

Refugee Children's Consortium

Response to the Home Office consultation paper *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children*

The Refugee Children's Consortium (RCC) is a group of NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international standards.

Members of the Refugee Children's Consortium are: The Asphaleia Project, AVID (Association of Visitors to Immigration Detainees), Bail for Immigration Detainees, Barnardo's, BASW (British Association of Social Workers), British Associations for Adoption and Fostering (BAAF), Children's Legal Centre, Child Poverty Action Group, Children's Rights Alliance for England, The Children's Society, The Fostering Network, FSU (Family Service Units), The Immigration Law Practitioners' Association (ILPA), The Medical Foundation for the Care of Victims of Torture, NCB, NCH, NSPCC, Rainer, Redbridge Refugee Forum, Refugee Council, Refugee Arrivals Project, Refugee Legal Centre, Scottish Refugee Council, Save The Children UK, Student Action for Refugees (STAR) and Voice. The British Red Cross, Office of the Children's Commissioner (England), UNICEF UK and UNHCR all have observer status.

Many member organisations will also be submitting individual responses based on the work each undertakes with children seeking asylum. Some of these responses reflect consultation agencies have conducted with children themselves. This response represents a shared view by all agencies on some of the principles underlying the Home Office's proposals as well as addressing most of the issues raised in the specific questions asked in the paper. The response therefore comprises some general comments in addition to responses to the issues raised in specific sections of the paper, under the same headings.

The response does not address the issue of how the proposals for reform would apply or be implemented in the parts of the UK with devolved administrations. The RCC urges the government to outline their plans with documents that explain how the reforms would work in practice in Scotland, Wales and Northern Ireland. The most obvious examples of this are in Scotland, where different legal and regulatory frameworks govern child care and the funding and regulation of legal advice is administered and funded differently. The response from Scottish Refugee Council addresses these matters in more detail and is endorsed in that respect by RCC. In this response where we refer to the Every Child Matters framework we assume inclusion of Getting it Right for Every Child.

1. Scope of the paper

Definition of an 'unaccompanied asylum seeking child'

The definition of an 'unaccompanied asylum seeking child' used in the paper is similar to that used by UNHCR and NGOs in defining an unaccompanied or separated child. RCC welcomes this adoption of a definition that includes children who arrived in the UK or joined with an adult who is not their usual carer. A significant number of these children are subsequently looked after by local authorities who currently receive no funding from BIA for their care. RCC welcomes the inclusion of these children into the scope of the consultation paper to the extent that we assume that BIA has taken responsibility for funding the care provided by a local authority to these children as they are now to be designated 'unaccompanied asylum seeking children'. However, the inclusion poses some challenges if it is proposed that all of these children will be subject to the specialist authority model proposed in the paper.

Unaccompanied children's different or additional needs

The RCC agrees with the statement made in paragraph 6; namely that 'young asylum seekers, whether children in need or looked after children matter every bit as much as other young people in the context of meeting each and all of the five outcomes in the *Every Child Matters* framework'. However, we strongly disagree with the selection of this group of children for particular types of arrangement based on their 'different and particular needs'.

It is important to note that children and young people who are asylum seekers are children first and have the same universal needs and rights as any other child. Under the Equality Act 2006, it would be difficult for a public authority to justify the differential or discriminatory treatment of any unaccompanied child.

Secondly every looked after child is unique and has different needs. Otherwise there would be no need for a "flexible, diverse range of responses," as suggested in the *Care Matters* proposals for looked after children. The common factor for asylum seeking children and refugee children and the reason they may have additional needs is linked to immigration issues.

Whilst welcoming the recognition that unaccompanied children seeking asylum have particular needs (that should be identified in each child's assessment of need) and may require specialist support (that should be addressed in each child's care plan and placement), it is unacceptable that as a group unaccompanied children seeking asylum should be treated differently from any other looked after child or care leaver

2. Why improvements need to be made

The RCC strongly questions the assumptions on which this consultation exercise is based, namely that asylum seeking children should not be provided for, other than on the presumption that they are in the UK temporarily and that by virtue of their immigration status they should receive different treatment to settled children.

The need for improvement is undeniable; service provision varies widely in quality and consistency for all looked after children, including unaccompanied children. But it is long-term, systematic under-funding and a lack of adherence to existing law, regulation, statutory guidance and policy standards regarding looked after children which is in the RCC's view, the underlying cause of the failures felt by asylum seeking children.

As the Home Office acknowledges, there are no plans to take this group of children outside the scope of Children Act 1989 duties. That must be the right decision: the Children Act 1989 remains the benchmark legislation to meet the needs of all children, but the fundamental need is to ensure that child welfare provisions in those Acts are met in full, rather than seeking to create a system within a system for children with a range of protection needs.

