

Information note

Note on Home Office position re Schedule 3 of the *Nationality, Immigration and Asylum Act 2002* as it applies to former Unaccompanied Asylum Seeking Children (UASC).

1. In January 2005, at the *Unaccompanied Asylum Seeking Children (UASC) stakeholder group*, the Home Office circulated a 'clarification note' regarding entitlement to continued support for former UASC once they turn 18. The Home Office have indicated that, further to the 'clarification note', they will soon be issuing guidance to assist local authorities in determining the circumstances in which continued support should be provided to this group – and when it should end. This note summarises the 'clarification note' issued by the Home Office, anticipates the position likely to be taken in the forthcoming guidance and offers some comment. It concerns the application of schedule 3 ('withdrawal and withholding of support' provisions) of *Nationality, Immigration and Asylum Act 2002* (NIA 2002) to former UASC.
2. By letter to the Children's Legal Centre of 26th May 2005, the social policy unit confirms that the 'note' is **not** to be regarded as 'relevant guidance' for the purpose of paragraph 14(2)ⁱ of Schedule 3. There is therefore no statutory *requirement* for local authorities to act on the note (unlike the guidance issued under paragraph 14(2)). Rather, the note was issued '*in response to queries raised by Peter Gilroy on the implications of Schedule 3 for former UASC, before being circulated to others*'. It offers an *interpretation* of the law. The status of the forthcoming guidance is not yet known.
3. The nub of the issue is whether a former UASC should be regarded as being a person 'unlawfully in the United Kingdom' – thus meaning paragraph 7ⁱⁱ of the Schedule may apply or whether they should be regarded as a 'failed asylum seeker' – thus meaning paragraph 6ⁱⁱⁱ may apply.
4. The issue is of particular importance to local authorities providing leaving care services to former UASC under sections 23C, 24A or 24B (the 'leaving care' provisions) of the *Children Act 1989* as the schedule obliges them to withdraw such services from those falling under paragraph 7, i.e. where they have determined that the person is in the UK '*in breach of the immigration laws within the meaning of section 11 of this Act*'^{iv} and is, in addition, *not an asylum seeker*.
5. Local authorities considering withholding or withdrawing leaving care services because they believed a former UASC met these two conditions would still be subject to the test of whether in doing so they would breach the person's rights under the European Convention or Community Treaties and would be expected to start or continue providing services *to the extent* of avoiding any breach. The

^v means that some local authorities are now arguing that it would be sufficient to pay the airfare home of someone 'unlawfully in the UK' in order to avoid a breach.

6. Conversely, where a former UASC can be properly designated as a 'failed asylum seeker' the person does not fall under paragraph 6 until he or she *'fails to co-operate with removal directions issued in respect of him'* and the local authority must continue providing services up to that point.
7. The new emphasis on paragraph 7 established by the 'clarification note' is already having the effect of making some local authorities reconsider the provision of leaving care services to formerly looked after UASC. There have been reports that some local authorities have already withdrawn services from those who failed to make an 'in-time' application for an extension of Discretionary Leave (DL) thus rendering themselves 'unlawfully in the UK'. Formally, most local authorities had assumed that former UASC were 'failed asylum seekers' and had assumed that they had a duty to continue providing leaving care services until the 'trigger' in the form of 'failure to co-operate with removal' had occurred. It is therefore important to clarify which former UASC fall into which category.
8. Paragraph 7 (the 'fourth class' of ineligible persons): A person is *'in the UK in breach of the immigration laws'* if s/he: a) entered illegally (and has not since been granted leave to remain). That is the case either where the person has clearly entered illegally (e.g. by deception or clandestinely) or has been declared by an immigration officer to have done so or; b) was granted leave to enter/remain but that leave to remain has expired or is no longer valid, e.g. because: i) she did not apply for an extension before it expired; ii) she applied for an extension but it was refused and she did not appeal; iii) she appealed but that appeal has been finally determined and she has not been granted leave to remain.
9. In order to fall under paragraph 7 (person unlawfully on the UK) *as well as* being *'in the UK in breach of the immigration laws'*, the person must also *not be an asylum seeker*. The question arises as to why the Home Office are now taking the view that former UASC are not 'asylum seekers' as they are clearly, by definition, persons who have sought asylum prior to being granted DL.
10. Paragraph 6 (the 'third class' of ineligible persons): Paragraph 6 applies (in part) to a person who *'was (but is no longer) an asylum seeker....'* Under Paragraph 17(1)^{vi} of Schedule 3 the definition of an 'asylum seeker' is given for the purpose of the Schedule. Part of the definition is that an asylum seeker is a person *'who is at least 18 years old'*. It would appear that where DL is granted to a person under 18 year-olds seeking asylum (under the UASC concession), the Home Office are not considering them ever to have been an 'asylum seeker' for the purpose of the Schedule due to the definition in Paragraph 17(1).
11. The letter to CLC from the social policy unit states that *"The reason the third class exists is that not all failed asylum seekers will fall within the fourth class – because they will not be in breach of immigration laws as provided by section 11 of the Immigration Act 1971"*. The Home Office are here relying on the distinction

between persons who are a) illegal entrants or; b) overstayers, and therefore *are* in the UK in breach of the immigration laws (irrespective of having lodged an asylum claim) and those who are *port applicants* reaching the end of their claim (irrespective of appeal decisions) who are not in the UK in breach of the immigration laws (since they retain their TA status until either granted leave or removed).

