



Scottish Elections (Franchise & Representation) Bill 2019

Briefing on potential amendments at Stage 2

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Part One: “Qualifying Foreign Nationals” for the purpose of voting

Policy intent: to include people with outstanding asylum claims in the new Scottish electoral franchise.

Context: The current version of the Scottish Elections (Franchise & Representation) Bill 2019 provides for an “electoral system that supports and empowers the engagement in elections of all those who have chosen to make Scotland their home”¹ and one in which that “citizens of all countries who are legally resident in Scotland are able to vote in the elections which affect them.”²

The terms under which foreign nationals will be eligible to vote in Scottish Elections are included in Section 1(8) of the Bill. The Bill provides the definition of a qualifying foreign national through reference to the Immigration Act 1971. A qualifying foreign national, therefore, is someone of any nationality who “does not require leave to enter or remain in the United Kingdom under the Immigration Act 1971 or who has, or is to be treated as having, any such leave. The extent of the period of leave to remain under subparagraph (b) (ii) is not relevant: any period of leave will suffice to permit registration.”³

In its current format, the Bill enfranchises people who have been granted refugee status or other forms of leave to remain, but falls short of granting the right to vote to people still waiting for a decision on their asylum application. Whilst this is not made explicit in primary legislation, it is spelt out in accompanying documentation: “as this policy is to enfranchise citizens of all nationalities who are legally resident in Scotland, this will include those whose claim for asylum has been allowed and have been granted refugee status and leave to remain in the UK. [...] Those without leave to remain will be ineligible to register and vote in elections. This will include individuals who are illegally present in the UK and/or subject to deportation or removal, and also asylum seekers who have an undetermined claim for asylum.”⁴

In its current format, the Bill draws an incorrect and uncomfortable association between people still in the asylum system and those who are living in Scotland without any form of leave to remain (“illegally present in the UK”). If the legislative intent is to “enfranchise citizens of all nationalities who are legally resident in Scotland”, we believe it is inconsistent to exclude people in the asylum system. [point out here that when an asylum claim is pending, asylum seekers have a lawful right to live in the UK, pending the outcome of that claim, it is just a restricted right. This is consistent with the recognition that many asylum seekers will eventually be recognised as refugees and given an extended period of leave to remain.”

The spirit of the legislation – and the extension of the franchise – is to ensure that all those who have made Scotland their home have a say on the decisions that affect them. As it stands, we believe there is dissonance between the legislative intent and the legislative effect of the Scottish Elections (Franchise and

¹ Scottish Elections (Franchise & Representation) Bill (2019), *Policy Memorandum*, p.2

² *Ibid*, p.2

³ *Ibid* p.2

⁴ Scottish Elections (Franchise & Representation) Bill (2019), *Policy Memorandum*, p.8-9

Representation) Bill. We do not believe that there is a normative argument within the legislative intent of the Bill that allows for the exclusion of people in the asylum system from the franchise.

What should change: We believe the Scottish Elections (Franchise & Representation) Bill should be adequately amended to ensure that people seeking asylum are included in the new electoral franchise. Primarily, we encourage the Scottish Government to consider ways to amend the legislation to achieve full enfranchisement in line with the recommendation in the Stage 1 report. However, we have also outlined some suggested routes for amendments below:

Possibilities for amendments:

All amendments propose changes to Part 1, paragraph 1.8 of the Scottish Elections (Franchise & Representation) Bill, which outlines the definition of a ‘qualifying foreign national.’

Option 1: Amendment at 1(8)(b)(iii)

Intent: To expand the definition of a qualifying foreign national to include people who have claimed asylum.

Context: To guarantee the inclusion of people seeking asylum in the franchise it is necessary to amend the definition of what constitutes a “qualifying foreign national” to include people who have lodged a formal application for leave as a refugee.

We believe that people in the asylum system in Scotland are able to meet the main tests for voter eligibility that other foreign nationals are subject to:

Lawful presence: By the nature of having an outstanding asylum claim, people seeking asylum are granted temporary stay whilst their applications are considered. This is known as “immigration bail”, granted under the Immigration Act 2016 (but was formally known as temporary admission). People seeking asylum are issued with a BAIL 201 notice, which indicates they have lodged a formal claim for asylum with the Home Office. People should also be issued with an Asylum Registration Card (ARC), a form of photo-ID provided for people in the asylum system. Additionally, if someone has an outstanding asylum claim, a pending appeal, or has submitted a fresh claim, they should not be removed from the country.

Fundamentally, people who have an outstanding asylum claim are not in the country unlawfully. Their ability to stay in the UK is conditional, in that they are unable to work⁵ or access most public funds, but their presence in Scotland is entirely lawful. The question is then whether being granted “immigration bail” constitutes sufficient ‘right to reside’ in Scotland for the purpose of being granted voting rights.

