

## Changes to residency criteria for access to financial support in Further and Higher Education: our response

### About JustRight Scotland

JustRight Scotland is a registered charity (SC047818) established by an experienced group of human rights lawyers. We use the law to defend and extend people's rights, working collaboratively with non-lawyers across Scotland towards the shared aims of increasing access to justice and reducing inequality.

We provide legal advice and representation on human rights and equalities issues across a range of legal areas including: women's legal justice, trafficking and labour exploitation, EU citizen rights, migration and citizenship, disability and trans legal justice.

Whilst our work is specific to Scotland, our work covers both devolved and reserved policy areas, and as such we endeavour to respond to policy consultations across both Scotland and UK, where appropriate.

As public lawyers for people who face systemic inequalities, discrimination and disadvantage, we use the provisions of the Human Rights Act 1998 (HRA) in our work, daily. In addition to providing direct legal advice to clients, we also run outreach legal surgeries and helplines, deliver rights information, training and legal education, and contribute to research, policy and influencing work.

### Our Response

Our response to the Scottish Government's consultation on changes to residency criteria for access to financial support in Further and Higher Education.

#### JustRight Scotland

JustRight Scotland is a Scottish Charitable Incorporated Organisation (SC047818) which provides legal services through its limited liability partnership, JustRight Scotland LLP which trades as JustRight Scotland (SO305962). This firm has been authorised to act as solicitors by the Law Society of Scotland (Registered No 53703).

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### Question 1

**Do you agree with the overarching policy aim that students need to be able to demonstrate a connection to Scotland in order to obtain financial support from the Scottish Government for their studies?**

Yes

### Question 2

**Please provide any relevant comments you may have in regards to your answer at question one.**

We welcome the overarching policy in this consultation.

We believe that students need to demonstrate a connection to Scotland, however, we must stress that this is as much about looking forward to the potential life, contribution, and connection to Scotland that the prospective student may have, as much as looking back to their past, reflected in length of residency.

This concept was emphasised in [Lord Sandison's Opinion](#) in *Jasim v Scottish Ministers* which found that the 7 years and half-life residency requirement in the 2007 SAAS Regulations were unlawful when considering Article 14 (the right not to be discriminated against) and Article 2 of Protocol 1 (the right to education) of the [European Convention on Human Rights](#), resulting in this current consultation process.

By taking residency as the litmus test for connection to Scotland, individuals will inevitably be excluded from student support despite clear objective connections to Scotland. Arguably, focusing on length of residency too much would be in conflict with Article 28 of the [UNCRC](#) which seeks to 'make higher education accessible to all', and Article 2 in which State Parties are to ensure that children do not face discrimination. We encourage the Scottish Government to focus on the aims of the UNCRC during their attempt to [incorporate the convention](#) into Scots Law. These rights should not only be incorporated into the law but must also be realised in practice.

Residency requirements can be an 'imprecise' way to answer the question of the degree of connection that a student has to Scotland, and the likelihood of the student remaining in Scotland long term, as discussed in Lord Sandison's Opinion. Although we understand a connection must be shown, and a line drawn somewhere, it is crude to rely solely on the length of residency without any flexibility built into the process elsewhere. Immigration law, and the decisions made by families who migrate, are complex and ordinarily out of the hands of a child. A child may be brought to Scotland, without positive choice on their part as to whether and when they make the move. A child may then fully participate in society and the education system for the time they have been in Scotland and thus foster a connection resulting in them having no intention of leaving this country – in many instances now considering Scotland their home just as meaningfully as their schoolmates who may have been born here. This idea is expressed in Paragraph 51 of Lord Sandison's Opinion. If this child is to then receive the grades necessary to go on to further or higher education, they should not be denied the realisation of their right to education due to crude residency requirements, with no further recourse. Instead, we must look

forward to their continued connection with Scotland, which is very often acknowledged and borne out in the UK Immigration Rules, and the benefit they will be to an inclusive and welcoming Scottish society. Connection to Scotland is key; however, connection requires us to look forward rather than solely backward as has been the case in the past.

### **Question 3**

**Do you agree that the length of a person's residence in the UK (together with a requirement to be ordinarily resident in Scotland on the relevant date) is an appropriate way of assessing whether a person has a sufficient connection with Scotland to qualify for the financial support package in Further / Higher Education?**

Yes

The length of residence does help understand a person's connection to Scotland, but it is not the whole picture as previously expressed. The previous regulations were punitive, applying a length of residence that was far too long. We agree that 3 years residency requirement is a better approach and brings the regulations in line with other groups of students applying for funding.

