



United Kingdom Children's Commissioners response to the Home Office consultation

**“Reforming support for failed asylum
seekers and other illegal immigrants”**

September 2015

Introduction

- 0.1** The UK Children's Commissioners welcome the Government's statement in the consultation paper that it remains committed to fulfilling its international obligations to meet minimum standards for asylum seekers (Consultation paper – paragraph 1). Another stated policy objective of the consultation is to '*retain important safeguards for children*' (Paragraph 13, bullet 3). The UK Children's Commissioner's welcome this approach to the intended reforms.
- 0.2** Among the international obligations that the Government has is its formal, binding commitment to implement the United Nations Convention on the Rights of the Child (UNCRC) which the United Kingdom ratified on 16 December 1991.
- 0.3** The reservation to the UNCRC ('The Convention') in respect of children subject to immigration control was lifted on 18th November 2008. The lifting of the reservation paved the way for section 55 ('Section 55') of the Borders, Citizenship and Immigration Act 2009 (UK Borders Act) which creates a duty on the Secretary of State to make arrangements for ensuring that immigration and asylum functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. The immigration and asylum functions that are the subject of this consultation fall within the remit of this mandatory duty.
- 0.4** The Commissioners believe that the options for reform presented in this consultation must meet the standards defined in its obligations under the Convention, its other international law obligations including those under the European Convention on Human Rights and in its domestic law obligations under Section 55 of the Borders, Citizenship and Immigration Act 2009.
- 0.5** As UK Children's Commissioners, our legislative mandate requires us to have particular regard to the United Nations Convention on the Rights of the Child. The principle articles of the UNCRC engaged by the proposals here are as follows:

Article 2

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

Article 3

States that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 6

States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 19

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 22

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

The UK Children's Commissioner's responses to the consultation are framed within the context of the Government's legal obligations outlined in part above. We hope that the response will assist the Government in choosing options that best meet their obligations to children.

Responses to the consultation questions

1. The proposed repeal of Section 4(1) of the 1999 Act (paragraph 16).

1.1 While the repeal of Section 4(1) will have limited impact on children we nevertheless express the concerns below which we hope the Government will address.

1.2 The consultation document (paragraph 14) claims that few individuals will be affected by the repeal of Section 4(1) (a) and 4(1) (b) of the 1999 and the focus of the proposed reform (paragraph 15) is on s 4 (1) (c) – the provision relating to release on bail from immigration detention.

1.3 The repeal of Section 4(1) (a) and (b) will prevent some individuals granted temporary admission and others released from immigration detention under paragraph 21 of Schedule 2 of the 1971 Act from accessing support. The risk of abolition is that it may leave some people destitute or unlawfully detained. Potentially these might include:

- Families who have not claimed asylum and are attempting to return to their country of origin, but are encountering difficulties obtaining the required documentation.
- Families released from detention and given temporary admission rather than bail (e.g. families released from detention back into the community following an unsuccessful removal and detention in pre-departure accommodation at CEDARS).
- Persons who have lived in the UK for all or the majority of their lives, who are now adult, and who have not claimed asylum but are seeking to regularise their unsettled or unresolved immigration status and are waiting for this to be determined. The Commissioners believe it is unhelpful and dehumanising to characterise those born in the UK or brought here as children as 'illegal immigrants' as the consultation suggests throughout.

1.4 We consider that the abolition of Section 4(1) would lead to the people affected, where they are families, looking to local authorities for assistance. We consider this further in our response to Question 6.

1.5 The consultation recognises that Section 4(1) (c) is more frequently used. Our understanding is that hundreds of people are released on bail from detention each year to Section 4(1) (c) accommodation. Section 4(1) (c) accommodation is provided on a single person basis only, so children are unable to live with bailed parents in

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

Section 4(1) (c) accommodation. If parents and children wish to live together an application would have to be made once a parent had been released, via the usual Section 4(2) or s95 route. The Children's Commissioners do not have any data on the numbers of children who historically have been included in such applications but we would ask the Home Office to consider their own management information on this.

- 1.6 More broadly, the repeal of Section 4(1) risks unintended consequences of people being unlawfully detained and may also encourage individuals to make an asylum application in order that they can make a bail application. It is also likely to result in an increase in challenges to detention in the High Court and see an increase in successful claims for compensation for unlawful detention, both of which can only increase costs to the public purse. A further policy goal of the proposed changes is to decrease the cost to the public purse and this financial consequence is not considered in the impact assessment.

