

Getting it Right for Separated & Unaccompanied Children in Scotland

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JustRight Scotland

Scotland's Legal Centre for Justice and Human Rights

Our vision: Collaborative Social Justice

- Identify gaps in the law and the provision of legal service that lead to inequality and prevent people from accessing justice
- Create collaborative projects – with legal and non-legal partner organisations – that cross disciplines, sectors and borders to pool expertise and resources to meet those gaps



: www.justrightscotland.org.uk



: @justrightscot



JustRight Scotland

Scotland's Legal Centre for Justice and Human Rights

Our Current Projects:

- JustRight for Refugee Women
- JustRight for Refugee Children
- JustRight for All
- Scottish Women's Rights Centre
- Asylum Support Legal Service
- Scottish Family Reunion Service
- JustRight Interns



Presentation Outcomes



- Understanding the international legal framework for separated and unaccompanied children
- Understanding UK legal processes through which separated and unaccompanied children go
- Importance of a human rights based approach



Definitions



Definitions

- What is an asylum seeker?
 - *A person who has left their country of origin and formally applied for asylum in another country but whose application has not yet been concluded*
 - They have “temporary admission” to the UK until their claim is decided
 - They do not have access to “public funds”
 - They do not choose their housing
 - They are not allowed to work
 - They have access to SOME educational funding



Definitions



- What is a Refugee?

- In the UK, this is a legal status – a Refugee is an asylum seeker whose application was successful
- They obtain leave to remain in the UK for 5 years, after which they can apply for Indefinite Leave to Remain (settlement)
- They have full access to public funds
- They DO have access to educational funding

Definitions

- Humanitarian Protection (HP)
 - 5 years leave to remain, after which can apply for ILR
 - Full access to health, education, welfare, employment
 - Can apply for Travel Certificate
 - Can apply to bring over family members (family reunion)
- Indefinite Leave to Remain (ILR)
 - Sometimes called “settled status”
 - Full access to health, education, welfare, employment