Services for asylum seeking children, including their placements should be based on a full assessment of their individual care needs and not false assumptions of what their needs are as a group, made by a sector of government that has made itself responsible for immigration control rather than child protection..

It is disappointing that this paper repeats the myth that these children can easily be separated into pre- and post-16 groups, and that a child over 16 is less vulnerable, more removable and in need of less care. There is no evidence to support those assertions. Recent evidence¹ reveals that the age distinction made with regard to the levels of funding to local authorities is a key factor influencing the level of support and care afforded to unaccompanied children. We urge the

¹ Local Authority Support to Unaccompanied Asylum Seeking Children, Save the Children 2006

government to remove this artificial distinction to encourage local authorities to fulfil their statutory responsibilities.

Failure to address necessary improvements

The RCC believes that the consultation paper fails to acknowledge the extent to which the children covered by these plans are in need of international protection. This is in part due to the approach of the UK government to the protection of children which fails to see their needs in an holistic way. This section of our response aims to address the failure of the UK government to fully acknowledge its obligations to protect children in this situation and respond to their situation by looking at their best interests.

International human rights obligations

The RCC endorses UNICEF (UK)'s response to the consultation document, namely,

“We note that the consultation paper (para 10) takes as a reference point the 1951 Refugee Convention. However, this approach is too narrow – while all legal provisions of the 1951 Convention and in particular the principle of non-refoulement, apply to Unaccompanied Asylum Seeking Children (UASC), there are no child-specific provisions included in this instrument. The detailed provisions in the UN Convention on the Rights of the Child (CRC) however, offer much more elaborate and comprehensive legal guidance on the treatment of children, including UASC. The complementary relationship between the two international instruments affords optimal protection for UASC; the 1951 Convention seeks to protect the rights of the child as a refugee, whilst the CRC serves to guard the child’s rights as a child. Moreover, it must be recalled that the rights stipulated in the CRC apply to every child on the territory or under the jurisdiction of the UK authorities and are not contingent upon holding citizenship, specific residence, or other status.”

It is a welcome step in the right direction that the Asylum Policy Instructions recognise (albeit in a very limited way) the need to consider children's best interests, and that training for new asylum model children's caseowners now includes a little more understanding of these rights, but any programme of reforms which considers the welfare and international protection needs of children of all ages MUST take as its starting point the full international legal rights of children.

Discretionary leave to remain until the age of 17½ is an inadequate protection framework for children who are not recognised as refugees. The protection of a child is not and should not be left to a matter of a discretionary policy. This response will address the proposals on Discretionary Leave (DL) later but as a starting point, both Refugee and Subsidiary Protection decision-making must be fully informed by UNCRC principles.

A strong underpinning presumption within the consultation document is that *it is not a solution to simply respect the person's wishes to remain in the UK* (para 12) This has never been the practice, nor has it been advocated by the RCC. A child's wishes and feelings are important as a relevant factor in ascertaining what is in the best interests of the child. Children's best interests must be a primary consideration and should have in every individual case at least as much weight as government's "right" to maintain effective immigration controls. Best interests is not a concept to be made to fit around the political decisions of government but vice versa.

Identifying the protection needs of children and balancing children's rights with immigration control is a careful assessment requiring the most anxious scrutiny on an individual basis.

The presumptions made in this consultation are no more than political value judgments, political choices and political wishes. They should not be presented as matters of law and principle and in many respects the political choices and presumptions in this consultation are highly inconsistent with international and domestic legal obligations and moreover anathema to child welfare practice.

The RCC therefore calls on the Home Office as it has repeatedly done over time, to base its policies on child welfare best practice and full and positive adoption and understanding of the UN Convention on the Rights of the Child. We are pleased therefore that government has decided that the general reservation against the CRC is no longer applicable to refugee and subsidiary protection determination procedures having now ratified the EU Qualifications Directive². Unfortunately this is simply not reflected in the presumptions, proposals and questions set out in the consultation document.

The RCC maintains its position that there is no place for a reservation relating to immigration status against the CRC but in any event, the UK's reservation has no bearing upon the care of children whilst they are in the UK and should not inform any policy considerations relating to their welfare.

