with appropriate legal aid) should be equivalent to those in other areas where decision-making determines a person's fundamental rights	UK Government but access to legal aid competence of Scottish Government; Court of Session has locus within onward appeals and judicial reviews ⁷⁶	Current proposals ⁷⁷ aim to restrict onward appeals to the Court of Session (Inner House) so that only cases which can demonstrate an issue of "public interest" can be considered; proposals to transfer supervision from Court of Session (Inner House) to Upper Tribunal of the Immigration and Asylum Chamber in asylum and immigration judicial reviews	UK Government: End proposals to restrict avenues to the Court of Session which threaten to undermine the fair and effective procedures that are essential to protect asylum seekers fundamental rights Scottish Government: To maintain administrative law tradition of courts reviewing tribunals the Scottish Government should resist these proposals to introduce a "public interest" threshold. The existing "error of law" threshold is a sufficient restriction on onward appeals; the Scottish Government should resist proposals to transfer asylum judicial reviews from the Court of Session (Inner House)
'Front-loading' (Concentrating efforts and resources on getting asylum decisions right first time)	UK Government but access to legal aid competence of Scottish Government	Positive attempts to focus on quality of decisions: Early Legal Advice Project running in Midlands; Key Worker Pilot in North West; Family Key Pilot	UK Government: Continue monitoring quality of asylum decisions; evaluate and roll out successful pilot projects; improve training of staff Scottish Government: ensure all asylum seekers access and benefit from early interventions of legal advice before the substantive asylum interview

	Competence	Policy / Practice	Policy Recommendations
Assessing the asylum claim in a fair and efficient asylum process			
Dealing with vulnerable applicants	UK Government ⁷⁸	Identification problematic at screening unit; ⁷⁹ vulnerable applicants at risk of being routed to DFT and not removed despite existing guidance ⁸⁰ ; insufficient use of flexibility to extend timescales to assess the claim	UK Government: Improve screening process to identify vulnerable applicants early and act on their needs; conduct holistic vulnerability assessment at key intervention points throughout the procedure (including at the border or while asylum seeker is in detention); ensure vulnerable applicants are not detained
Unaccompanied asylum-seeking children (UASC)	UK Government / Scottish Government ⁸¹	Age disputes are common; UKBA wishes to trial the X-raying of age disputed cases; age assessments conducted by Local Authorities using inconsistent guidance and insufficient training; conflict of interest: if Local Authority assesses the child as below 18 they must take them into their care; no system of guardianship ⁸² Scotland: few Scottish Local Authorities apart from Glasgow and Edinburgh have experience in conducting age assessments; best interest assessments not always conducted consistently throughout the procedure; procedures not child-friendly; no permanent system of guardianship	UK Government: Improve training and guidance on identifying UASC; Improve training and guidance on assessing children's claims ensure best interest of the child is represented and considered throughout the procedure; ensure that interviews take place in a child-friendly environment Scottish Government: Promote age assessment tool ⁸³ and provide Local Authority training; ensure sustainability and consider statutory underpinning of Scottish Guardianship Service ⁸⁴
Detention of asylum seekers	UK Government	Although under EU law asylum seekers should not be detained solely for seeking asylum, current DFT applies to any claim that could be decided quickly (exclusions apply); no clear criteria for routing to DFT	UK Government (long-term): Abolish the detention of asylum seekers solely for the purpose of assessing their claim UK Government (short-term): Ensure detention in DFT and Detained Non-Suspensive Appeals process is not arbitrary, is only used if necessary and proportionate in each case, following a careful consideration of available alternatives and should always be for the shortest possible time; detention should not be imposed on vulnerable applicants

	Competence	Policy / Practice	Policy Recommendations
Reception and Integration of Asylum Seekers			
Accommodation and Financial support	UK Government but Scottish Government has a locus ⁸⁵	No-choice accommodation in dispersal areas; support for asylum seekers in the procedure separate from mainstream support (equivalent to 70% of income support initially but currently around 50%); insufficient to meet needs and cumbersome to administer resulting in destitution; no support for refused asylum seekers forcing them into abject poverty; some may be granted cashless support and accommodation subject to strict conditions ⁸⁶	<p>UK Government: Introduce end-to-end asylum support to be part of and administered through mainstream welfare support.⁸⁷ Support should be provided at equivalence to nationals based on the need to ensure a dignified standard of living.</p> <p>Scottish Government: Work together with UK Government: to develop dispersal policies which benefit asylum seekers and host communities e.g. by ensuring communities are prepared for new asylum applicants and asylum seekers are informed about and can access services</p>
Entitlement to health care	Scottish Government	Full access to free healthcare in Scotland ^{88 89}	Scottish Government: Continue to provide full access to healthcare and ensure people access this right
Access to Education (primary, secondary, FE and HE)	Scottish Government ⁹⁰	Access to primary and secondary education not problematic; however, there are practical limitations on access to higher education: asylum seekers must pay 'overseas' fees; in Scotland, some asylum seekers have been eligible for tuition fee support; ⁹¹ for Further Education asylum seekers receive fee waivers for non-advanced part-time courses. Some refused asylum seekers are also eligible. However there is a lack of clarity. ⁹²	Scottish Government: Expand the scope of asylum seekers eligible for HE and FE fee support ⁹³
Language Classes	Scottish Government	Entitlement under policy to ESOL is granted immediately in Scotland. ⁹⁴	Scottish Government: Expand ESOL provision to reduce waiting times and facilitate integration
Vulnerable groups	UK Government / Scottish Government ⁹⁵	<p>No robust and consistent identification procedure with result that vulnerable people are placed in detention or inappropriate accommodation with inadequate service provision to meet their needs;</p> <p>Lack of guardianship system for UASC impacts negatively on children forced to navigate complex procedures with little information or understanding about their rights; pilot Guardianship project in Scotland</p>	Scottish Government: Urge Local Authorities to introduce holistic vulnerability assessment at key intervention points; provide training on vulnerability and clarify Local Authority responsibilities; improve access to mental and physical health care; review all services provided to asylum seekers under devolved competences to ensure they meet the needs of vulnerable persons; support continuation of Scottish Guardianship Service and consider the benefits of placing on a statutory footing
Right to work for people seeking asylum	UK Government	Currently only possible if no decision has been made on an application after one year, asylum seekers may only take jobs on shortage occupation list; denying asylum seekers the possibility to support themselves leads to skills deterioration and has a negative impact on self-esteem ⁹⁶	<p>UK Government: asylum seekers should be allowed to work, either:</p> <ul style="list-style-type: none"> • after six months if there has been no decision on their application • following the screening interview, subject to cooperation with authorities to establish identity⁹⁷ <p>Scottish Government: should continue to express its opposition to the current policy</p>

	Competence	Policy / Practice	Policy Recommendations
Refugee Integration			
Secure residence status	UK Government	Current five-year status affords rights similar to those of nationals but does not provide enough security and is not conducive to integration; ⁹⁸ employers may not be willing to invest in workers with no permanent residence	UK Government: Refugees should be granted permanent status (Indefinite Leave to Remain) upon recognition ⁹⁹
Citizenship	UK Government	Costs of acquiring citizenship prohibitively high; current tests do not take into account specific situation of some refugees who may be disadvantaged; under current policy refugees must wait six years (+ time in the asylum procedure)	UK Government: Ensure affordability and accessibility of citizenship procedure
Integration support	UK Government ¹⁰⁰ / Scottish Government	Currently financial and accommodation support provided by UKBA ends 28 days after the person has been granted refugee status which is insufficient to ensure they have completed transition to mainstream support and found appropriate housing; UKBA no longer provides dedicated integration advice to assist refugees ¹⁰¹ Refugees in Scotland can apply for housing in any local authority regardless of where they lived after dispersal ¹⁰² but refugees have little information about housing and employment possibilities in various Local Authorities in order to make an informed choice; the Scottish Government is currently reviewing how it and statutory bodies support the integration of refugees and asylum seekers in Scotland.	UK Government: Extend 28-day period on the basis of an individual assessment; Reinstate dedicated advice support to assist refugees to rebuild their lives Scottish Government: Ensure implementation of recommendations of new strategy; raise concerns with the UK Government where reserved competences impact on refugee integration in Scotland
Family reunion	UK Government	Obstacles to family reunion ¹⁰³ currently include restrictive definition of 'family'; preventing child refugees from sponsoring any family members; costly procedure and conditions for reuniting with other family members and post-flight spouses	UK Government: Consider expanding the definition of 'family'; allow child refugees the right to be reunited with their families; support refugees unable to meet the travel expenses of family members ¹⁰⁴

	Competence	Policy / Practice	Policy Recommendations
Responsibility sharing			
European Union	UK Government but Scottish Government has locus ¹⁰⁵	UK Government has chosen not to participate in any solidarity and responsibility-sharing mechanisms at the EU level, including the recast Directives of the Common European Asylum System aimed at increasing standards across the EU or relocation of refugees from countries experiencing disproportionate pressure on their asylum system	<p>UK Government: Reappraise position on not seeking to improve EU-wide standards</p> <p>Scottish Government: Engage more with UK Government on promoting responsibility-sharing and raising standards in the EU</p>
Global	UK Government but Scottish Government could be involved	Only 750 refugees are resettled under the Gateway Programme annually, despite UNHCR's estimate of 200,000 refugees in need of resettlement and the availability of considerable EU funding	<p>UK Government: Increase number of resettlement places</p> <p>Scottish Government: Encourage Local Authorities in Scotland to engage in current resettlement programme; identify and reduce barriers to their participation; consider and explore other means and possibilities for resettlement in Scotland with the UK Government</p>

