the children's legal centre

CARE AND SUPPORT FOR UNACCOMPANIED ASYLUM SEEKING CHILDREN

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Some definitions of terms

- **Who is a child?**

In English law, a child is anyone below the age of 18

- **Who is a child under the immigration rules?** (1)

'...*a child means a person who is under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age.*' *(Immigration Rules, paragraph 349).*

- **Who decides if an asylum seeker is under 18 'in the absence of documentary evidence establishing age'?**

Where *'…a Merton compliant age assessment report from a local authority later assesses an applicant as being under 18, the Border and Immigration Agency decision to dispute age must be withdrawn and our records amended to reflect the conclusion'* (see Border and Immigration Agency Guidance on Disputed Age Cases) (2)

- **Unaccompanied children:**

'A child, whether unaccompanied or accompanied, is defined at paragraph 349 of the Immigration Rules as a person under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age.

An unaccompanied asylum seeking child:

- *is applying for asylum in his or her own right*
- *is separated from both parents and not being cared for by an adult who by law or custom has responsibility to do so..'*

(Border and Immigration Agency Asylum Process Guidance on 'Processing Asylum Applications from Children')

Care arrangements for unaccompanied children

- **Who has the responsibility for caring for unaccompanied asylum seeking children?**

The provision of support to destitute adult asylum seekers and their dependant children was, from April 2000, the responsibility of the National Asylum Support Service (NASS) (3). Asylum Support is now overseen by the Border and Immigration Agency and may be referred to as BIA Support.

Unaccompanied asylum seeking children (and other unaccompanied children), remain the responsibility of the local authority in whose geographical area they seek help.

There is a statutory duty placed on the local authority under the Children Act 1989 to assist 'children in need' and to provide accommodation for certain groups of 'children in need'. The fact that a child is 'subject to immigration control' is not a relevant consideration in respect of the local authority duty to the child.

➢ Statutory provisions under which accommodation and support for unaccompanied asylum seeking children may be provided

Since the *Hillingdon* judgement (4) it is established that section 17 of the Children Act should not *routinely* be used to meet the accommodation and support needs of unaccompanied asylum seeking children – in particular the 16+ age group.

The legislation does however *allow* the use of section 17 to provide accommodation to children.

Section 17 of the Children Act relates primarily to the provision of services for children in need and their families. *"The power to provide accommodation under section 17 will almost always concern children needing to be accommodated with their families"* (LAC (2003) 13)

Since 7th November 2002, accommodation is a service that can *expressly* be provided under s.17 of the Children Act (previously it had only been *thought* to be the case) (5)

Since 7th November 2002, where a child is provided with accommodation under s.17 powers, they are **not** considered to be 'looked after' (6) and would **not**, therefore, be able to benefit from the provisions of the Children (Leaving Care) Act 2000.

Section 20 (1) of the Children Act 1989 imposes a clear and unequivocal duty on local authorities to :

"Provide accommodation for any child in need within their area who appears to them to require accommodation as a result of :-

- *(a) there being no person who has parental responsibility for him;*
- *(b) his being lost or having been abandoned; or*
- *(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care".*

Some or all of these conditions will clearly be met in the case of a child who arrives in the United Kingdom alone and is therefore normally the most appropriate section of the Children Act under which a local authority should provide support.

That Section 20 is the most appropriate route for the support of unaccompanied asylum seeking children was made clear by guidance issued to local authorities in 2003 by the Department of Health.