Definitions

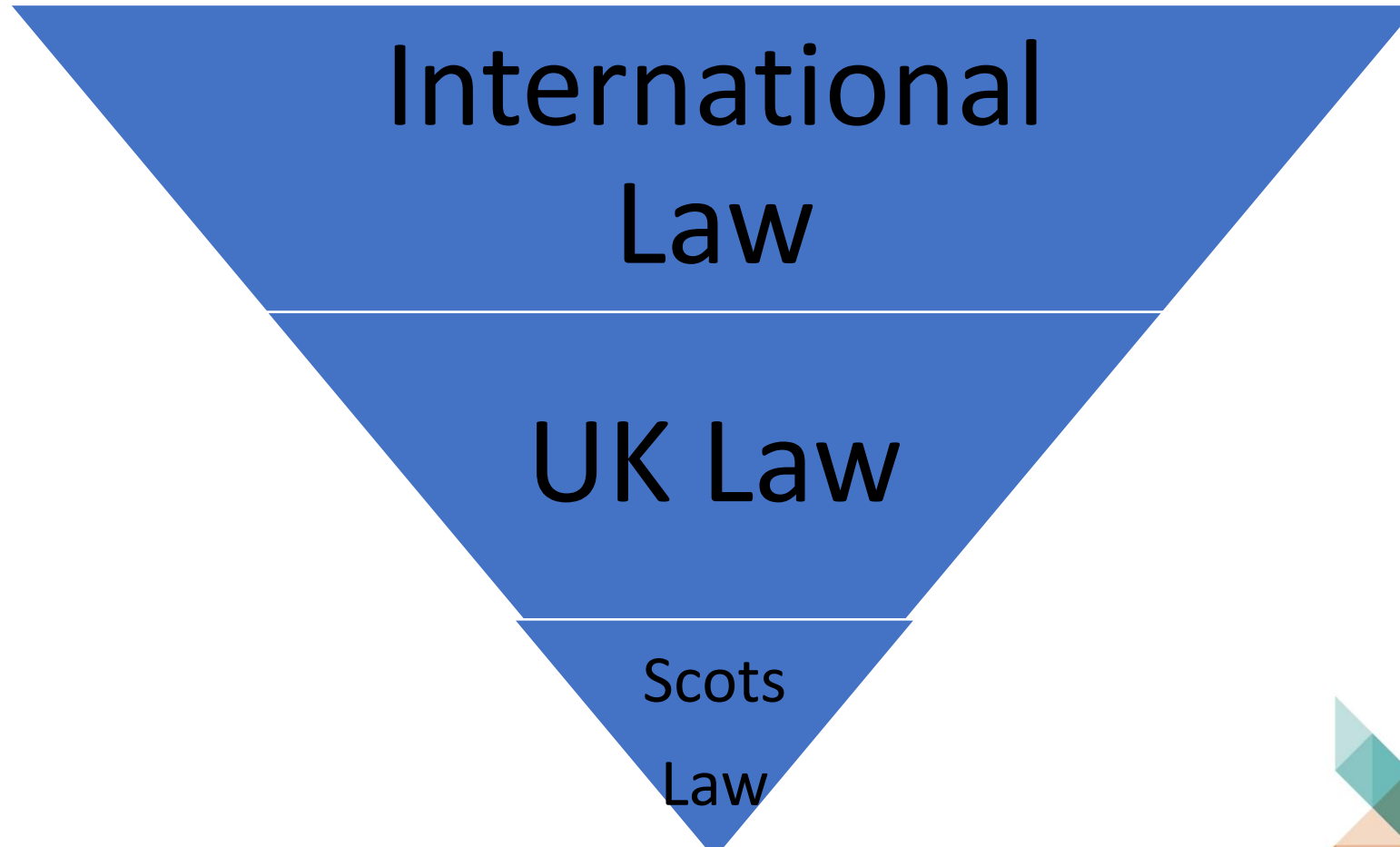
- Limited Leave to Remain (LTR) / Discretionary Leave (DL)
 - Usually 2.5 years, sometimes less, sometimes 3 or 4 years – requires renewal
 - Usually has ‘No Recourse to Public Funds’ (NRPF) – BRP will state this
 - Often granted as a result of ‘private life’ in UK – Article 8 ECHR
 - If UASC is refused Refugee Status/Humanitarian Protection, gets LTR until 17.5 years old (called “UASC Leave”)
- Leave to Remain – Family Reunion
 - Spouse/children can come to UK to join Refugee
 - Immigration Rules don’t provide for parents or siblings
 - Lasts as long as the Refugee’s leave to remain
 - All the entitlements of a Refugee



Legal Framework



Legal Framework



Legal Framework

International

- UN Convention on the Rights of the Child (UNCRC)
- Refugee Convention 1951
- European Convention on Human Rights (ECHR)
- CoE Trafficking Convention & EU Trafficking Directive

UK Law

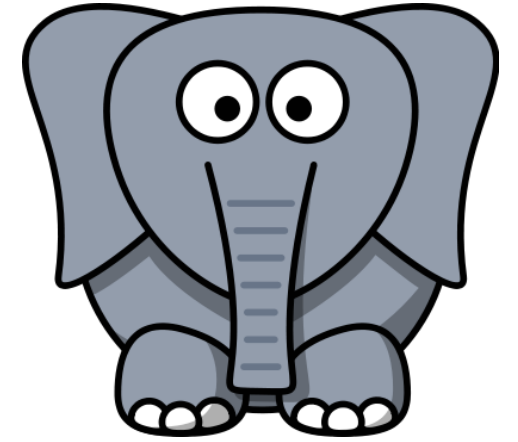
- Immigration Acts and Rules
- UKVI guidance and policy

Scots Law

- Children (Scotland) Act 1995; GIRFEC
- Human Trafficking and Exploitation (Scotland) Act 2015



Legal Framework



- Elephant in the room...
- Unless it is “incorporated” into domestic law, then it cannot be enforced in the UK courts.