	Competence	Policy / Practice	Policy Recommendations
Return			
Status for those asylum seekers whose claims have been refused but who cannot be returned	UK Government	Some asylum seekers whose claims have been refused cannot be returned for various reasons but are nevertheless not granted residence status, forcing them to live in destitution for years ¹⁰⁶	UK Government: Asylum seekers who cannot be returned should be granted legal status
Detention pending return	UK Government ¹⁰⁷	Currently, there is no statutory limit to detention pending return, resulting in some cases of asylum seekers spending unacceptably long periods in detention; inadequate procedures for assessing vulnerability may result in detention of vulnerable applicants; concerns around access to justice for detainees in Dungavel who are transferred often arbitrarily around the UK detention estate and thus away from the jurisdiction of legal representatives in Scotland	<p>UK Government: Detention pending return must not be arbitrary, should be used only if necessary and proportionate in each case, following a careful consideration of available alternatives and should always be for the shortest possible time where removal is imminent;</p> <p>Detention should never be imposed on vulnerable applicants</p> <p>Scottish Government: Make the case to the UK Government to ensure vulnerable asylum seekers are not detained in Scotland; ensure continued access to quality legal representation for detainees</p>
Enforcement of return¹⁰⁸	UK Government	Currently conducted by private companies on behalf of UKBA, raising serious concerns about the treatment of people being returned ¹⁰⁹ ; special return process for families with children ¹¹⁰	UK Government: Abolish the outsourcing of enforced returns to private companies; consider implementing early engagement strategy (e.g. Key Worker project) for other groups of asylum seekers beyond families with children

Asylum and Refugee Policy in the UK under Current Competences of the UK and Scottish Governments

Conclusions and Recommendations

The Chapter has described the current powers of the UK and Scottish Governments in relation to asylum and thus the constitutional settlement that would exist if no changes to powers are made after the referendum.

Under the current constitutional settlement, immigration and nationality are reserved matters under schedule 5 of the Scotland Act 1998, as such the UK Government through the Secretary of State for the Home Department (SSHD), Home Office, and UK Border Agency (UKBA) exercises power across a range of policy areas which impact on the protection, welfare and integration of refugees. These include access to the territory, determining asylum claims, providing welfare and accommodation to asylum seekers who would otherwise be destitute; granting immigration leave and citizenship; detention and removal.

Human beings however are not 'reserved' and the Scottish Government meanwhile has competence in a range of areas of social policy, welfare and justice functions which primarily impact on the reception and integration of people seeking asylum and refugees in Scotland. However the Scottish Government also exercises competence in areas which relate to the asylum process such as child welfare and protection and the provision of legal representation.

The Chapter provides an assessment of key policies of the two Governments in the exercise of their respective powers and a series of recommendations. As these represent the current constitutional settlement, they could be enacted now to ensure a fair and humane system for refugees in Scotland as well as across the whole of the UK. As stated at the beginning of this Chapter, the list of policies included should not be read as exhaustive.

Access to the territory and procedure

- **The UK Government** should review bilateral readmission agreements and practice to ensure refugees have access to the territory and the asylum procedure in the UK. The UK Government should assume responsibility for examining the applications of asylum seekers in the UK where other EU Member States responsible under the Dublin II Regulation do not treat asylum seekers in accordance with international and EU law obligations;
- **The UK Government** should ensure that refugees newly-arrived in Scotland seeking protection, often destitute, and those residing in Scotland seeking protection can access the UK asylum procedure in Scotland. **The Scottish Government** should press the UK Government on this issue as a matter of equality of access to the asylum procedure;

Assessing the asylum claim in a fair and efficient asylum process

- **The UK Government** should continue to improve training and guidance to asylum decision-makers and tackle 'culture of disbelief' with the UK Border Agency. It should consider establishing an independent agency dealing only assessing asylum applications;
- **The Scottish Government** should maintain the level of legal aid provision for asylum applicants in Scotland and ensure all asylum seekers in Scotland access and benefit from early interventions of quality legal advice before the substantive asylum interview. The **UK Government** should extend early legal advice projects in England and Wales and improve access to legal advice in the Detained Fast Track procedures;
- **The UK Government** should ensure the continued provision of and access to independent, competent and professional advice to assist people seeking asylum to navigate the complexities of the asylum and asylum support processes;

- **The UK Government** should end and **the Scottish Government** should resist proposals to restrict avenues to the Court of Session (Inner House) which threaten to undermine the fair and effective procedures that are essential to protect asylum seekers' fundamental rights and the principle of courts reviewing tribunal decisions;
- **The UK Government** must improve the initial asylum screening process to identify vulnerable applicants early and act on their needs. Assessments should be conducted throughout the asylum procedure at key points;
- **The UK Government** should improve training and guidance on identifying children. Invasive medical interventions should not be used to assess age. **The Scottish Government** should promote the age assessment tool and guidance developed by Glasgow City Council and Scottish Refugee Council for social workers in Local Authorities across Scotland. **The UK Government** should ensure the best interest of the child is represented and considered throughout the asylum system and develop a system of guardianship. **The Scottish Government** should support and further develop the Scottish Guardianship Service including placing it on a statutory footing;
- **The UK Government** should abolish the detention of people seeking asylum solely for the purpose of assessing their claim. In the interim, stop the arbitrary use of the Detained Fast Track and Detained Non-Suspensive Appeals process is not arbitrary. Vulnerable asylum seekers should never be detained;

Reception and integration of asylum seekers

- **The UK Government** should allow asylum seekers to work, either after six months if there has been no decision on their application following the screening interview or subject to cooperation with authorities to establish

identity. **The Scottish Government** should continue to express its opposition to the current policy;

- **The UK Government** should introduce cash support throughout the asylum procedure until an asylum-seeker has left the UK or been recognised as a refugee. This should be part of and administered through mainstream welfare support. Support should be provided at equivalence to nationals based on the need to ensure a dignified standard of living;
- Under the current review of its integration strategy for refugees in Scotland, **the Scottish Government** should work together with **the UK Government**: to develop reception and integration policies and practice which benefit all people seeking asylum and host communities, for example, by ensuring communities are prepared for new asylum applicants and asylum seekers are informed about and can access services;
- **The Scottish Government** should continue to provide full access to healthcare and ensure people access this right. It should expand ESOL provision to reduce waiting times and facilitate integration;

Refugee integration

- **The UK Government** should grant permanent residence status to refugees upon recognising them as refugees and ensure the affordability and accessibility of refugees becoming UK citizens, including a maximum qualifying period of five years. To avoid destitution and improve early integration, **the UK Government** should extend the 28-day period after which the UK Border Agency withdraws financial support and should reinstate dedicated advice and support to assist refugees to integrate and rebuild their lives;
- **The UK Government** should have a clear strategy for refugee integration in the UK with responsibility clearly allocated within a UK Government department. **The Scottish Government** should ensure the implementation

of the recommendations of the review of its strategy to integrate asylum seekers and refugees in Scotland and raise concerns with the UK Government where reserved competences impact on refugee integration in Scotland;

- To improve refugee integration and ensure refugees can be reunited with their family members, **the UK Government** should expand the definition of ‘family’ within the immigration rules; allow child refugees the right to be reunited with their families and support refugees unable to meet the travel expenses of family members;

Responsibility-sharing

- **The UK Government** should reappraise its position on not seeking to improve EU-wide asylum standards. **The Scottish Government** should engage more with UK Government on promoting responsibility-sharing and raising standards in the EU;
- **The UK Government** should increase the number of resettlement places, currently 750 per year, it offers to refugees. **The Scottish Government** should identify and reduce barriers to participation of Scottish Local Authorities in the UK Government’s resettlement programme and consider and explore other means and possibilities for resettlement in Scotland with the UK Government;

Return

- **The UK Government** should grant a legal status to refused asylum seekers who cannot be returned;
- **The UK Government** should end the arbitrary use of detention. Detention must be used only if necessary and proportionate in each case, following a careful consideration of available alternatives and should always be for the shortest possible time where removal is imminent. It should never be imposed on vulnerable applicants. **The Scottish Government** should make the case to **the UK Government** to ensure vulnerable asylum seekers are not detained in Scotland and detainees in Dungavel Immigration Removal Centre (IRC) are not moved arbitrarily around the UK detention estate away from the jurisdiction of their legal representatives; **the UK and Scottish Governments** should clarify their respective powers in relation to Dungavel IRC; and
- **The UK Government** should abolish the outsourcing of enforced returns to private companies and implement early engagement strategies for other groups of refused asylum seekers beyond families with children.

⁶⁷ An analysis of the competences of the devolved administrations in Wales and Northern Ireland in relation to asylum is not within the scope of this report.

⁶⁸ Scotland Act 1998, Schedule 5, Section B6 (reserved matters): Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents

⁶⁹ Under the Concordat between the Home Office and the Scottish Executive, ‘reserved matters in which the Scottish Executive has an interest’ fall under the category of Joint Working (Annex C) and include ‘arrangements for the dispersal of asylum seekers and the designation of reception zones’. The impossibility of lodging an in-country claim in Scotland results in many asylum seekers, some of whom may have been living in Scotland, traveling to Croydon and being subsequently dispersed to another area in the UK. Between 2009 and 2012, Scottish Refugee Council gave out 257 travel grants totaling £13, 042 from the Refugee Survival Trust to newly-arrived asylum seekers in Scotland who had no means of travelling to Croydon to claim asylum. Gillespie, M. (2012) *Trapped: Destitution and Asylum in Scotland*, Glasgow Caledonian University

⁷⁰ This is regulated through the Legal Aid (Scotland) 1986 Act. Section 53 Scotland Act 1998 transferred functions of the Minister of the Crown to Scottish Ministers.

⁷¹ Any asylum claim, whatever the nationality or country of origin of the claimant, may be routed through the DFT procedure, if, after the screening process, it appears to be one that may be decided quickly. Subject to some exceptions, there is a general presumption that the majority of asylum applications are ones on which a quick decision may be made (UKBA, *Detained Fast Track Process*). The DFT does not operate in Scotland.

