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Assembly

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# Support to Appeal Rights Exhausted Asylum Seekers in Northern Ireland

## 1 Introduction

On 18 January 2017 the Committee for the Executive Office heard evidence from the Northern Ireland Community of Refugee and Asylum Seekers (NICRAS) and Refugee and Asylum Forum (RAF) on the situation of refugees and asylum seekers in Northern Ireland<sup>1</sup>. In particular, issues for people whose applications for asylum had been declined, but for various reasons remain in Northern Ireland, were raised.

This paper briefly summarises the asylum system as it applies to Northern Ireland and gives an overview of support to appeal rights exhausted asylum seekers. This refers to people seeking asylum who have been unsuccessful in their applications and any appeals have failed.

Appeal rights exhausted asylum seekers do not have access to public funds. The expectation is that people in this situation will return to their home country. However,

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<sup>1</sup> Minutes of Proceedings, Committee for the Executive Office, 18 January 2017:  
<http://www.niassembly.gov.uk/globalassets/committee-blocks/executive-office/20170118-mops.pdf>.

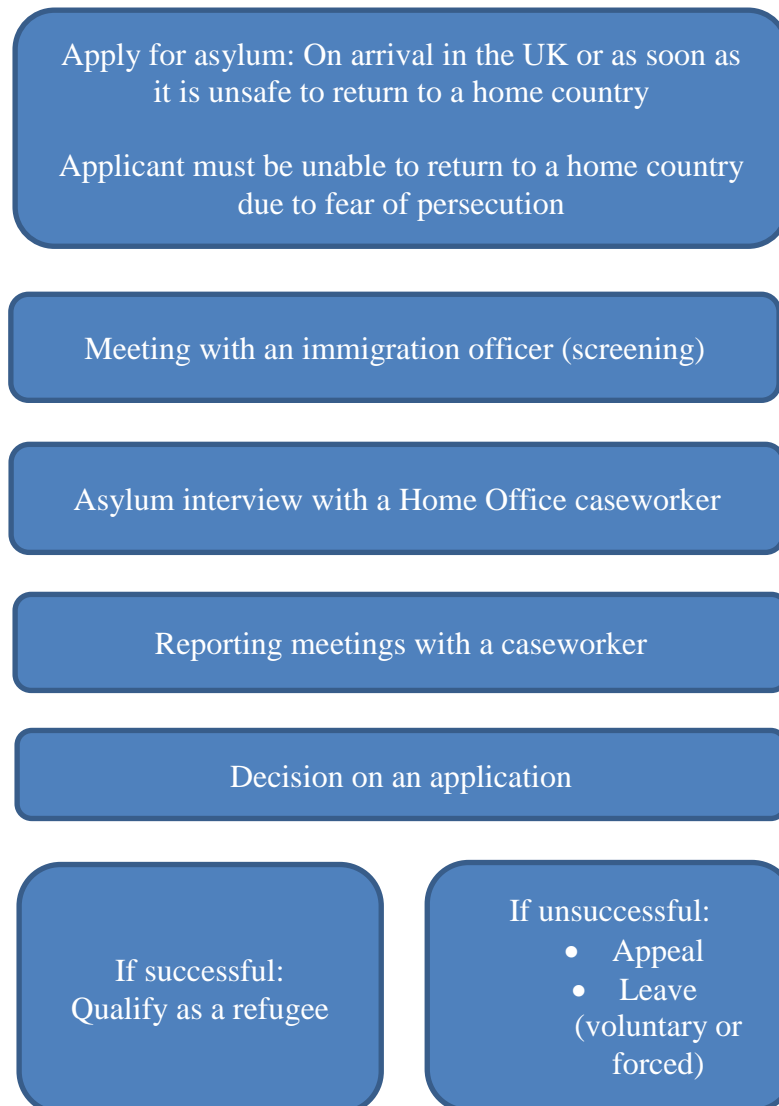
there are circumstances under which people remain in the host country, despite having been refused asylum, including:

- The receiving country will not accept them
- There is no safe route of return
- Lack of documentation
- Gathering evidence for a follow-on application for asylum
- Lack of trust in the asylum system

This paper explores some options for the support of people in this situation.