Local Authority Circular (2003) 13

LAC(2003) 13 was issued by the Department of Health on 2nd June 2003 and is cited and referred to at length in *Hillingdon.*

Under the heading *'Framework for the assessment of Children in Need and their Families'* the guidance notes:-

- The amendment to s.17 did not affect the duties and powers of LA's to provide accommodation for lone children under s.20 (or under a care order)
- The power to provide accommodation under s.17 will *almost always* concern children needing to be accommodated with their families
- There may be cases where a lone child needs help with accommodation but does not need to be looked after and might appropriately be assisted under s.17

LAC(2003) 13 sets out the *process* for deciding which section to provide support under:-

- *Before* the decision the LA should undertake an assessment in line with the statutory guidance set out in the '*Framework for the assessment of children in need and their families'.*
- *While* the needs assessment is being carried out the child should be accommodated under s.20 powers.
- Does the child meet the criteria in s.20 (1)? If yes, the presumption should be that s/he falls within the scope of s.20.
- Does the needs assessment (taking into account and giving due consideration to the child's wishes under s.20(6)) reveal particular factors which would suggest an alternative to accommodation under s.20(1)?
- Where a child *refuses* to become 'looked after' **and** the LA deems them 'competent to look after themselves', s.17 may be used for support, including help with accommodation

The significance of the section used to provide support stems from the fact that the Children (Leaving Care) Act provisions *only apply to children who have previously been **looked after** by a local authority.*

As s.17 has not been classed as 'looked after' provision since the amendment to the Children Act (see above), if it can be shown (as the London Borough of Hillingdon attempted to do) that a LA has only provided 'assistance' under s.17 then they would not be liable to provide services under the provisions of the Leaving Care Act.

The Leaving Care regime – a 'comprehensive after-care service' - a very brief guide.

The Children (Leaving Care) Act 2000 amends the Children Act 1989 and imposes duties on LA's in respect of children who have been 'looked after' by them.

In relation to entitlements to leaving care provision, the Act categorises children as 'eligible', 'relevant', 'former relevant' or 'qualifying'. All children who have at some stage been looked after will fall into one of these categories once they cease to be looked after. What they are entitled to will depend upon which category they fall into.

'Eligible children' are:-

- Aged 16 or 17 and;
- Have been looked after for at least 13 weeks since age 14 and;
- Continue to be looked after

'Relevant children' are:-

- Aged 16 or 17 and;
- Are no longer looked after by the authority and;
- Were looked after for at least 13 weeks after the age of 14 and;
- Had continued to be looked after at some time while they were 16 or 17

'Former Relevant children' are;-

- Aged 18 to 21 and;
- Had previously been an 'eligible' or 'relevant' child

'Qualifying children' are:-

- Under the age of 21 and;
- After the age of 16 ceased to be looked after, accommodated or fostered

Entitlements include:-

- A *'pathway plan'* for 'eligible' and 'former relevant' children. Prepared by the Children's Services Authority once the child becomes 'eligible' this document sets out (following assessment) what advice , assistance and support the child should have both while and after ceasing to be looked after.
- Pathway plans include amongst other matters, details of the support and accommodation to be provided for the young person, a detailed plan for education and training and the support to be provided for those in or seeking employment. They are subject to six monthly review and more often where required by the child.
- A *'personal advisor'* for eligible, relevant and former relevant children. The PA is appointed by the local authority and provides personal and practical advice to the young person, is involved with the assessment of needs and the production and review of the pathway plan. Amongst other duties, they should liaise with the CSA over implementation of the pathway plan, co-ordinate the provision of services and keep records of contact with the child.

The Local Authority is also responsible for ensuring that the young care leaver is provided with accommodation which assists him or her to continue his or her education or training or enter employment (7)

LA interpretation of the care arrangements for unaccompanied minors – the Hillingdon case

- An action brought in the High Court (a judicial review) by four former UASC who had been accommodated and otherwise assisted by the London borough of Hillingdon until they were 18.
- The contention of the four (now all over 18) that the LA owed them a continuing duty under the Children (Leaving Care) Act 2000 as 'former relevant children' as they had been 'looked after' (by being provided with accommodation) either under s.17 or s.20 powers.
- The contention of the authority that they had no such duty as they had only provided 'services' (including assistance with accommodation) under s.17
- The contention of the authority that *even if* the four had been looked after (rather than assisted) the period during which that was alleged to have occurred *had not started before they reached 16 and they were therefore never 'eligible' children and could not now be 'former relevant children'*

The Questions for the court:-

- Is it a requirement of becoming an 'eligible' child that you should have been looked after by the LA prior to your 16th birthday?