⁷² Detention Action (2011) Fast Track to Despair

⁷³ Under specific projects, e.g. ‘Early legal advice project’, legal aid in England and Wales may be available, subject to merits test (“significant benefit to client”).

- ⁷⁴ If an applicant comes from a safe country of origin, their application is certified as 'clearly unfounded' unless the Secretary of the State is satisfied that it is not. For certified cases, the right of appeal must be exercised from outside the UK (non-suspensive appeal), although the applicant may seek a judicial review prior to removal. Applicants may be detained. Under the Nationality, Immigration and Asylum Act 2002, the Secretary of State has currently designated 26 countries as generally safe. Some countries are deemed generally safe, and some are partially designated, for example, by applicant gender. On certification of claims and appeal rights see Nationality, Immigration and Asylum Act 2002, s. 94.
- ⁷⁵ According to ILPA (2011) *Legal Aid: Current Practice and Developments*, there is better than 50% chance of success.
- ⁷⁶ If the application for asylum is refused by UKBA, the person can appeal prior to removal to the First Tier Tribunal (Immigration and Asylum Chamber). This is a full appeal which means that factual and legal aspects of the UKBA decision are addressed, and full reasons given. Appeals to the second-tier Upper Tribunal of the Immigration and Asylum Chamber are restricted to errors of law (i.e. that the first appeal judge got the law wrong). There is also then the possibility of an onward appeal to the Court of Session (Inner House). For further details on onward appeals, see Craig, Sarah, Fletcher, Maria, and Goodall, Kay (2008) *Challenging Asylum and Immigration Tribunal Decisions in Scotland: An evaluation of Onward Appeals and Reconsiderations*. Nuffield Foundation, London and Craig, S., and Fletcher, M. (2012) *The supervision of immigration and asylum appeals in the UK: taking stock International Journal of Refugee Law*, 24 (1). pp. 60-84.
- ⁷⁷ Crime and Courts Bill 2012
- ⁷⁸ In so far as this concerns the asylum procedure. See below for reception and integration of asylum seekers.
- ⁷⁹ Currently, the situation of vulnerable applicants must be taken into account when providing support but no similar obligation exists with regard to the asylum procedure (guidance concerning the determination of claims by certain groups such as women and children is available). The Asylum Seekers (Reception) Regulations 2005 define 'vulnerable person' as a minor, a disabled person, an elderly person, a pregnant woman, a lone parent with a minor child, or a person who has been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, who has had an individual evaluation of his situation that confirms he has special needs (Section 4 (3)). Crucially, however, the Regulation also states that the Secretary of the State is not obliged to carry out an individual assessment of the vulnerable person's situation to determine whether they have special needs (Section 4(4)).
- ⁸⁰ Independent Chief Inspector of UKBA (2012) *A Thematic Inspection of the Detained Fast Track; UNHCR Quality Integration Project: Key Observations and Recommendations*, August 2010.
- ⁸¹ Whilst asylum is a reserved matter, the welfare and protection of children is a devolved responsibility of the Scottish Government. In *Strengthening Scotland's Future*, the command paper to the Scotland Bill in November 2010, the UK Government stated that: "UKBA recognises the statutory responsibility of Scottish authorities for the well-being of children in Scotland." This was in response to concerns raised in the report of the Calman Commission about the conflict and lack of respect by UK authorities for the responsibilities of Scottish authorities towards refugee children. http://www.scotlandoffice.gov.uk/scotlandoffice/files/Scotland_Bill_Command_Paper.pdf
- Local authorities in Scotland have a duty under Children (Scotland) Act 1995 to provide accommodation and care for UASC. They can then be reimbursed for the costs incurred in relation to discharging this duty by UKBA through a grant amounting to £95 and £71 for UASC below 16 and 16/17, respectively. In addition, age assessment in age-disputed cases is also conducted by Local Authorities.
- ⁸² For international obligations towards providing guardianship to unaccompanied asylum-seeking children, see, for example, Goeman, Martine, van Os, Carla, Bellander, Eva, et al, *Core Standards for guardians of separated children in Europe. Goals for guardians and authorities*, Defence for Children - ECPAT, Leiden, 2011
- ⁸³ See: http://www.scottishrefugeecouncil.org.uk/assets/0000/4415/Age_Assessment_Practice_Guidance_GCC-SRC_June_2012_FIRST_EDITION.pdf
- ⁸⁴ Scottish Refugee Council and Aberlour Childcare Trust are currently piloting the Scottish Guardianship Service. A Guardian is defined as: "someone who accompanies children and young people when they claim asylum or are trafficked from outside of the EU and are cared for by health, education and welfare services. A Guardian will help a child or young person to be actively involved in decisions that affect their life and to get the help they need, when they need it. A Guardian is on the child's side, can explain what is happening to them, will listen to their views and experiences and speak up for them when needed. A Guardian will also help a child or young person to plan their future, whether in the UK or elsewhere." See: http://www.scottishrefugeecouncil.org.uk/policy_and_research/responding_to_policy/guardianship_project
- ⁸⁵ As described in above, under the Concordat between the Home Office and the Scottish Executive, 'reserved matters in which the Scottish Executive has an interest' fall under the category of Joint Working (Annex C) and include 'arrangements for the dispersal of asylum seekers and the designation of reception zones'.
- ⁸⁶ See: Gillespie, M. (2012) *Trapped: Destitution and Asylum in Scotland*, Glasgow Caledonian University
- ⁸⁷ This will not only help alleviate poverty and prevent destitution but will also resolve problems arising from UKBA's restrictive definition of dependents. See: Scottish Refugee Council (2010) *Maintaining Family Unity throughout the Asylum Support. System in Policy and Practice*
- ⁸⁸ Scottish Government Healthcare Policy & Strategy Directorate (April 2010) CEL 9 (2010) Overseas Visitors' Liability to Pay Charges for NHS Care and Other Services. Refused asylum seekers not in receipt of Section 4 support are denied access to free secondary healthcare in England.
- ⁸⁹ Refused asylum seekers in England not in receipt of Section 4 support are denied entitlement to free secondary healthcare in England. For further details and for provision in other devolved nations see Northern Ireland Law Centre (2012) *Refused asylum seekers and access to free secondary healthcare: a comparison of England, Scotland, Wales & Northern Ireland*. Available at: http://www.lawcentreni.org/component/content/article/63-policy-briefings/865-refused-asylum-seekers-and-access-to-free-secondary-healthcare.html#_edn10
- ⁹⁰ Education is a devolved matter. The Scottish Government's competence in this area is generally not disputed. One important exception concerns the provision of education to children held in detention in Scotland. Currently this is not problematic because no children are held in Dungavel and the UK Government is committed to ending child detention.
- ⁹¹ The eligibility criteria are that the asylum seeker is: resident in Scotland and is under 25 years old on 1st August 2008, 1st January, 1st April or 1st July 2009 - whichever is closest to the beginning of the first term of the person's course; has been resident in Scotland for a minimum period of 3 years; and was under 18 years old on the date when the asylum application was made (this application having been made prior to 1st December 2006).
- ⁹² Scottish Funding Council guidance refers to the definition of 'asylum seeker' in the Nationality and Immigration Act 2002 for the purposes of defining eligibility for fee waivers for full-time ESOL and part-time non-advanced courses at colleges in Scotland. Thus entitlement is not based on whether the person is in receipt of Section 4 support. See footnote 97. (http://www.sfc.ac.uk/web/FILES/CircularsSFC2009/_guidance_fee_waiver_2009_10.pdf)
- ⁹³ In practice, no asylum seeker can currently benefit from this provision as eligibility is limited to those who were below 18 when the application was submitted, provided that it was lodged before 1st December 2006.
- ⁹⁴ In England, asylum seekers are only entitled to fee remissions (meaning the Skills Funding Agency will pay for some or all of the course fees): after six months if they are still waiting for a decision on their asylum claim or appeal; or if they are in receipt of Section 4 support. See: <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/policy/FE%20for%20advisers%20guide%2011%2012%20final.pdf>

