Response to the Home Office Immigration and Nationality Directorate Consultation Paper, February 2007, *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children*

ILPA is the UK's professional association of immigration lawyers, advisers and academics practising or engaged in immigration, asylum and nationality law.

ILPA is a member of the Refugee Children's Consortium (RCC) and we endorse its response to the Consultation Paper. This response focuses on the particular issues we as immigration practitioners have identified in the Consultation Paper.

ILPA has recently produced a report on age disputed cases, which is founded upon extensive and careful research. A copy of that report entitled *'When is a child not a child? Asylum, age disputes and the process of age assessment'* accompanies this response.

1. Introduction

As legal practitioners working with children subject to immigration control we are very keen to participate in any discussions or consultations which may result in the Home Office making better quality immigration and / or asylum decisions in respect of children's applications.

We welcome the statements in the Consultation Paper which affirm that Unaccompanied Asylum Seeking Children (UASC) (or separated children, as

these children will be referred to in this response[1]) matter every bit as much as other children within the context of meeting each and all of the five outcomes of the *Every Child Matters* framework [Chapter 1, paragraph 6]. This is an important principle that must not be overlooked or downgraded by the Home Office and Local Authorities, despite the clear message from the Home Office running through the Paper that "immigration decisions must be upheld" [Ministerial Foreword, paragraph 2].

We also welcome the statements in the Consultation Paper which recognise the need for separated children to only be placed in areas where there are sufficient and adequate services available, including legal representatives that specialise in asylum and child care issues [Chapter 2, paragraphs 17 and 19]. We as immigration practitioners know how crucial it is that children have access to specialists who have the ability to communicate with children and to advise them comprehensively, are knowledgeable about family and child care law, and are experienced in representing children's protection claims.

2. False Assumptions

At the outset we challenge a number of false assumptions which in our strong view underlie the Consultation Paper itself. It is our submission that unless these assumptions are critically examined, the objective of *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children* will fail: failure in terms of the quality of care and services provided to separated children, and failure in actually protecting children from harm in the UK and/or in their home country.

The Consultation Paper assumes that as so few children are granted asylum in the UK the vast majority of them are economic migrants who have been sent here by their parents to benefit from educational or employment opportunities which are available here but not in their countries of origin [see figures stated on page 15]. This is a crude assumption, which has not been

[1] We note the Consultation Paper recognises the limitations of the term UASC, including in its unabbreviated form, in failing to give adequate recognition to the fact that these are children. As indicated elsewhere in this response, failing to treat children as children is not restricted to the term UASC, and it may be thought that the very term UASC contributes to such wider failures.

subjected to any research or analysis. This assumption sets the tone for the Paper, which seeks to suggest that very few separated children are deserving of international protection and therefore preparing them for return to their home country is an essential element of their "care package".

The Consultation Paper states that separated children are distinct from settled children because they enter the care system or seek children's services when they are, on average, considerably older than other children or young people [Chapter 1, paragraph 7]. This statement does not refer to any statistics or research as evidence. It is well known that a high number of settled children enter the care system or seek children's services in their teens. Can this distinction legitimately be drawn between separated and settled children in defining their different and particular needs?

The Consultation Paper asserts that separated children have different and particular needs from settled children in the care system because of the "temporary nature of their stay in the UK" [Chapter 1, paragraph 7]. Again, there is no evidence presented to support this assumption.

Many of the separated children we advise and represent are effectively non-returnable. They may be stateless, there may be no formal return arrangements between the UK immigration authorities and their national authorities e.g. Iran, they may have arrived in the UK without evidence of their identity and nationality and/or their national authorities will not acknowledge them and re-document them for removal.

A large majority of the separated children we advise and represent are caught-up in the legacy casework of the Case Resolution Directorate because they have outstanding applications for extensions of their Discretionary Leave to Remain (DL) which are subject to active review by Home Office Caseworkers. These reviews have not been conducted owing to large backlogs at the Home Office. Indeed, the separated children are routinely receiving letters from the Home Office informing them that their applications may take up to 5 years to be determined!