### **Question 4**

**Do you agree that 3 years' residence in the UK is a suitable minimum residence requirement for setting eligibility for student support in Scotland?**

Yes

We understand that there is a need to have a certain minimum eligibility criterion regarding length of residency, and we agree that 3 years is an appropriate duration. It removes the overly punitive criteria that were there before (7 years and half-life), and it brings the residency requirements more in line with other students in Scotland seeking student funding.

In the *New Scots: Refugee Integration Strategy 2019 to 2022* it states that: '...[t]he Scottish Government and local authorities are committed to delivering excellence and equity in Scottish education through a focus on raising attainment for all children and young people and closing the gap in attainment between Scotland's least and most disadvantaged young people.' We would strongly suggest that enabling migrant young people who have made Scotland their home to access higher and further education alongside their peers, is a critical structural feature in helping close the attainment gap.

### **Question 5**

**Do you agree that residence based on any form of leave to enter or remain from the Home Office in the UK should entitle a person to student support in Scotland, provided they otherwise meet the residence requirements?**

Yes

We do not believe a potential student should be discriminated against regarding their immigration status. If an individual has any form of leave to enter or remain – aside from a student visa – and has resided here for three years or more, they should be entitled to student support in Scotland.

#### **Question 6**

**Do you agree that individuals who are here specifically for education purposes and are on a student visa, should remain ineligible for the financial support package from Scottish Government?**

Yes

We fully understand that a connection to Scotland should be established for eligibility for student funding. As such, we agree that a student visa alone does not establish this connection.

#### **Question 7**

**Do you think eligibility should be extended to the dependents (child, spouse or civil partner) of those with student visas?**

Yes

#### **Question 8**

**Should financial support beyond support already given through discretionary funds be extended to students who are currently ordinarily resident in Scotland and have sought asylum from the UK Home Office, but whose application is still pending?**

Yes

JustRight Scotland stands squarely against the hostile environment and its impact upon those seeking refuge and asylum in the United Kingdom.

We note that the Consultation document proposes that the time spent living in Scotland waiting for asylum should count towards the length of residence. We agree with this, but we would note that people who obtain asylum or another form of leave to remain as a result of an asylum claim, have no length of residence requirement at all under the current regulations. However, we agree that if another form of leave to remain is granted for a young person which is separate from the asylum process, then it is logical that their time waiting for asylum counts towards their residence. We are in favour of the Scottish Government offering student funding to those in Scotland whose asylum applications are still pending but have been in the United Kingdom for 3 years.

The Independent Chief Inspector of Borders and Immigration published [An Inspection of Asylum Casework \(August 2020 – May 2021\)](#) which states that claimants who received a decision in 2020 were waiting an average of 449 days, rising to 550 days for unaccompanied asylum seeking children.

Recent Home Office [statistics](#) show that at the end of 2022, 160,919 people were waiting for an outcome on their initial claim for asylum. This figure has tripled since the end of 2019 (51,228). Of the 160,919 people awaiting a decision, 68% (109,641 people) have been waiting for more than 6 months.

Our experience tells us that there are individuals living in Scotland whose wait times have exceeded 3 years. Current Home Office statistics show that over 75% of those in the asylum system obtain asylum from the Home Office, and almost 50% of those who are refused obtain protection upon appeal, meaning the 75% statistic is in fact higher.

To this end, we would argue that it is fair and reasonable to allow those in the asylum system with a claim being considered by the Home Office, to access student support. The asylum system is already dehumanising and in effect presses pause on families' lives, barring them from working and enforcing poverty through the asylum support system. The children of asylum seekers are particularly badly affected by being unable to access higher or further education. Once they leave school – having lived in Scotland for years – they are forced to watch their peers continue their lives, while they are condemned to civic limbo. Only a tiny number of people are supported through the philanthropic funding of sanctuary scholarships.

We note that access to education has in the past been extended to children of asylum seekers and young asylum seekers as per Schedule 2, Part 2, Section 22 of the *Student Support (Scotland) Regulations 2022*. This section states that children of asylum seekers and young asylum seekers are eligible for tuition funding only if:

- they have been resident in Scotland for three years;
- are resident in Scotland on the relevant date;
- are under 25 years old on the relevant date;
- and, were under 18 years old on the date when the application for asylum was made, which application must have been made **before 1<sup>st</sup> December 2006**.