- ⁹⁵ As explained above, the Secretary of the State has a duty to take into consideration the situation of vulnerable applicants when providing support. In certain cases, such applicants may also qualify for Local Authority support. Local Authorities have a duty to provide accommodation (and therefore welfare support) to adult asylum seekers where they have a need for care and attention which has not arisen solely because of destitution or because of the physical effects or anticipated physical effects of being destitute. Asylum seekers in this position are referred to as having a care need. (As amended by Section 120 of the 1999 Immigration and Asylum Act). This has been upheld by the English courts. The extent of these responsibilities has been clarified by courts (e.g. R (on the application of M) (FC) (Respondent) v Slough Borough Council (Appellants) [2008]) and although contested in a Scottish context, has never been subject to formal legal challenge. Thus, under section 12 of the Social Work (Scotland) Act 1968, refused asylum seekers with care needs may in certain cases be eligible for local authority support. The Scottish Government commissioned COSLA to provide guidance on migrants' benefits in Scotland: COSLA (2012) *Establishing Migrants' Access to Benefits and Local Authority Services*
- ⁹⁶ Both the current Scottish Government and the European an External Affairs Committee of the Scottish Government have voiced opposition to denying people seeking asylum the right to work. See Scottish Government (2007) *Cabinet Memo on Asylum Issues*; <http://www.scotland.gov.uk/News/News-Extras/asylum-issues> and Scottish Parliament (2005) *An Inquiry into the Scottish Executive's Fresh Talent Initiative Examining the Problems It Aims to Address, Its Operation, Challenges and Prospects*; <http://www.scottish.parliament.uk/business/committees/europe/reports-05/eur05-04-01.htm>
- ⁹⁷ As is the case in Norway and Sweden
- ⁹⁸ Stewart, E., Mulvey, G. (2010) *Becoming British Citizens? Experiences and Opinions of Refugees Living in Scotland*, University of Strathclyde and Scottish Refugee Council
- ⁹⁹ Recommendation also made in Da Costa, Rosa (2006) Rights of Refugees in the Context of Integration: Legal Standards and Recommendations, UNHCR: p. 43 "...granting refugees permanent residence is one of the most effective measures States can adopt to facilitate integration. Such a status not only offers refugees a form of legal residency which, due to its long-term security and psychological impact, is conducive to integration, but it also affords them the broader regime of rights attributed to this status..."
- ¹⁰⁰ The UK Government acknowledges the responsibility of the devolved nations towards supporting the integration of refugees and people seeking asylum (See Home Office (2009) *Moving on Together: Government's Commitment to Refugees*). However key competences which play a significant role in fostering integration remain the responsibility of the UK Government, such as employment and welfare benefits, granting of residence status, family reunion and citizenship policy.
- ¹⁰¹ The UK Border Agency ended funding for the Refugee Integration and Employment Service (RIES) in 2011. "RIES is a national service which ensures that new refugees can benefit from a standard level of integration support wherever they live and aims to get 30% of refugees into work within a year. The service recognises that the transition from asylum seeker to refugee is a difficult one and provides practical help in the very early stages of integration with housing, education and benefits. Over the longer term the service focuses particularly on employment as a key driver to successful integration – empowering individuals to contribute to the community on their path to citizenship." See <http://www.eelga.gov.uk/documents/Policy%20and%20Priorities/Strategic%20Migration%20Partnership/Asylum%20and%20Refugee%20Integration/UKBA-refugee-integration-strategy-2009.pdf>
- ¹⁰² Section 11 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 removed the rights of refugees in England and Wales who become homeless to apply for social housing to a local authority in England or Wales other than the one to which they were dispersed as asylum seekers.
- ¹⁰³ Scottish Refugee Council (2010) *One day we will be reunited: Experiences of Refugee Family Reunion in the UK*
- ¹⁰⁵ Under 'reserved matters in which the Scottish Government has an interest', the Concordat lists 'EU business' (Annex C). The Directives of the Common European Asylum System also encompass areas where the Scottish Government has competence.
- ¹⁰⁶ See: Gillespie, M. (2012) *Trapped: Destitution and Asylum in Scotland*, Glasgow Caledonian University
- ¹⁰⁷ Detention is an area where there is lack of clarity between the competences of UK and Scottish Government. This is especially evident in relation to children, healthcare and vulnerable applicants. The Scottish Government pressured the UK Government to ensure no children are detained in Scotland under immigration powers. Given the Scottish Government's competences in social policy, it could be argued that the Scottish Government could use these competences to improve the detention conditions for vulnerable applicants. It could also potentially make more use of its power to transfer to hospital for treatment under the Mental Health (Scotland) Act 1984 persons held under immigration legislation (reserved matter subject to executive devolution).
- ¹⁰⁸ As stated clearly in the principles identified above, voluntary return should always take precedence over forced return measures. The UK Government also recognises that voluntary return is a more sustainable and preferred approach than forced removals. On the various ways of organising voluntary return and re-integration measures and their effectiveness see Matrix Insight Ltd., ICMPD, ECRE (2012) *Comparative Study on Best Practices to Interlink Pre-Departure Reintegration Measures Carried out in Member States with Short- and Long-Term Reintegration Measures in the Countries of Return*.
- ¹⁰⁹ Wistrich, H., Arnold, F., & Ginn, E. (2008). Outsourcing abuse: The use and misuse of state sanctioned force during the detention and removal of asylum seekers. A report by Birnberg Peirce & Partners, Medical Justice and the National Coalition of Anti-Deportation Campaigns; Amnesty International UK (2011) *Out of Control: The Case for a Complete Overhaul of Enforced Removals by Private Contractors*. Amnesty International UK Briefings. Available at http://www.amnesty.org.uk/uploads/documents/doc_21634.pdf
- ¹¹⁰ The process consists of four stages, each involving close cooperation with the family: decision-making, assisted, required and ensured return. There is a dedicated family returns conference which aims to help the family plan the return process. At the last stage there is a possibility of accommodating the family in 'family-friendly pre-departure accommodation' which entails a severe restriction on their freedom of movement. Some NGOs have argued that accommodation in this facility is not very different from detention. Another innovative approach (Key Worker Pilot) was implemented in Liverpool by Refugee Action. Under the project, a keyworker assists the family in their current situation, life in the UK, health and wellbeing, as well as discussing the complex and emotional subject of return in a supportive and non-coercive environment.

Although the outcome of the referendum is uncertain, it is likely that it will have an impact on the relationship between the Scottish and UK Governments. In the event of the current constitutional status quo being the outcome of the 2014 referendum, a rearrangement of the current division of competences cannot be excluded.

This Chapter provides examples of institutional arrangements in EU Member States, the US, Canada and Australia where sub-state authorities (at the regional, city or municipal level) are responsible for various aspects of asylum and refugee policy.

The examples provided concern various ways of allocating competences between the state and sub-state level, broadly defined. This division of powers can potentially result in a number of policy outputs, leading to different policy outcomes for asylum seekers and refugees. The inclusion of an example of division of competences in a certain country does not imply a positive or negative assessment of its current policy or practice. Nor equally should it be implied that we support any particular changes to competences.

The options have been developed with reference to the Scottish context. In some cases, the division of competences in the countries used as examples does not correspond to the current allocation of competences between the Scottish and the UK Governments, resulting in cases where certain policy options could be implemented without the need to rearrange competences. Where that is the case, this has been noted in the assessment.

Each policy option has been assessed in light of the principles identified above as well as taking into account possible financial, legal, administrative and political costs. The assessment column in the table lists potential advantages (+) and disadvantages (-) of each of the options.

As in the previous Chapter, we assess particular policies within the following six areas:

- Access to the territory and procedure;
- Assessing the asylum claim in a fair and efficient asylum process;
- Reception and integration of asylum seekers;
- Refugee integration;
- Responsibility-sharing; and
- Return.

The list of issues presented here is not exhaustive. Those aspects which Scottish Refugee Council believes are currently working well and should be maintained in Scotland¹¹¹ regardless of the outcome of the referendum are not included.

The Chapter concludes with suggested options for policy change should the current division of competences between the UK and Scottish Governments be negotiated or changed after the referendum in this area. These are not intended to be definitive but to provide some consideration of the areas where competences could be negotiated.

	Competence	Options	Assessment
Ensuring access to the territory and procedure			
Lodging a claim	National authorities are responsible but usually it is possible to file an asylum claim in a number of local offices across the country ¹¹² or at the border	Allow all asylum seekers in Scotland to register their asylum claim in Scotland	<p>Would not require any change in current competences between the UK and Scottish Governments</p> <p>(+) facilitate access to reception conditions and procedure for all asylum seekers in Scotland; especially beneficial to destitute asylum seekers who do not have the means to travel to London; unlikely to require considerable additional resources as such possibility exists for families and UASC;</p> <p>(-) some additional resources/training may be required</p>
<p>Scottish Refugee Council Recommendation: Comparing practice in European countries people in Scotland seeking protection should be allowed to lodge a claim for asylum in Scotland. This would require no change in competence as is the responsibility of the UK Government.</p>			

	Competence	Options	Assessment
Assessing the asylum claim in a fair and efficient asylum process			
Assessment of asylum claim by trained and professional responsible authorities	Assessment of asylum claims is of national competence but in Italy there are territorial commissions who exercise responsibility ¹¹³	Create territorial commissions for assessing asylum claim	<p>(+) Scottish Government to create a new body staffed with professional, responsible and open-minded decision-makers;</p> <p>(-) may create discrepancies in recognition rates in different parts of the UK; depending on division of competences, decisions would require approval by HO (UKBA) in order to grant a permit (bureaucratic and fraught with legal challenges)</p>
<p>Scottish Refugee Council Recommendation: Assessing asylum applications is a state obligation and as such Scottish Refugee Council believes that the creation of a parallel system in Scotland to assess asylum applications in Scotland would be very difficult and costly to implement.</p>			

	Competence	Options	Assessment
Reception and Integration of Asylum Seekers			
Accommodation and financial support	Germany: States responsible for reception of asylum seekers on a basis of quota, must provide conditions in line with federal legislation but have some discretion	Develop a reception system which disperses asylum seekers to Scotland on quota basis: Option 1: Scottish Government to decide on provision of services, including housing; (partial) reimbursement by UKBA or a lump sum	Option 1: (+) some flexibility to provide appropriate accommodation and develop additional services (especially for vulnerable asylum seekers); reimbursement model already applies between UKBA and Local Authority for UASC so could be built upon (-) which expenses would be eligible for reimbursement is likely to be a controversial question and bureaucratic to administer
	Austria: State responsible for initial reception centres (until access to merits procedure is granted); Provinces responsible for accommodation and support afterwards Switzerland: State responsible for initial reception centres, cantons for reception afterwards on quota basis: they are reimbursed with a lump sum for every applicant and can choose what services to provide	Option 2: Scottish Government to cover all costs, but must also be given power to decide on right to work	Option 2: (+) more possibilities to provide appropriate accommodation and address other concerns (-) cost implications (may be partially offset by granting the right to work)
Right to work for asylum seekers	In Germany, Belgium, Switzerland application to be made to relevant local authorities, following the expiration of a time period during which asylum seekers are not allowed to work	Asylum seekers could be allowed to apply for work permit in Scotland to be granted	(+) fair; benefits both asylum seeker and community; reduces the cost of asylum support; encourages self-reliance (-) may increase incentive to claim asylum; ¹¹⁴ would need to be combined with dispersal system
Scottish Refugee Council Recommendation: The UK and Scottish Governments could consider Scotland playing a greater role in the provision of accommodation and reception of people seeking asylum. Asylum seekers residing in Scotland could be allowed to apply and be granted a work permit in Scotland by an authority in Scotland.			