## 2 The Asylum System in Northern Ireland

Immigration law is an excepted matter and therefore not devolved. The asylum system<sup>2</sup> is provided for in the Immigration Rules<sup>3</sup>. The process of applying for asylum is summarised below<sup>4</sup>.



In 2015 35% of appeals were allowed. This has to a certain extent led to a lack of faith in the asylum system if a full third of decisions are assessed to be wrong, potentially sending people to countries where they would not be safe<sup>5</sup>.

<sup>2</sup> For an overview of the refugee and asylum system in Northern Ireland, see Research and Information Service Research Paper 63/14 Refugees and Asylum Seekers in Northern Ireland, 6 June 2014: <http://www.niassembly.gov.uk/assembly-business/research-and-information-service-raise/research-publications-2016/research-publications-2014/>.

<sup>3</sup> Immigration Rules, Part 11: Asylum (paragraphs 326A to 352H): <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>.

<sup>4</sup> Summarised from 'Claim Asylum in the UK', Gov.UK website, accessed 6 September 2016: <https://www.gov.uk/claim-asylum>.

<sup>5</sup> 'National statistics – Asylum: Asylum appeals', Gov.uk website: <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2015/asylum#asylum-appeals>.

### 3 Support to Appeal Rights Exhausted Asylum Seekers in Northern Ireland

#### **Support to Asylum Seekers in the UK**

Support to asylum seekers in the UK is provided for in the Immigration and Asylum Act 1999<sup>6</sup>. Section 95 provides for support to destitute asylum seekers (referred to as Section 95 support). People who have been refused asylum cease to receive support, but may apply for short-term support pending return to a home country<sup>7</sup>, except for those with children (under 18), who continue to receive support. Section 4 of the 1999 Act provides for the provision of accommodation and a pre-paid payment card for food and essential items to asylum seekers whose applications have failed, if eligible for such support<sup>8</sup>. Similarly, Section 21 of the National Assistance Act 1948<sup>9</sup> provides for local authorities to provide accommodation under certain circumstances.

UK Department of Health guidance indicates the trigger for free National Health Service (NHS) secondary care is those in receipt of Section 4 or Section 95 support<sup>10</sup>. There is no legal bar to registration for primary care, which is at the GP's discretion<sup>11</sup>.

The Immigration Act 2016 provides for the repeal of Section 4 of the 1999 Act<sup>12</sup>. Instead a new section is provided for (Section 98A) where support may be given to a failed asylum seeker who may be destitute and who may face a genuine obstacle to leaving the UK<sup>13</sup>. Refusal of support in this instance will not be affected by the presence of an accompanying family.

#### **Northern Ireland**

This section summarises provision for rights appeal exhausted asylum seekers in Northern Ireland, in particular, access to social security benefits, accommodation and health care.

#### **Social Security Benefits**

'Refused' asylum seekers are not eligible for mainstream social security benefits including Housing Benefit. Even though social security matters are devolved to Northern Ireland under Section 87 of the Northern Ireland Act 1998<sup>14</sup>, immigration

<sup>6</sup> Immigration and Asylum Act 1999: <http://www.legislation.gov.uk/ukpga/1999/33/contents>.

<sup>7</sup> 'Asylum support', Gov.uk website, accessed 8 September 2016: <https://www.gov.uk/asylum-support/overview>.

<sup>8</sup> UK Visas and Immigration (2015), *Asylum Support, Section 4 Policy and Process*, London: Home Office: <https://www.gov.uk/government/publications/asylum-support-section-4-policy-and-process>.