We can tell judges that the state has not complied with UNCRC provisions, but judges have no power to force the issue unless they are set out in domestic UK or Scots law



Best Interests Principle

UNCRC – Article 3

*(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.***

UNCRC Principles



Best Interests Principle

- Section 55 Borders Citizenship and Immigration Act 2009
 - The Secretary of State must make arrangements for ensuring that ...the functions in relation to immigration, asylum or nationality are discharged **having regard to the need to safeguard and promote the welfare of children** who are in the United Kingdom
- Section 17 Children (Scotland) Act 1995
 - (1) Where a child is looked after by a local authority they shall, ...**safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern)**...
- Supreme Court in *ZH (Tanzania) v SSHD [2011] UKSC 4* - the best interests of the child shall be a **“primary consideration”**

This means that Art 3 UNCRC is incorporated into UK law



European Convention on Human Rights

- Right to **Life** (*Article 2, EHCR*)
- Right to be free from **torture, inhuman and degrading treatment** (*Article 3, ECHR*)
- Prohibition of Slavery and Forced Labour (encompasses **human trafficking**) (*Article 4, ECHR*)
- Right to **private and family life** including **physical integrity and safety** [*Article 8, ECHR*]
- Right not to be **discriminated** against [*Article 14, ECHR*]
- Rights to health, work, education and freedom of expression as well

**The ECHR is incorporated into UK law by
Human Rights Act 1998**



CoE Trafficking Convention

EU Trafficking Directive

- Make trafficking a **criminal offence** (EU Directive Art 2; ECHR Art 4; Trafficking Convention Chapt IV);
- Provide **protection and assistance** to victims, especially children (EU Directive Arts 11,13,16; ECHR Art 4; Trafficking Convention Arts 11-13);
- Principle of **non-prosecution** (EU Directive Art 8; Trafficking Convention Art 26);



CoE Trafficking Convention

EU Trafficking Directive

- Provision of access to **compensation** for victims (EU Directive Art 17; Trafficking Convention Art 15);
- **Prompt identification** of victims (EU Directive Art 2; ECHR Art 4)
- **Presumption of age** (EU Directive Art 13; Trafficking Convention Art 10).

The Directive is directly effective in UK law

The Convention is reflected in Scottish & English legislation



Refugee Convention 1951



Article 1A:

- “[any 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”



Refugee Convention 1951

- **Well founded fear**

- Must be genuinely afraid of returning home [**subjective element**]
- Fear must be well founded [**objective element**] - to be ascertained independently of refugee's state of mind and on consideration of information about the particular country

- **Persecution**

- Persecution = Serious Harm + Failure of State Protection
- Must identify a specific actor and act



Refugee Convention 1951

- **Persecution for a Convention Reason**

- Race, Religion, Nationality, Political Opinion, Membership of a Particular Social Group

- **Failure of State Protection**

- An effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and person must have access to this protection
- Protection can be from an non-state actor (NGO)



Refugee Convention 1951

- **Internal Relocation**

- Does the risk persist throughout the country?
- Is it reasonable to expect the person to stay in another part of the country? (the “unduly harsh” test)

The Refugee Convention is incorporated in UK law through various EU Directives, Immigration Acts, the Immigration Rules, and UKVI Policies



Refugee Convention 1951



- Alice is a 14 year old girl from Iran. She made a dancing video of a pop song and posted it to YouTube. She was sentenced to 9 months in jail and 50 lashes. It is unlawful in Iran to dance with members of the opposite sex or for women to appear without a headscarf.
- Barney is a 19 year old from China. He was found guilty of shoplifting and was sentenced to 2 years in jail. It is unlawful in China to shoplift.
- Arnold is a 17 year old boy from Eritrea. He fled after being forced to sign up to the military. Military service in Eritrea is often indefinite, it is unlawful to desert the military and there are widespread abuses of those who do.

Asylum Process in the UK



Myth – “why don’t they claim immediately once out of their own country?”