	Competence	Options	Assessment
Refugee Integration			
Residence Status	In general, even in federal states there is no discretion on whether to grant permit once the decision to award refugee status has been made even if the permit itself is issued by the responsible local authorities. The length of the permit for those who are granted subsidiary protection/ toleration status may be subject to discretion ¹¹⁵ ; Sub-state authorities (SAAs) usually have more powers to grant permanent residence permits upon the expiry of the limited residence permit: ¹¹⁶ they may be allowed to ask the responsible authorities to grant/ revoke temporary admission permits ¹¹⁷	Scottish Government could issue residence permits once UKBA has granted refugee status; this may have to be related to conditions of residence (e.g. for a limited time the refugee would only be allowed to reside in Scotland)	(+) facilitates integration; (-) limitation on freedom of movement within the UK; politically controversial
Integration Support	Belgium: integration competence of SSAs; programmes vary among regions Switzerland: competence of cantons, Federal Government provides financial support for a certain time period	Option 1: Scottish Government is financially responsible for all integration support services Option 2: UK Government provides funding to Scottish Government to support integration in areas that still remain the responsibility of the UK Government e.g. employment	Would not require any change in current competences between the UK and Scottish Governments Option 1: (+) SG having more possibilities to create and implement a comprehensive integration policy (-) bearing on its own the cost of measures for which the UK government has responsibilities Option 2: (+) financially beneficial; (-) difficult to negotiate the precise division of areas of responsibility and the level of support
Scottish Refugee Council Recommendation: The Scottish Government already exercises competence in many of the social policy areas related to refugee integration. Dedicated integration advice support was previously funded by the UK Government but has been withdrawn. Responsibilities in this area could be clearer to ensure a comprehensive integration policy. Aspects of immigration control related to integration are not devolved, such as the granting of residence permits. This potentially could be one area to explore, thus the Scottish Government could be allowed to issue (temporary or permanent) residence permits once refugee status has been granted. However our principled view is that refugees upon recognition should be granted permanent leave to remain whoever were to exercise competence in this area.			

	Competence	Options	Assessment
Responsibility-sharing			
	Germany participates in both relocation and responsibility-sharing with beneficiaries allocated to federal states in accordance with the same quota used to allocate asylum seekers	Scotland could participate in resettlement programmes through: Option 1: dispersal quota, to be agreed between UK and Scottish Governments on the basis of voluntary agreement of Local Authorities; selection still to be conducted by UKBA	Would not require any change in current competences between the UK and Scottish Governments Option 1: (+) easier to implement; (-) less flexibility for Scottish Government to select refugees resettled; if Local Authority agreement is voluntary: problems with sustainability;
	Sweden: municipalities participate voluntarily; refugees are free to settle anywhere in Sweden but state-sponsored accommodation only provided in municipality where they are placed initially Québec has its own resettlement programme and is allowed to select the refugees coming to settle there ¹¹⁸	Option 2: permanent resettlement programme with quotas annually agreed by Scottish and UK Governments; selection based on Scottish Government's own criteria (in terms of characteristics of refugees), possibly with additional grounds for protection; subject to final approval by UKBA	Would not require any change in current competences between the UK and Scottish Governments Option 2: (+) Scotland could make better use of resettlement strategically; (-) complex and possibly difficult to implement
Scottish Refugee Council Recommendation: The UK and Scottish Governments could negotiate greater involvement in the UK Government's refugee resettlement programme. Annual quotas and priorities could be established jointly with the UK Government and the Scottish Government could be allowed to select the refugees who settle in Scotland, subject to final approval by the UK Border Agency			

	Competence	Options	Assessment
Return			
Status for those who cannot be returned	In Germany, SSAs have powers to grant permit / toleration status; special hard case commissions can also make recommendations to grant permits in exceptional cases ¹¹⁹	Option 1: Establishing 'hard case' commissions which would make recommendations for residence permit to UKBA	Option 1: (+) Possibility to allow well integrated asylum seekers to stay in Scotland; non-political body, dedicated to assessing compassionate circumstances; (-) limited number of cases; costs; question of membership of commissions and rules
	In Switzerland, cantons may ask the federal authorities to grant a temporary permit	Option 2. Grant Scottish Government the power to refer exceptional cases to UKBA	Option 2. (+) possibility to allow well integrated asylum seekers to stay in Scotland; likely to be politicised; (-) unclear how a negative decision by UKBA may be challenged
Enforcement of Return¹²⁰ / Detention	In Germany ¹²¹ , Switzerland ¹²² enforcement measures are of the competence of SSAs	Devolving powers to Scottish Government to execute return and removal decisions	(+) establishing voluntary return programmes; establishing guidelines on detention to ensure it is in line with international standards; (-) difficult, complex and controversial policy area (should only be considered if powers to grant (temporary) leave to remain are also devolved)
Scottish Refugee Council Recommendation: Devolving powers to the Scottish Government to execute return and removal measures for people refused asylum based on immigration decisions made by the UK Government would be difficult, complex and controversial. Consideration could be given to allow the Scottish Government or an independent body in Scotland to refer exceptional cases to the UK Government.			

The Role of Sub-state Authorities in Asylum and Refugee Policy

Conclusions and Recommendations

If there were further negotiations between the UK Government and the Scottish Government post the referendum in 2014 on increasing the competences of the Scottish Government, these are potential areas that could be explored in relation to asylum and refugee policy. These are based on comparisons with other sub-state authorities who exercise competence in this area. In some instances it would not require a change to powers, but a change in working between the two governments.

Access to the territory and procedure

- Comparing practice in European countries (Germany, Switzerland, Austria, Sweden) people in Scotland seeking protection should be allowed to lodge a claim for asylum with the UK Border Agency in Scotland without having to travel to the Asylum Screening Unit in Croydon. This would not require any change in powers;

Assessing the asylum claim in a fair and efficient asylum process

- Assessing asylum applications is a state obligation and function and as such Scottish Refugee Council believes that the creation of a parallel system in Scotland as a sub-state authority to assess asylum applications (as for example exists in Italy) would be very difficult, contentious and costly to implement. However **the UK Government** should respect, engage and adapt to Scottish authorities who exercise competence in areas which currently support the asylum decision-making procedure, such as the Scottish Legal Aid Board and the Scottish Guardianship Service;

Reception and integration of asylum seekers

- **The UK and Scottish Governments** could consider Scotland playing a greater role in the provision of accommodation and reception of people seeking asylum. Asylum seekers residing in Scotland could be allowed to apply and be granted a work permit in Scotland by an authority in Scotland (Germany, Belgium, Switzerland);

Refugee integration

- The Scottish Government already exercises competence in many of the social policy areas related to refugee integration. Dedicated integration advice support was previously funded by the UK Government but has been withdrawn. Responsibilities in this area could be clearer to ensure a comprehensive refugee integration policy in Scotland;
- Aspects of immigration control related to refugee integration are not devolved, such as the granting of temporary or permanent residence permits. This could potentially be one area to explore, thus **the Scottish Government** could be allowed to issue temporary or permanent residence permits to refugees. However our principled view is that refugees upon recognition should be granted permanent leave to remain whoever were to exercise competence in this area. This would be the best, most cost-effective way to improve refugee integration and thus could be enacted immediately;

Responsibility-sharing

- **The UK and Scottish Governments** could negotiate greater involvement in **the UK Government's** refugee resettlement programme. Annual quotas and priorities could be established jointly with the UK Government. **The Scottish Government** could be allowed to select the refugees who settle in Scotland, subject to final approval by **the UK Border Agency** (Québec). This would not require changes to powers; and

Return

Devolving powers to the Scottish Government as a sub-state authority to execute return and removal measures for people refused asylum (as is the case in Germany and Switzerland) based on immigration decisions made by the UK Government would be difficult, confusing, complex and controversial. Consideration could be given to allow **the Scottish Government or an independent body in Scotland** to refer exceptional cases to **the UK Government** to consider granting a temporary resident permit (Germany, Switzerland).

¹¹¹ See previous Chapter.

¹¹² Germany, Switzerland, Austria, Sweden. It should be noted that countries which have only one office where the application can be lodged in-country have smaller population/territory than the UK (Belgium, Norway, Ireland).

¹¹³ The asylum applications are examined by one of the 10 territorial commissions (the competence is determined on a geographical basis). There is a National Commission with competence for providing guidelines to the local ones and for the revocation of the protection (for the revocation of the protection a new interview is provided in front of the National Commission). The territorial Commissions are of mixed composition and include: 1 member of the prefecture career (home office officer) as president, 1 officer of the state police, 1 member that represents territorial entities, 1 member designated by the UNHCR. On specific cases an officer of the foreign office can join the commissions.

¹¹⁴ There is no empirical evidence to support UK Government's assertion that the reception conditions provided to asylum seekers constitute a 'pull factor'. i.e. an incentive to seek protection in the UK. cf. Crawley, H. (2010) *Chance or Choice? Understanding why asylum seekers come to the UK*, Refugee Council.

¹¹⁵ E.g. In Germany, the law states that beneficiaries of subsidiary protection are to be granted a permit for at least one year. Foreigner's authorities also have some discretion in granting toleration status or permit to those whose removal is not possible in the foreseeable future.

¹¹⁶ E.g. in Germany, even if the competent authority decides to revoke the refugee status, the Foreigners' Office may still decide to grant the person a residence permit.

