

**ILPA for 1 November 2016 debate on the House of Lords Select Committee on the European Union, subcommittee F, report Children in crisis: unaccompanied children in the EU second report of session 2016-2017, HL paper 34 of 26 July 2016**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

ILPA provided written evidence to the Committee for this enquiry and Alison Harvey, legal Director of ILPA, gave oral evidence to the Committee on 16 March 2016.<sup>1</sup> In addition ILPA provided evidence to the Committee for its enquiry on the EU Action Plan on migrant smuggling<sup>2</sup> and has briefed extensively for parliamentary debates on the topic in the context of the Immigration Act 2016<sup>3</sup>.

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### **Overall findings**

The committee described 'a harrowing picture of the squalor, destitution and desperation unaccompanied migrant children face across the EU<sup>4</sup> and found that 'collectively, Member States are fundamentally failing to comply with their obligations under EU and international law to receive and protect children.'<sup>5</sup> It found that both the actions and omissions of EU Member States, in particular their failure to implement the existing provisions on family reunification, are contributing to an increased vulnerability of unaccompanied migrant children to smugglers, traffickers and organised crime.<sup>6</sup> The Committee deplored the continuing reluctance of the UK Government to show solidarity with its European partners in helping to relocate children.<sup>7</sup>

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<sup>1</sup> See <http://www.ilpa.org.uk/resources.php/31951/ilpas-evidence-to-the-house-of-lords-eu-select-committee-for-its-enquiry-into-unaccompanied-children>

<sup>2</sup> See <http://www.ilpa.org.uk/resources.php/31315/ilpa-submission-to-house-of-lords-select-committee-on-the-euroepan-union-home-affairs-sub-committee->

<sup>3</sup> All briefings are available at <http://www.ilpa.org.uk/pages/immigration-bill-2015.html>

<sup>4</sup> Conclusions and recommendations paragraph 1.

<sup>5</sup> Conclusions and recommendations paragraph 2.

<sup>6</sup> Paragraph 205.

<sup>7</sup> Paragraph 92.

As we write this briefing, the accuracy of the Committee's conclusions is being confirmed by a steady stream of tweets from Help Refugees UK in the Calais camp:

*@HelpRefugeesUK We are sad to report that both the women and children's bus and Baloo children's centre have burned down. It seems no one is injured. [October 25<sup>th</sup> 2016]*

*@HelpRefugeesUK It is unacceptable children were not placed in safe accommodation before the demolition. Forced to witness the destruction of yet another home. [October 25th]*

*@HelpRefugeesUK Many women and children in Calais camp despite fires. They must be offered safe accommodation immediately [4pm October 26<sup>th</sup>]*

*@HelpRefugeesUK Children refused entry to the safety of the container camp and forced to sleep outside. This is not the protection promised. #dubsnow [21.43pm 26 October]*

*@HelpRefugeesUK Many #children & #minors waiting outside the registration warehouse in #calais this morning. The warehouse is closed & no officials on site. [07.33am 27 October]*

These tally with other accounts we have received.

## **Family reunification**

While UK law provides for parents recognized as refugees to be reunited with their minor children, minor children recognised as refugees to be reunited with their minor children. The Committee held:

*We found no evidence to support the Government's argument that the prospect of family reunification could encourage families to send children into Europe unaccompanied in order to act as an 'anchor' for other family members. If this were so, we would expect to see evidence of this happening in Member States that participate in the Family Reunification Directive.*

*Instead, the evidence shows that some children are reluctant to seek family reunification, for fear that it may place family members in danger.<sup>8</sup>*

**We urge peers to call on the government to allow unaccompanied refugee children to be reunited with their parents in the UK.** There is nowhere else that the family can be together.

Children overseas are at risk if they cannot be reunited with family members in the UK. Since the Committee's report was published the Chief Inspector of Borders and Immigration has issued his report on family reunion<sup>9</sup> and it is critical. He finds that the Home Office treat these as immigration applications and do not show sensitivity to the protection elements of the cases: family members may be in danger and the person waiting in the UK has been found to be in need of international protection yet this does not appear to affect how the Home Office conducts work on these cases. He calls for more understanding and compassion. He finds that

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<sup>8</sup> Paragraph 62, and conclusions and recommendations at 59.