- Had the four applicants been 'looked after' within the meaning ascribed to that term in the Children Act?

If the court found that they had been looked after rather than assisted, it was not in dispute that they should be in receipt of the 'after care' service they were entitled to as 'former relevant children'

The High Court's determination of the issues:-

Issue 1 (requirement for becoming 'eligible')

- Those entitled to benefit from the provisions in the Leaving Care Act were carefully defined in a detailed legislative scheme
- Exceptions and qualifications to those entitled to benefit were spelt out in the Act itself or the accompanying regulations (8)
- Against this background there was no warrant for the addition of further exceptions or qualifications
- HELD: The Act specified a 13 week period which commenced any time after the child attained 14 and had to end after the child had reached 16 (9). There was no scope for reading into the Act a further requirement that the 13 week period must commence before the child was 16

Issue 2 (had the applicants been 'looked after'?)

- The court considered s.22 of the Children Act which defines the term 'looked after' as either a child in care or as a child who is 'provided with accommodation….'
- Section 116 of the Adoption and Children Act 2002 did not apply to the claimants as it came into force too late. (10)
- Before trying to 'pigeonhole' the assistance given by the authority into any particular statutory formulation, it was important to see what the authority actually did for the children.
- The claimants had been provided with housing as well as a range of other services (e.g. subsistence and help with their asylum claims and medical needs).
- Given the provision of these services it did not do the statutory language or the policy underlying the statute any violence to say the claimants were being 'looked after'
- HELD: They had been eligible children whilst being assisted by Hillingdon and became former relevant children on reaching 18. The authority had a continuing duty to them.

The impact of Immigration Status

If it is accepted that a child has been looked after, he or she should be provided on becoming eligible for leaving care services with a number of services as set out below (these are to be provided irrespective of the decision on the young persons asylum claim):-

- A named personal advisor (who should meet and advise on a regular basis)
- A pathway plan (devised with the assistance of the PA) detailing (amongst other matters) his or her plans for education, training or employment

The LA should ensure that the young person is provided with accommodation *which assists him or her to continue his or her education, or become trained, or enter employment.*

The duty relates to the need to assist the young person to train for and enter employment and is not a more general one.

The LA should also assist the young person with fares and the cost of purchasing books and equipment.

It is arguable that the LA should cover the cost of any tuition fees which fall due (although for Further Education up to age 19 these will most likely be covered by the Learning and Skills Council, irrespective of immigration status).

Until the child is 18, a child who is being looked after or was looked after when he or she was 16 or 17 (but has subsequently ceased to be looked after) *can not apply for income support or housing benefit* due to Section 6 of the Children (Leaving Care) Act 2000 . (11) *This applies even where the child has been granted indefinite leave to remain as a refugee (or its replacement, 'Refugee Leave' after 30th August 2005) or has been granted 'limited leave' under the Humanitarian Protection or Discretionary Leave policies and is therefore 'allowed' to claim benefits.*

When the young person turns 18 and is eligible for welfare benefits as a result of being granted ILR, Refugee Leave, HP or DL, the local authority may only need to top up rent paid for by housing benefit or provide additional funding to meet travel costs or pay for book and equipment.

If a young person becomes 18 before his or her application or asylum appeal is finally determined , BIA will not seek to disperse the child (where they have been looked after) and will reimburse the LA a certain sum, £140 per week, for his or her accommodation and support. The LA will only then have to meet any additional costs which may arise in connection with his education or training.

Where the child or young person's asylum claim has failed (even where granted a period of limited leave) it is likely that they will ultimately be removed from the United Kingdom.