¹¹⁷ E.g. Switzerland

¹¹⁸ Refugees to be resettled in Quebec must meet the criteria of both Canadian and Québec Governments. The latter include factors such as capacity for integration including knowledge of language and education as well as personal qualities. Québec has its own collective sponsorship program which allows sponsorship of a broader category of persons than those resettled by the Canadian government, namely those who are in a distressful situation owing to the fact that their physical safety is threatened by risk of imprisonment, torture or death if prevented to come to Québec.

¹¹⁹ Special commissions have been established on the state level in order to investigate the so-called 'hard cases', allowing exceptional cases to be considered on their own merits in administrative practice without being tied down by individual facts related to right of residence. On the basis of a recommendation by these commissions, the foreigners' authorities in the state may issue a residence permit. There is no appeal right.

¹²⁰ As stated clearly in the principles identified above, voluntary return should always take precedence over forced return measures. On the various ways of organizing voluntary return and re-integration measures and their effectiveness see Matrix Insight Ltd., ICMPD, ECRE (2012) Comparative Study on Best Practices to Interlink Pre-Departure Reintegration Measures Carried out in Member States with Short- and Long-Term Reintegration Measures in the Countries of Return.

¹²¹ Detention is executed by the federal states. National law provides a basic regulation for those federal states that keep migrants in detention in normal prisons. Those federal states that run specialised detention centres either as an exclusive means to execute detention or in addition to detaining foreigners in correctional facilities then additionally need own regulations. However, some federal states that execute detention in normal prisons also have additional regulations. As a result, there is a fairly confusing situation when it comes to the legal grounds for executing detention. (JRS Detention in Europe, http://www.detention-in-europe.org/index.php?option=com_content&view=article&id=95&Itemid=127)

¹²² Enforcement of return decision issued by the federal authorities.

This Chapter explores what asylum and refugee policy in an independent Scotland might look like. We make the assumption that in the event of independence, the Scottish Government would have responsibility and the competence for all aspects of asylum and refugee policy within its international obligations.

We also make the assumption that Scotland would be a member of the European Union and would be party to European *acquis* on asylum. In the context of negotiating EU membership, the Scottish Government would have to consider whether it would join the Schengen Area¹²³ or if it would seek to be part of the Common Travel Area.¹²⁴ Both have implications for asylum and refugee policy. The Scottish Government has stated that it would wish to remain within the Common Travel Area.¹²⁵

The options are developed on the basis of examples from EU Member States, the US, Canada and Australia and reflect the Scottish context.

As in the previous Chapters, we consider policies within the following six areas:

- Access to the territory and procedure;
- Assessing the asylum claim in a fair and efficient asylum process;
- Reception and integration of asylum seekers;
- Refugee integration;
- Responsibility-sharing; and
- Return.

The assessment of the policy options is based on our key principles of a fair and humane refugee protection system identified in Chapter Two and takes into consideration possible administrative, financial, legal and political implications. The assessment column in the table below lists potential advantages (+) and disadvantages (-) of each of the options.

The list of issues presented here is not exhaustive. Those aspects which Scottish Refugee Council believes are currently working well and should be maintained in Scotland¹²⁶ are not included as it is assumed that there would be no retrograde steps.

The section concludes with recommended policy options which Scottish Refugee Council believes would lead to the best possible outcomes for asylum seekers and refugees in Scotland in the event of the referendum leading to the creation of an independent state.

	Competence	Options	Assessment
Access to Territory and Procedure			
Lodging an asylum claim	Scottish Government	Option 1: UK Border Force to enforce border control a) Scottish Government to contract out border control to UKBA who would use existing guidance b) Scottish Government to contract out border control to UKBA and issue new guidance	Option 1: (+) experience in border control; reassuring members of the public; (-) question about accountability (English/Scottish Governments); 1a) (+) may be easier to implement; no additional training necessary; (-) possible conflict of interest between existing UKBA guidance and SG aims; possibly incongruous with the image of an independent state; 1b) (+) opportunity to develop and implement guidance reflecting Scottish values and priorities; (-) re-training may be necessary; UKBA unlikely to agree; possible conflict of interest between Scottish Government guidance and UKBA culture
		Option 2: Scottish Police to exercise border control (e.g. Dumfries and Galloway police within the Common Travel Area)	Option 2: (+) Scotland taking responsibility for controlling its borders on its own terms and according to its own values ; (-) Additional training necessary; guidelines must be developed; however: direct arrival of asylum seekers limited to a few airports; In many EU countries border control is exercised by the (local) police ¹²⁷ or a border force which is part of the police; ¹²⁸
		Option 3: Scottish Border Force - a new agency responsible for border control	Option 3: In addition to considerations under Option 2: (-) creating an entirely new structure likely to be costly and time-consuming
Scottish Refugee Council Recommendation: Scottish Refugee Council believes that granting access to the territory to those seeking asylum would constitute a very small part of the role of future border control authorities. Nevertheless, we would consider the option to contract out border control to a UK authority (UKBA) in an independent Scotland (UKBA) not to be feasible.			

	Competence	Options	Assessment
Assessing the asylum claim in a fair and efficient asylum process			
Assessment of claim by trained and professional responsible authorities	Scottish Government	Option 1: UKBA	Option 1:
		1a) Scottish Government to contract out refugee status determination procedure to UKBA who would use existing guidance	(+) experience; training; extensive Country of Origin resources (-) possible conflict of interest and divided loyalties; 1a) (+) no additional training necessary; - 'culture of disbelief' may continue to impact decisions negatively;
		1b) Scottish Government to contract out refugee status determination procedure to UKBA and draft new guidance to be used in Scotland	1b) (+) possibility to create new policy and guidance based on Scottish values; (-) re-training will be necessary; unlikely to address problems stemming from "culture of disbelief"; UK Government unlikely to agree
		Option 2: Independent Agency	Option 2:
			(+) new agency with new 'culture', reflecting Scottish policies and values; (-) some set-up costs including developing guidelines, and providing training (but costs must be assessed against charges levied by UKBA under Option 1); Various levels of 'independence': from statutory independence ¹²⁹ , through accountability to the government ¹³⁰ ; to a separate agency ¹³¹ (or department ¹³²) still accountable to the relevant Ministry
		2a: agency responsible for asylum	2a: (+) focusing on protection, emphasising the difference between refugees who are forced to flee and voluntary economic migrants; (-) some issues (e.g. family reunion; residence status for refused asylum seekers who cannot be returned) are not easy to dissociate; potentially small caseload
		2b: agency responsible for asylum and immigration issues	2b: (+) single agency to deal with 'mixed flows'; (-) possible conflict of interest between exercising immigration control and providing protection especially as migration would be the largest part

Scottish Refugee Council Recommendation: Government in an independent Scotland should take full responsibility for granting international protection and should not contract out this core state function to UKBA. Scottish Refugee Council considers that in the event of an independent Scotland the best way to ensure asylum claims are assessed fairly and efficiently by professional and well-trained responsible authorities would be to establish a separate asylum agency.

	Competence	Options	Assessment
Reception and Integration of Asylum Seekers			
Accommodation and financial support	Scottish Government	Option 1: Access to mainstream benefits system ¹³³	Option 1: (+) fairness; easy to administer; (-) if no initial screening of applications is made the system may be abused ¹³⁴
		Option 2: Specific benefits for asylum seekers covering basic needs	Option 2: (+) reducing incentives to claim asylum; ¹³⁵ (-) stigmatising; insufficient to provide a dignified standard of living
		2a: collective accommodation and preference for in-kind provision of services ¹³⁶	2a: (+) reducing incentives to claim asylum even further; ¹³⁷ (-) not conducive to integration, stigmatising and humiliating; costly to administer
		2b: no-choice accommodation in the community, own flat, cash payment ¹³⁸	2b: (+) more humane and conducive to integration than 2a: (-) may deprive asylum seekers from access to support networks; limits employment prospects
		2c: choice-based accommodation in the community, own flat, cash payment	2c: (+) allowing asylum seekers to choose where they want to live would help foster integration and ensure their presence benefits them and the local communities (e.g. asylum seekers could be given information and incentives to move to regions with good housing and job opportunities) ¹³⁹
Scottish Refugee Council Recommendation: Asylum seekers should have access to cash support sufficient to maintain a dignified standard of living and of equivalence to a national in need. They should have the possibility to choose their accommodation in the community. The government in an independent Scotland could provide information about job and housing opportunities in areas of Scotland to help asylum seekers make an informed choice and ensure integration benefits both those seeking protection and the host community.			
Right to work for people seeking asylum	Scottish Government	Option 1: unrestricted access to the labour market for all asylum seekers	Option 1: (+) fair; benefits both asylum seeker and community; reduces the cost of asylum support and increases National Insurance contributions ; encourages self-reliance; positive impact on mental health; (-) may affect efforts to create managed migration policy negatively by providing incentives to those who do not qualify under managed migration schemes to seek asylum ¹⁴⁰
		Option 2: unrestricted access, subject to cooperation with authorities and preliminary screening of application ¹⁴¹	Option 2: (+) helps prevent possible abuse; (-) more bureaucratic to administer
		Option 3: Access to the labour market if a claim has not been resolved within a certain period of time	Option 3: (+) reducing the incentive to claim asylum in the UK; (-) deterioration of skills; not conducive to integration; government must bear the entire cost of supporting the asylum seeker
Scottish Refugee Council Recommendation: In an independent Scotland asylum seekers should be granted immediate access to the labour market. In some cases, access may be conditional upon cooperation with the authorities responsible for the asylum procedure.			