<sup>9</sup> <http://icinspector.independent.gov.uk/wp-content/uploads/2016/09/An-inspection-of-family-reunion-applications-january-to-may-2016.pdf>

the Home Office is too ready to reject applications on the basis that the person has provided insufficient evidence of their eligibility, without giving them the opportunity to provide such further evidence. The inspection found a number of cases where supporting evidence had been misread or misinterpreted or where not all the positive evidence had been considered when deciding to refuse. In other cases inadequate record keeping made it difficult to ascertain whether decisions were correct and there was evidence of apparent inconsistency. A minor had been refused for failing to provide evidence of their contact since fleeing their country with the family member in the UK and applications had been refused for failure to provide documentary evidence not specified in the guidance.

The withdrawal of Home Office commissioned and funded DNA tests is identified as a major reason for refusals of applications at first instance and the Chief Inspector is also critical of the lack of publicity given to the change of policy. The Government has agreed to review its policy on commissioning and paying for DNA evidence, which was one of the recommendations of the report and **we urge peer to call for the Government to recommence paying for DNA evidence to facilitate family reunion.**

## **Legal Aid**

### ***For refugee family reunion***

The Committee expressed particular concern at the lack of legal aid for immigration (as opposed to asylum)<sup>10</sup> cases. There is no legal aid for family reunification. It said:

*We recommend that the UK Government reconsider its restrictive position on family reunification. Legal aid should be available to unaccompanied migrant children for the purposes of proceedings for family reunification.*<sup>11</sup>

**We urge peers to call on the government to reinstate legal aid for refugee family reunion.** Legal aid was preserved for asylum cases because of what was at stake. But family members of refugees are very often in just as much danger as the person who has been granted asylum in the UK. The Government said in its response to the consultation on legal aid:

*“Applications to join family members are treated as immigration cases, and are generally straightforward because they follow a grant of asylum. Respondents argued that these cases are akin to claims for asylum but if a person wishes to claim asylum it is open to that person to do so either as a dependant of a primary asylum claimant or to do so in his or her own right. Legal aid for any such asylum claim will be in scope.”*

This is incorrect. The family members are outside of the UK and hence cannot claim asylum. It would be unlawful<sup>12</sup> to assist them to do. To deny family reunion increases the risk that children make hazardous and clandestine journeys to the UK.

Refugee family reunion cases frequently take a long time. Often family members must be traced. Communication may then be indirect and very slow. Even when they can be reached, they may be in a camp and unable under their own steam to travel to interviews at embassies or consular

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<sup>10</sup> Paragraph 168.

<sup>11</sup> Paragraph 291 and conclusions and recommendations at 60.

<sup>12</sup> Immigration Act 1971, s25A

posts etc. Even submitting the application may be a matter of considerable difficulty. It is too often the case that not all family members survive long enough to be reunited in the UK.

In the leading cases on the inadequacy of the exceptional funding regime for cases that fall outside the scope of legal aid, the courts examined a family reunion case.

### **Case of B, Gudaviciene et ors v SSHD [2014] EWCA Civ 1622**

Following her departure from Iran, B's husband and their son, who was born on 2 June 1997, were arrested and interrogated. They were beaten and threatened and ordered on release to give the authorities information about the B. The Court of Appeal records

*...In the ordinary course the applicants and sponsor would be expected to provide proof of marriage, proof of parentage, proof of a de facto pre-flight family relationship which was still subsisting, and proof of the sponsor's UK refugee status. ... (a).. the family did not have access to all documentation required to satisfy the requirements of the rules, on account of their separation and dispersal, (b) the son was a 16 year old now living separately from his parents and it could be contended that he was living an independent life, so that assistance was required with preparing a witness statement to set out what had happened, and submissions were required on the point of continued dependency; and (c) evidence was needed on the psychological/psychiatric impact of separation on members of the family. In addition, the family would need legal advice and assistance in order to make a concurrent application to expedite the family reunion applications, on the basis of factors including the best interests of the son.*

B's son had no passport and there were no facilities available in Iran to enable a visa to allow entry to the UK to be obtained there. B feared that if he approached the Iranian authorities for a passport he would be arrested or ill-treated. The High Court records "The only way he could apply for the necessary documentation to enable him to achieve entry to the UK was to go unlawfully to Turkey and apply there".

