

ILPA response to the Department of Education consultation on the draft regulations and statutory guidance for local authorities on the care of unaccompanied asylum seeking and trafficked children

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government committees, including Home Office, and other consultative and advisory groups.

I. Will the proposed regulations help identify in care planning arrangements, unaccompanied and trafficked children and help ensure they receive appropriate care?

Yes. ILPA is of the view that the proposed changes go some way towards recognising that unaccompanied and trafficked children have specific needs related to their status and to ensuring that the care planning has these specific needs in mind so that they can receive appropriate care particular to their needs.

However given the broader purpose of the regulations is to enhance the understanding of the specific needs of unaccompanied and trafficked children who are 'looked after'¹ by the local authority, we are concerned that the definitions proposed at regulation 5(f) are too narrow, and that as a result many children and young people will not be covered.

We are of the view that regulation 5(f)(i) should include children for whom a referral to the National Referral Mechanism is being considered or has been made. From a child protection point of view, consideration of a referral is the point at which a child has been flagged up as showing indicators of trafficking. The care planning process thus must be alive to the risks posed to them in this context, particularly the risks of re-trafficking, which are live even before they are formally identified as having positive Reasonable Grounds decisions. The proposed draft guidance correctly recognises that the window for intervention in respect of trafficked children can often be as narrow as the first 48 hours they come to the attention of a local authority (paragraph 23 of the draft guidance) thus before the child has been formally identified under the National Referral Mechanism, thus it is vital that the care planning process at the outset acknowledges the specific needs and status of those children whose circumstances indicate² that they may be trafficked.

In the light of delays to the making of a positive Reasonable Grounds decision and/or the ongoing risks which are posed to children who may have been trafficked even before they are formally identified, we are of the view that it is necessary for regulation 5(f)(i) to have a

¹ The Care Planning, Placement and Case Review Regulations apply to those who are 'looked after' by the local authority within the meaning of section 22(1), Children Act 1989.

² See *Rantsev v Cyprus and Russia*, (Application no. 25965/04), European Court of Human Rights.

broader remit to cover those children whose circumstances give rise to a ‘credible suspicion’³ they may be trafficked. This is a lower threshold than “reasonable grounds” and encompasses, *inter alia*, those who have been referred to the National Referral Mechanism.

The proposed amendment is therefore as follows:

(f) where C is –

(i) a victim, or a potential victim, of trafficking in human beings within the meaning of the Council of Europe Convention on Action against Human Trafficking in Human Beings, or where indicators suggest that he or she may have been trafficked.

As for regulation 5(f)(ii), we consider that the definition should not be limited to those children who have or may make an asylum claim. It should cover all children subject to immigration control. A child may make, for example, a claim for humanitarian protection relying on Articles 2 or 3 of the European Convention on Human Rights (right to life; freedom from torture, inhuman and degrading treatment). The child’s life and well-being are equally at risk in such cases. This regulation should be amended to capture the child’s immigration status, a matter that is highly relevant to care planning. Not all children who end up in local authority care are unaccompanied or asylum seekers. There are children who may be subject to interim care orders or are accommodated pursuant to section 20 of the Children Act 1989 pending family proceedings or otherwise so accommodated who may be dependents of parents/family members in the United Kingdom. Yet for whatever reason they may have been separated from their family members and placed in local authority care. If they are from abroad, they too may have needs associated with their status and this should also be noted in the care planning process. To limit regulation 5(f)(ii) to those children who come to the UK unaccompanied to claim asylum is overly restrictive.

We recommend the insertion of a regulation 5(f)(iii) to should read: “otherwise subject to immigration control” to cover this cohort of children.

We agree that regulation 42 and schedule 7 paragraph 14 should be amended to reflect the recognition in regulation 5(f) (subject to our observations above) of the status of unaccompanied and trafficked children. We presume status includes but is not limited to these children’s immigration status. This is important to ensure that the proposed guidance encourages the best possible child protection irrespective of immigration status and that care planning encompasses needs arising from the child’s immigration status.