It is also possible to draw parallels between how EU nationals and people seeking asylum draw down their certain rights through exercising other rights. For example, EU nationals currently draw down their voting rights by virtue of exercising their treaty rights. Similarly, people seeking asylum in Scotland are exercising a right to claim asylum and that is how they derive their right to stay (which is termed “immigration bail” in UK legislation).

The conditions placed on people in the asylum system as part of their lawful residence in the UK are not dissimilar to some of the conditions placed on non-EEA nationals who have conditional leave to remain in the UK, such as limited access to public funds. Both populations are here legally; both populations may be here temporarily; and both populations are an important part of communities across Scotland. Importantly, the Bill already guarantees that the ‘temporariness’ of someone’s leave to remain in Scotland should not affect their right to vote in Scottish Elections.

⁵ Unless their claim has been outstanding for over 12 months and they have been granted permission to work in professions in the shortage occupation list by the Home Office.

Habitual residence: The majority of people seeking asylum will be provided with financial support and accommodation by the Home Office whilst their application for refugee protection is considered if they would otherwise be destitute. The accommodation provided is known as ‘dispersal accommodation’ and individuals are allocated accommodation by the Home Office. People seeking asylum living in dispersal accommodation would have relevant documentation from the Home Office that lists them as resident at a specific address.

A small population of people seeking asylum will not access financial and accommodation support from the Home Office whilst they wait for a decision on their asylum claim. These individuals will be able to prove their residence in Scotland like any other resident.

Age and capacity: Like the rest of the general population, they would be subject to the broader exclusions relating to age and capacity.

Therefore, if the Bill is adequately amended, we do not see that there would be any significant practical barriers for someone in the asylum system to be considered a ‘qualifying foreign national’ for the purpose of voting.

There is also precedent set in other aspects of Scottish law and practice whereby regulations governing access to public services have been drafted in a way which is inclusive of people seeking asylum as well as those granted leave to stay as refugees. We encourage the Scottish Government to take a similar approach to the Scottish Elections (Franchise & Representation) Bill.

Possible amendment: The wording of this amendment has been based on similar provisions in [NHS Scotland regulations](#) on access to care for people seeking asylum (see 4(c)).

Voting by qualifying foreign nationals

1 (8) In section 202 (general provisions as to interpretation), after the definition of “qualifying address” in subsection (1) insert –

““qualifying foreign national” means a person of any nationality who -

(a) is not a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union, and

(b) either -

(i) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or

(ii) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) any description of such leave, **or**

(iii) is such a person but has made a formal application for leave as a refugee”.

Option 2: Defining what it means to be “treated as having such leave”

Intent: To interpret the provision to be “treated as having such leave” in an expansive and inclusive way.

Context: Sub paragraph 1(8)(b)(ii) states that someone can be considered a qualifying foreign national if they are not a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union, and – by virtue of any enactment – are “treated as having such” leave to remain.

It is unclear from the primary legislation and accompanying documentation to the Bill as to what being “treated as having such leave” means in practice for the purpose of voter registration. It is possible to argue that people who have lodged a formal application for refugee protection could be considered as being “treated as having such leave” as they are granted conditional leave to stay (known as immigration bail) whilst their asylum claims are considered.

Potential amendments: We would encourage the Scottish Government to interpret sub paragraph 1(8)(b)(ii) in an expansive way to ensure that the electoral franchise in Scotland is inclusive of everyone who has made Scotland their home. This could either be confirmed through specifying the definition of being “treated as having such leave” within primary legislation, or outlining this clearly in accompanying documentation to the Bill.

Option 3: reframing Section 1(8) entirely

Intent: Amend section 1(8) so that eligibility to vote is based on ‘ordinary residence’ in Scotland.

Context: As it stands, the definition of a “qualifying foreign national” for the purposes of voting in Scottish Elections is rooted in the Immigration Act 1971. The Scottish Government could choose to redraft Section 1(8) in its entirety and create a standalone definition of “qualifying foreign national” based on the principle of being ‘ordinarily resident’ in Scotland.

The concept of being ‘ordinarily resident’ has been established through years of case law and practical application. The leading case in this area is *R v Barnet LBC ex parte Shah* [1983] 1 All ER 226. The House of Lords found that the concept of ordinary residence implied:

- ordinary residence is established if there is a regular habitual mode of life in a particular place for the time being, whether of short or long duration, the continuity of which has persisted apart from temporary or occasional absences, residence must be both: voluntary & adopted for a settled purpose;
- a person can be ordinarily resident in more than one country at the same time, distinguishing it from domiciled;
- ordinary residence is proven more by objective evidence than evidence of an individual’s state of mind at a point in time.

‘Ordinary residence’ is not defined in primary legislation either in Scotland or UK-wide. Nevertheless, it is used in both policy and practice to determine access to certain services, such as healthcare, or benefits, such as university grants. ‘Ordinary residence’ is already used within Scottish legislation and policy, for example, in relation to access to higher education funding where being ‘ordinarily resident’ is defined as: “habitual or normal residence, by choice, over a period of time in one place and does not include residence solely for the purposes of education.”⁶ There is also precedent set for ‘ordinary residence’ being used in electoral franchise: everyone who is ‘ordinarily resident’ is eligible to vote and stand in local government elections in Ireland.⁷

In the case of people seeking asylum, we believe that they meet the relevant requirements to be considered ‘ordinarily resident’ in Scotland.