Whilst government in general has adopted a positive agenda for the improvement of outcomes for children, the RCC considers that the Home Office presumptions about asylum seeking children set out in this document run counter to key domestic, European and International policy statements and priorities for children, for example

Every Child Matters and Care Matters³ in England

“Building a Europe for and with children “ – agreed by The Heads of State and Government at the Council of Europe Warsaw Summit 2005⁴

The UN Committee on the Rights of the Child General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin⁵

European Network of Ombudspersons for Children – Statement on State Obligations for the Treatment of Unaccompanied Children⁶

3. The journey through the asylum and support system

Sponsoring Key Messages in Countries of Origin

The key message (para 23) is “*we must safeguard the asylum system from abuse*”. In a document entitled “ Planning Better Outcomes and Support...” the emphasis on deterrence and border controls and particularly the use of the word “safeguard” in this context is most regrettable. The principle of safeguarding in a document aimed at better outcomes for children should be about ensuring that those duties are met rather than emphasising the protection of the system from children – any measure which serves to deter or prevent vulnerable children leaving their country of origin to seek international protection is unwelcome.

As recently as the 3rd reading of the Borders Bill⁷ the Immigration Minister Liam Byrne strongly resisted the inclusion of the Borders and Immigration Agency within the statutory duty to safeguard children under s.11 of The Children Act 2004 fearing that such a duty would provide yet further obstacles to removal.

2 Council Directive 2004/83/Ec of 29 April 2004

3 Every Child Matters 2003, Care Matters 2006, DfES

4 http://www.coe.int/t/transversalprojects/children/BriefDescription/Default_en.asp

5 [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/\\$FILE/G0543805.DOC](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/532769d21fcd8302c1257020002b65d9/$FILE/G0543805.DOC)

6 http://www.crin.org/docs/ENOC_TSatementUnaccompanied.doc

7 Hansard 07.05.07 Minister at Column 233 onwards

It is clear that the key message is deterrence and speedier removal rather than safeguarding vulnerable children. The RCC once again⁸ re-iterates the need to make the BIA subject to statutory safeguarding duties.

Initial Assessments, including Age Determination

The RCC response endorses the research carried out by Dr Heaven Crawley for ILPA on the use of age dispute and assessment processes. The RCC agrees with the findings, conclusions and recommendations contained in that research.⁹

The use of X ray technology in the determination of age is not supported by the RCC, which continues to follow the guidance of The Royal College of Paediatrics and Child Health (RCPCH) to its members.

RCC is concerned about the lawfulness of such a use of X ray and has seen nothing from government to be satisfied that the proposals in any way demonstrate compliance with UK and EU legal requirements around the use of ionising radiation.

RCC condemns the proposal (para 30) that an age determination will be negatively influenced by a refusal to undergo the examination. There is no place in working with children for the adoption of such crude coercive measures. It is entirely reasonable for a child (or indeed an adult) to refuse to give consent to be subjected to a process which health professionals and their professional bodies consider clinically inaccurate and ethically unacceptable.

The RCC, through this response, calls upon government to require the immediate cessation of any current use of X ray examination by local authorities as age assessment pilot projects and any reliance on such information by the Home Office until such time as the methods are considered safe, lawful, ethically acceptable and of material benefit to the child welfare assessment process.

International Protection and the Child's Asylum Application

"Child specific persecution" is now acknowledged within both the Asylum Policy Instructions and the NAM caseowners training materials which is most welcome, yet there remains a basic poverty of information and understanding of the situation of children in their countries of origin. Insufficient work has been done on developing an objective child specific country information resource to assist decision makers. There is also little evidence as yet that decision letters from BIA address the persecution/protection of a child in child oriented terms whether this may be child specific persecution or not. It is also rare, as confirmed in the statistics¹⁰ for subsidiary protection leave to be granted.

UNHCR's revised textbook on refugee protection¹¹ states that "*[children's] special vulnerabilities require an age sensitive approach be adopted in relation to substantive aspects of refugee law as well as procedures. If not, the risk of failing to recognise child specific forms of persecution or underestimating the particular fears of children is high*".

"The range of potential [Refugee Convention] claims with an age dimension is broad, including forcible or under-age recruitment into military service, family or domestic violence, infanticide, forced or under age marriage, female genital mutilation, forced labour, forced prostitution, child pornography and trafficking".¹²

⁸ see RCC briefings – Borders Bill and previously

⁹ When is a child not a child? Asylum, age disputes and the process of age assessment ILPA/Heaven Crawley May 2007

¹⁰ <http://www.homeoffice.gov.uk/rds/pdfs07/asylumq406.pdf>

¹¹ Refugee Protection in International Law (Feller Turk Nicholson 2005) at page 57

¹² *ibid* page 57

The proposals in this consultation require a high degree of confidence in the reliability of child refugee and subsidiary protection determination procedures. Where a child requires international protection, under RC51, ECHR or indeed other special measures (e.g. Hague Convention) there needs to be a marked improvement in knowledge and skills in handling children's cases across the board by all the specialists involved in that decision.