<sup>9</sup> National Assistance Act 1948: <http://www.legislation.gov.uk/ukpga/Geo6/11-12/29/contents>.

<sup>10</sup> Department of Health (2015), *Guidance on implementing the overseas visitor hospital charging regulations 2015*, London: Department of Health: <https://www.gov.uk/government/publications/guidance-on-overseas-visitors-hospital-charging-regulations>.

<sup>11</sup> 'Patient registration for GP practices', British Medical Association website, accessed 8 September 2016:

<https://www.bma.org.uk/advice/employment/gp-practices/service-provision/patient-registration-for-gp-practices>.

<sup>12</sup> Paragraph 1 of Schedule 11 of the Immigration Act 2016: <http://www.legislation.gov.uk/ukpga/2016/19/contents/enacted>.

<sup>13</sup> Paragraph 13; see also Home Office (2015), *Reforming support for failed asylum seekers and other illegal migrants*, London: Home Office, p.5: <https://www.gov.uk/government/consultations/reform-of-support-for-failed-asylum-seekers-and-other-illegal-migrants>.

<sup>14</sup> Northern Ireland Act 1998: <http://www.legislation.gov.uk/ukpga/1998/47/contents>.

policy remains within the competence of the UK Parliament. Therefore, there is limited opportunity for the Northern Ireland Executive, and agencies such as the Northern Ireland Housing Executive and Social Security Agency, to deviate from either social security or housing accommodation eligibility criteria in relation to refused asylum seekers.

### **Accommodation**

With regards to homelessness amongst refused asylum seekers, Article 22(A) of the Housing (Northern Ireland) Order 1981<sup>15</sup> stipulates that the Housing Executive shall not allocate housing accommodation to a person from abroad if he/she is a person subject to immigration control who is ineligible for an allocation of housing accommodation by virtue of the terms of the Immigration Act 1999<sup>16</sup>. In March 2016, the then Minister for Social Development outlined further the position of the Northern Ireland Housing Executive in respect to refused asylum seekers who are homeless<sup>17</sup>:

*“The Housing Executive has no statutory authority to provide accommodation to failed Asylum Seekers or others with no recourse to public funds and must operate within the bounds of UK immigration law.*

*Persons subject to immigration control and other persons from abroad with no recourse to public funds are entitled to free advice in relation to homelessness and the prevention of homelessness. This may include referring the applicant to other support agencies. If the Housing Executive has decided the homeless applicant is a person who is ineligible but believes they are destitute, and has a pre-existing care need or has children in the household, the Housing Executive may secure the services of the Department of Health, Social Services and public safety under the Health & Personal Social Services under the Children (Northern Ireland) Order 1995 to provide services for persons under 18 who are children in need. Therefore, the Housing Executive will make a referral to the relevant Health and Social Service Trust in such instances.”*

### **Health care**

It was formerly the case that appeals exhausted asylum seekers were only entitled to free emergency care, maternity care and treatment for infectious diseases. However, on 17 September 2014 an official of the Department of Health, Social Services and Public Safety (DHSSPS) briefed the Health Committee on proposed regulations<sup>18</sup>:

<sup>15</sup> Housing (Northern Ireland) Order 1981: <http://www.legislation.gov.uk/nisi/1981/156/contents>.

<sup>16</sup> Assembly Question for Written Answer (AQW 53175/11-16). Mr David McNarry MLA to the Minister for Social Development. Answered on 4 February 2016.

<sup>17</sup> Assembly Question for Written Answer (AQW 54897/11-16). Mr Stephen Agnew MLA to the Minister for Social Development. Answered on 15 March 2016.

<sup>18</sup> Committee for Health, Social Services and Public Safety, Official Report 17 September 2016: <http://www.niassembly.gov.uk/assembly-business/official-report/committee-minutes-of-evidence/session-2014-2015/september-2014/health-services-for-persons-not-ordinarily-resident-and-health-and-personal-social-services-regulations-hspps-officials/>.