2. **The proposal to close off support for failed asylum seekers who make no effort to leave the UK at the point that their asylum claim is finally rejected, subject to continued support in cases with a genuine obstacle to departure at that point or in which further submissions are lodged with the Home Office and are outstanding (paragraphs 20-21).**

Estimated number of children affected by this proposal:

- 2.1 The numbers of failed asylum being supported under both Section 95 and Section 4 of the 1999 Act is cited in paragraph 5 of the consultation document as being approximately 15,000 at 31st March 2015. This figure is extrapolated from the official statistics. Consultation question 2 relates only to Section 4 support.
- 2.2 Referring back to the tables on which this number is arrived at indicates that at the end of Quarter 1 2015 (31st March) there were 4,941 'main applicants and dependants' in receipt of Section 4 support. Of those, 3,616 were 'main applicants' (and therefore adults) leaving 1,325 'dependants'. This figure is not broken down further in the official statistics between spouses/partners and children but provides a rough idea of the numbers of children likely to be affected by the closure of this route of support. An estimate might be in the region of 1000 children.

Section 4 (2) of the 1999 Act

- 2.3** The Commissioners share the widespread concern about the use of Section 4 support for children that have been well documented by others including the cross party parliamentary enquiry on asylum support which concluded in 2013. The enquiry concluded that: *"The government should abolish Section 4 support and urgently implement a single cash-based support system for all children and their families who need asylum support while they are in the UK. This should include children who were born after an asylum refusal, to ensure that no child is left destitute."*
- 2.4** It is not in children's best interests to be supported under a cashless system that pays the same rate as adults and therefore takes no account of children's additional needs. Children in receipt of Section 4 support are not entitled to 'passport' benefits, such as school hardship funds, free school meals or the pupil premium for their schools. If the closure of the Section 4 route of support addresses this then we welcome it.
- 2.5** Families with children in receipt of Section 4 support also face difficulties under a cashless system such as inability to use public transport or buy small items locally from non-designated supermarkets, attend medical appointments or take children to school.
- 2.6** Due to these problems, the Commissioners give a cautious welcome to the proposed closure of the Section 4(2) support stream with the proviso that it is essential that all children previously supported under this regime are able to access adequate cash-based support and accommodation. The temporary nature of the alternative support proposed under Section 95 is of deep concern to us.
- 2.7** The Commissioner's over-arching position is that families, as they are legally prevented from working, must be able to obtain adequate cash-based support from the moment they arrive until they are granted leave to remain and can transition onto mainstream benefits or into employment or, where unsuccessful in obtaining permission to remain, until they leave the UK through the structured Family Returns Process which has proved relatively successful in encouraging families with no further legal basis to remain to leave the UK voluntarily without recourse to enforced removal.

3. The proposed changes for failed asylum seekers with children (paragraphs 29-33).

Number of families likely to be affected by the proposed withdrawal of support in the UK as a whole and in the devolved administration regions.

- 3.1** Paragraph 3 of the consultation document states that as at 31st March 2015 an estimated 20,400 asylum seekers whose claims had yet to be finally determined were in receipt of Section 95 support. Referring back to the official tables on which this figure is based the total number supported under Section 95 on the same date was 30,476. Subtracting the number of 'yet to be finally determined applicants' in receipt of Section 95 support from the total you are left with 10,076 individuals.
- 3.2** This group is the cohort currently supported by virtue of Section 94 (5) which allows section 95 support to continue after the asylum claim has been finally determined if the asylum seeker has with them a dependent child (who was a child at some point prior to the asylum claim being finally determined). This is the cohort to which the proposed changes in support will be directed. The consultation document extrapolates from the official statistics that as of 31st March 2015 an estimated 2,900 families (around 10,100 people) were supported on this basis.
- 3.3** The official statistics only break down the 'total supported under Section 95 by UK region (30,476 at 31st March 2015) rather than the 10,076 individuals supported by virtue of Section 94(5) – families with a dependent child. Nevertheless if approximately one third of all recipients of Section 95 support nationally are thus supported, there will be significant impacts for the devolved administrations in respect of families whose support will be withdrawn.
- 3.4** The March 2015 official statistics show that Wales supported 2,238 individuals in receipt of Section 95, Scotland 2,626 and Northern Ireland 492. A working assumption in light of the lack of a breakdown in the official statistics by family membership as opposed to singles is that approximately a third of each of these totals will be individuals in families who are 'appeals rights exhausted ' and this liable under the proposals to have support withdrawn.