About **86%** of the world’s refugees are living in developing countries, often in camps.
(UNHCR Global Trends 2014)



The average period of time spent in a refugee camp is **14 years**



Myth – “we are overrun in Britain”

- The UK is home to **less than 1%** of the world’s refugees – out of more than 59.5 million forcibly displaced people worldwide (UNHCR Mid-Year Trends 2015)
- Total number of first time asylum applications to the **European Union** in 2016 was an estimated **1.2 million.**
- In 2016, the UK received **38,000** first-time applications, approx. **3%** of the EU total.
 - Germany received over 722,000, approx. 60% of the EU total
- Source: <http://ec.europa.eu/eurostat>





Numbers

- Over **3,000** applications from UASCs in the UK 2016 – just under 10% of total.
- Afghanistan, Albania, Eritrea, Iran and Iraq are the main countries of origin – comprise **70%** of total.
 - Others include Vietnam, Sudan, Ethiopia and Syria
 - 90% male
 - Over 60% aged 16+
- Only **33%** get Refugee Status or Humanitarian Protection
- Source: <https://www.refugeecouncil.org.uk>



Numbers



- Trafficking in the UK – **3,805** potential victims of trafficking referred to the National Referral Mechanism (NRM) in 2016
 - 1278 of these referrals were children (increase of 30% on 2015)
- Trafficking in Scotland – **150** referrals in 2016, over 30% of which were children
- This is the tip of the iceberg – UK Anti-Slavery Commissioner believes that there are **tens of thousands** of people in slavery in the UK
- Source: <http://www.nationalcrimeagency.gov.uk>



Asylum Process



- Hostile
- Scary
- Long
- Complicated

Asylum Process – UK level

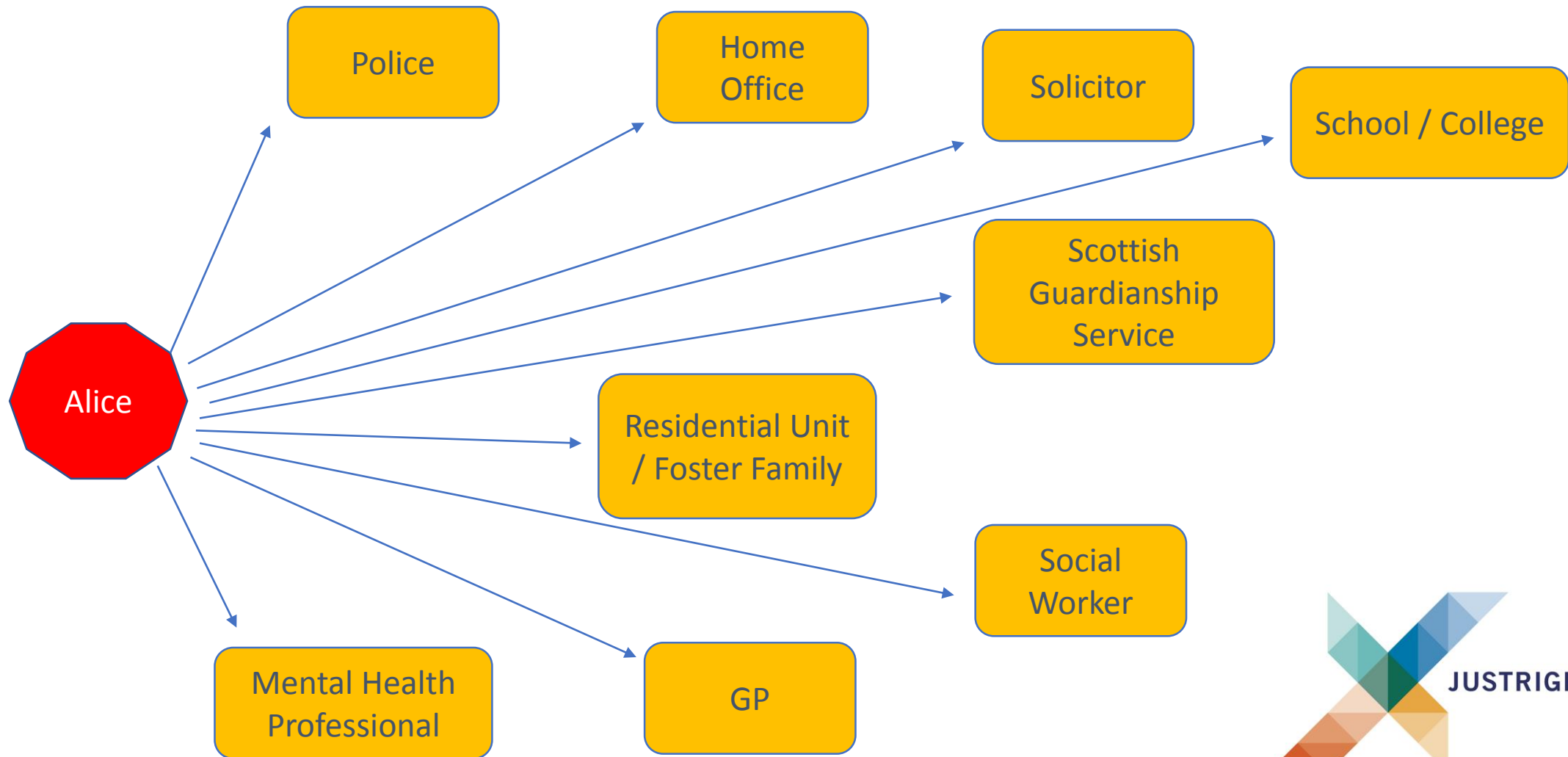
- UKVI Asylum Policy Instruction – ‘Processing children's asylum claims’, October 2017
- Section 55 Borders, Citizenship and Immigration Act 2009 – best interests of the child
- Immigration Acts 2016 – Part 5
 - National Transfer Scheme