*“The regulations will be drafted in such a way as to provide primary care and secondary care for an asylum seeker who has made an application. That is all that the regulations will say. It has been agreed that primary care and secondary care will be provided up until deportation papers have been presented to the person.”*

The official continued:

*“Quite simply, the legislation will leave it that anybody who makes an application for asylum will be entitled to free primary and secondary health care. That will apply if they have made an application; it will not matter whether their application has been approved or turned down. So, that includes all asylum seekers.”*

Paragraph 9(b) of the Provision of Health Services to Persons Not Ordinarily Resident Regulations (Northern Ireland) 2015 provides for primary and secondary care of all asylum seekers.

#### **Visitors exempt from charges – refugees, asylum seekers and children in care**

9. No charge may be made or recovered in respect of any services forming part of health services provided to a visitor who—

- (a) has been granted temporary protection, asylum or humanitarian protection under the immigration rules made under section 3(2) (general provisions for regulation and control) of the Immigration Act 1971(19);
- (b) has made an application to be granted temporary protection, asylum or humanitarian protection under those rules; or
- (c) is a child, taken into the care of an authority under the Children (Northern Ireland) Order 1995

## 4 Other Jurisdictions

This section briefly summarises arrangements in other jurisdictions.

### Scotland

As in the rest of the UK, if an asylum claim fails and Section 4 support is refused, then statutory support ends<sup>19</sup>.

Guidance in relation to NHS treatment in Scotland states<sup>20</sup>:

*“Anyone who has made a formal application for asylum, whether pending or unsuccessful, is entitled to treatment on the same basis as a UK national who is ordinarily resident in Scotland while they remain in the country. If their application to remain in the UK is successful, they will be granted refugee status and will continue to be exempt from NHS charges on the same basis as a person ordinarily resident in Scotland.”*

Registration for primary care is at the discretion of GPs, secondary care is free for all applicants regardless of outcome.

### Wales

As with Scotland, Section 4 support is the only statutory recourse for support if an asylum application fails.

Guidance by Primary Care Quality states<sup>21</sup>:

*Wales Government issued new Regulations in 2009 stating that any person in Wales who has claimed asylum (regardless of the outcome) falls within the overseas exemption category and therefore cannot be charged for treatment prior to repatriation.*

Registration for primary care is at the discretion of GPs, secondary care is free for all applicants regardless of outcome.

### Republic of Ireland

Asylum seekers are handled through the Direct Provision system, where they are provided with accommodation, meals, medical care and financial support. Those whose applications have failed remain in Direct Provision on a discretionary basis until they are deported and therefore continue to receive support up to that point<sup>22</sup>.

<sup>19</sup> 'Getting support if your asylum claim fails', Shelter Scotland website, accessed 8 September 2016:

[http://scotland.shelter.org.uk/get\\_advice/advice\\_topics/finding\\_a\\_place\\_to\\_live/asylum\\_seekers\\_and\\_refugees/support\\_for\\_failed\\_asylum\\_seekers/getting\\_support\\_if\\_your\\_asylum\\_claim\\_fails](http://scotland.shelter.org.uk/get_advice/advice_topics/finding_a_place_to_live/asylum_seekers_and_refugees/support_for_failed_asylum_seekers/getting_support_if_your_asylum_claim_fails).

<sup>20</sup> Healthcare Policy and Strategy Directorate (2010), *Overseas visitors' liability to pay charges for NHS care and services*, CEL 09 (2010), Edinburgh: Healthcare Policy and Strategy Directorate.

<sup>21</sup> Primary Care Quality (2016), *Access to NHS services by Asylum Seekers, Failed Asylum Seekers and Refugees; A brief guide for General Medical Practices (GMP's)*, Cardiff: Public Health Wales, p.3.

<sup>22</sup> Communication from the Oireachtas Research Service, 7 September 2016.