Assumptions that the proposals will lead to 'behaviour change'

- 3.5** The appraisal section of the Impact Assessment on the consultation document relies heavily on the assumption that introducing restrictions to support (under both Section 4 and Section 95) will lead to:

... 'behaviour change' by 'reducing the incentive for migrants to come to or remain in the UK to make an unfounded claim for asylum and for current asylum seekers and

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

failed asylum seekers not to comply with the asylum process (including the requirement to leave the UK for those whose claim is rejected by the Home Office and the courts). As such it is reasonable to expect behaviours to change as a result of the proposed changes including: fewer unfounded asylum applications in the UK and; greater compliance by asylum seekers and failed asylum seekers with the asylum process, including for departure from the UK for those whose claim is finally rejected.'

- 3.6** This central assumption defies both the objective evidence and the Home Office's own research on this issue. Home Office research indicates that there is very little evidence that asylum seekers are deterred by the prospect of harsh treatment in a putative or actual country of asylum (Home Office 2002; Home Office Research Study 259 2003). Furthermore, previous policies that have left people to subsist on vouchers or withdrawn support have proved ineffective in persuading those refused asylum to leave the UK.

Behaviour change and the 'Section 9 Pilot'

- 3.7** The clearest evidence that policies such as those proposed here will not lead to 'behaviour change' comes from the Home Office's report of the pilot study that the Government ran between December 2004 and December 2005 in which families who were appeal rights exhausted had their accommodation and financial support removed if they failed to take "reasonable steps" to leave the UK.
- 3.8** The Home Office's evaluation of the Section 9 pilot compared the behaviour of the cohort of 116 families in the pilot against a control group of similar cases who did not have their support cut off. By June 2007, the Home Office evaluation found that of the 116 cases in the Section 9 cohort, there was only one case in which a family was successfully removed, as compared to nine successful removals in the control group.
- 3.9** Even when voluntary returns were taken into account, the total number of returns in the control group was nearly twice as high as in the pilot. Differences in applications for travel documents between the pilot cohort and the control group '*do not represent statistically significant changes*'. The Home Office evaluation concluded that under the pilot "*there was no significant increase in the number of voluntary returns or removals of unsuccessful asylum seeking families. It shows that in the form piloted section 9 did not influence behaviour in favour of co-operating with removal – although there was some increase in the number of applications made for travel documents.*"

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

3.10 The disappearance of families was documented in the Home Office evaluation which compared the pilot's cohort with the control group in relation to cases which should have been reporting to the Immigration Service or been in contact with asylum support officials. It found that the rate of absconding was 39% for those in the Section 9 pilot - nearly double the amount of those in the control group (21%), who remained supported. This impact is likely to be increased under the current proposals due to the planned withdrawal of a right to appeal against the refusal of asylum support.

3.11 A report by Refugee Council and Refugee Action looked in detail at the cases of 35 of the 116 families in the pilot whose support had been withdrawn and who were living in destitution but had not disappeared. They found that in all cases the families believed that it was unsafe for them to return to their home country.

Continuing support where there is a genuine obstacle to departure

3.12 While the Children's Commissioners welcome the Government's intention to continue support in cases where there are genuine obstacles to departure or in which further submissions have been lodged (paragraph 21), we note that this provision is currently implemented in a very restrictive way and that individuals who are manifestly unable to return home are still denied any form of support.

3.13 The Asylum Support Tribunal frequently overturns such cases and in the six months between 01.09.14 and 28.02.15 allowed 44% of decided cases and remitted a further 12% back to the Home Office for reconsideration. This highlights the need to retain the right of appeal against the refusal of asylum support which the consultation proposes to abolish.

The proposal to amend Section 94 (5) of the 1999 Act (paragraphs 30-33 of the consultation document)

3.14 Paragraphs 30-33 of the consultation document indicate the planned legislative amendment to Section 94 (5) of the Immigration and Asylum Act 1999 ('The 1999 Act'). This currently allows Section 95 support to continue after the asylum claim has been finally determined if the asylum seeker has a dependent child. The proposal is simply to remove this concession to families and to treat them in the same way as single asylum seekers without dependent children are treated – by withdrawing their accommodation and support. This is a minor difference proposed between single asylum seekers and families in that a further seven days 'grace period' will be allowed for families before support is withdrawn. The proposed legislative amendment, abolishing a measure designed to safeguard children from destitution

is, in the Commissioners' view, inconsistent with the UK's obligations under the UNCRC.