We see separated children, seeking asylum and formerly seeking asylum, who have been living in the UK for years, and can expect to be here with outstanding applications for years to come. Their stay cannot reasonably be described as temporary. However these children do feel like they are in the UK temporarily because they do not enjoy security of status to establish and integrate themselves into UK society.

To assume that separated children are in the UK "temporarily" is to deny the practical and political realities of forcibly removing failed asylum-seeking children from the UK.

It is true that the number of claims by separated children has not fallen in line with the general fall in the number of asylum claims [Chapter 1, paragraph 3]. However, so far as we are aware, the reasons for the fall in asylum claims generally have not been the subject of any detailed research, which of itself indicates that drawing any conclusions on the relative number of claims is unsafe. In any case, that there has not been a similar fall in the number of separated children's claims cannot simply be accounted for by there being some young adults falsely claiming to be children as the Consultation paper claims: "the number of age dispute cases are illustrative of a serious level of abuse in the system" [Chapter 3, paragraph 24]. The increase in cases of age disputes did not occur when dispersal was first introduced in 1999. Nor did it correlate with any practical changes made to the asylum determination system which sought to treat children differently from adults.

The increase in separated children did correlate with particular conflicts and emerging forms of persecution targeted at children. The Home Office statistics themselves indicate that there was an increase in applications for asylum from Afghani boys at the time at which the Taliban were press ganging under age boys to serve in their army. In 2002 and 2003, more than 50% of applications from unaccompanied children from the top ten asylum producing countries for children were from girls, whilst the usual gender split is around 23% female and 77% male. All of these countries were known to be source countries for

child trafficking to some extent at least. Many of these countries were also countries where female genital mutilation (FGM) was prevalent.

Until very recently very little guidance or training was provided to Home Office Caseworkers deciding applications from separated children about child specific forms of persecution. Now NAM Caseworkers undergo a programme of Minors Training before they undertake separated children casework and this is to be welcomed. However there are still severe shortcomings in that the country material the Caseworkers rely on to examine the context of a child's asylum claim seldom record and highlight children's experiences. Children are often an invisible group in human rights reports.

A recent research project *Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the UK*[2] also analysed a year's worth of determinations from appeals made to the Immigration Appellate Authority (IAA), as it then was, by separated children. It was very clear that the level of understanding of the child specific nature of the persecution suffered by many of these appellants was generally low among Home Office Presenting Officers, legal representatives and adjudicators.

The *Seeking Asylum Alone* research also highlighted the fact that children were at a real disadvantage, in comparison to adults, in relation to both rights and opportunities to appeal. As they are usually granted at least a small period of DL, many of them are advised not to appeal against any decision to refuse them asylum by social workers or even by legal representatives. Sometimes this is on the mistaken basis that this DL will automatically be extended in the future and was granted in recognition of the child's need for international protection. At other times, social workers concluded it would be too traumatic for children to go to court and in some instances legal representatives did not comprehend the particular dangers facing certain children which entitled them to international protection.

[2] This report is available at http://www.humanrights.harvard.edu/conference/SAA_UK.pdf

Many other separated children were prevented from exercising any right of appeal against a refusal of asylum whilst still children. Children often waited months if not years for a decision on their initial application. Then if they were only granted a period of a year or less of DL, Section 83 of the Nationality, Immigration and Asylum Act 2002 deprived them of a right of appeal. This could mean that separated children who arrived at 17, 16 or even younger were not able to appeal often because of administrative delay on the part of the Home Office. There were also many others who were deprived of a right of appeal in the same way as they came from what are known as non-suspensive appeal countries and as a matter of policy they were only granted DL to remain on the basis of being children for a maximum of one year.