The following table summarises support to rights appeal exhausted asylum seekers in Northern Ireland, England, Scotland, Wales and the Republic of Ireland.

	Accommodation	Health care	Financial support
NI	Section 4 support if eligible, otherwise free advice only	Free primary and secondary care	Section 4 support if eligible
England	Section 4 support if eligible	Charges apply for secondary care (other than emergency); no bar to primary care	Section 4 support if eligible
Scotland	Section 4 support if eligible	Free primary and secondary care	Section 4 support if eligible
Wales	Section 4 support if eligible	Free primary and secondary care	Section 4 support if eligible
RoI	Direct Provision (discretionary)	Direct Provision (discretionary)	Direct Provision (discretionary)



## 5 Options for Additional Support

Broadly speaking, access to health care for appeals exhausted asylum seekers have been addressed through the 2015 Regulations. Formal financial support is a challenge, although a combination of the Crisis Fund and private charity has to some degree alleviated destitution in this respect. The key challenge remains access to accommodation. This section summarises some of options for additional support.

**Direct negotiations with the UK Government:** The Northern Ireland Executive is significantly constrained by legislation which prevents it from providing refused asylum seekers with access to social security benefits, social housing and other of sources of support which require public funding. Direct discussions between the NI Executive and the UK Government may be the only means by which significant flexibilities can be negotiated. The Scottish Government is currently in discussions with the UK Government on greater devolved powers in relation to the operation of asylum support. This is a result of the outworking of the Smith Commission Report on further devolution of powers to the Scottish Parliament.

### *The Smith Commission explained*

Following the outcome of the Scottish independence referendum, the Prime Minister announced the appointment of Lord Smith to take forward proposals made in a joint declaration by the three pro-union parties of more powers for the Scottish Parliament in the event of a 'No' vote. Lord Smith was tasked with producing a report with recommendations for further devolution of powers to strengthen the Scottish Parliament within the UK. Greater devolved (non-legislative) powers in respect of asylum support was one (of many other issues) identified in the report.

The table below provides a summary of the issues identified in the Smith Commission report along with the Government's position as at January 2016.

Issue	Smith Agreement provision <sup>23</sup>	Progress (January 2016) <sup>24</sup>
Asylum	<p>96 (4) explore with respect to asylum:</p> <p>(a) Different powers being in place in Scotland for asylum seekers to access accommodation and financial support and advice.</p> <p>(b) Being able to lodge from within Scotland an asylum claim to the Home Office.</p>	<p>(a) The provision of accommodation and advice are subject to contractual arrangements with third party suppliers. It is not possible to vary the arrangements mid-contract. The Asylum system is a UK, i.e. state obligation and function. It is not feasible to envisage a situation whereby asylum seekers in the UK receive different levels of benefit based on their post-code.</p>

<sup>23</sup> Smith Commission Report (<http://webarchive.nationalarchives.gov.uk/20151202171017/https://www.smith-commission.scot/smith-commission-report/>).

<sup>24</sup> Smith Commission Agreement: Non-legislative and additional issues for consideration [www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-01-11/HCWS458/](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-01-11/HCWS458/).

	<p>(c) MSPs being able to represent directly to UK Visas and Immigration Enforcement their concerns with respect to devolved matters affecting their constituents.</p>	<p>(b) All individuals wishing to lodge an in-country asylum claim are required to report for the asylum screening unit in Croydon unless there are reasons for the screening to take place elsewhere. In Scotland those individuals who are assessed as being vulnerable are screened locally. Work has taken place with partners to ensure that applicants are aware of this process when they seek to make an asylum application. Migrant Helpline and local social work teams, who receive asylum applications, make their own assessment on vulnerability before referring to the Glasgow asylum team for screening.</p> <p>(c) With regards to MSPs correspondence, UK Visas and Immigration responds to enquiries on immigration cases raised by all levels of elected representatives and peers. The Home Office recommends that constituents with immigration enquiries use their Member of Parliament for the speediest response through one of the UKVI's six MP Account Management teams across the UK.</p>
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The Scottish Communities Minister, revealed in a Scottish Parliamentary Question in August 2016, that *"in the period since the Smith Commission's report was published, the Scottish Government have sought to progress the recommendation on issues relating to asylum seekers....this has been done through meetings...This inter-government work with the UK Government on asylum issues is ongoing, and Scottish Government and Home Office officials are in close contact to take forward further discussion on the Smith Commission's recommendations"*.<sup>25</sup>