Conclusion

- 3.15** This evidence suggests that withdrawal of support and accommodation is unlikely to achieve the consultation's stated intention of "*ensuring the departure from the UK of refused asylum seekers with no lawful basis to remain in the UK*". It is however likely that should the proposals go forward as planned there will be an increase in the number of families that disappear and an increase in the number seeking support from their local authority (or appropriate statutory service providers in Northern Ireland). We are in no doubt that this puts children at serious risk of neglect or other forms of abuse and engages the UK's Convention duties (e.g. Article 19).
- 3.16** The Children's Commissioners consider that pursuing a policy that entails a serious risk of putting children at risk of destitution on a spurious expectation of parent's 'behaviour change' is inconsistent with making decisions in children's best interests as required by Article 3(1) of the United Nations Convention on the Rights of the Child nor with the duty on the Secretary of State to safeguard children and promote their welfare under Section 55 of the Borders, Citizenship and Immigration Act 2009.
- 3.17** Rather than leading to returns from failed asylum seeking families we anticipate that the proposals as currently framed will undermine immigration control. Refused asylum-seeker families will have little incentive to stay in touch with the authorities once support is withdrawn. Destitution will also impact on families who do try to maintain contact with the Home Office as the practical barriers created by destitution may make contact very difficult for example by having no money for travel to attend interviews or for other communication.
- 3.18** Continuing support to refused asylum seekers in families, (including those previously in receipt of Section 4), would strengthen the integrity of the immigration system as the Home Office would be able to maintain contact with families who are appeal rights exhausted and would be better able to enforce removals against individuals who do not have protection needs in the UK and do not leave voluntarily..
- 4. The length of the proposed grace period in family cases (paragraph 31).**
- 4.1** The proposal to provide an extended 'grace period' for families with children – 28 days from refusal rather than 7 days as is the case for single failed asylum seekers, does not provide a sufficient safety net for children.

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

- 4.2** A further proposed safeguard for children is that this grace period could be extended on application if there was a practical obstacle beyond the family's control that prevented them from leaving the UK. The onus would be on the recipient of the support to make an application before the grace period expired and to demonstrate why they could not leave the UK and that they would otherwise be destitute.
- 4.3** Putting the onus on parents to prove they could not return home assumes literacy, access to help with making such an application and an ability to communicate with, and travel to various agencies to obtain documentation or submit representations. In our view, this is very unlikely to happen in the most cases and parents will either go into hiding if they fear forced return or approach their local authority for help with accommodation and support.
- 4.4** The factors to which it is proposed that the Secretary of State could have regard in making the decision whether or not to extend the grace period would be specified in regulations leaving little discretion for Home Office case owners considering meritorious claims for continued support where the matter under consideration was not covered in the regulations. If regulations are to be made they must include a clause that allows case owners to extend the grace period where it is considered to be in a child's best interests to do so.
- 4.5** The consultation document includes two factors which 'could' be taken into account in the regulations including:
- *'taking all reasonable steps to leave the UK or place themselves in a position in which they would be able to do so, including 'applying for any travel document required to facilitate their departure' and;*
 - *'unable to leave the UK owing to a practical obstacle beyond their control. E.g. the provision by their government of a travel document following their application for it or a medical or physical impediment to travel or because in the opinion of the Secretary of State there was currently no viable route of return available'.*
- 4.6** There would be no right of appeal against a refusal to extend the grace period leading to an increased number of applications for judicial review as the only remedy available.
- 4.7** The Commissioners consider that the proposed safeguards and concessions relating to children are likely to be unworkable in practice even if a parent were to consider

the option of applying for voluntary return on the day after they became appeal rights exhausted. For example, we would anticipate that the family would need to:

- Obtain any original documentation submitted to the Home Office when applying for asylum. Our experience is that the Home Office cannot guarantee that all original documentation would be returned to the asylum seeking family at the start of the grace period.
- Travel from their dispersal area to their embassy – likely to be in London – using the limited funds they are provided with under Section 95 support and/or travel to a centre where their voluntary return application could be processed.
- Travel to Liverpool (as now required) in order to make any further representations or submissions in person on either or both their substantive asylum claim or their inability to return home for another reason.

4.9.1 These matters alone are a huge amount to achieve within the proposed 28 day grace period. Removing support – including accommodation – after 28 days would frustrate attempts where voluntarily departure was being pursued.

Conclusion

4.10 The Commissioners do not believe that a 28 days 'grace period' is a sufficient period of time for a refused asylum seeking family to understand and review the options available to them and make a decision on what their next steps should be.

4.11 Given the reliance that the consultation document places on voluntary departure prompted by withdrawal of accommodation and support, sufficient time must be allowed based on real data on how long voluntary departure takes to arrange. This will vary depending on a number of individual factors including the country to which the family will be returning. The Home Office acknowledges that embassies vary in the speed in which they process such applications.

4.12 They must also acknowledge their own administrative capacity to return relevant documentation to families needed to process any return arrangements. This would include original birth certificates of children born in the UK as embassies will have no records of UK born children as being their nationals and may indeed in some cases not accept such children as their nationals or require further investigation into the paternity or maternity of the parents.