By this the RCC means not only the BIA caseowners, but also for legal representatives and the judiciary for whom little formal guidance and training has been provided specific to children's appeals. Whilst ILPA has produced excellent best practice guides for practitioners¹³, there is no formal accreditation requirement for a legal representative to demonstrate child specialist competence. This is an essential requirement in considering particularly the access to legal advice requirements of a specialist authority.

At present, far too many children's cases are handled as if they are at best simply slight variations on the adult system, when what is required is a root and branch overhaul of the approach to the way in which these cases are handled. There are procedural and substantive decision making improvements that need to be made to give confidence that the policy changes proposed at the end-of-process stages in this document, around the reduction of limited leave and around planning for return, is to be safe for the child.

The RCC welcomes a move towards more specialist child caseowners and the development of specialist training courses for these staff, but the new NAM process itself has been brought on stream at very short notice, despite a lengthy available lead-in time and requests for information about how the new system will work, by RCC and other stakeholders over a long period.

Instead, the new process was implemented with little or no notice, let alone formal consultation with stakeholders in February/March 2007 making sweeping changes to the process – i.e. interviewing children of 12 and over, instituting a first reporting event early in the process, and major policy changes introduced without consultation by reducing the limit of Discretionary Leave to remain to 17 ½ . The training of case-owners is only as an additional short 5 day child specific course after completion of the NAM adult case-owners training. Supervisors of these teams are not required to be child specialists themselves. It is also unclear what plans have been put in place for continued professional development for caseowners and team leaders on child specific issues.

To date there has been no specific evaluation of children's decision making under the UNHCR Quality Initiative. The Non-Suspensive Appeals Children's interview pilot conducted by IND was the subject of an internal evaluation report in August 2004, which whilst a largely favourable report, nonetheless concluded that:

6.3 There would be a risk of an adverse impact on the speed of decision making if interviewing were to be more widely adopted and interviewing on a wider scale could have significant implications in terms of resources.

The evaluation also recommended that

a further interviewing pilot is conducted, linked to the work being undertaken on the returns programme, including a wider range of nationalities and tracking cases to appeal, active review and removal;

To our knowledge, no further pilot was carried out before this full scale implementation. The speed of decision making has been significantly accelerated by the NAM timetable despite collective concerns from a large number of stakeholders when this was announced only weeks before commencement.

¹³ Putting Children First, 2002 and Working with children and young people subject to immigration control: Guidelines for good practice, 2004.

Until a comprehensive independent evaluation of the whole process from screening through to interview, appeal and removal is carried out there is no objective evidence to demonstrate whether improvements have been made to the protection process as a result of interviewing children.

On that basis, the end-of-process aspects of asylum policy – that is – further reductions to discretionary leave and related appeal rights, development of enforced or inducement-led voluntary returns packages should not be implemented before the quality of decision making in children's cases has been evaluated by the UNHCR Quality Initiative Project and found to have improved sufficiently.

The Home Office itself acknowledges¹⁴ that their decision making on children's cases needs to improve. At present a huge 93% of children's claims are refused recognition at first decision. Statistics about the success rates on appeal following a negative decision are not easily extrapolated from the main adult figures as the granting of discretionary leave to 18 and the exclusion of appeal rights under s83 of the Nationality Immigration and Asylum Act 2002 further complicates the ability to work out accurate figures but those for adult appeals¹⁵ reveal that 23 % of decisions were overturned on appeal by the AIT in 2006.

If the figures relating to the asylum decision on a child's claim are even broadly comparable then almost a quarter of all children's refugee claims are decided incorrectly at first instance irrespective of whether the discretionary leave policy is applied.

In terms of the international protection element of decision-making - i.e. refugee and subsidiary/humanitarian protection – significant improvement at all levels is still needed to have any confidence that the initial decision is safe and has been effectively reviewed in the event of a refusal.

The decision to reduce DL to 17½ and the proposal in this document to make it possibly even lower; the widening exclusion of appeal rights now caught by s83 of NIA 2002 for children as young as 16½¹⁶ ; and the reduction in legal representatives doing LSC work (around 15% did not sign contracts to continue immigration work in April 2007) leave us unconvinced that there are sufficient safeguards in place to ensure that children will have the necessary access to good legal representation and timely appeals to the Tribunal.

Refugee children require timely durable solutions, as advised in UNHCR guidance, paragraph 43 of this consultation states that BIA recognises that an informed decision needs to be made at an early stage. The RCC agrees but s.83 NIA 2002, deferring a child's right of appeal against a refusal of asylum until they have had leave of 12 months or more is clearly incongruent with and undermines this principle. It provides no platform for effective care planning and rehabilitation work with children and will leave significant numbers of children in effective limbo regarding their protection rights.