**Homelessness Advice and Assistance:** Section 2 of the Housing (Amendment) Act (Northern Ireland) 2010<sup>26</sup> requires the Housing Executive to ensure that advice about homelessness, and the prevention of homelessness, is available free of charge to any person in Northern Ireland. It further enables the Housing Executive to pay grants or to make loans or other assistance available to persons providing such advice. The Housing Executive may assist the advice provider, who is providing advice on behalf of the Department to:

- Use premises belonging to the Executive;

<sup>25</sup> Scottish Parliament Question (S5W-00979) Linda Fabiani. Lodged 22 June 2016.

<sup>26</sup> Housing (Amendment) Act (Northern Ireland) 2010: <http://www.legislation.gov.uk/nia/2010/9/contents>.

- Make available furniture or other goods (e.g. by way of gift, loan or otherwise); and
- Make available the services of staff employed by the Executive.

In relation to the form and context of the advice, the Housing Executive must have regard to any guidance issued by the Department.

**Initiatives and funding for the not-for-profit sector:** refused asylum seekers have 'no recourse to public funds' (NRPFs). Legal opinion obtained by the Association of Charitable Foundations, the Joseph Rowntree Trust and the Joseph Rowntree Housing Trust argues that the meaning and use of the term 'public funds' is far narrower than may be thought.

The legal opinion highlights that there is much confusion around the term 'public funds' and what exactly this entails. The legal opinion states that the definition of 'public funds' includes, for example, access to Housing Benefit (and a list of other social security benefits), and allocation of social housing and homelessness assistance<sup>27</sup>. However, it argues that:

*"Nothing else constitutes 'public funds'. Any other money derived from the public purse and used in some way for the support of persons subject to immigration control, such as a grant or allocation of funds to build or otherwise supply residential accommodation, does not fall within the definition of 'public funds' used for Immigration Rules purposes".*

The interpretation and application of immigration legislation is a very complex area of law. Unfortunately, it is not within the remit of the Northern Ireland Assembly Research and Information Service (RaISe) to provide legal advice and so we are not a position to comment on the accuracy of the interpretation of the legislation set out in the legal opinion.

However, it is clear that this is an area that could be explored further in terms of its potential for the Northern Ireland Executive to use block grants funding to either (a) directly provide funding and resources through statutory agencies or (b) provide funding and resources to non-for-profit organisations to support destitute refused asylum seekers in accordance with immigration law. In particular, the Housing Executive might look at the extent to which the Supporting People programme<sup>28</sup> is constrained by restrictions on persons with no access to public funds.

Is it legally feasible for the Northern Ireland Executive to provide funding to assist non-profit organisations to build capacity and infrastructure to provide accommodation and support services to refused asylum seekers? A recent report produced on behalf of 'Housing Justice' highlights a range of accommodation and support models for people

<sup>27</sup> Adrian Berry (2015) 'In the matter of an opinion requested by the Association of Charitable Foundations, the Joseph Rowntree Trust and the Joseph Rowntree Housing Trust', Garden Court Chambers, 13 July 2015.

<sup>28</sup> 'What does the Supporting People Programme do?', NI Housing Executive website, accessed 23 September 2016: [http://www.nihe.gov.uk/index/advice/supporting\\_people.htm](http://www.nihe.gov.uk/index/advice/supporting_people.htm).

with no recourse to public funds. The suitability and legality of providing funding to non-profit organisations to provide such initiatives in Northern Ireland could be explored.