4.13 The time taken to arrange voluntary departure will also be contingent on access to advice and support through the voluntary assisted return programme (VAARP). The Commissioners understand that the current contract with Refugee Action to support voluntary return is due to expire and that the Home Office will now administer the scheme itself. The Home Office's ability to engage with families over VAARP is untested.

4.14 We would suggest that any grace period is flexible and negotiated between the family and their case owner or Family Engagement Manager depending upon the particular circumstances of their case and, in particular the circumstances of any child intended to be removed. The child's right and ability to establish or re-establish an identity in the country of origin must be paramount in the timing of any departure.

4.15 The Commissioners believe that, whatever arrangements are arrived at in respect of a 'grace period' the right of appeal is a vital mechanism that prevents asylum seekers from being incorrectly refused support and left destitute and must not be removed.

5. The proposed transitional arrangements (paragraphs 36-37)

5.1 The consultation document proposes to use Schedule 3 of the Nationality, Immigration and Asylum Act 2002 ('The 2002 Act') powers (used in the Section 9 pilot described above¹) on a 'case by case basis' but, it seems, only in relation to the 'transitional arrangements'.²

5.2 The Impact Assessment ('IA') suggests that the changes to Section 95 – requiring legislative change – will be implemented on 1st July 2016. The transitional arrangements will therefore pertain to all those who are appeal rights exhausted and in receipt of s95 support on that date – by the Home Office's current estimate, around 3,000 families – though this may well increase by July 2016.

5.3 Even without factoring in any increase in this number the proposals have significant resource implications for the Home Office especially given that consideration is

¹ The 2005 pilot discussed in the response to question 3 above was predicated on a power introduced by s.9 of the 2004 Act to amend The new power, contained in s.7A of Schedule 3 provided for the first time for the withdrawal of accommodation and support from 'a failed asylum seeker with family' where the Secretary of State certified that the person had failed without reasonable excuse to take reasonable steps to: a) leave the UK voluntarily or b) place himself in a position in which he is able to leave the UK voluntarily.

² The 2007 Home Office evaluation of the pilot recommended that the Schedule 3 power "should not be used on a blanket basis" in the future and that "it should be for case owners to take a view, based on an established relationship with the family and an intimate knowledge of the asylum claim which has not been successful, of which approach to encouraging departure is most likely to be effective."

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

promised on a 'case by case' basis. Support services – in particular those assisting with assisted voluntary return (AVR) – are unlikely to be able to process a significant rise in applications and requests for help from those now subject to the transitional provisions. If AVR (VAARP) is now to be administered by the Home Office, the resource implications are even greater.

- 5.4** Consideration must be given to who will be processing the transitional cases, who will be administering AVR and how these functions relate to new cases coming on stream that will need to be administered under the new arrangements. A key question is whether the backlog of transitional cases will be dealt with by family case owners also dealing with decisions on post 1st July removal of support cases.
- 5.5** While the Impact Assessment suggests that the Schedule 3 power will only be used in respect of those who become ARE before 1st July 2016 – a major proposed change to the use of the power will be that there will no longer be a right of appeal against the refusal of support. There are two likely consequence of this proposal
- The incentive to remain in touch with the authorities will be removed and more families will disappear and fail to remain in touch making removal more difficult.
 - There is likely to be an increase in Judicial Review. This will slow down resolution of the transitional cases in the backlog.
- 5.6** In addition, we would anticipate that local authorities (and statutory service providers in Northern Ireland) will receive a significant rise in applications for support and may be overwhelmed in areas with high concentrations of Appeal Rights Exhausted families (see response to q.6 below).
- 5.7** In order to avoid this the Commissioners suggest that the current arrangement for ARE families continue, that proposals for transitional arrangements are put on hold and that any new arrangements apply only to those who become appeal rights exhausted after implementation on 1st July 2016.
- 6. The assessment of the impact of the proposals on local authorities (paragraphs 38-45).**
- 6.1** While local authorities themselves are best placed to provide a detailed consideration of the impact of these proposals, the Commissioners would anticipate three areas in which local authorities and statutory service providers in Northern Ireland will be significantly affected:

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

- An increase in requests for assessment of children in need by refused asylum seeking families who will be looking for accommodation and financial assistance. Local authorities/statutory service providers have legal duties and processes to follow to determine whether they must provide such support.
- Some assessments are likely to conclude that financial support and accommodation for children and their families is required to meet statutory obligations. This represents cost shifting from central government to already stretched local services.
- Increased numbers of destitute families in communities which will impact negatively on community cohesion and other aspects of community life.