This he did. He was staying in Turkey unlawfully, afraid to go out, very distressed and suffering from mental health problems. The husband was at that time hiding in Iran and it was not clear when he would be able to go to Turkey. They had no financial resources.

Yet an application for exceptional case funding was refused. The refusal was the subject of a review decision. It took six months for the application, prepared without funding, to be decided. B's son was refused. The High Court comments "Apart from the inexcusable delay in dealing with the application having regard to the circumstances in which the applicants were living in Turkey, the decision was extraordinary." The reasons for refusal were:

*"You have not fully completed your Annex 4 of your application form, but according to your claimed father's application form you last saw your sponsor in February 2013. ... You have provided a birth certificate, however apart from this, you have not provided any evidence that you were or are in a relationship with your sponsor. You have provided no photographs of the two of you together or any evidence of any contact ... I acknowledge that you have provided your sponsor's Screening interview, but this does not mention you by name. If you had been in a relationship since you were born I would expect there to be overwhelming evidence of this. I am therefore not satisfied that you have been part of a family unit of your father at the time he left his country of his habitual residence in order to seek asylum."*

The Court of Appeal concludes

*... It is striking that even though the application on behalf of the son was prepared with legal advice and assistance, it was refused at first on the ground of failure to satisfy the entry clearance officer that the son was part of the family unit – ... The resulting appeal and request for reconsideration added to the overall procedural complexity of the exercise. In relation to all of this, B was wholly unable to represent herself or her other family members. It was not simply that she was unable to speak English but that “[s]he did not have the first clue”, as it was graphically put by IKWRO. Without legal advice and assistance it was impossible for her to have any effective involvement in the decision-making process”*

It found the refusal of exceptional case funding to be unlawful.

### **Legal Aid for children generally**

Under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, successful identification by the National Referral Mechanism is the gateway to legal assistance for trafficked children. But trafficked children are unlikely to have the confidence to approach the authorities unless they can get advice on the consequences of so doing: in terms of immigration status and of protection. Because there is no legal aid for immigration matters lawyers do not have the opportunity to detect indicators of trafficking or other exploitation and risks in the course of interviewing a child about their immigration matter. **Children should be entitled to legal aid for all immigration matters.**

### **Relocation of children: the ‘Dubs amendment’**

The Committee said

*In keeping with the Prime Minister’s statement on 4 May 2016, we urge the Government to act promptly and to work in partnership with frontline France, Greece, Italy and the UNHCR to relocate significant numbers of unaccompanied migrant children to the UK. Relocation to the UK must take place as soon as possible, and in full accordance with individual best interests assessments.<sup>13</sup>*

Section 67 of the Immigration Act 2016, inserted by the ‘Dubs amendment’ required the government to make provision for unaccompanied children to come to the UK ‘as soon as possible’. The Act received Royal Assent on 12 May 2016 and s 67 came into effect on 31 May 2016. Yet it took months for children to reach the UK and the initial claims that children were being brought to the UK under the amendment related to children entitled to come to the UK under the provisions of the Dublin III regulation which determines the member State responsible for determining a claim for asylum and whose cases had already been in train. Children were caught up in demolition of the camp on 25 and 26 October as described above. We do not demur that considerable criticism can be levied at the French authorities whose child protection systems have failed to reach these children for so many months, but we do

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<sup>13</sup> Paragraph 358 of the report.

consider that the UK must also take responsibility. We got in touch with the Home Office on 29 September 2016 to express concern that the person placed within a French NGO and working on best interests assessments in the context of relocation to the UK was in some difficulty getting responses to what he should do when, for example, he ‘phoned a family willing to receive a child but whose accommodation was too small to accommodate the child, or which was too poor to support the child without assistance. We also raised the matter with the office of the Children’s Commissioner for England. The family often did not know if anything could be done, and he had not been supported to know who to ask and was having difficulty in finding out, impeding completion of best interests assessments for such children and thus the relocation of the children before they were caught up in the demolition of the camp, or indeed at all.