Further amendments to the regulations are necessary to bring the specific needs of unaccompanied and trafficked children to the forefront of care planning. We propose the following: changes.

Schedule 1 paragraph 1: this provision deals with health considerations in the course of care planning. The EU Directive on combating and preventing human trafficking (2011/36/EU) imposes an obligation to provide specialist health support for child victims of trafficking. Reference should be made here to regulation 5(f) in the same manner as has been proposed vis-à-vis regulation 42 and schedule 7.

³ *Ibid.*

Regulation 10: this refers to “avoiding disruption in education” when planning for looked after children. This is a negative duty. But with unaccompanied and trafficked children, there needs also to be a positive duty to make arrangements for them to access education. This would be strengthened by the insertion of a reference to section 22(3A) of the Children Act 1989 (as amended), which specifically requires the local authority to safeguard and promote a looked-after child’s educational achievement.

The need for specific planning duties owed to children who are unaccompanied or trafficked is all the more important where they are not subject to an interim or full care order and there is no one with parental responsibility for them (which would be the case if they were accommodated under Part III of the Children Act 1989, for example under section 20). For children in the UK who have parents, irrespective of whether they are subject to an interim care order, there is a parental duty under section 7, Education Act 1996 to make sure they are in school if they are at compulsory schooling age. Failure to send a child to school could expose the person with parental responsibility to criminal sanctions. There is a further duty under section 19, Education Act 1996 which requires local authorities to make arrangements for suitable education for children who are for whatever reason out of school. Court cases have highlighted that unaccompanied and trafficked children are often without suitable or any education for long periods of time. In *R (KS) v LB of Croydon* [2010] EWHC 3391 (Admin), the two unaccompanied minors had been without schooling for over 12 months before they were provided with interim education by the local authority (by way of a court order) and subsequently provided with a school placement.

We therefore propose an amendment in the form of Regulation 10A to enshrine a positive duty to arrange education for children who are looked after, and in particular, for the local authority to acknowledge the status of those who are unaccompanied/trafficked as per the new definition in regulation 5(f).

Problems with access to education are further evidence of both the need for there to be a person with parental responsibility for these children and for a guardian: an appointed adult whose remit is to act in the best interests of the unaccompanied/trafficked child.

Regulation 5(4)(aa): as for the proposed amendment to regulation 5(4)(aa) of the Care Leavers (England) Regulations 2010, the same observations raised above in respect of regulation 5(f) to the Care Planning, Placement and Case Reviews (England) Regulations 2010 apply. A regulation 5(4)(iii), stating “otherwise subject to immigration control”, should be inserted.

2. Will the proposed guidance help local authorities plan for and deliver appropriate care for unaccompanied and trafficked children?

Given that the statutory guidance is to be considered in conjunction with the *Working Together to Safeguard Children* statutory guidance and the existing *Practice Guidance on Safeguarding Children who may have been trafficked*, putting the safeguarding of unaccompanied and trafficked children on a statutory footing is a positive and important step toward recognising their particular needs.

The following comments on the draft guidance are designed to clarify the guidance further and thereby assist local authorities in planning and delivering appropriate care to unaccompanied and trafficked children:

Page 3:

- **Paragraph 1** refers to unaccompanied and trafficked children. We refer to our observations above regarding to the overly restrictive definition under regulation 5(f) of the Care Planning Regulations and regulation 5(4)(aa) of the Care Leavers Regulations and suggest that reference be made to children and young people who are subject to immigration control who are ‘looked after’ by the local authority.
- **Paragraph 2** refers to ‘local authority care’ which we presume includes all those who are defined under section 22(1) as ‘looked after’. It would be advisable at least to put in a footnote that ‘local authority care’ refers to all those who are ‘looked after’. This is because ‘in care’ has a specific legal meaning even though it is often used colloquially to cover those who are accommodated under sections 20, 21 or 25, as opposed to under an interim or full care order.
- As for the ‘status of the guidance’ referred to at **paragraph 5**, we agree that section 7, Local Authority Social Services Act 1970 is correctly referred to. However we are of the view that the guidance should also be afforded a status under section 11(4), Children Act 2004 and section 16, Children Act 2004, on par with the *Working Together to Safeguard Children* guidance particularly if the purpose of the guidance is to highlight how the welfare of unaccompanied and trafficked children can and should be safeguarded and promoted.