	Competence	Options	Assessment
Refugee Integration			
Status	Scottish Government	Option 1: Limited Residence Permit ¹⁴²	Option 1:(+) allows flexibility and may increase public acceptance (this must be balanced against administrative costs of processing further applications for leave and possible legal challenges); (-) creates insecurity and hinders integration; administrative and financial costs
		Option 2: Permanent Residence Permit ¹⁴³	Option 2: (+) encourages integration; (-) may affect public perceptions negatively, especially in cases of significant number of arrivals over a short period of time ¹⁴⁴
Scottish Refugee Council Recommendation: Refugees in an independent Scotland should be granted permanent residence permit upon receiving protection.			
Integration Support		Option 1: Having specialised services dealing with integration and designing individual integration plans ¹⁴⁵	Option 1: (+) allow for planning, assessing progress and priorities for each individual; (-) may not be suitable for all refugees, especially vulnerable ones who then may be left behind
		Option 2: Mainstreaming integration in all public policies but no centralised coordination	Option 2: (+) adapting public services to meet the needs of refugees; (-) little scope for tailoring the integration process to the persons' needs and abilities
Scottish Refugee Council Recommendation: Frontloading of individual integration plans drafted together with the refugee and mainstreaming integration in all public services is the best and most cost-effective way to facilitate integration.			
Citizenship	Scottish Government	Option 1: Immediate choice for refugees to obtain citizenship upon receiving protection status	(+) facilitates integration; (-) may be perceived as a pull factor; may lead to negative public reaction; negates refugee status
		Option 2: Refugees can apply for citizenship after a certain period of time	(+) more likely to be accepted by the general public; (-) less conducive to integration compared to Option 1
		Option 2a: Refugees can apply for citizenship earlier than other immigrants ¹⁴⁶ and the time spent in the asylum procedure counts towards the qualifying period ¹⁴⁷	(+) facilitates integration; (-) may create resentment among other immigrants
		Option 2b: Refugees can apply for citizenship under the same conditions as other immigrants	(+) easy to administer; (-) may have a negative impact on integration
Scottish Refugee Council Recommendation: Refugees in an independent Scotland should be given the opportunity to choose whether to apply for citizenship after a period of permanent residence. This should be no longer than five years and time spent in the asylum procedure should be included in the qualifying for citizenship. When developing Scotland's citizenship policy, the government in an independent Scotland should take into account the particular situation of refugees to ensure that no additional barriers are created.			

	Competence	Options	Assessment
Responsibility-sharing			
	Scottish Government	Option 1: Not participating in resettlement	Option 1: (+) cost saving; (-) failure to show responsibility and solidarity
		Option 2: Introduce a Scottish Resettlement Programme	Option 2: (+) Scotland would demonstrate it is a good global citizen, capable of taking responsibility and showing solidarity; making use of generous funding available through European Refugee Fund; supports demographic need of Scotland; (-) administrative and financial costs
		Option 2a: Government-sponsored programme only	Option 2a: (+) government control over composition of refugee arrivals; more possibilities for strategic use of resettlement; (-) fewer places available due to financial implications
		Option 2b: Private sponsorship by communities ¹⁴⁸ in addition to government-sponsored programmes	Option 2b: (+) increased capacity; pioneering approach in Europe; (-) choice may be biased towards specific groups
Scottish Refugee Council Recommendation: Scottish Refugee Council believes that an independent Scotland should establish its own resettlement programme, which could consist of a mixture of government-sponsored and community-sponsored schemes.			

	Competence	Options	Assessment
Return			
Status for those whose asylum claim has been refused but cannot be returned	Scottish Government	Option 1: No Status	Option 1: (+) incentive to leave voluntarily ¹⁴⁹ ; (-) forces people into destitution; not conducive to finding a durable solution;
		Option 2: Status of limited duration, with the option of acquiring permanent residence or citizenship ¹⁵⁰	Option 2: (+) humane; allows asylum seeker access to a decent standard of living, prevents loss of skills; (-) unclear effect on willingness to return voluntarily
		Option 3: Allowing asylum seekers to submit an application for a work permit without leaving the country ¹⁵¹	Option 3: (+) benefits both asylum seeker and host community; avoids costly return measures; (-) may conflict with the goals of managed migration
Scottish Refugee Council Recommendation: Asylum seekers whose claims are refused could be allowed to submit an application for a work permit without leaving the country. Those asylum seekers whose claims have been refused but who cannot be returned could be granted a residence status [with the option of being granted permanent residence or citizenship at a later date if there is no substantive change to their situation].			

	Competence	Options	Assessment
Return			
Enforcement of Return ¹⁵²	Scottish Government	Option 1: carried out by the police ¹⁵³	Option 1: (+) possibility to train police officers to ensure returnee’s dignity is respected; (-) administrative and financial costs
		Option 2: carried out by UKBA	Option 2: (+) easy to implement; (-) currently UKBA uses private contractors (G4S) whose handling of detainees often fails to meet basic human rights standards; issues of accountability
		Option 3: carried out by Scottish Border Force	Option 3: (+) possibility to introduce standards to ensure humane and dignified treatment of people who are being returned; (-) developing and implementing high standards involves administrative and financial costs
Scottish Refugee Council Recommendation: Voluntary return should always be prioritised over forced return measures. Given issues of accountability and the controversies surrounding the current UK practice of enforced return, Scottish Refugee Council does not believe UKBA should have any role in such process, should it be introduced in an independent Scotland.			
Detention pending return	Scottish Government	Option 1: No detention	Option 1: (+) humane; (-) unlikely to be seen as credible by the public
		Option 2: Using detention centres managed by UKBA	Option 2: (+) availability; (-) centres mostly managed by private contractors who often fail to maintain high standards; problem with jurisdiction: UKBA may simply transfer detainees to England; accountability issues
		Option 3: Using prisons ¹⁵⁴ where asylum seekers are separated from other prison population	Option 3: (+) little investment needed; (-) according to UNHCR and EU law best avoided
		Option 4: Detention centres managed by: Option 4a: Scottish ‘Home Office’	Option 4: (+) opportunity to adopt Scottish approach and detention standards; (-) need to develop guidelines and provide training; potentially small population;
		Option 4b: Independent Agency dealing with asylum and/or immigration ¹⁵⁵	Option 4b may be more effective in ensuring detention of asylum seekers is separate from criminal detention
Scottish Refugee Council Recommendation: In an Independent Scotland, one institution should be responsible for implementing return policy to ensure that all voluntary return options and alternatives to detention have been exhausted before enforced return and/or detention is considered. People whose asylum claims have been refused should never be detained in prisons.			

Asylum and Refugee Policy in an Independent Scotland

Conclusions and Recommendations

In the event of independence, we assume that the Scottish Government would have responsibility and the competence for all aspects of asylum and refugee policy within its international obligations of being an independent state. We propose recommendations on what this policy could or should look like based on Scottish Refugee Council's principles for fair and humane asylum policy

In our analysis we also make the assumption that Scotland would be a member of the European Union and would be party to European *acquis* on asylum. In the context of negotiating EU membership, the Scottish Government would have to consider whether it would join the European Common Travel Area (Schengen Area) or if it would seek to continue to be part of the Common Travel Area. Both have implications for asylum and refugee policy. The Scottish Government has stated that it would wish to remain within the Common Travel Area that currently exists with Ireland and the rest of the British Isles.

Bearing these assumptions in mind, the following recommendations should be seen as Scottish Refugee Council's initial considerations and not a definitive response.

Access to the territory and asylum procedure

- Scottish Refugee Council believes that granting access to the territory to those seeking asylum would constitute a very small part of the role of future border control authorities in an independent Scotland, thus we do not take a view on how should exercise this function **in an independent Scotland**. Nevertheless, in an independent Scotland we would consider the option to contract out border control to the UK Border Agency not

to be feasible. Looking to other European countries this function could be carried out by the police force or a new agency responsible for border management;

Assessing the asylum claim in a fair and efficient asylum process

- **An independent Scotland** should take full responsibility for granting international protection and should not contract out this core state function to the UK Border Agency. Scottish Refugee Council proposes that the best way to ensure asylum claims are assessed fairly and efficiently by professional and well-trained responsible authorities in **an independent Scotland** would be to establish a small separate asylum dealing with asylum applications;

Reception and integration of people seeking asylum

- People claiming asylum in **an independent Scotland** should have access to cash support sufficient to maintain a dignified standard of living and of an equivalence to a national in need. They should be given the possibility to choose their accommodation which should be in the community. **The government in an independent Scotland** could provide information about job and housing opportunities in different areas of Scotland to help people seeking asylum make an informed choice and ensure integration happens from day-one of arrival and benefits both refugees and the host community;
- Asylum seekers in **an independent Scotland** should be granted immediate access to the labour market. In some cases, access could be conditional upon cooperation with the authorities responsible for the asylum procedure;

Refugee Integration

- Refugees in **an independent Scotland** should be granted permanent residence permit upon receiving protection;
- Frontloading of individual integration plans drafted together with the refugee and mainstreaming integration in all public services is the best and most cost-effective way to facilitate the process;
- Refugees should be given the opportunity to choose whether to apply for citizenship after a period of permanent residence. This period should be no longer than five years and time spent in the asylum procedure should be included in the qualifying for citizenship. When developing Scotland's citizenship policy, **the government in an independent Scotland** should take into account the particular situation of refugees to ensure that no additional barriers are created;

Responsibility-sharing

- Scottish Refugee Council believes that **an independent Scotland** should establish its own refugee resettlement programme, which could consist of a mixture of government-sponsored and community-sponsored schemes as exists in Canada;

Return

- Those asylum seekers whose claims have been refused after a fair and efficient process in Scotland but who cannot be returned or where there are barriers to return could be granted a temporary residence status [with the option of being granted permanent residence or citizenship at a later date if there is no substantive change to their situation];
- Asylum seekers whose claims are refused should be allowed to submit an application for a work permit without leaving Scotland and be granted or refused in line with whatever rules are created for migration policy;
- Voluntary return should always be prioritised over forced return measures. Given issues of accountability and the controversies surrounding the current UK practice of enforced return, Scottish Refugee Council does not believe the UK Border Agency should have any role in such process, should it be introduced in **an independent Scotland**; and
- One institution should be responsible return policy to ensure that all voluntary return options and alternatives to detention have been exhausted before enforced return and/or detention is considered. Asylum seekers whose claims have been refused should never be detained in prisons.