Guardianship

The UNCRC General Comment # 6 paragraph 33¹⁷, UNHCR Handbook for Determining Refugee Status (para 182 (2))¹⁸, The EU Reception Directive (Article 19)¹⁹ all call for the appointment of a guardian to effectively represent the interests of the child throughout the asylum process and for the duration of the child's minority.

14 Planning Better Outcomes para 38

15 See footnote 10

16 see RCC briefing for 3rd reading of the Borders Bill (2007) re: s83 NIA 2002

17 see footnote 5 above

18 <http://www.unhcr.org/home/PUBL/3d58e13b4.pdf>

19 COUNCIL DIRECTIVE 2003/9/EC laying down minimum standards for the reception of asylum seekers

The consultation document is silent about guardianship. This is, we believe a sadly missed opportunity. Whilst the document speaks of minimum levels of services that ought to be available in a specialist authority area and an expectation on the part of the NAM process that a “responsible adult” will accompany children in various stages of the process, the basic statutory levels of care (s.20 and s.17 Children Act 89) envisaged for the majority of children in the proposed arrangements are left either the same or even reduced for older children.

The local authority as “corporate parent” is neither legally equipped to exercise parental responsibility nor adequately resourced to fulfil the effective functions of a guardian as set out in the UNCRC guidance²⁰. Valuable NGO agencies such as the Refugee Council Children’s Panel are no substitute for statutory guardianship. The case is more compelling in light of these proposals and the interviewing of children as young as 12. Guardianship is especially needed in circumstances where the local authority is funded by the Home Office and is required by its relationship with the Home Office to play a much more conflicted role, by fitting the child’s needs around those of the Home office timetable, by acting as an immigration officer in respect of reporting conditions by co-locating and aligning social work and immigration functions, and being encouraged to write pathway plans built on a strong assumption that the refused child should be removed from the UK.

The UN Committee on the Rights of the Child, UNHCR, SCEP²¹, the RCC and others have all called on government over time²² to enable unaccompanied children to have access to effective legal guardianship. If these reform proposals genuinely seek to improve the care and protection of asylum seeking children, guardianship should be seen as an essential first step.

The RCC urges the government to appoint a guardian for every unaccompanied child in the asylum process.

Discretionary leave to remain

As has been said elsewhere in this response, it is the RCC’s view that children must be treated equally as children, irrespective of age, according to their individual needs and experiences. Chronological age is one factor amongst many when assessing those needs.²³

The shift of DL to 17 ½ is one based upon expediency rather than the protection and welfare needs of a child.

There is no basis evidentially to suggest that a child of 16 or over (para 41) is easier to return to their home country. It may in fact present an increased risk to the child (from military conscription, trafficking, inability to access welfare services, education etc.). The presumption that this may be possible undermines any notion that “best interests” is a fundamental aspect of planning for the child’s future.

All children remain minors until 18 and the present DL policy, based on the adequacy of care and reception arrangements must apply to all children on a case by case basis. There is no justification for any further reduction of DL based on suppositions about the child’s ability to cope

In terms of children’s DL generally, the RCC is concerned that a policy which is on the surface rational and based on a child’s welfare protection needs can be changed by a Minister unilaterally without parliamentary scrutiny, as the political climate dictates.

Children’s welfare protection must be based on more than Ministerial discretion

20 See footnote 5 above at paragraph 33

21 Separated Children In Europe Programme

22 see e.g. RCC Briefing for Parliamentary Debate on Immigration and Asylum 23.2.05

23 see Medical Foundation for the Care of Victims of Torture separate response.

As such, where a child is not determined to have a Refugee Convention or Article 3 ECHR need for protection but for whom there are nonetheless welfare concerns preventing removal, leave ought to be granted in the form of “child protective leave” within the Immigration Rules and subject to rights of appeal against refusal.

The role of social workers

The role of social workers in working closely with the BIA has been the subject of much discussion in recent years. This is in part as a result of Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002 which introduced limits on local authority assistance to certain classes of people subject to immigration control. Social workers were included in groups of professionals being asked to work much more closely with the Home Office, in this case with a view to determining eligibility for services based not on need but on whether or not they had been deemed in need of international protection and thus whether or not it is reasonable for the local authority to make arrangements for such a person to return to their country of origin.