It would therefore be very dangerous to assume that because historically very few separated children have been granted asylum they have not been victims of persecution which merited international protection [see figures stated on page 15]. Building a special system of care for separated children based on false assumptions such as this runs the risk of fixing endemic inadequacies in that system.

3. Home Office Process and Decisions

The Consultation Paper asserts that there are many features of the current arrangements for separated children that the UK should be proud of. It points to the "careful consideration" of asylum applications and the fact that separated children refused asylum are only forced to leave the UK if adequate reception arrangements are in place to receive them which means that "the great majority are allowed to remain in the UK until they reach adulthood" [Chapter 2, paragraph 10].

We strongly disagree with the Home Office claim that children's asylum applications receive careful consideration. Glaring support for our position is revealed by the fact that the Home Office recently introduced a so-called 'Children's Statement of Evidence Form (SEF)' and 'Children's Statement of Evidence Form (SEF) Combined Interview and NINO Application' for the New Asylum Model (NAM), for use with UASC. The SEF questionnaire form and

interview record form cannot reasonably be described as child-friendly. In fact they are essentially the same forms produced for adults, but with little difference other than the titles.

The questionnaire form does not explain to children what the Refugee Convention grounds are. Children are expected to identify their Convention ground without the provision of any examples. Similarly, the questionnaire form does not explain to children what forms of harm may constitute persecution by giving child-specific examples like child-conscription, forced marriage, child-slavery, FGM. This has particular relevance to particular social group under the Convention definition.

The interview form starts with the Home Office Caseworker reading out warnings to children about prohibited behaviour, curtailment of their leave and removal if their asylum claims are refused and giving an explanation of their legal representative's passive role at their interview. This introduction cannot be conducive to a child giving their full account.

In our view, the Home Office in their determination to rush NAM into implementation has missed a begging opportunity to radically overhaul the process for determining UASC's asylum claims. We strongly regret this. Had the Home Office consulted children's organisations and experienced immigration practitioners doing children's work, there is no doubt that a fairer information-gathering process could have been devised with the child's welfare at the centre. In our strong opinion, a fairer information-gathering process would in turn have led to improved quality of decision-making by Home Office Caseworkers. With child-unfriendly forms mapping out a child-unfriendly information gathering process, how can a Caseworker realistically expect to extract key information in determining whether a child is in need of international protection?

The inclusion of UASC in NAM, with in our view a wholly child-unfriendly information-gathering process, concerns us even more given the radical change in Home Office policy to routinely interview UASC over the age of 12

years about their asylum claims, whereas previously UASC under 18 years were not normally interviewed. How can it be deemed in the best interests of a child to interview them about their asylum claim by beginning with section 8 credibility warnings, making plain that their legal representatives are merely there as observers, and explaining that if their asylum claims are refused they will be liable to removal to their home country? Does this approach demonstrate that UASC matter?

4. Legal Advice and Representation

We welcome the fact that the availability of legal advice on immigration issues is one of the criteria for the proposed Specialist Authorities. It is to be hoped that the Home Office aim of developing Specialist Authorities results in all separated children having access to quality legal advice and representation. However, how this will be achieved is a complete mystery to our members at present! The Legal Services Commission (LSC) and the Home Office do not seem to be working together on this issue at all. ILPA has raised concerns with both the LSC and the Home Office regarding the future for legal aid provision for separated children.

The LSC originally informed their suppliers that from 1st April 2007 they would only be able to advise and represent separated children if they had an exclusive contract to do the work. These exclusive contracts were to be awarded following a competitive bidding process, that is, suppliers would have to demonstrate their expertise, competence and capacity to advise and represent separated children to the highest standard.

Now we are 2 months on from 1st April 2007 and LSC suppliers still do not know what their proposals are for working with separated children. The exclusive contract bidding process was never set up.