## Guardianship

The Committee said

*... we are persuaded by evidence from England and Wales and from Scotland that the role of guardian should be independent, and should not be undertaken by social workers. We call on the Government to establish a guardianship service in England and Wales for all unaccompanied migrant children.<sup>14</sup>*

A legal representative acts upon instructions. That is a requirement of the professional codes for both barristers and solicitors. Difficulties arise when

- the client lacks or appears to lack capacity to give instructions as may be the case for a younger child or as may be the case for a client, child or adult, who is acting under the influence of some other person, and possibly under threats or duress.
- a client gives instructions that appear contrary to their interests. In the case of an adult of sound mind that is something they are free to do, although difficulties arise when it appears that the client may be acting under the influence of another. In the case of a child, such instructions raise questions of safeguarding responsibilities for those with responsibility for the child.

These problems can arise in any jurisdiction but a particular difficulty arises in the case of unaccompanied or separated children because in many case there is no person in the UK (or indeed anywhere else) with responsibility for the child. What singles out many of these children is that they are so very alone. This should be addressed by fulfilling the UK’s obligations and instituting a system of guardianship as required by the European Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims of Human Trafficking<sup>15</sup>; Article 10 of the Council of Europe Convention on Action Against Trafficking in Human Beings<sup>16</sup>, Article 19 of the version of the EU Reception Directive by which the UK is bound<sup>17</sup> and to which Article 19 of the version of the EU Qualification Directive by which the UK is bound<sup>18</sup>

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<sup>14</sup> Paragraph 321.

<sup>15</sup> Section 14(2) Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>16</sup> CETS No. 197, opened for signature 16 May 2005, into force 1 February 2008.

<sup>17</sup> 2003/9/EC

<sup>18</sup> 2004/83/EC

makes reference. The UN Committee on the Rights of the Child and UNHCR<sup>19</sup> recommend that the guardian or adviser should be maintained until the child has either reached the age of majority or has permanently left the UK. The former provides, in its General Comment no. 6:

*21. Subsequent steps such as the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian. In cases where separated or unaccompanied children are referred to asylum procedures or other administrative or judicial proceedings, they should also be provided with a legal representative in addition to a guardian*

The term “guardian” is used in many different ways by different people: we use it in the sense of a legal guardian: a person with the skills and the authority to enable the child to participate in legal proceedings, including through providing instructions to the legal representative where the child does not have capacity to do so.

Alastair Pitblado, the Official Solicitor to the Senior Courts, giving evidence alongside Alison Harvey of ILPA to the Joint Committee on Human Rights for its *Access to Justice* enquiry into legal aid<sup>20</sup>, told the Committee

**Alastair Pitblado:** *...I have acted in cases with young people where there is a dispute as to their age, although those are increasingly no longer judicial reviews in the court and are being dealt with by tribunal. I do not act as a litigation friend in the tribunal, because there is no process of appointing a litigation friend.*

*...the solicitor is normally the person who thinks, “This client may not have capacity to conduct their own proceedings”, and traditionally that has meant “instruct a solicitor”. If a person lacks capacity to conduct their own proceedings with the assistance of a solicitor explaining this to them in simple terms, they certainly lack the capacity to conduct the proceedings in person. However, if there is no legal aid, there is no solicitor; the court is faced with a litigant in person who may or may not have capacity. The rules of court prohibit the court continuing if the litigant in person lacks the capacity to conduct proceedings, but there is nobody finding out whether or not they do. That is an overall elephant in the room.*

## The National Transfer scheme

The Committee welcomed the Government’s adoption of a National Transfer Scheme for unaccompanied asylum-seeking children whereby when a local authority places a child outside its area responsibility for that child can transfer to the area where the child is living. The Committee urged the Government to ensure that, in practice, decisions to disperse unaccompanied migrant children are made only in the best interests of the child, and take into account the facilities available in the destination local authority.<sup>21</sup>

We have particular concern about the availability of legal advice in the destination local authority. Neither the Legal Aid Agency nor the Home Office are taking the lead in mapping provision and ensuring that it is available in practice when looking for local authorities to accept

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<sup>19</sup> UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, 1997, <http://www.unhcr.org/3d4f91cf4.pdf>

<sup>20</sup> <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/evidence-session-on-legal-aid-inquiry-231013/>

<sup>21</sup> Paragraph 353 of the report.

transfers. **Peers should seek assurances that no child will be transferred to an area where there is no provision for skilled legal advisors experienced in working with children to give legal advice funded by legal aid on a child’s asylum claim or any judicial review and for immigration advice, which should fall to be paid for by the local authority.**