The LA must still provide any leaving care services to which the young person is entitled. The point at which entitlement to leaving care services ends will depend on whether they are properly 'failed asylum seekers' (as designated in Paragraph 6 of Schedule 3 of the Nationality, Immigration and Asylum Act 2002 – see endnote 12) or a person 'unlawfully in the United Kingdom' (as designated by Paragraph 7) and whether withdrawal or withholding of such services would lead to a breach of the young persons rights under the European Convention or under Community Treaties.

If they are 'failed asylum seekers', leaving care support should continue up to the point that they are removed from the UK or they fail to comply with removal directions set by the Immigration Service (12). It is important to recognise that merely being a failed asylum seeker is not sufficient cause to withdraw or withhold services – the young person must *also* fail to co-operate with removal direction set in respect of him or her.

If the young person becomes a person 'unlawfully in the UK' by virtue of overstaying and having exhausted any application for extensions of leave and any appeal from the refusal to extend leave *and* they are not asylum seekers (no outstanding recorded asylum application or asylum appeal after their 18th birthday) then consideration must be given to withdrawing or withholding leaving care support at the point at which they remain in the UK in breach of the immigration laws.

Note however that in either case assistance should continue if the withdrawal of support would lead to a breach of Article 3 of the European Convention on Human Rights. (13)

Following the *Limbuela* judgement (14), it is no longer necessary to prove that the young person has been subjected to inhuman and degrading treatment by being rendered homeless and destitute but only that, if support is withdrawn, there would be no means for him or her to obtain accommodation and support from governmental, charitable or community sources or his or her own legal endeavours.

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REFERENCES

(1) Immigration Rules: The Rules made by the Secretary of State for the Home Department (the Home Office) under statutory powers to control the entry and stay in the United Kingdom of non-British nationals.

(2) The Border and Immigration Agency (BIA) Guidance on Disputed Age Cases note is a statement of the BIA's *policy* on dealing with unaccompanied children. The note does not form part of the Immigration Rules and is subject to change without any reference to parliament.

(3) By enactment of Part VI of *The Immigration and Asylum Act 1999* which sets out the categories of persons for whom support may be provided under the statute. These are:

(a) asylum seekers, or
(b) dependants of asylum seekers,

'who appear to the Secretary of State to be destitute or to be likely to be destitute within such period as may be prescribed'. (s.95(1))

However, s.94 (1) makes it clear that for purpose of Part VI of the Act an "asylum seeker*…means a person* ***who is not under 18*** *and has made a claim for asylum which has not been recorded by the Secretary of State but which has not been determined"* (emphasis added). The National Asylum Support Service (NASS), established by Part VI of the Act is not, therefore, designed to support asylum claimants who are under 18.

(4) *Berhe v London Borough of Hillingdon* [2003] EWHC 2075 (Admin)

(5) Section 116 of the *Adoption and Children Act 2000* which came into force on 7th November 2002, amends section 17(6) of the *Children Act 1989 by inserting the words 'providing accommodation and'* . The section now reads: *" The services provided by a local authority in the exercise of functions conferred on them by this section may include* ***providing accommodation and*** *giving assistance in kind, or, in exceptional circumstances, in cash* "(emphasis added)

(6) Section 116 of the *Adoption and Children Act 2000* which came into force on 7th November 2002 amends s.22(1) (b) of the Children Act 1989 by excluding the local authorities' section 17 functions from the meaning of a 'looked after' child: The section now reads: *"In this Act, any reference to a child who is **looked after** by a local authority is a reference to a child who is …provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970 **apart from functions under sections 17**, 23B and 24B." (emphasis added)*

(7) See for example The Children (Leaving Care) Act 'regulations and guidance' issued under s.7 of the Local Authority Social Services 1970 (meaning that the guidance must be followed by councils unless there are exceptional circumstances which justify a variation), which state that: *"Former relevant children in Further Education may not have access to any other help – Income Support and Housing Benefit are not available for those aged 19 and over in full time education - **and in such circumstances the responsible authority would need to provide them with maintenance and accommodation.***" (Chapter 8, para 22).

