

Assessment and Support of Post 18 UASC's listed as Appeal Rights Exhausted As of June 2012

1. Introduction

1. This paper has been produced by a "Task and Finish Group" established by the Local Government Association Asylum Refugee and Migration Task Group. The Task and Finish Group was asked to clarify the current position in asylum legislation in respect of the support that unaccompanied asylum seeking children (UASC) may be entitled to receive after they reach 18 years of age (see sections 2 and 4); to explore the implications of the case of R (on the Application of) S.O. v London Borough of Barking and Dagenham (2010) (see section 3 below); and the role of human rights assessments (see section 5 below).
2. The Task and Finish Group included representatives of the Local Government Association, the ADCS Asylum Task Force, COSLA, WLGA and the No Recourse to Public Funds Network. The Department for Education and the UK Border Agency participated in the Group and contributed to the final paper.
3. The paper does not attempt to provide an exhaustive statement of the relevant law, nor is it a substitute for detailed legal advice, either generally or in relation to complex issues that may arise through the consideration of individual cases. **This document is intended only as background information with regards to the circumstances where local authorities may be required to provide a care leaver service to UASC who have reached 18 years of age and are 'Appeal Rights Exhausted'. What assessment and support is ultimately provided will be decided locally.**

2. Background

The current legal and policy framework in leaving care

4. Local authorities have clearly defined duties and responsibilities for their care leavers. The Care Leavers (England) Regulations 2010 and guidance 'Planning Transition for Adulthood for Care Leavers' requires local authorities to provide certain young people who turn 18 with appropriate leaving care support.
5. This includes a regularly reviewed pathway plan and the allocation of a personal adviser who will provide advice and support on a range of matters including accommodation up until the young person reaches the age of 21, or beyond if the young person is still in education.
6. The possibility of return for some asylum seeking young people should be discussed as part of the pathway planning process, where there is a possibility of them becoming Appeals Rights Exhausted.
7. The revised regulations and guidance on support for care leavers are intended to bolster the quality of support, and bring consistency so that all young people receive the same opportunities to succeed as their peers. Key entitlements for care leavers include:
 - the £2000 Higher Education Bursary for all eligible care leavers;
 - a new 16-19 Bursary scheme which will begin from the start of the 2011/12 academic year. Looked after young people and care leavers are guaranteed a £1,200 bursary if they continue in full-time education;
 - the provision of a personal adviser. Since April 2011 care leavers up to age 25 who return to education or training have been able to also benefit from the support of a personal adviser while they are on their agreed course; and
 - provision of vacation accommodation if the young person is in higher education

The current legal and policy framework in immigration law

8. The immigration status of UASC is not relevant to the consideration of their support entitlement for as long as they are under 18 years of age. All fall to be supported by Local Authorities under the provisions of the Children Act 1989 - in the same way as any other child in need.
9. The position after the young people reach 18 years of age is more complicated. However, the great majority will have been supported under section 20 of the Children Act 1989 and will therefore be “former relevant children”.

This means that they will (subject to immigration considerations described below) be entitled to leaving care support services, including accommodation where needed, from their Local Authority. (The small minority who are not former relevant children will be entitled to support from the UK Border Agency if their asylum claim is still outstanding or be able to access mainstream benefits if they have been granted leave to remain in the United Kingdom).

10. The financial cost of providing accommodation and subsistence for former relevant children is usually provided through mainstream benefits (for as long as the person has leave to remain in the United Kingdom) – although the cost of these and other services may sometimes be supplemented by Local Authority expenditure and grant funding from the UK Border Agency.
11. Access to mainstream benefits ends if the person no longer has leave to remain in the United Kingdom. In practice, this is likely to only happen in cases where the young people have been refused asylum and the period of limited ‘Discretionary Leave to Remain’ that was awarded to them before they turned 18 has now expired (sometimes after an application to extend the period of leave has been rejected). From this point the person is likely to be classed as “Appeals Rights Exhausted” (ARE) by the UK Border Agency. In addition to the person losing access to mainstream benefits, the Local Authority will also only be able to access UK Border Agency funding for a period of 3 months after the ARE date, subject to the requirements of the grant conditions. For these reasons, Local Authorities may find that they need to review the cases of former UASC care leavers if they become ARE after they reach 18.