The legal framework

- 6.2** Throughout the UK local authorities (or statutory service providers in Northern Ireland) have legal duties and processes for determining whether assistance must be provided to children in need and their families. It is indisputable that whether or not services are provided to destitute families as a result of the proposed changes, *the duty to assess remains* and this in itself will represent a significant call on resources.
- 6.3** In England the duty to assess children in need falls under section 17 of the Children Act 1989. In Wales, the Children Act 1989 is being repealed and whilst many of the provisions of Part III of the 1989 Act are similarly reproduced in *the Social Services and Well-being (Wales) Act 2014* ('The 2014 Act'), the provisions of Section 17 in respect of the duty to assess have been significantly amended.
- 6.4** In Wales, the duty to assess will fall under Part 3 of the 2014 Act. This will impose duties on local authorities to assess both adults and children who are – a) ordinarily resident in the authority's area and; b) any other adult/child who is within the authority's area *where it appears to the local authority that they may need care and support*.
- 6.5** As with Section 17 of the Children Act 1989, the 2014 Act does not create an automatic right to the provision of care and support services (including financial assistance and accommodation) but as a result of the requirement to assess there is likely to be an increased burden on Welsh local authorities if as proposed Section 4 (2) of the 1999 Act is repealed and Section 95 amended.
- 6.6** Under the 2014 Act there are *no exceptions to the duty to assess*. At the time *the Social Services and Well-being (Wales) Act* was drafted and enacted, the issue of removing support from failed asylum seekers was not under active consideration.

Parts 3 and 4 of the 2014 Act come into force in April 2016 and therefore will be binding on Welsh Authorities when the changes to primary legislation and transitional arrangements come into force on 1st July 2016. While the Children's Commissioner for Wales is supportive of the new legislation the resource implications of the proposed changes will be felt even more keenly by local authorities in Wales than elsewhere in the UK. Wales, for its size, takes a disproportionately high number of families seeking asylum in relation to other administrations within the UK.

Oversimplification of the duty on local authorities in the consultation document

- 6.7** The consultation document reasons that there would be no human rights issues engaged for local authorities as any failed asylum seeking family could avoid a breach of their human rights by returning to their country of origin to avoid destitution. It is also made clear that there is no general obligation on local authorities to accommodate destitute illegal migrants. As outlined above, these arguments ignore the duty to *assess* whether such support needs to be provided.
- 6.8** Schedule 3 of the Nationality Immigration and Asylum Act 2002 excludes certain groups of migrants from support and assistance under various pieces of relevant national legislation including section 17, 23(c), 24A and 24B of the Children Act 1989, Article 18, 35 and 36 of the Children (Northern Ireland) Order 1995 and sections 22, 29 and 30 of the Children (Scotland) Act 1995.
- 6.9** However, Schedule 3 only applies to some groups of refused asylum seekers including:
- Refused asylum seekers who have failed to comply with removal directions
 - Refused asylum seeker with family who has failed to leave the UK voluntarily, or placed themselves in a position to do so and this has been certified by the Secretary of State
 - Those who are 'unlawfully present' - including refused asylum seekers who claimed 'in-country', but not those who claimed at a port of entry.
- 6.10** Given that to the year ending March 2015, 11% of the 25,020 asylum claims lodged were made at port of entry, there will be a significant number of refused asylum seekers ('port claimants') who will *not* be excluded by Schedule 3 unless they have also failed to comply with removal directions. It will therefore fall to the local authority to provide assistance to them if the family is destitute (and therefore contains a child in need) - or indeed to an adult who has eligible care and support needs.

United Kingdom Children’s Commissioners response to the Home Office consultation
“Reforming support for failed asylum seekers and other illegal immigrants”

6.11 Furthermore even when an applicant belongs to an excluded group under Schedule 3, the local authority or statutory service provider is required to *undertake a human rights assessment* to determine whether the exception, set out at paragraph 3 of Schedule 3, applies³:

6.12 The purpose of the human rights assessment is to identify whether or to what extent the circumstances are such that the bar on services under section 17 of the Children Act 1989 (or other national legislation) should be lifted in order to avoid a breach of human rights or of European community treaties.

6.13 When considering this for families, the local authority is required to determine that:

- There are no barriers preventing the family from leaving the UK (e.g. pending human rights application, medical condition preventing travel, lack of documentation etc.)
- The child(ren) would not be in need in the country of origin - therefore a child in need assessment is necessary.
- It is in the best interests of the child(ren) to return to the country of origin
- The provision of assistance under section 17 Children Act (or other national legislation) is not necessary to prevent a breach of human rights (e.g. the right not to be destitute which the Courts have ruled constitutes inhuman treatment in respect of children).