Page 4:

- In line with our comments above on the status of the statutory guidance, it should not be described just as something which would “*be of interest to local safeguarding children boards... police, health, education, and youth offending services practitioners*”. Sections 11 and 16 of the Children Act 2004 would require these professionals to have due regard to the statutory guidance when complying with their duties under sections 10 and 11, Children Act 2004 to safeguard and promote the welfare of children. **Paragraph 6** should be amended accordingly to replace the phrase “*be of interest to*” with “*must have regard to.*”

Page 6:

- At **paragraph 17**, the definition of trafficking referred to under the Council of Europe Convention on Action against Trafficking of Human Beings is referenced. We suggest that the broader definition set out in Article 2 of the EU Directive (2011/36/EU) be adopted as this definition covers the situation of trafficking for criminal activities and begging, which are not covered by the Council of Europe Convention definition but are referred to in the draft guidance at paragraph 1.

Page 7:

- **Paragraphs 22 and 23** (and also 25, 27, 28 and 31) refer to the term “core assessment”. This term is no longer referred to in the *Working together to Safeguard Children* statutory guidance. It may cause confusion as the *Working together* guidance refers to a single assessment process.

- Insofar as the requirement for a “core assessment” is a call for a careful, considered and in-depth assessment of the needs of unaccompanied and trafficked children, we agree that this is necessary. The needs of these children are likely to be complex; a careful assessment is needed to identify and respond appropriately to those needs. We therefore suggest that where the term “core assessment” is removed from the draft guidance, it is replaced by language which emphasises the importance of an in-depth needs assessment.

We agree with **paragraph 23** and its emphasis on the fact the narrow window for intervention in the case of children who have been trafficked. The guidance is right in requiring that an assessment of the needs of an unaccompanied or trafficked child should be commenced immediately. The *Working Together* guidance provides a time scale of 45 working days to complete assessments but as paragraph 23 correctly observes, time is often of the essence and the first 48 hours is a vital window to protect a trafficked child who may well be at risk of re-trafficking or further exploitation. The need for expediency should be emphasised.

- The same principle should be extended to those who are unaccompanied or otherwise subject to immigration control as all too often these children do not have anyone with parental responsibility for them who can assist in decision-making in respect of their care. This further highlights the important need for a guardian to be appointed to the child to ensure that his/her voice and his/her needs are not lost in the process.
- As for **paragraph 24**, whilst we agree that trafficked children may well be victims of crime, it is, in our view, important to draw the distinction between being trafficked and being a witness or person who provides evidence in a criminal case. Children should not be made to feel as though they must participate in any criminal investigation; this should be set out in the guidance. Any investigations should adopt the Achieving Best Evidence techniques and be dealt with by those who are trained in these techniques.
- At **paragraph 25**, insofar as it is suggested that social workers carry out an assessment of the psychological/emotional impact of the child’s experiences as an unaccompanied or trafficked child, we agree it is important to bear this in mind but suggest that consideration also be paid to any referrals to specialists or assessments by experts at this juncture as these may reveal complex needs beyond those identified in the social work needs assessment. This underscores the importance of putting this guidance on a parallel statutory footing with the *Working Together* guidance, with specific reference to sections 11(4) and 16 of the Children Act 2004. Section 10 of the Children Act 2004 requires multi-agency co-operation. We suggest the addition of a sentence at the end of this paragraph as follows: “*Appropriate referrals for specialist counselling or other treatment should be considered as part of the assessment of needs.*”

Page 8:

- As to **paragraph 26**, we agree that no assumptions should be made about a child’s language skills. This should mean that an interpreter should always be offered to the child as children are less likely to voice their needs in this regard than adults. Equally, there needs to be awareness that some children may believe their language skills are

such that they do not require an interpreter so independent steps need to be taken to ensure that this is the case given it is paramount that the voice of the child be heard in the course of any assessment or care planning and thus assumptions should not be made. Trafficked children who have been subjected to sexual or other violence are likely to find this difficult to disclose. To assist in promoting such disclosure a child should be offered a choice of gender of the interpreter. We suggest the addition of the following sentence: “*The child should always be offered a free choice of the gender of his/her interpreter, where possible.*”

- The gender of the child’s social worker may also be a factor in facilitating difficult disclosures. A child should be supported to voice their preference in this regard, presented as an open choice. We suggest the inclusion of the following paragraph:

“Children who have been trafficked may have been subjected to sexual or other violence. The child may be inhibited from making relevant disclosures in this regard by the gender of those dealing with the child. The child must be supported to express any preference as to the gender of the social worker(s) allocated to him/her, bearing in mind that a child may be less likely than an adult to express their preference or to request what could be perceived as a change to the status quo (e.g. if asked by a male social worker what their preference is they may be less likely to voice their actual preference for a female social worker). The option should always be presented as a free choice, for example by a formulation such as: “everyone gets to decide whether they have a male or female social worker (and interpreter, if applicable). Which would you like?”

- We agree with paragraph 26 that a technical term such as “trafficking” may not be readily understood by a child. This is an example of a paragraph that appears to pertain only to trafficked children but contains matters relevant to all children. The point applies more generally to the question of the child’s literacy either in his/her mother tongue or in English and to the child’s understanding of technical terms and concepts such as asylum, persecution, etc. which may equally be unfamiliar to unaccompanied minors. There should be a broader emphasis in this paragraph on practitioners explaining concepts and questions to children in a child-friendly manner, irrespective of whether an interpreter is being used. The guidance should also state that assumptions should not be made, whether about language skills or about literacy.
- We are concerned by the reference to ‘promote contact’ and ‘reunification’ in **paragraph 29**. We do not agree that the best interests of the child always require the State to promote contact between the child and his/her family or to reunite the child with his/her family. Any decision to do so must be done having regard to the child’s safety and to his/her best interests and consideration should be made to the assessment of best interests outlined by the UN Committee on the Rights of the Child General Comment No 14.
- As to **paragraph 30**, there needs first to be full consideration of whether it is appropriate to initiate contact with a child’s family. Child protection considerations are paramount. The child’s family may have been involved in trafficking, exploiting or subjecting the child to persecution, or there may be a risk of harm in future.

Furthermore, the child may be at risk of persecution and attempts to contact his or her birth family could put them at risk. The wishes and feelings of the child will be important in establishing whether tracing should be undertaken at all. There should be a child-centered approach, which should first ascertain what are a child's best interests before any steps are taken to initiate contact. We question whether it will be appropriate for the Home Office to be involved in tracing at all but any actions it undertakes must be constrained and informed by an assessment of the best interests of the child. There should be no assumption that tracing would necessarily be in the child's best interests. Children should always be informed and their consent sought, if family tracing is being undertaken or commissioned on their behalf.

- Tracing and family reunification are different and this highlights the importance of the child having a guardian who is able to assist the State in determining what would be in the child's best interests. In family proceedings, guardians assist with key decisions such as where a child should be placed and how much, if any, contact a child should have with the birth family. A similar system of guardianship is appropriate in the context of trafficked or unaccompanied children particularly given the recognition of the possible traumatic and difficult circumstances in which they may have come to the attention of the local authority.

Page 9:

- We agree with **paragraph 32**. However given the care plan is a living document subject to review, we are of the view that it would be useful for the care plan not only to capture the child's status at the time of the assessment but also to note the key stages relevant to the child's evolving status (particularly in respect of the child's immigration status but also in respect of the child's progress in care).
- As to **paragraph 33**, whilst we understand that the guidance is designed to address the situation of both unaccompanied asylum seeking children and trafficked children – including those who are internally trafficked within the UK, there is a danger in the wording as drafted currently that local authorities would understand the guidance to be saying that the social worker should investigate through the care planning process whether or not specialist legal advice is required. It is imperative that all trafficked and unaccompanied children receive specialist legal advice from an immigration lawyer. Referral to an immigration solicitor (where the child is not already instructing someone) should be a mandatory core function of care planning for these groups of children and the wording of the guidance should reflect that. We would therefore suggest that the language be changed from 'may' to 'will' so that it would read:

Unaccompanied and trafficked children will have a need for access to specialised legal advice and support. This will be in relation to immigration and asylum applications, decisions or court proceedings. If they have been trafficked, it may also be in relation to criminal proceedings or compensation claims. The plan should note that legal support is required and how it will be provided. The child's social worker or carer should arrange for them to be accompanied in all meetings with legal professionals and any court hearings.

- As regards the last sentence above, while the responsible adult role is important in interviews with legal professionals it is our view that it will be inappropriate to send local authority staff where the child is in dispute with the authority over their age or provision of a service. An immigration lawyer working under legal aid is contractually obliged to refer a child client to a family or community care lawyer where their client is in conflict with their local authority and they are not being represented on the matter. The presence of a local authority representative at a meeting where the child is discussing their conflict with the authority would be inappropriate. In such circumstances the authority's duty is to arrange for an independent advocate to accompany the child to the meeting. Again, this highlights the need for a guardian: an appointed person, who is independent, charged with overseeing arrangements to address the needs associated with the child's best interests.
- As to **paragraph 36**, we refer to our earlier comments in respect of provision for education in the draft regulations. We highlight the importance of arranging education for these cohorts of children. Regard should be had to the Department of Education's guidance, *Aiming High: Guidance on Supporting the Education of Asylum Seeking and Refugee Children*.
- As to **paragraph 37**, it should be stressed that absent a school placement, section 19 of the Education Act 1996 requires the local authority to make arrangements for suitable education otherwise than at school, the emphasis being 'suitable education' as defined under section 19(6) and not by reference to what available resources there are within any given local authority: see *Secretary of State for Education and Sciences v Tameside* [1977] AC 1014.

Page 10:

- **Paragraphs 39-43** appear to focus exclusively on the situation of trafficked children. Whilst we understand that there are specific and clear risks giving rise to child protection concerns in respect of trafficked children, we are of the view that there may well be different but similarly important risks that unaccompanied children face generally. All of these children are without the protection of someone with parental responsibility for them and have been separated, for whatever reason, from their birth families. These paragraphs should be amended to encompass all unaccompanied children.
- We agree with the approach advocated under **paragraph 43** but would suggest that this should apply not just to trafficked young people for the same reasons as set out above.

Page 11:

- As to **paragraph 48**, we repeat that it is imperative that all trafficked and unaccompanied children receive specialist legal advice. Not all children will be advised to claim asylum. Local authorities must fund independent legal advice for children who do not qualify for legal aid. If the care planning process is clear from the outset as to what the child's immigration status is, this should diminish the risk of children missing important deadlines for immigration applications.

Page 13:

- As to **paragraph 50**, whilst we agree that children should be fully informed of the available services regarding establishing contact with their families as well as with returning to their home country, if they are from abroad, we are of the view that any such information should only be conveyed in circumstances where practitioners are satisfied that it would be in the child's best interests to provide this information to the child. We refer to our comments above in respect of family tracing.

Pages 14-15:

- As to **paragraph 64**, a child's immigration status does not preclude or change the nature of the support to which he or she is entitled under the Children Act 1989, particularly if the child is 'looked after': see paragraph 2 to schedule 3 to the Nationality, Immigration and Asylum Act 2002. Thus whilst a child's status is relevant to the consideration of the specific needs he/she has which require particular provision of support, the child's immigration status cannot and should not be relied upon to restrict the support the child receives.
- As to **paragraph 65**, we invite reference to chapter 6(b) of volume 3 to the Children Act 1989 Guidance: Care Leavers (England) Regulations 2010, the statutory guidance which accompany those regulations. That statutory guidance envisages that whilst the care leaver's immigration status is a relevant consideration, the care leaver's care plan must not be restricted by his or her status. We would further add that any change in services relating to the child's or care leaver's immigration status should not take place without a full consideration of paragraph 3 to schedule 3, Nationality Immigration and Asylum Act 2002 and whether to withdraw support would breach the care leaver's human rights or even rights arising under EU law. Attention should be drawn to Lord Justice Dyson's dicta for the Court of Appeal in *Clue v Birmingham City Council* [2010] EWCA Civ 860 where he envisages where a care leaver has an outstanding immigration application, it would be difficult to see the circumstances where a local authority can withdraw support if doing so would leave the care leaver destitute and lead to him abandoning his immigration application. It is now settled law as well that a local authority cannot look to the availability of asylum support provided by the Home Office as a means of discharging duties owed to a care leaver under section 23C of the Children Act 1989 (see *R (SO) v LB of Barking and Dagenham* [2011] EWCA Civ 1101).

3. Are there any additional steps local authorities could be taking within existing care arrangements that could be included in the proposed guidance?

Yes.

- At **paragraph 26**, interpreters used for children should be subject to an enhanced Disclosure and Barring Service check;
- At **paragraphs 36-37**, there should be an emphasis on the obligation to arranged suitable education whether at school or otherwise than at school for these cohorts of children;
- At **paragraphs 39-42** regarding placement, consideration needs to be given as to whether to place the child in an area where there are members of the same national

or ethnic community, particularly in the context of trafficked children who may have been trafficked by members of their community. Conversely placing unaccompanied children near their own community may be beneficial and reflect their needs relating to their cultural/ethnic/religious needs.

There is no reference in this statutory guidance to one of the most prevalent issues pertaining to trafficked and unaccompanied children: the assessment of their age. Whilst we appreciate that it may not be possible to set out guidance at great length as to age assessment, it is important to acknowledge that the fact of the child's age is a matter often subject to assessment.

For trafficked children, it is important to acknowledge the explicit presumption of being a child for which provision is made under the Council of Europe Convention (at article 10(3)) and under the EU Directive at article 13(2).

It is also important to refer to the clear dicta of the Supreme Court in *R (A) v LB of Croydon* [2009] UKSC 8 that age is an objective fact which admits only one right answer. There is detailed guidance, often referred to by short-hand as *Merton* guidance, governing the manner in which assessments should be conducted. What should not be lost is the purpose of the age assessment – it is to establish chronological age, not maturity of the child, which can be influenced by cultural, ethnic, and other factors such as exploitation, abuse, trauma.

4. Is there anything included in the proposed guidance that should be removed?

See comments *passim*. In particular, the inappropriate deference to the Home Office as regards family tracing should be removed from paragraph 30, as discussed above.

5. Do you have any suggestions for further links or resources that could be included at Annex A of the guidance?

Yes.

General:

- The guidance reads as though it had been designed for trafficked children and then had unaccompanied children grafted on to this. The task of producing one set of guidance to cover the internally trafficked, who may not be subject to immigration control at all, as well as the trafficked and unaccompanied children under immigration control is a difficult one and we consider that careful review of all statements to ascertain to which of these groups they apply and whether all groups have been covered, is required.
- The guidance serves to highlight the need for implementation of the obligation, contained *inter alia* in the EU Directive on combating and preventing human trafficking (2011/36/EU) to appoint a guardian for a trafficked child and contained in the EU Reception Directive to appoint guardians for unaccompanied children. The difficulty in formulating adequate standards and safeguards, as highlighted in the comments above, stems, we suggest, from the lack of guardians for unaccompanied and trafficked children.

- Little reference is made in the Guidance to the UN Convention on the Rights of the Child or to the best interests of the child. More could be added.
- It would be helpful to include reference to *Aiming High: Guidance on Supporting the Education of Asylum Seeking and Refugee Children*.

International

It would be helpful to include specific reference to:

- UN Committee on the Rights of the Child General Comment 6 “Treatment of Unaccompanied and Separated Children outside Their Country of Origin.”
- UN Committee on the Rights of the Child General Comment 14 “The Right of the child to have his or her best interests considered.”

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25 March 2014