Examples of accommodation models set out in the report included<sup>29</sup>:

- *Housing Association accommodation* - Social services covering an area of relatively low housing demand and rents negotiated with housing associations to offer occasional vacant properties for a peppercorn rent<sup>30</sup> for those who have no recourse to public funds.
- *'Hosting'* – offering accommodation to destitute migrants in the homes of volunteer 'hosts' i.e. using spare rooms in private residential housing to 'host' an individual or families. This should be accompanied with the provision of a basic package of support including health and legal advice. Hosting could be used as a form of emergency and short-term accommodation. There are many factors to consider in such initiatives such as using a recognised referral agency; criteria for excepting people into such as scheme. Requires investment in terms of setting up an infrastructure, volunteer support and public liability insurance.
- *Acquiring a property* – assisting a non-profit organisation with purchasing or leasing for free, accommodation for use by those with no recourse to public funds. Bearing in mind this will require property management responsibilities for the organisation. According to the report some organisations have leased properties from housing associations or churches which have included housing management and/or repairs as part of the leasing agreement.
- *Ethical property guardians*: whereby an organisation legally uses vacant properties e.g. empty churches to provide accommodation to destitute migrants. In return that organisation will act as caretaker to the property with an assurance that the building can be made vacant at reasonably short notice.

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<sup>29</sup> Ceri Hutton and Sue Lukes (2015) *Models of accommodation and support for migrants with no recourse to public funds (NRPF): A resource for practitioners and groups who want to get involved*, Coventry: Housing Rights.

<sup>30</sup> I.e. a very small sum.

## 6 Overview

This section gives a broad summary of support to appeal rights exhausted asylum seekers in Northern Ireland and suggests a range of opportunities for support.

Currently, appeal rights exhausted asylum seekers can have access to the following support in Northern Ireland:

Financial support There is no access to social security benefits. Destitute refused asylum seekers can receive support from private charities, community organisations and churches. There is the Crisis Fund, managed by the British Red Cross, but a very small proportion of recipients of the Fund are refused asylum seekers and this is not a permanent arrangement<sup>31</sup>. Food is provided by homelessness organisations in Belfast and in some other cities and towns in Northern Ireland. Food banks are also a source of support.

Health Care Access to primary care is free, but discretionary, and access to secondary and emergency care is free.

Accommodation The position of the Housing Executive is that a lack of recourse to public funds disqualifies for anything more than homelessness advice. Accommodation may be provided by private charities, community organisations and churches and the Crisis Fund can pay for accommodation.

Beyond the humanitarian argument, there is a case that can be put in favour of the provision of basic needs, otherwise the resulting decline in health will create additional costs on the health system. The provision of accommodation remains the most problematic.

Options for change might be as follows:

- Negotiation with the UK to exempt the Housing Executive of legislation barring provision of accommodation to appeal rights exhausted asylum seekers
- Alternative arrangements for the in-kind provision of facilities and/or services
- Additional investment in or funding of alternative housing provision, such as in the not-for-profit sector

The Immigration Act 2016 provides for the withdrawal of Section 4 support for families in the event of appeal rights being exhausted. There may be opportunities to engage on the issue when Legislative Consent Motions are brought before the Northern Ireland Assembly for the commencement of aspects of this legislation.

Legal challenge under the European Convention on Human Rights (ECHR) may be an option in some circumstances, for example:

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<sup>31</sup> Information from the British Red Cross 12 September 2016.

- Article 3 – subject to torture or inhuman or degrading punishment or treatment, by virtue of being left destitute by a withdrawal of support
- Article 8 – right to protection of a private or family life, in the event of a withdrawal of Section 4 support for families under the provisions of the Immigration Act 2016. Social Services will still be required to support the welfare of children, although adults will no longer be entitled to such protection.