The RCC believes that whilst the immigration status of a young person should not be ignored when planning their care, we do not agree that care planning should be dictated by that status. We do not object to a close working relationship between a child's BIA caseowner and their allocated social worker but stress that this relationship must fall within the code of ethics that underpins social work in this country and internationally. It must not compromise the codes of practice that each social worker agrees to adhere to when registering with the General Social Care Council or Scottish Social Services Council. The RCC supports statements made by the British Association of Social workers at their Annual General Meeting 2007 and in their response to this consultation paper.²⁴

Return to the Country of Origin

Since around 2004, the RCC was, we believe, constructively engaged in discussions with the Home Office on the development of its forced returns programme for children and met with the Minister twice, specifically on this issue. However, since the lead responsibility for this programme was transferred to the IND International Delivery Directorate, it would appear that little development work has taken place recently and the RCC has not been invited to discuss or to comment further on current thinking on this aspect of the reform plans. RCC is very concerned that despite a statement made at the stakeholder meeting on 23rd April by a member of the reform programme team that there was no development on which to update RCC and that nothing internally has happened (on the returns programme) an RCC member agency had indeed been informed that a significant element of the BIA plan has in fact now been changed. Plans shared by IND with RCC between 2004 and 2006 stated that the relevant local authority would be party to any decision made with regard to a child's suitability for return to country of origin, as part of an end-of-process Inter-Agency Planning Meeting. We understand that this aspect of the project is now to be disregarded.

The RCC is concerned that this element of the returns programme fails to fit the proposal to ensure that outcomes for unaccompanied children are planned with the full engagement of all concerned with their care. If the process is now to exclude the relevant authority and other welfare agencies involved in planning for the child's ongoing care needs the RCC fails to see how this process can possibly fit the definition of ‘planning better outcomes’. It is also in conflict with the position taken by the Scottish Executive and relevant local authorities regarding the role of a lead professional.

The RCC rejects completely the assertion (para 41) that for children over 16 “*the difficulties in enforcing or expecting return to the country of origin are much reduced*”.

²⁴ See www.basw.org.uk

Such a statement is made without any justification and without any evidence to support the proposition. It is contrary to child welfare and health professionals' understanding of the needs of this particularly vulnerable group of children²⁵ irrespective of their chronological age and in our view undermines the work done so far in developing a more child welfare appropriate returns programme. The RCC does not and will not support any plans that are in any way based on such false presumptions. In particular, we strongly object to the proposal that an 'enhanced but reducing package of support' be made available to encourage take up of voluntary return. This suggestion reveals much about the priorities of meeting 'tipping point' targets over the welfare of children and the development of a safe and sustainable plan for a child.

One of the central themes of this consultation document is much earlier returns, including the unsubstantiated stated aim of reducing children's expectations of staying in the UK beyond the age of 18 and indeed if the returns programme materialises, removing them whilst still a child.

The consultation document assumes that local authorities will automatically agree to the return of a child to his or her country of origin if their application for asylum is refused.

However, at the age of 17½ or younger, all the rights contained in the Children Act will still apply and the local authority will have to consider whether such a return would safeguard and promote the child's welfare. There are likely to be many occasions on which the fact that the child has no right to remain here as a refugee under the terms of the Convention Relating to the Status of Refugees, there still remain child protection concerns. It may also be the case that the child is not entitled to protection under the ECHR despite these concerns.

For example, the child may have disclosed prior abuse by a family member and it would not be in his or her best interests to be placed back in a situation where it could re-occur. It may also be that in trafficking cases the local authority concludes that the parents in a particular case had failed to provide their children with sufficient protection from harm in the past. The solution in family law terms would be to apply for a care order whilst the solution in immigration terms to them failing to come within the terms of either convention would be to remove them to their country of origin. The consultation document does not recognize the possibility of such a conflict or suggest any means of possible resolution.

Assessment of Need and Placement

Children Act 1989 (England and Wales only) considerations

The model outlined in the consultation document fails to take into account the varying circumstances in which a separated child may be living prior to claiming asylum; variations which may give rise to a conflict of protection needs, both international and domestic. Similarly it fails to appreciate the complexities of the intersection between asylum and family law but appears to assume that the NAM process will dictate the speed at which local authorities will comply with their duties under the Children Act 1989.

1. Initial assessment

The consultation document assumes that an initial assessment will be undertaken and completed at the same time as the child makes his or her initial articulation of his or her application for asylum. However, the child may be so traumatized by rape or other physical assault, from witnessing genocide or from being forcibly recruited as a child soldier that no such assessment can be undertaken. His or her welfare needs may require that a child is first stabilised before being asked any questions which may revive memories of persecution as will inevitably happen if a child is asked any questions about his or her family or personal circumstances.

²⁵ e.g. see Bahba and Finch – Seeking Asylum Alone 2006.