## **Data collection and sharing**

The Committee found that the lack of data exacerbates many of the specific difficulties faced by unaccompanied migrant children in the EU<sup>22</sup>. It identified opportunities for adequate data collection at European level including through the safe and ethical use of Eurodac<sup>23</sup>, amendments to the Statistics Regulation<sup>24</sup> improvements to the Schengen Information System<sup>25</sup> and monitoring compliance with the Returns Directive<sup>26</sup> These recommendations are a stark reminder of the extent to the UK’s current opt-outs inhibit, and to which Brexit will further inhibit the UK’s ability to protect trafficked and missing persons, including children.

In addition to the police cooperation on trafficking which stands to be lost, specific protection for trafficked persons under EU law will be lost post Brexit. The EU Directive on trafficking<sup>27</sup> and the EU Victims Directive<sup>28</sup> both contain safeguards which have the potential to protect unaccompanied children in Europe .

Article 18 of EU Directive on trafficking requires member States to take steps to prevent and reduce trafficking in human beings: to take measures to discourage and reduce demand and to train officials in identification. These preventative obligations are perhaps some of the most important for the protection of unaccompanied children in Europe. The Directive contains general provisions for all trafficked children and specific provisions for unaccompanied children who have been trafficked. It has particular importance for unaccompanied children who do not claim asylum or who are found not to be in need of international protection and thus do not benefit from the protection of the Directives on the Common European Asylum System. By bringing trafficked children within the scope of EU law it also ensures that the EU Charter of Fundamental Rights is applicable in their cases.

The EU Trafficking Directive provides for the appointment of guardians for trafficked children<sup>29</sup>. As described in our initial and oral evidence to the Committee, the UK has piloted guardians for trafficked children, who have been the first among unaccompanied children in the UK to benefit from guardians and, the pilot having been deemed inconclusive by government, although not by those carrying out the evaluation for Government, another pilot will be carried out.

Article 16 (2) of the Directive requires Member States to take the necessary measures with a view to finding a durable solution based on an individual assessment of the best interests of the

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<sup>22</sup> Paragraph 238

<sup>23</sup> Paragraph 274

<sup>24</sup> Paragraph 275

<sup>25</sup> Paragraph 276.

<sup>26</sup> Paragraph 294.

<sup>27</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings.

<sup>28</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA UK.

<sup>29</sup> Articles 14(2); 16(3).



unaccompanied child. **All these protections are put at risk re Brexit and we urge peers to ask the government how the gap left in protection will be filled?**

## **Age Assessment**

On age assessment, the committee called for authorities to observe their legal obligation to give young people claiming to be children the benefit of that doubt.<sup>30</sup> A failure to identify a person as a child or a dispute over age can throw all the protections guaranteed to a child into jeopardy and this protection is thus of primary importance. ILPA has long worked in this area and published the influential report *When is a child not a child? Asylum, age disputes and the process of age assessment* in 2007.<sup>31</sup> One of the children in that report was a girl who did not know her age. Social workers assessed her as 16. She did not demur. The Home Office argued that she was an adult. When finally her birth certificate was obtained from her home country it was found that she was 12. We were delighted to see the Home Office cite the British Dental Association's assessment of the use of x-rays to assess age as 'inaccurate, inappropriate and unethical' and concur with this assessment. The same words could be used to describe the trial by television that has led to a range of unqualified commentators, who have spent no time with the children and young people concerned, passing judgment on their age. The *When is a child not a child?* report highlighted that as well as putting the child at risk, of accommodation with adults, of detention and of being put through adult procedures with which they could not cope, disputes about their ages were experienced as profoundly painful and threatening, not to mention as an injustice that banished all their faith in the asylum system.

Age assessment is not an exact science. It is a matter of comparing a child with a cohort and there is often no cohort data for the population from which the child originates. It is also difficult to compare a child who has had varied and extreme life experiences with any cohort which might otherwise be used. The margin for error is such that the possible range of accurate ages may encompass the child's actual age and an adult age. **Children must be given the benefit of the doubt in all age assessment procedures.**

ILPA

27 October 2016

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<sup>30</sup> Paragraph 55.

<sup>31</sup> <http://www.ilpa.org.uk/pages/publications.html>