Scotland



Separated Child



Children (Scotland) Act 1995

- Definition of “child”?
 - Part I – “Parents Children and Guardians” – up to age 16
 - Part II – “Promotion of Children’s Welfare by Local Authorities and Children’s Hearings” – up to age 18
- What sections of Children (Scotland) Act 1995 are migrant children accommodated under?



Children (Scotland) Act 1995

Section 25 Children (Sc) Act 1995

- **Child residing in area in need**
- **No-one has parental responsibility for him;**
- **He is lost or abandoned; or**
- **The person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care**

Section 22 Children (Sc) Act 1995

- **Child residing in area in need**
- **Safeguard and promote the welfare**
- **Promote the upbringing of such children by their families**
- **Service may be provided for**
 - **A particular child**
 - **Their parent(s)**
 - **Other family members**

Children (Scotland) Act 1995



Section 17 Children (Scotland) Act 1995

17. Duty of local authority to child looked after by them.

(1) Where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe—

(a) safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern);

(b) make such use of services available for children cared for by their own parents as appear to the authority reasonable in his case;

Children (Scotland) Act 1995

Section 25 Children (Scotland) Act 1995

25. Provision of accommodation for children, etc.

(1) A local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because—

(a) no-one has parental responsibility for him;

(b) he is lost or abandoned; or

(c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.

(2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare.

Section 29 Children (Scotland) Act 1995

- Aftercare

- ‘advice, guidance and assistance’ on accommodation, education and employment opportunities, and financial support
- Available to all care leavers regardless of placement type
- Children & Young People (Sc) Act 2014 extended eligibility to these services to care leavers ages 21 to 26th birthday.

- Continuing Care

- Introduced by Children & Young People (Sc) Act 2014
- Only available to care leavers whose final placement was ‘*away from home*’
- Local Authority’s obligation to provide care leaver with the accommodation and support they were receiving directly before they ceased to be looked after

Section 29 Children (Scotland) Act 1995

- Immigration Act 2016
 - Section 69 and Schedule 12 remove legal duty on local authorities to support some migrant care leavers over 18
 - This affects asylum seeking and trafficked children
 - Also affects migrant children in care with no status
 - Not yet implemented

- Child law (devolved) v. Immigration law (reserved)?



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