3. **Schedule 3 of the Nationality, Immigration and Asylum Act 2002**

12. Some Local Authorities have reviewed ARE cases with reference to Schedule 3 of the Nationality, Immigration and Asylum Act 2002. The starting point of their consideration is that leaving care support, or more particularly support under sections 23C, 24A or 24B of the Children Act 1989, is one of the classes of support that may be unavailable to certain classes of people from abroad as a result of Schedule 3. Whether or not a person is affected by the restrictions in Schedule 3 depends on their immigration status.
13. Schedule 3 sets out the four classes of people who are deemed ineligible for a range of support entitlements (subject to the exceptions described below). The ineligible classes are:
 - (i) Person granted refugee status by another EEA state
 - (ii) An EEA national and any dependants
 - (iii) A failed asylum seeker who has failed to comply with removal directions
 - (iv) A person unlawfully present in the UK (including visa overstayers, failed asylum seekers who applied for asylum in-country, illegal entrants, people in breach of their visa conditions).
14. **The particular class that most UASC are likely to fall into (if at all) after they turn 18 is the fourth class of ineligible person listed above: *person unlawfully present in the United Kingdom*.** In practice, any of the young people who originally lodged their asylum claims “in-country” (rather than at the port of entry to the United Kingdom) will be deemed unlawfully present in the United Kingdom if their asylum claim is refused and any appeals finally rejected; or in the case of those initially granted a period of Discretionary Leave to Remain (DL), once any application to extend DL is finally refused and any appeal finally determined as dismissed.
15. Most of the young people who claimed asylum at the port of arrival will also fall into the “unlawfully present in the UK” category after they turn 18 if their asylum claims fail and any applications for further DL have been rejected and their appeals finally dismissed.

A much smaller number who claimed asylum at the port of entry and did not receive a grant of DL will not fall into the fourth category, but will fall into the third category if their asylum claim is rejected and they fail to comply with removal directions.

16. However, simply because a person falls into one of the four classes does not automatically mean that their leaving care support, including any provision of accommodation and subsistence, should be stopped.
17. **Under current asylum legislation, the Local Authority will still be under a duty to provide support if this is necessary to prevent a breach of the individual's human rights** (or rights under EU Community Treaties in the rare case where the person is a citizen of a European Economic Area country).

4. **Impact of case of R (on the Application of) S.O. v London Borough of Barking and Dagenham (2010)**

18. The main finding of the court was to reject the Local Authority's argument that Section 23C(4)(c) of the Children Act 1989 does not create a duty to a Local Authority to accommodate a former relevant child; and their alternative argument that a Local Authority can look to the UK Border Agency to provide support (i.e. Section 4 support) when considering whether a former relevant child's welfare needs include a need for accommodation.
19. The Court decided that, when reading section 17 (6) of the Children Act, to not treat s23C similarly would lead to unacceptable consistency. It therefore found that a Local Authority does have a general duty to provide a former relevant child with accommodation under section 23C(4)(c) 'to the extent that his or her welfare requires it'.
20. The second point from this ruling was that a Local Authority is not entitled, when considering whether the young person should be provided with accommodation, to take account of the possibility of their receiving support under Section 4. A Local authority cannot therefore look to the UK Border Agency to provide for the accommodation or support needs of a former UASC who is ARE.

21. In conclusion, the Barking and Dagenham case has helped to demonstrate the continuing responsibilities that will befall a Local Authority under leaving care legislation by clarifying what housing, subsistence and other support UASC are entitled to when they turn 18. **The case did not, however, consider the impact of Schedule 3 of the Nationality, Immigration and Asylum Act 2002**, since none of the parties to the proceedings thought it relevant to the matters being decided and thus did not provide the clarity that many had hoped.

5. Undertaking a Human Rights Assessment

22. In preparing this paper, the Task and Finish Group was aware that some Local Authorities conduct human rights assessments as part of their review of whether young people who are ARE should continue to receive support through leaving care provisions to prevent a breach of human's rights.

23. The relevant articles of the European Convention on Human Rights that may need to be considered, depending on the circumstances, are:

- Article 3 (prohibition on torture or inhuman or degrading treatment or punishment); and
- Article 8 (respect for private and family life).
- In cases where the person is involved in court proceedings in the UK, Article 6 (right to a fair and public hearing).

