

Submission to Department for Education consultation on revised Family and Friends Care Statutory Guidance, June 2018

Coram Children's Legal Centre (CCLC), part of the Coram group of charities, is an independent charity working in the UK and around the world to protect and promote the rights of children, through the provision of direct legal services; the publication of free legal information online and in guides; research and policy work; training; and international consultancy on child rights. The CCLC's legal practice specialises in education, community care, family and immigration law and CCLC operates several free advice phone lines including the Child Law Advice Service. The Migrant Children's Project at CCLC provides specialist advice and legal representation to migrant and refugee children and young people as well as legal guidance and training to practitioners on the rights of young refugees and migrants. CCLC is co-chair of the Refugee and Migrant Children's Consortium (RMCC), a coalition of over 50 organisations working for promote and protect the rights of young refugees and migrants, and also fully supports RMCC's submission to this consultation.

Main concerns

The aim of the guidance is to support local authorities in fulfilling their role where children are being brought to the UK under the Dublin III Regulation to live with family or relatives. For this to be effective it will need to ensure that local authorities understand that Dublin III carers are included as family and friends carers; will need to increase understanding of the Dublin III process; and will need to clarify the support available to those family and friends carers.

The EU Dublin III Regulation provides for circumstances in which an unaccompanied asylum seeking child in the EU can be reunited with family or relatives in another EU country. At Article 8, the Regulation sets out a hierarchy of relatives a child is eligible to join. A child can join their parents, step-parents or adults who have cared for them, or their siblings where it is in the child's best interests. Article 8(2) states that where a child has a relative (aunts and uncles by blood or marriage and grandparents) and 'it is established...that the relative can take care of him or her' they should be reunited with them where it is in the child's best interests.

It should be recalled that the purpose of the Regulation is to promote family unity, and that it can prevent child trafficking or smuggling, and can prevent children undertaking dangerous journeys alone to reunite with their families because there is a legal route for them to access. Article 8 operates in conjunction with Article 6, which provides guarantees for unaccompanied minors, requiring member states to take into account not only family reunification, but also well-being and social development, safety and security and their wishes and feelings. This is stated in the preamble to the Regulation, which whilst not legally binding, is an interpretative guide to the Regulation. This requires states to consider the child's best interests as set out in the UN Convention on the Rights of the Child (UNCRC) and the EU Charter of Fundamental Rights.

The guidance also needs to be clearer throughout that the purpose of support provided to family and friends carers of these children is *separate* to the decision taken under Dublin III on whether a child should be reunited with relatives in the UK. It is critical that the assessment as part of Dublin III does not limit the support available to carers and children once here, but that it is treated as a

separate legal process and it should be clear that the local authority is not making the decision on the child's eligibility for entry into the UK.

This guidance should aim to reflect the purpose and principals behind the Dublin III Regulation, and local authorities should be encouraged to ensure that all actions are taken with the best interests of the child as a primary consideration. Treating all children arriving under Dublin III as children in need and undertaking the relevant assessments could help ensure that these children receive the support they need and reduce to possibility of family breakdown at a later stage.

Specific comments on the guidance

Paragraph 5: The Department for Education's statutory guidance on 'Care of unaccompanied migrant children and child victims of modern slavery' (November 2017)¹ should be included in this list, as this guidance contains useful information regarding the particular issues faced by asylum-seeking children.

Paragraphs 13 and 19: Both of these paragraphs emphasise the support needs of children coming to the UK under Dublin III. However the guidance at present is silent on *how* these needs might be addressed, especially in light of the discretion of the local authority when offering support. The guidance could usefully state that a social worker should visit any child arriving under Dublin III within the first week of arrival to assess immediate needs and then after a month to assess ongoing support needs and undertake a child in need assessment under section 17 of the Children Act if the child is in need of services, and/or if the family have requested support.