The proposed franchise effectively repositions ordinary residence as the primary trigger for voting rights, rather than citizenship. Therefore, we would argue that this intent is better represented in primary legislation through the term ‘ordinary residence.’

⁶ Scot Gov: <https://www.gov.scot/publications/change-residency-eligibility-criteria-student-support-scotland-egia/>

⁷ Enfranchised under Electoral Act 1992, S2.10, and supported by S.I. No 175/2004 Electoral (Amendment) Regulation 2004.

Possible amendment:

1 (8) In section 202 (general provisions as to interpretation), after the definition of “qualifying address” in subsection (1) insert –

““qualifying foreign national” means a person of any nationality who ***is ordinarily resident in Scotland; and***

(a) is not a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union.

~~(b) either –~~

~~(i) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom, or~~

~~(ii) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) any description of such leave,”.~~

Part Two: Candidacy Rights

Policy intent: to amending the Scottish Elections (Franchise & Representation) to ensure all foreign nationals with voting rights in Scotland are able to stand as candidates in Scottish Elections.

Context: As it stands, the Bill does not grant candidacy rights to all foreign nationals who are eligible to vote in Scottish Elections. Provisions state that qualifying foreign nationals must have indefinite leave to remain in order to stand as a candidate. There are a number of issues with this proposal:

The Stage 1 report clearly outlines the first issue with the current candidacy rights proposals: “at present, under European freedom of movement provisions, there is no period of leave, so EU and European Economic Area (EEA) nationals are immediately able to stand as candidates. [...] The Bill provides that foreign nationals who do not have candidacy rights at present will be able to stand once they have indefinite leave to remain.” Therefore, going forward, any EU and EEA national would be able to stand as a candidate from their day of arrival in Scotland, whilst others – including refugees, would be required to have indefinite leave to remain before they are able to stand.

Secondly, we believe the requirement for prospective candidates to have indefinite leave to remain is unnecessary and overly restrictive. By only granting candidacy rights to those with indefinite leave to remain, the Bill excludes some Scottish residents who may have been in the country for a significant period of time, but not acquired indefinite leave to remain.

Immigration and nationality law is complex, and there are many different routes to citizenship in different immigration categories. For example, aside from refugee status, the longest period for which the Home Office now grants leave is two and a half years. People will often have this limited leave renewed for a period for up to 10 years, at which point they may achieve the right to stay permanently. Effectively, people may have lived here lawfully for a number of years and have every intention of settling here but not have indefinite leave to remain, thus excluding them from standing as candidates in Scottish elections.

With this in mind, we do not see that there is a clear and rational reason for choosing indefinite leave to remain as a threshold for candidacy, otherwise doing so would create an uneven pattern of candidacy rights that is not based on an individuals’ relationship to a community, but rather subject to somewhat arbitrary structures imposed by an immigration system.

Therefore, the Bill’s provisions on candidacy rights could be amended in line with the amendments on voting rights above. For example (amendments in bold):

Possible amendments:

2 Scottish parliamentary elections: nomination, election and holding office

In section 16 of the Scotland Act 1998 (exceptions and relief from disqualification), after subsection (2) insert—

“(2A) A person other than a citizen of the European Union is not disqualified from being a member of the Parliament merely because of section 3 of the Act of Settlement, provided the person—

(a) is resident in the United Kingdom, and

(b) either—

- (i) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom (excluding a person who does not require such leave by virtue only of section 8 of the Immigration Act 1971 (exceptions to requirement for leave in special cases)), or
- (ii) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) ~~indefinite leave to remain within the meaning of this Act~~ **any description of such leave, Or**
- (iii) **is such a person but [is a refugee or] has made a formal application for leave as a refugee”.**

3 Local government elections: nomination, election and holding office

(1) Section 29 of the Local Government (Scotland) Act 1973 (qualifications for nomination, election and holding office as a member of a local authority in Scotland) is amended as follows.

(2) In subsection (1), after “Union” insert “or a qualifying foreign national”.

(3) In subsection (2), after the definition of “owner” insert—

““qualifying foreign national” means a person of any nationality who—

(a) is not a Commonwealth citizen, a citizen of the Republic of Ireland or a relevant citizen of the Union, and

(b) either—

- (i) is not a person who requires leave under the Immigration Act 1971 to enter or remain in the United Kingdom (excluding a person who does not require such leave by virtue only of section 8 of the Immigration Act 1971 (exceptions to requirement for leave in special cases)), or
- (ii) is such a person but for the time being has (or is, by virtue of any enactment, treated as having such leave) ~~indefinite leave to remain within the meaning of this Act~~ **any description of such leave, Or**
- (iii) **is such a person but [is a refugee or] has made a formal application for leave as a refugee”.**