2. Transfer to a specialist authority

Local authorities undertaking an initial assessment under Section 17 of the Children Act 1989 will also be accommodating those children under Section 20 of that Act if he or she has no-one in the United Kingdom with parental responsibility for him or her²⁶. Whilst he or she is accommodated the local authority will have the power under Section 23 of the Children Act 1989 to decide where to accommodate him or her. It will also have the power to decide on the type of accommodation which would be appropriate. Section 23 does not require the local authority to accommodate the child within its own geographical area but Section 23(7) does require it to ensure that so far as is reasonably practicable and in so far as it is consistent with his or her welfare to place the child close to his home. Around 85% of asylum seeking children claim asylum after entry. Some will have been in the United Kingdom for an even longer time as a result of being trafficked or being placed in abusive private fostering arrangements and may have established a “home” here. If they have a local authority will have to consider whether it can just agree to the child being dispersed to a “specialist” authority likely to be many hundreds of miles away. This has not been taken into account when devising the flow chart at page 19 of the consultation document.

Neither do the proposals take into account the duty under Section 23(7) to place siblings together so far as is reasonably practicable and consistent with the child’s welfare.

Two other considerations also appear to have been ignored. Firstly, once a child is accommodated under Section 20, the local authority first accommodating him or her is under a duty under Section 22(4) to ascertain the child’s wishes and feelings about the proposed accommodation. This would require the child to be given sufficient information to make an informed choice. It would also be particularly relevant when a child had already been living in the area of the local authority undertaking the initial assessment as a result of being trafficked, privately fostered or entering the United Kingdom illegally.

The local authority will also be under a duty arising from Section 22(3)(a) to safeguard and promote the child’s welfare and this will have to inform any decision to transfer the child to a “specialist” authority. In considering this question the local authority will inevitably take into account the welfare checklist contained in Section 1(3) of the Children Act 1989. This checklist applies to factors to be taken into account by the family courts in cases involving children but local authorities also look to it as guidance. Sub-section 1(3)(c) states that particular regard should be paid to the likely effect of any change in the child’s circumstances. Again if the child is already resident in the local authority’s area, this could indicate that it would not be in their best interest to be transferred to another local authority. They may have to change school or be separated from adults they have learnt to trust.

3. Core assessments

Even if the initial local authority deems that it is in a child’s best interests to be transferred to a “specialist” authority, that authority may encounter difficulties in completing a core assessment of the child’s needs. There may well be a real issue of lack of trust on the part of the child, who perceives the local authority as merely a part of the Borders and Immigration Authority. This will particularly be the case if the child’s age has initially been disputed or his or her NAM caseworker has indicated at a screening interview or a First Reporting Event that there are elements of his or her account which may be challenged.

It may also be that the local authority decides that it cannot complete a core assessment without knowing more about the child’s family circumstances in his or her country of origin but the child is unwilling to provide details through this lack of trust.

It may also be that the local authority concludes that a core assessment cannot be completed until a psychiatric or psychological assessment of the child has been completed and raises the propriety

²⁶ Behre & Others v London Borough of Hillingdon [2003] EWHC 2075 (Admin)

of conducting an asylum interview prior to the completion of such an assessment. This has also not been taken into account in the proposed model on page 19 of the consultation document.

The asylum process should not start until a child has stabilised and a full needs assessment has taken place. This is essential, both to a child's wellbeing and to ensure effective decision making; one of the key aims of the New Asylum Model.

4. Pathway Plans

Section 23E of the Children Act 1989 places a local authority under a duty to provide pathway plans for both children they are presently accommodating and those they used to accommodate in the past. These plans encompass both the child's welfare and educational needs. They will of course be informed by the fact that the child may ultimately not be granted leave to remain in the United Kingdom. However, they will also be informed by the fact that many local authorities will have had direct experiences of children and young people being refused asylum or further leave to remain but remaining here as the Borders and Immigration Agency does not have the means to remove them to their countries of origin. Young people from Iraq, Somalia, the DRC, Eritrea and Ethiopia often fall within this group. Therefore it may well be that the local authority cannot draw up a pathway plan giving a "realistic option for return". This was a situation well exemplified in a recent report by Save the Children²⁷

Further difficulties will arise for the local authority in terms of its own budgets if it cannot meet the child's needs as identified in his or her pathway plan from the pro rata budget provided to it by the Borders and Immigration Agency. However, its difficulties will not be merely financial. It will also have duties arising from Section 6 of the Human Rights Act 1998 to ensure that the child is able to enjoy a reasonable private life. This could encompass a right to particular educational and social opportunities and a certain standard of living conditions. Once Article 8 of the European Convention on Human Rights is engaged, the local authority would also have to comply with the United Nations Convention on the Rights of the Child²⁸ and Article 3 of this Convention would re-emphasise its duty to act in that child's best interests.