We know of a firm in the North East of England, one of the many that has closed their immigration department for business reasons owing to the threatening changes to legal aid introduced by the LSC in April 2007, but this firm we highlight because it specialised in separated children work and had a

national reputation for this work within children's organisations. Had the LSC launched their exclusive contract bidding process before 1st April 2007 as originally proposed, this firm would have undoubtedly secured a contract and been able to continue to provide high quality legal advice and representation to children and potentially survived as a business. It is highly regrettable that their expertise has been lost to the sector, and in particular to separated children present and future.

To illustrate the total failure of the LSC and the Home Office to meet their apparent shared objective for separated children to have access to good quality legal advice and representation, the NAM ploughed ahead with processing children's claims in March 2007 without there being any special arrangements in place between the LSC and their suppliers to provide legal advice and representation specifically to children, yet alone high quality legal advice and representation.

We are increasingly aware of separated children who have entered the NAM process un-represented, because of a breakdown in communication and coordination between the Home Office and LSC suppliers. Children have been invited to first reporting events (often with substantial journeys) only to find that they are not met by their Case Owner; and even not to be given their Case Owner's name or contact details. Children have been interviewed in the absence of legal representatives. We are aware of one instance where a child was refused on non-compliance grounds for failing to participate in the SEF interview, despite medical evidence of mental health concerns. In this case, the Home Office also failed to engage with the legal representative on record. This is extremely worrying, and is in spite of the assurances that were given upon the introduction of NAM, that the speed of the process would not jeopardise the fairness of it as access to legal advice and representation would be an essential component.

The lack of detail, even now, about how the provision of legal services will be linked to the appointment of Specialist Authorities causes ILPA's members grave concern. The LSC have a responsibility here as much as the Home

Office and it is regrettable that the LSC's plans in respect of a specialist children's contract are so embryonic when practitioners are already faced with radical changes to the provision of legal services. We fear that without the LSC and the Home Office grappling with the issue of legal representation for children without delay, legal services will be the forgotten element of the picture.

The Consultation Paper rightly emphasises the need for specialist expertise and skills among those professionals with responsibility for separated children. Whereas the Paper's emphasis is on social services and Home Office caseworkers, it is plain that specialist capacity will be required among legal advisors and representatives. This will be both because legal representatives will need similar skills for similar reasons as Home Office Caseworkers and because legal representatives will need to be familiar with the various processes through which children will pass (whether related to their immigration status or their wider welfare needs).

The Paper further acknowledges that currently separated children find the process confusing. This finding is one which members of ILPA recognise through their contacts and meetings with children and children's organisations. This reinforces the need for particular expertise in children's cases (whether in substantive terms or in terms of client skills) among legal representatives who conduct such cases.

A key concern arising out of the Paper, therefore, is how any further reform preserves and improves the quality and expertise among legal representatives for conducting children's cases. This requires not only immigration expertise, but also wider welfare expertise. Addressing this concern is not possible by simply looking at reform in relation to areas of responsibility of Home Office and social services departments and their interrelation. It requires specific attention to responsibilities of the LSC and the supply and quality of legal representation under legal aid.

That concern is now acute because the LSC intends to make radical changes from 1st October 2007, and these changes have even now had a detrimental effect upon the supply of specialist legal representation for separated children as illustrated above. Although the LSC intends to provide special arrangements for children, it has as yet given no clear indication of what arrangements will be made, when they will be introduced and provided no preparation (e.g. specialist training) for these.

It is our fear that unless the LSC imminently make clear their plans for ensuring that only those legal representatives with the knowledge, experience and skills to advise and represent children do the UASC work, there will be a significantly increased prospect that these children are left with representation that lacks the expertise and experience they need. As indicated by the example we cite above, specialist representatives may well elect to pull out of legal aid provision. We note this concern is shared by the Constitutional Affairs Committee in relation to legal aid generally[3].