This aspect of the Regulations has little relevance as of today because it requires an asylum claim to have been made over 16 years ago. The Regulation does tell us, though, that the Scottish Parliament recognised the impact on asylum seeking children in the past and sought to remedy it. We would encourage this same approach now, and we recommend that this rule be revised to allow for children of asylum seekers and young asylum seekers to be eligible for tuition support in Scotland.

Finally, we would also point out an error in the information set out in paragraph 20 of the [Consultation document](#) which states: '*[t]his expansion of the eligibility criteria would not include those who currently have outstanding asylum claims. This is due to conditions under UK immigration laws imposed on the applicant whilst awaiting their application being processed, which restricts their recourse to public funds.*'

We wish to advise that funding for education is [not considered a public fund](#) as per the UK Immigration Rules. Further and Higher Education funding is not classed as a public fund for immigration purposes so a person can access home fees, or receive student support if they are subject to the 'no recourse to public funds' (NRPF) condition.

### **Question 9**

**Do you think eligibility for student financial support should be fixed according to an assessment at the start of their course (i.e., with reference to the relevant date)?**

No

We describe this as the “year 1 rule”. We believe that the “year 1 rule” is problematic, as was argued in the case of *Jasim v Scottish Ministers*. Our client had no realistic means of ever obtaining state support for her 5-year medical degree, because her eligibility for such support would always depend on her circumstances on the first day of the first academic year of that course (the “year 1 rule”), when she was ineligible, even though she became eligible during the duration of the course.

Although we fully support decreasing the residency requirement to 3 years, we do not believe that residency recorded at the start of the university course should dictate the funding for the full duration of the course. Typically, for example, undergraduate degrees in Scotland are four years in length. Length of residency is fluid, and continually growing in length if one is to remain in the same place. If an individual does not meet the 3-year residence requirement at the start of a degree programme, but would meet the requirement in the course of the first year, we believe they should be re-assessed on the first day of the next academic year.

Arguments were made by the Scottish Ministers in *Jasim v Scottish Ministers* as well as in the consultation policy document that this could increase administrative workload. We would submit that any increase in workload would be small, given the relatively few numbers of students impacted as compared to the overall student population. We also do not believe that an individual should be barred from accessing a human right due to a slight increase in administrative burden. In any event, we note that financial eligibility is re-assessed annually by SAAS; an assessment of residence eligibility is a more straightforward process.

Were the “year 1 rule” to continue, it forces young people to either defer and place their lives on hold or drop out of courses and start again. We would argue that the impact of doing this is disproportionate to the small administrative burden for finding agencies.

### **Question 10**

**Do you have any comments on the sort of ‘events’ or changes in circumstances that should trigger reassessment of a student’s eligibility after the first academic year of their course?**

For the reasons set out above, we believe that meeting the 3-year residency requirement should be considered an ‘event’ important enough to trigger a reassessment of a student’s eligibility after the first academic year of their course. We agree with the consultation that a student obtaining Indefinite Leave to Remain or British Citizenship should also qualify as an ‘event’.

### **Question 11**

#### **Do you have any other comments on the current policy of carrying out an assessment of eligibility on the relevant date, or the proposals to change it?**

We wish to raise to your attention a divergence between the Student Awards Agency Scotland (SAAS) funding eligibility and Scottish universities' power to decide whether a student is deemed a *home* or *international* student. It is not clear to us what criteria are used by universities.

This has already been a stumbling block for young, aspiring students in Scotland looking to attend further or higher education. An example of this in practice is one of our clients who applied for the same course at two separate Scottish universities. Whilst one university classified the individual as a *home* student – resulting in her fees being £1,820 – the other regarded them as an *international* student for which fees can be in excesses of £20,000. Being deemed an international student would not only exclude them from student support but would also increase the yearly fees astronomically.

We would note that some universities have tended to exercise their apparent discretion on this matter in the favour of young people, meaning that even those students who fell foul of the long residence criteria and therefore not eligible for student funding, would be classified as a home fees student by the university, giving them a chance to pay lower fees and attend their studies. However, you can appreciate that this paints a confusing and opaque picture of access to education in Scotland, when universities have discretion over this matter, but funding bodies do not.

This need for transparency is referenced in the education objectives in the *New Scots: Refugee Integration Strategy 2019 to 2022*, stressing the need for young refugees and asylum seekers (and their parents, carers, and guardians) to be aware of and understand the education landscape and options open for them.

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