¹²³ The Schengen area and cooperation are based on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border. The UK Government is currently not part of the Schengen.

¹²⁴ See footnote six

¹²⁵ See <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-18364699>

¹²⁶ See Chapter Six

¹²⁷ For example, Sweden

¹²⁸ Ireland; Belgium (Federal Police), Germany (Federal Police)

¹²⁹ Office of Refugee Applications Commissioner (ORAC) in Ireland; it must be noted, however, that only the Minister can grant asylum in Ireland, on the recommendation of ORAC or Refugee Appeals Tribunal. Unlike all other EU countries, Ireland operates a separate procedure for granting refugee status and subsidiary protection, with ORAC being responsible for the former while the Irish Naturalisation and Immigration Service (INIS) (part of the Ministry of Justice and Equality) being in charge of the latter. Belgium (independent agency); Canada (independent administrative tribunal).

¹³⁰ Sweden

¹³¹ Germany

¹³² Norway, Australia

- Most countries do not provide immediate unrestricted access to mainstream benefits for asylum seekers. In Germany, access to mainstream benefits available to nationals is granted after the applicant has spent four years receiving benefits in accordance with the Asylum Seekers' Benefits Law.
- Scottish Refugee Council does not believe that the state's legitimate concerns about preventing abuse should be addressed by curtailing rights.
- There is no empirical evidence to support UK Government's assertion that the reception conditions provided to asylum seekers constitute a pull factor'. i.e. an incentive to seek protection in the UK. cf. Crawley, H. (2010) *Chance or Choice? Understanding why asylum seekers come to the UK*, Refugee Council.
- Ireland (so called 'direct provision, administered by Reception and Integration Agency (RIA)), Switzerland, Germany, Belgium (administered at the federal level by an agency (Fedasil))
- See above.
- Current UK system, some German states depending on stage of procedure, Sweden.
- The Swedish system aims to ensure that asylum seekers are dispersed across the country by providing free accommodation in small and medium-sized cities on a no-choice basis; subsistence-only option is available to those who arrange their own accommodation. After the person is granted refugee status, they cannot choose the municipality where they would settle if they have been accommodated by the Swedish Migration Board; they may, however, improve their chance of moving to a particular municipality if they can demonstrate they have good job prospects there. Those who had arranged their own accommodation are entitled to remain in the municipality they previously lived in and receive accommodation there.
- Scottish Refugee Council does not believe that the state's legitimate concerns about preventing abuse should be addressed by curtailing rights.
- Sweden, Norway
- UK (five years), Germany (three years and at least one year for humanitarian protection)
- Norway, Sweden (refugees and beneficiaries of subsidiary protection), Belgium (refugees only; beneficiaries of subsidiary protection receive one-year renewable permit which is converted into permanent residence permit after five years)
- Decisions on granting asylum and residence permit should be based on the person's protection needs, not on public opinion.
- Norway, Sweden
- Belgium, Sweden, Ireland.
- UNHCR considers, as a matter of best practice, that the required period of residency in order to be eligible for naturalisation should not exceed 5 years in order to restore an effective nationality to refugees and promote their full integration into society. The period of time that a refugee spends in the country of asylum prior to receiving their asylum decision should be taken into account in the eligibility criteria for naturalisation. Recognised refugees (and those with humanitarian protection) are either (i) eligible for naturalisation within a maximum of 5 years of their total period of residence (legal stay) in the country, or (ii) after a maximum of 5 years of permanent residency in the host country when they have been granted permanent residency status automatically upon recognition (cf. Legal and Protection Policy Research Series 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations,' Division of International Protection Services, UNHCR, June 2006).
- Private sponsorship exists in Canada and the Australian government is currently consulting on the adoption of a similar scheme there. Sponsors are groups that commit to providing financial settlement assistance to refugees for one year or until they can support themselves financially, whichever comes first. This assistance includes accommodation, clothing and food. In special cases, the sponsorship period can be extended for up to 36 months. In Canada, private sponsors could be Sponsorship Agreement Holders and their constituent groups; community organizations or 'groups of five' (i.e. five or more Canadian citizens or permanent residents).
- Empirical evidence shows that, contrary to UK Government's belief, forcing people into destitution decreases the likelihood of return. Refugee Action (2010) *The Destitution Trap*
- Most countries provide such option but the rights associated with the status vary enormously. See ECRE 'Complementary Protection in Europe', 2009.
- Granting a work permit if there are no obstacles to return but the asylum seeker has found a job and wants to remain in the country is currently possible in Sweden. However, specific requirements about the job (salary level, length of contract etc apply). In the UK, an asylum seeker who wants to obtain a work permit under a managed migration route has to leave the UK and apply from abroad. However, a person working in the UK can submit an asylum application.
- As stated clearly in the principles identified above, voluntary return should always take precedence over forced return measures. On the various ways of organizing voluntary return and re-integration measures and their effectiveness see Matrix Insight Ltd., ICMPD, ECRE (2012) Comparative Study on Best Practices to Interlink Pre-Departure Reintegration Measures Carried out in Member States with Short- and Long-Term Reintegration Measures in the Countries of Return.
- E.g. Belgium, Germany
- Ireland, Germany, Canada, US. Switzerland. The use of prisons is especially common in federal states, largely due to overlapping competences.
- Sweden adopts a social services approach to detention. The Swedish Migration Board is responsible for managing the detention centres. However, there is a possibility to place people in police detention if they pose a danger to others.

Based on our principles for fair and human refugee and asylum policy, this report has sought to consider a series of policy options aimed at improving the lives of people seeking asylum and refugees living in Scotland under various constitutional outcomes. It is worth reiterating some of the context in which the constitutional debate is taking place. Scotland has a self-image and increasingly presents itself externally as a nation that is based on fairness, equality and justice. To maintain that image and be viewed as a 'good global citizen', protecting those fleeing persecution should be seen as a crucial plank. Additionally, there are internal reasons for providing protection as it sends a strong signal to Scottish society more generally of the type of nation that Scotland wants to be, should that be within or outside of the United Kingdom. The proposals we make here correspond closely with not only the expressed views of the Scottish Government regarding policy and policy-making, but also those of the Scottish Parliament. Discussions around the Christie Commission recommendations, for example, chime with the more person-centred, early intervention perspectives taken in this report. What is more Scottish political leaders more generally express support for international human rights treaties and in Scotland itself the importance of human rights is a fundamental tenet that guides much of policy-making. It is crucial that in developing policy as well as in discussions about Scotland's constitutional future, the views of those most disadvantaged are taken into account. This report is hopefully an initial contribution to stimulate discussion around refugees' position within that debate and the linked issue of what kind of nation Scotland is and what kind of nation we would like Scotland to be.

Within that broad political context, the issue of numbers and cost are also of interest in this time of financial constraint. Asylum application numbers are very low at present and within the parameters of fluctuating application numbers that should be expected in forced migration, it is unlikely that numbers would dramatically change regardless of the outcome of the constitutional debate. Even in the case of independence, despite an expected increase in the number of direct flights to Scotland, given the context of expected European Union membership, with the Dublin II Regulation being part of that, the number of people seeking asylum in Scotland is unlikely to increase, and indeed may fall as the majority of asylum seekers in Scotland are currently 'dispersed' from England. The Scottish Government's views regardless of the constitutional debate indicate a desire for increased migration and so any small increase in numbers should be seen as an opportunity rather than a risk. In this regard the ability for Scotland to plan around its population needs could be impacted on by changes to the dispersal of asylum seekers to Glasgow. Discussions are presently taking place around what any future dispersal system should look like but decisions in this regard are beyond the powers of the Scottish Government.

The potential contribution of refugee populations towards the economic and social life of Scotland is difficult to boil down to pounds and pence. While we have not costed our proposals here, beyond any set up costs it seems unlikely within any options presented that there would be a large demand on the public purse and any costs that do exist would have to be weighed against both the contribution that refugees make to Scotland, and Scotland's global image. What is more Scotland has and would have international legal obligations that would need to be met. While early intervention and front-loading can add initial costs it is also suggested that such a system could lead to cost savings.

With regards to the constitutional debate, the aim of this project is not to suggest a favoured position within that debate, but to develop workable ideas for refugee protection within all potential outcomes. To that effect, this report has detailed ways in which refugee protection could be improved within the status quo. That is, should there be no changes in the constitutional settlement, we have outlined a number of ways in which the current practice could be improved, to the benefit of refugees and to Scottish society more generally.

As this project began prior to the decision being made that there will be only one question in the referendum, we had started to address the issue of various options within what was described as “devo-max” or “independence light”. Despite there being no question on devo-max/independence light, the British Prime Minister has indicated a willingness to look at devolving powers to Scotland beyond those in the Scotland Act should there be a ‘no’ vote in the referendum. Therefore we

proceeded with a series of options, along with their potential positive and negatives effects on the lives of refugees on the basis that increased powers were negotiable. Similarly, in the case of a ‘yes’ vote in the referendum we have outlined what we see as the various options within certain institutional limitations, limitations based on Scottish Government predilections towards staying in the European Union and maintaining a Common Travel Area with the rest of the British Isles. Again the principles outlined in Chapter Two have led to the development of what we see as more positive and negative options.

The future of Scotland and the place of refugees within it are matters of great importance. We hope that this report makes a critical contribution to, and helps inform the important discussions and debates that are taking place and will continue to take place over the next few years.



Scottish Refugee Council is an independent charity dedicated to providing advice and information for people who have fled horrific situations around the world.

We have been advocating and campaigning for the rights of refugees since 1985.

To find out more, sign up to our e-newsletter by going to our website:
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