5. Use of foster placements for children aged 16 and over

The proposal to move young people from foster care at 16 is contrary to good child care principles and practice.

"We want to offer young people more options, and a much greater say over becoming more independent. We want to offer them the same opportunity that all young people have to remain in a family setting and not force them to enter adult life too quickly" – *Care Matters*, DfES (2006)

Foster carers are trained to work within and meet the requirements set out in the Children (Leaving Care) Act 2000. One key principle is the need for the child to be prepared for independent living and recent government proposals²⁹ expressly state that the intention is to move away from an age determinant approach.

The UNCRC clearly establishes every child's right to experience family life. Foster carers play a key role in restoring this right to children who are separated from their parents or usual carers.

Foster carers are trained and supported to deal with separation and loss; the length of time a child spends with a foster family is not the only determinant of attachment. Joining a family at a time of crisis can often result in a strong bond. It is therefore completely appropriate that children facing

27 Unaccompanied refugees and asylum seekers turning 18: A guide for social workers and other professionals. Save the Children 2006.

28 ID v Home Office [2005] EWCA Civ 38

29 Care Matters: Transforming the lives of Children and Young People in Care, DfES 2006

the possibility of preparing for removal or voluntary return should be supported to do so from the secure base of their foster placement, at whatever age this is planned for.

Foster carers can provide a safe, supportive environment in which young asylum seekers can have space to recover and think about their future. It is essential that a programme asking children and young people to think about the possibility of electing to take a voluntary return package also provides sufficient safeguards and support to reduce the risks associated with difficult decision making.

The Specialist Authority (criteria)

It has been known for at least 18 months that the essential framework of these reforms is built upon placement of children in non-London local authority areas. Since the initial stages of these reforms, the RCC has called on IND (BIA) and the Legal Services Commission to tell us how these local areas will demonstrate the necessary specialist legal skills and capacity to represent asylum seeking children effectively.

Whilst the consultation document suggests (para 58) that *“the following criteria are likely to be relevant ... (v) ... availability of legal advice...”* it is not within any local authority’s control to determine this. The Legal Services Commission as the responsible national agency must ensure, well in advance of selecting any specialist placement areas, that those areas are fully able to meet the demands for children’s legal advice. The LSC must work closely with BIA and practitioners to ensure that this happens in a planned way. This must include training and accreditation of legal representatives, local accessibility for the child, and remuneration and contract terms which create the necessary conditions for lawyers to commit to doing the work. This must be so in relation not just to immigration advice but also children’s law advice.

It is not acceptable to suggest that access to legal advice is “likely to be relevant”. The RCC strongly takes the view that this must be an absolute minimum condition. It is the responsibility of government departments to work together to resolve these issues in advance, rather than adopt a “wait and see” approach.

Individual agency responses from RCC members may identify additional criteria to be considered.

Procurement and commissioning of services

The RCC does not believe that the Home Office has a role to play in the procurement of care packages for looked after children. Whilst there is always room for improvement in the provision of care, including that for unaccompanied children, the setting of standards, monitoring and guidance on commissioning should be led by the Department for Education and Skills. Indeed, as the paper itself acknowledges (para 63), *Care Matters* and *Getting it Right for Every Child* make recommendations as to how the commissioning of services can result in better quality placements. It may be that arrangements between local authorities to combine resources and access to placements may be useful for some local authorities.

Other Issues when the Young Person turns 18

The consultation paper fails to acknowledge that there are young people who, having been refused asylum and had their application for further leave turned down, will nevertheless remain in the UK. The RCC feels that young people who cannot be returned should be given temporary leave to avoid being classed as unlawfully in the UK through no fault of their own. There is no evidence that ceasing support to people in order to ‘encourage’ them to opt for voluntary return actually works. In fact studies on the impact of Section 9 of the Asylum and Appeals (Treatment of Claimants) Act 2004 suggest that in fact these policies are more likely to result in people electing to cease contact

with authorities, including local authorities.³⁰ The RCC urges the Home Office to work with local authorities to ensure that policies are not introduced that give young people no reason to remain in touch with those who can continue to give them guidance as well as support.

Young people should be continued to be supported under the Children (Leaving Care) Act 2000 until they have left the UK, in recognition of the fact that their age and vulnerability is more important than their immigration status.

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³⁰ The End of the Road, Barnardos 2005 and Inhumane and Ineffective, Refugee Council and Refugee Action 2006