12. If paragraph 7 applies to failed asylum-seekers would deprive the limitation in paragraph 6 ('**and** he fails to cooperate with removal directions...') of most of its real effect. The power to provide support would end (for all failed asylum seekers except port applicants) before the asylum seeker had a chance to comply with removal directions. The case of *R (on the application of AW) v. Croydon*^{vii} addressed the issue of whether paragraphs 6 and 7 are 'mutually exclusive'. The court ruled that a failed asylum seeker can be precluded from receiving services provided under the power and duties listed in paragraph 1 of the Schedule by virtue of falling under paragraph 7 (being in the UK in breach of immigration laws).
13. The situation for most UASC is that they will be granted leave (a period of DL) on refusal of asylum. When that leave expires and they have exhausted any appeal rights they become overstayers whether or not they were originally port applicants or illegal entrants. On the Home Office interpretation, this would bring them under paragraph 7 – those unlawfully in the UK – at the point where they become 'appeal rights exhausted'.
14. The letter goes on to say that "*If a UASC's asylum claim has not been determined by the time of her 18th birthday, she will be capable (if the claim fails) of falling into the third class of ineligible person [i.e. paragraph 6]*". Because in these cases no leave has been granted, on refusal and disposal of any appeal the person either retains their TA status until removal (port applicants) or becomes 'unlawfully in the UK' (illegal entrants). If the Home Office view is correct, the only category of former UASC who could fall into the third class are port applicants who still have an outstanding claim/appeal when they turn 18 and are subsequently refused OR port applicants who apply prior to 18, have no further appeal rights AND for whatever reason are not granted a period of leave (and therefore remain on TA). The implication of this passage in the letter is that the Home Office do not view those who have their asylum claim finally determined prior to turning 18 as 'asylum seekers' for the purpose of schedule 3.
15. To summarise: The current Home Office position would appear to be that only the following classes of former UASC are entitled to receive *Children Act* leaving care services on turning 18:
 - Those who make an 'in-time' application to extend their period of limited leave and; a) are awaiting a decision on the extension application or; b) are within the time limit for appealing against a refusal of the extension application or c) have brought an appeal and are awaiting its final determination. (NB – where an extension application or appeal is successful, the applicant will be granted a new period of leave which will take over from the old leave – they would therefore be lawfully in the UK and can go on receiving 'leaving care' support).

- Port applicants who; a) have an outstanding claim or appeal when they turn 18 or; b) port applicants who have been refused and have exhausted any appeal rights but who were not (for whatever reason) granted any period of limited leave.

ⁱ Paragraph 14(2) reads: ‘A local authority shall act in accordance with any relevant guidance issued by the Secretary of State for the purpose of determining whether paragraph 1 applies or may apply to a person in the authority’s area by virtue of [paragraph 6, 7 or 7A].’

ⁱⁱ Paragraph 7 of Schedule 3 reads: “Fourth class of ineligible person; person unlawfully in United Kingdom. 7. Paragraph 1 applies to a person if- (a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 11, and (b) he is not an asylum seeker.”

ⁱⁱⁱ Paragraph 6 of Schedule 3 reads: “Third Class of ineligible person; failed asylum seeker. 6. – (1) Paragraph 1 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. (2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).”

^{iv} NIA 2002, Schedule 3, paragraph 7 (a). Under section 11(3) of NIA 2002 a person is not in the UK ‘in breach of the immigration laws’ if she was granted temporary admission before she ‘entered’ the UK (applying section 11(1) of the Immigration Act 1971). This means that a person who claimed asylum at port (without having entered illegally) does not become unlawfully present so long as they have temporary admission. Where a person was refused leave to enter (rather than refused leave to remain) this shows they were a port applicant.

^v [2004] EWCA Civ 1711

^{vi} Paragraph 17(1) provides the interpretation of an ‘asylum seeker’ for purposes of the schedule: ‘In this schedule – ‘asylum seeker’ means a person – (a) who is at least 18 years old and; (b) who has made a claim for asylum.... and; (c) whose claim has.... not been determined. Under Paragraph 17(2) a claim is ‘determined’ where the claimant (a)has been notified of the decision of the Secretary or State; (b) can not bring an appeal (disregarding an out of time appeal with permission) and (c) any appeal which has already been brought has been disposed of. A person ceases to be an asylum seeker when her (asylum or Article 3) claim is refused and any appeal has been finally disposed of.

^{vii} [2005] EWHC 2950 (Admin)