24. In practice, however, the first step in determining what support may need to be provided for human rights reasons is to note that in ordinary circumstances a decision that would result in a person sleeping rough or being without shelter or funds, will usually be considered inhuman or degrading treatment (R (Limbuela) v Secretary of State (2004)), contrary to Article 3 of the European Convention on Human Rights.

The Local Authority would therefore need to assess whether the consequences of a decision to deny a person with accommodation would result in a person suffering such treatment. To make that assessment it may be necessary to consider if the person can obtain accommodation and support from charitable or community sources or through the lawful endeavours of their families or friends.

Where the Local Authority concludes that there is no support from any of these sources it might need to accommodate the individual in order to avoid a breach of Article 3 of the Convention.

25. However, if the person **is able to return to their country of origin** and thus avoid the consequences of being left without shelter or funds, the situation outlined above is changed. This is because of the following:
 - There is no duty under the European Convention on Human Rights to support foreign nationals who are freely able to return home (*R(Kimani) v LB Lambeth* 2003)).
 - If there are no legal or practical obstacles to return home, the denial of support by a local authority does not constitute a breach of Human Rights (*R(on the application of AW) V Croydon LBA*); (*R (on the application of A, D and Y) v Hackney LBC and another* (2006)).
26. Legal and practical obstacles to return can include factors such as lack of travel documents or being temporarily unable to travel due to a medical condition. The Local Authority may therefore use the human rights assessment to consider if these obstacles are in place and if so, how and when they might be overcome. Things that can be done to facilitate a return include contacting relatives, or finding out about services in the country of origin. In some instances the Local Authority will be able to take steps to resolve obstacles - for example by liaising with national embassies, the UK Border Agency or Refugee Action (responsible for voluntary return programmes) to resolve travel documentation difficulties or provide medical escorts on flights.
27. In other instances, the person may be required to demonstrate the steps they are taking to resolve any obstacles. Unwillingness to return is not regarded as the same as inability to return, so where there is a genuine obstacle to return the person can be expected to take steps to resolve the obstacle where it is reasonable to do so (for example by applying for a travel document through the national embassy).
28. When conducting the human rights assessment, some Local Authorities find that the person sometimes states that they cannot leave the United Kingdom because they believe their human rights will be breached in their country of origin (usually the only

country they can go to). However, it is not the Local Authority's role to assess the merits of such a claim, as this is a matter that will already have been considered by the UK Border Agency (and usually the immigration courts).

29. If there are no legal or practical obstacles preventing the person leaving the United Kingdom, it will usually be difficult for a person to establish that a Local Authority is required to provide support in order to avoid breaching their human rights.
30. Clearly, however, if there are obstacles in place that mean the person cannot leave the United Kingdom, or they are taking reasonable steps to put themselves in a position whereby they can leave the United Kingdom, it will often be necessary to continue to provide support for human rights reasons (specifically, to avoid the inhuman treatment described in paragraph 22). As an example, if the person accepts the offer of assistance to return to their country of origin support under section 23C should normally continue until they leave the United Kingdom.
31. It should also be noted that if the person has dependant children, the Local Authority will also need to consider the impact of restricting or withholding support on their children. The Local Authority will always retain a duty to promote and safeguard the welfare of children under section 17 of the Children Act 1989.
32. When conducting human rights assessments, Local Authorities may also find that although an earlier asylum claim has been rejected by the UK Border Agency, the person has submitted new evidence or further representations for consideration. This will usually mean that there is a genuine obstacle that prevents them from leaving the United Kingdom and that support should continue until the representations are answered. The person will not, however, be treated as an 'asylum seeker' unless and until the fresh evidence is recorded as a fresh asylum claim by the UK Border Agency. The Local Authority should draw the UK Border Agency's attention to the case so that this can be done promptly. The Courts have clarified the approach to take in these sorts of cases in *Binomugisha v Southwark* (2006) as well as in *Clue v Birmingham City Council* (2010).
33. While there are barriers in place preventing return (including outstanding representations), such as to mean that the person requires support for human rights reasons, only limited grant funding is available from the UK Border Agency - currently for a period of 3 months. Further funding will become available if the Agency accepts

the further representations as a fresh asylum claim (though this would only be the case if they contained some new and compelling evidence which was significantly different to the material already considered in the person's previous application).