6.14 It is likely that local authorities will receive applications from families belonging to a group excluded by Schedule 3, but where a legal or practical barrier is in place which prevents the person from leaving the UK. This is particularly so if the grace period is only to be 28 days. In these circumstances the local authority will be required to provide assistance to families with a child in need as well as adults with eligible care and support needs (and to former looked after children).

6.15 While the consultation appears to presume that local authorities and the Home Office will be in agreement with regards to what constitutes a ‘genuine obstacle to departure’, local authority decisions to refuse assistance are likely to be challenged by Judicial review resulting in potentially significant costs to them as well as a further call on their resources.

6.16 In this regard, although local authorities must defer to the decision making of the Home Office (*Clue v Birmingham City Council*), they are *required to make their own*

³ Under the Schedule , exclusion from statutory provision under the stipulated legislation does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—

(a) a person’s Convention rights, or
(b) a person’s rights under the Community Treaties.

decision as to whether the provision of assistance under section 17 Children Act 1989 is necessary to prevent a breach of human rights, incorporating consideration of the matters raised above. This means they remain open to challenge by families who are refused support.

- 6.17** Where a refused asylum seeking family presents to a local authority, the assessment process must be undertaken and, as indicated above, this takes up resources even when services are not eventually provided. However if the family would otherwise be homeless, the local authority would need to provide interim accommodation and financial support whilst assessments are carried out.
- 6.18** Even where a local authority concludes that the family can safely return to their country of origin without there being any breach of their human rights they may need to provide interim accommodation in order to avoid a short term breach.
- 6.19** It can be seen from the above that the consultation and the Impact Assessment have significantly underestimated the likely impact on local authorities.
- 6.20** The consultation implies bypassing the existing arrangements whereby families with no further right to remain are referred to the family returns panel. The Panel currently considers the best interests of the children in the return arrangements proposed by the Home Office. The proposed changes effectively transfers the duty to consider the best interests of the child within the return process to local authorities, creating a further resource burden as well as resulting in costs incurred from direct service provision. The Home Office must set out what they consider to be the role of the Panel within the proposed new arrangements.

Increased numbers of destitute families

- 6.21** Even where lawful local authority assessments conclude that no support is required the historical evidence suggest families will remain within their communities but will be destitute. The Commissioners believe that this can only expose children affected by the changes to an unacceptable range of risks including child sexual exploitation, modern day slavery, non-attendance at school, not accessing healthcare and other services if they are ill, have a disability or special educational needs, living in unsuitable and unsafe conditions when for example, parents will be driven to obtain financial support which have safeguarding implications for children, for example, using unsuitable child care arrangements while they work illegally to support the family.

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

- 6.22** The impact of destitute migrants within communities also has wider implications for local authority communities and services, for example, around community cohesion, public health and demands on education providers.
- 6.23** If there are safeguarding concerns because a child is at risk of serious harm, the local authority will need to consider whether care proceedings are appropriate. This is the least desired outcome for the family and local authority due to child welfare, cost and resource implications.
- 7. Whether and, if so, how we might make it clearer for local authorities that they do not need to support migrants, including families, who can and should return to their own country (paragraph 42).**
- 7.1** Our response to Q.6 makes clear that we believe that the proposals are highly likely to mean that local authorities will be required to support refused asylum seeking families who do not return to their countries of origin regardless of whether amendments are made to Schedule 3, *unless* there are clear processes in place to address the family's destitution.
- 7.2** We share local authority and NGO concerns that stopping asylum support will not result in any significant increase in families leaving the UK and regard it is unacceptable and a breach of the UK's obligations that refused asylum seeking families are left destitute on the streets. We do not believe that local authorities would support measures that would lead to such a consequence.
- 7.3** A better approach to removing families with no right to remain would involve collaboration between local authorities and the Home Office through the 'NRFP connect' network which many of the most affected local authorities are not yet signed up to. Collaboration and patient work could, if adequately resourced, ensure that vulnerable families do not become homeless and destitute when they have exhausted all procedural avenues to pursue their claim, and that safeguarding responsibilities are maintained.
- 7.4** The restoration of legal aid for immigration cases involving ECHR Article 8 claims would also assist the process resolve more quickly and more fairly.
- 8. Any suggestions on how the Home Office, local authorities and other partners can work together to ensure the departure from the UK of those migrants with no lawful basis to remain here and minimise burdens on the public purse (paragraph 47).**