(8) The Children (Leaving Care) (England) Regulations 2001 (SI 2001/2874)

(9) Children Act 1989, Schedule 2- Local Authority Support for Children and Families, Part II – 'Children looked after by local authorities' , s.19B(2) reads: *"In sub-paragraph (1) "eligible child" means, subject to sub-paragraph (3), a child who (a) is aged sixteen or seventeen; and (b) has been looked after by a local authority for a prescribed period, which began after he reached a prescribed age and ended after he reached the age of sixteen."*

(10) The exclusion of s.17 functions from the definition of 'looked after' brought in by the amendment of s.22(1)(b) of the Children Act by s.116 of the *Adoption and Children Act 2000* (see note (6) above), came into force on 7th November 2002 – too late in respect of the 4 Hillingdon claimants to exclude them from the 'looked after' regime who had all been provided with accommodation by the authority prior to that date. This is why the claimants could safely argue that they had been provided with accommodation (synonymous with being looked after) *either* under s.20 *or* under s.17.

(11) The *Children (Leaving Care) Act 2000, Section 6, subsection 1 reads*: *"No person is entitled to income based jobseekers allowance under the Jobseekers Act 1995, or to income support or housing benefit under the Social Security Contributions and Benefits Act 1992, while he is a person to whom this section applies".* Subsection 2 reads: *"Subject to subsection (3), this section applies to:- (a) an eligible child for the purposes of paragraph 19B of Schedule 2 to the Children Act 1989; (b) a relevant child for the purpose of section 23A of that Act or (c) any person of a description prescribed in regulations under subsection (4)".* The *Children (Leaving Care) Social Security Benefits Regulations 2001* which describes the persons prescribed under subsection 2(c) above do not relate to the immigration status of the person.

(12) Schedule 3 to the *Nationality, Immigration and Asylum Act 2002 – 'withholding and withdrawal of support'* at subsection (1) details the statutory provisions to which a person to whom the schedule applies is not eligible:

"A person to whom this paragraph applies shall not be eligible for support or assistance under--
(a) section 21 or 29 of the National Assistance Act 1948 (c 29) (local authority: accommodation and welfare),
(b) section 45 of the Health Services and Public Health Act 1968 (c 46) (local authority: welfare of elderly),
(c) section 12 or 13A of the Social Work (Scotland) Act 1968 (c 49) (social welfare services),
(d) Article 7 or 15 of the Health and Personal Social Services (Northern Ireland) Order 1972 (SI 1972/1265 (NI 14)) (prevention of illness, social welfare, &c),
(e) section 21 of and Schedule 8 to the National Health Service Act 1977 (c 49) (social services),
(f) section 29(1)(b) of the Housing (Scotland) Act 1987 (c 26) (interim duty to accommodate in case of apparent priority need where review of a local authority decision has been requested),
(g) section 17, 23C, 24A or 24B of the Children Act 1989 (c 41) (welfare and other powers which can be exercised in relation to adults),
(h) Article 18, 35 or 36 of the Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2)) (welfare and other powers which can be exercised in relation to adults),
(i) sections 22, 29 and 30 of the Children (Scotland) Act 1995 (c 36) (provisions analogous to those mentioned in paragraph (g)),
(j) section 188(3) or 204(4) of the Housing Act 1996 (c 52) (accommodation pending review or appeal),"

(emphasis added)

Paragraph 6 of Schedule 3 states that paragraph 1 (above) applies to a person if :-

(a) he was (but is no longer) an asylum-seeker, and
(b) he fails to cooperate with removal directions issued in respect of him.

(13) Paragraph 3 of Schedule 3 reads:

Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of--

(a) a person's Convention rights, or

(b) a person's rights under the Community Treaties.

(14) R (Limbuela) –v- Secretary of State for the Home Department