34. In essence, Human Rights Assessments can allow the local authority to address the options available to the person and to themselves. It is very important that the persons are aware of all the options available to them, as well as the implications of the decisions about their access to support, that Local Authorities may decide to make. The person then could use the information to make their own decision about what they wish to do, for example:
- Seek legal advice as to whether they can submit further representations to the UK Border Agency for leave to remain in the United Kingdom (this will usually depend on fresh evidence being available about their likely treatment on return to their country of origin).
 - Remain in the United Kingdom without the right to work or to access benefits and thus relying on informal and non-statutory services, despite the obvious risks in choosing this option.
 - Accept the offer of assistance to return and reintegrate in the country of origin, as opposed to enforced removal by the UK Border Agency or remaining unlawfully in the United Kingdom.
35. In parallel to this, local authorities themselves may need to explore the financial implications of supporting those who are not eligible for public funds or UKBA funding but who cannot leave the UK because of legal or practical obstacles to returning to their country of origin. Against this, they will also have to consider the resource implications of carrying out human rights assessments; the need to understand the existing background case law and the real or perceived threat of legal challenge if support is withdrawn. (The Human Rights Assessment process itself may be of assistance in assessing the degree of risk of a legal challenge in the event of support being withdrawn).

36. Another consideration is that the Grant Instructions for the Leaving Care (Post 18) Grant for year 2011/12 provide that human rights assessment must be completed if Local Authorities are to receive the extra three months funding available in any case where the person is ARE.

6. Conclusion and further information

37. As noted above, this paper does not provide an exhaustive study of the existing legal and policy issues relating to the support entitlement of care leavers who are appeals rights exhausted. The Task and Finish Group was keenly aware that local authorities have interpreted these provisions differently, particularly in respect of the extent of their duties to provide continued support to persons who are Appeals Rights Exhausted. The support local authorities provide varies as a result, with some deciding to continue full support and some providing leaving care support but not accommodation or subsistence.
38. The paper does not seek to address the growing debate, outside the scope of this paper, of whether the existing legislation correctly assigns support responsibility for these cases to Local Authorities, instead of assigning such responsibility to the UK Border Agency.
39. It also does not, for example, consider the impact on community cohesion of leaving people without recourse to public funds – which will naturally need to be considered at a local level in partnership with other interested parties.
40. Nor does the paper attempt to set hard and fast rules on how Local Authorities should set about reviewing the support entitlement of the young people in question. These decisions involve a number of policy and resource considerations that are ultimately a matter for local discretion, most likely to be made at a political level informed by officer expertise.

41. It is hoped, however, that the paper is of some help in drawing together existing background and case law and as an explanation of how Local Authorities may wish to continue to provide support to persons who are ARE in a way that is consistent with the current legal framework in asylum and immigration; or alternatively (where appropriate) withdraw or restrict support access in a way that is consistent with this legal framework.

7. Further information

42. The following may be useful for more information:

- **The Children (Leaving Care) Act 2000**

This was implemented on 1 October 2001. The full detail of the provisions of the Act can be found:

- a) In the text of the Act;
- b) In the Explanatory Notes attached to the Act;
- 3) In the Guidance and Regulations attached to the

The provisions of the Children (Leaving Care) Act 2000 apply to the following groups of looked after young people, who will be known as 'Eligible' young people:

- Those looked after young people who reach their 16th birthday and have been Looked After for a period of 13 weeks after their 14th birthday (excluding planned respite care);
- Those young people who become Looked After at 16 or 17 years and are subsequently looked after for a period of 13 weeks.

- **Department of Education care planning and care leaver guidance:**

www.education.gov.uk/childrenandyoungpeople/families/childrenincare/a0065502/care-planning-for-looked-after-children-and-care-leavers

- **Guidance on the assisted voluntary returns scheme funded by the UK Border Agency**
www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/removal/guidance/assistedvoluntaryreturn.pdf?view=Binary
- Islington guidance on human rights assessments:
www.islington.gov.uk/DownloadableDocuments/CommunityandLiving/Pdf/adults_nrpfguidance.pdf
- The Human Rights Assessment may have some similarities to the approach the UK Border Agency takes when considering applications for Section 4 support from failed asylum seekers (who are not care leavers). Guidance on Section 4 can be found at:
www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/asylumsupport/guidance/section-4-support1.pdf?view=Binary

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