Co-operation between the Home Office and Local Authorities

- 8.1 The consultation document states that consideration of further applications and submissions by refused asylum seekers receiving assistance from local authorities would be expedited via NRPF Connect.
- 8.2 Apart from the fact that NRPF Connect is far from universally used by local authorities, the service demonstrates that Home Office case-working is time consuming and complex, and the ongoing costs to local authorities whilst it is undertaken are significant.
- 8.3 The existence of NRPF Connect to facilitate partnership working will not mitigate the fact that costs will increase due to local authorities being required to assist a new client group (i.e. refused asylum seeking families making further applications). The work being undertaken between the Home Office and local authorities via NRPF Connect to resolve local authority supported cases is likely to be over-burdened by the increase of cases which the proposals would lead to.

Legal Aid

- 8.4 The removal of legal aid for advice and representation in non-asylum immigration cases through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 has meant that children and families have not been able to access legal assistance to have their claims (not involving asylum) fairly considered.
- 8.5 Access to such assistance has been needed especially because of inefficiency in Home Office decision making that has led to families remaining here for many years and children being born and establishing their lives here thus establishing family and private life claims against removal. Families who have been in the UK for significant periods of time may well have a right to remain but are now unable to obtain legal assistance to present that case. This makes it more likely that they will not cooperate with removal.
- 8.6 A decrease in registered suppliers of immigration advice and representation has resulted from immigration (other than asylum) now being out of scope of legal aid. This compounds the worsening situation with access to advice and representation for families and children.
- 8.7 It would give clarity to families whom the Home Office wishes to return if the Government would ensure that in cases with merit and where the family had no means to pay for legal advice and representation, they were provided with such via

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

legal aid in order that their non-asylum immigration claims can be resolved quickly, effectively and fairly.

Fit with the current family returns process

- 8.8** The consultation does not mention how the proposals sit with the current family returns process and in particular the routing of cases through the Family Returns Panel. It is in the interests of local authorities to work with the Home Office to support the current family returns process but the proposals appear to undermine a collaborative approach.

Wider issues with the asylum system

- 8.9** In addition to the above, the Commissioners believe that the question of the departure of failed asylum seekers cannot be separated from investment in all stages of the asylum system to ensure that decisions are taken in a reasonable timeframe, are fair and reliable, and are then properly implemented.
- 8.10** There remains significant scope for improving the quality of initial decisions. In the first half of 2014, the Home Office audit team found that out of a sample of 276 cases, 42% were not satisfactory, meaning that they included one or more serious errors, such as failing to fully adhere to legislation, processes or policy.
- 8.11** It is not surprising that in consequence, 28 % of those who appealed a refusal of their asylum application were successful in 2014. Each decision to refuse which is subsequently overturned on appeal has a total average cost of around £6,500 per applicant. Addressing high overturn rates on appeal and poor decision making will save money and increase confidence in the asylum system by applicants who will understand that they have been through a fair process.
- 8.12** It is estimated that currently there are 21,651 cases pending resolution, including of families. These delays dramatically increase costs to the taxpayer. Furthermore, delays inevitable mean families set down roots and effectively acquire a 'private life' in the UK which increases the difficulty in lawfully removing them.
- 8.13** The Government should ensure that there are no backlogs at any stage in the decision making process. The only secure way to do this and improve the cost effectiveness of the whole asylum system, is through the recruitment of additional staff and better management to ensure that all staff take timely and good quality decisions.
- 8.14** The evaluation of the first Early Legal Advice pilot suggested evidence that the improved quality of initial decision making meant that those refused asylum felt that

United Kingdom Children's Commissioners response to the Home Office consultation
"Reforming support for failed asylum seekers and other illegal immigrants"

they had been given a proper opportunity to make their case. The evaluation concluded that failed applicant who had gone through the ELAP scheme were more likely to fully engage in the returns process.

8.15 The Commissioners believe the current proposals where support is terminated would make it difficult for families to engage with return even if a fair process has preceded it. It will also be easier for the voluntary sector and other partners to work more closely with the Home Office on options relating to those who are appeal rights exhausted if there is confidence that all those in need of protection have been recognised as such.

9. Any information or evidence that will help us to assess the potential impacts of the changes proposed in this consultation document and to revise the consultation stage Impact Assessment (paragraph 48).

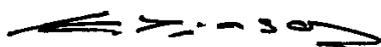
Please see the responses provided above.



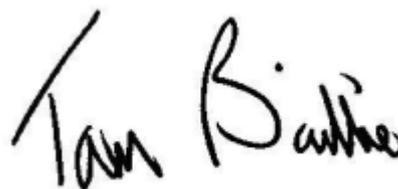
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