If more specialist representatives do withdraw from legal aid provision – whether because of anxieties over the future of legal aid generally or because of uncertainty as to the future for legal aid for children's cases – it may simply be that there are no specialist legal representatives available in those 50-60 areas in which Local Authorities might otherwise be able and willing to provide services for separated children as envisaged in this consultation.

Again ILPA has offered to the LSC to provide Best Practice Training to their suppliers and to draft a Best Practice Manual for their suppliers, in order to give suppliers the knowledge and skills they need to advise and represent separated children to the highest standards. We await a response to this offer. If our fears concerning further withdrawal of specialist representatives from legal aid provision are realised, it will become very much harder for the LSC or others to find expertise to provide such training or guidance.

[3] See paragraph 77 *et seq* of the Committee's report, which is available at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf.

Having regard to the fact that significant changes to the asylum process for children have been introduced by the Home Office, ILPA is gravely concerned that the Home Office and Department of Constitutional Affairs (Ministry of Justice) and/or the LSC have not coordinated sufficiently in relation to changes they are each making. This despite the fact that the changes each is making have substantial implications for the success or failure of the other's reforms.

5. Age Assessments

The Consultation Paper assumes that the number of age-disputes in separated children's cases, is indicative of the high level of abuse of the asylum system. The Paper proposes that there should be specialist social work teams working alongside immigration officials at all major ports and screening units, conducting full age assessments to prevent this apparent abuse.

We make reference to the ILPA report accompanying this response. This report reveals that immigration officers and Home Office Caseworkers do not give the 'benefit of the doubt' in favour of asylum applicants claiming to be children, contrary to Home Office policy, meaning that many children are excluded from the domestic care regime. The report examines why the problem of age-disputes exists. This report should be taken on board by the Home Office, not least because it refutes the central assumption that the reason behind the high number of age-disputes is that asylum-seeking adults lie about their age in order to benefit from the UK's care regime for children. The report strongly recommends that all separated children (disputed or non-disputed) should be able to access a formal, independent and holistic assessment of their age and needs, and that there is a formal review of all existing age assessment processes at the earliest stage possible.

Relying on the findings of the Report we have real concerns regarding the Home Office proposal to have social work teams working alongside immigration officials conducting age assessments at the major ports and asylum screening units. How can social workers adhere to their professional

role and code of conduct when they are employed to work alongside the immigration authorities to stem the so-called abuse by adults posing to be children when claiming asylum? Surely this means that social workers will approach their age assessment with a prejudiced view of the child/young person/adult? Also, if they are employed by the local authority where the major port or screening unit is, there is almost certainly an incentive for them to find that the child is an adult so that their department is not overly burdened by the number of separated children they take responsibility for.

We have observed an immigration judge at a recent Case Management Review Hearing openly criticising the quality of age-assessments carried out by Liverpool Social Services at the Asylum Screening Unit, and advising the age-disputed appellant's legal representative that he should obtain an independent expert's assessment of the appellant's age, or persuade another local authority to conduct an age-assessment because it is more likely to be detailed and thorough. This is indicative of the speed in which separated children are age-assessed, especially under the New Asylum Model. The approach cannot be described as holistic.

5. Return

We note that throughout the Consultation Paper an emphasis, both in tone and substance, has been placed on the return of separated children to their countries of origin and on protecting the asylum system from abuse. As an example, comments are made that children need to be dissuaded from "travelling here needlessly". Such comments are to be regretted, are unwelcome and we believe misinformed. They are an indication of the underlying assumption that most children do not have needs for international protection. We do not accept this and it is not our members' experience of the cases they deal with.

To our minds, such an assumption is an indication of the lack of child specific policies and understanding at the Home Office, which in our view has meant that children's protection claims have not been properly considered or understood. We are of the view that this assumption is dangerous and

unhelpful if it underlies the Home Office Casework decision-making process. We are anxious that an opportunity to improve decision-making at the Home Office should not be lost as part of the Reform.

Immigration Law Practitioners' Association

31 May 2007