Paragraph 24: This paragraph goes against the spirit of the Dublin III regulation that a child's best interests are a primary consideration in deciding whether they should be transferred. It is recognised that it is appropriate that the relative the child will join is assessed. However, the sentence '*...children are not being transferred to live with family members or relatives where they are unable to take on their care*' is misleading and is confuses the hierarchy that is in the text of the regulation. The guidance needs to be clear about the difference between pre- and post- arrival assessments, and the difference between assessments for the purpose of reunification with family members and for reunification with relatives. There should be clarification that a child can be transferred to join a family member (not relative) who is not able to look after them but where the transfer is still in their best interests. For example, transferring siblings to be together even where a child is likely to be a looked after child.

It would be useful if the guidance could be clearer about the role of the assessment and its interaction with the Dublin III decision-making process.

Paragraph 53: It would be helpful to include that unaccompanied asylum seeking children may benefit from an SGO, particularly where they are young and likely to spend an extended period of time in the care of a relative or sibling without parental responsibility.

Paragraph 71: Staff should have training on the asylum process and the particular needs of unaccompanied asylum seeking children as an issue faced by family and friends carers. This requirement is outlined the in the Department for Education's [guidance on 'Care of unaccompanied](#)

¹ <https://www.gov.uk/government/publications/care-of-unaccompanied-and-trafficked-children>

[migrant children and child victims of modern slavery](#)' which makes clear that social workers should have an understanding of the asylum and immigration system.

Paragraph 78: In the section on 'Financial Support' it would be helpful to highlight that in some circumstances carers may not have access to mainstream benefits (where they have leave to remain with No Recourse to Public Funds - NRPF) and that this is not a reason to exclude them from family and friends care, but that support may need to be provided under section 17 of the Children Act 1989 and information provided about applying to the Home Office for a change in conditions. This section should also link to information about the benefits 2 child limit.²

Paragraph 93: This is the first time that it is made clear that a child does not have to live with a close family member under Dublin III; this should be stated beforehand, rather than included in the section on contact with family members for the first time. In our experience there is confusion in local authorities about who a child transferred under Dublin III may, or should, live with. This paragraph is also unclear because it suggests that a transfer under the National Transfer Scheme may be appropriate, but there is no reference to the need for transfer to be in the child's best interests (which it may not be if it involves moving away from their family member). This should cross-reference to the National Transfer Protocol which states that:

*'Where a child is transferred to the UK and is reunited with a family member under the Dublin Regulation, and is not a looked after child, the child will not be eligible to be included in the transfer scheme. The child may become eligible for the transfer scheme if the family relationship subsequently breaks down and the child becomes looked after by a local authority that is over their 0.07% threshold, and it is assessed to be in the child's best interest to transfer away from the family member.'*³

Paragraph 98: In the section on 'Support groups' it would be helpful to include information specific to Dublin III children, for example providing information on refugee welcome groups, or ESOL classes as well as other specific or non-specific support groups.

Annex A:

Page 51: This sets out that if an arrangement is 'deemed unsuitable' by the local authority then a child may not enter the UK. This is confusing the two separate tests for family members and relatives. Reunification with a 'family member' is *not* limited by the ability of the family member to care for a child - transfers may still take place to the care of the local authority if in the best interests of the child. Even where the child is to be reunited with a relative, 'deemed unsuitable' does not reflect the language of Dublin III, in which the test is that a relative 'can take care of him or her'. The purpose of the LA assessment should also be to ascertain whether any additional support is needed by the family.

Page 55: The draft guidance states that "*Relatives (as defined in Dublin III Regulation) will need to support the child without recourse to public funds*". There is no basis in Dublin III to require relatives to be support a child without access to public funds. Indeed, a denial of public funds could be

² <https://www.gov.uk/guidance/claiming-benefits-for-2-or-more-children>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/687226/NTS_Protocol_Final_-_March_2018.pdf, p 7

potentially unlawful since the allocation of Child Benefit and Child Tax Credit is not related to the status of the child, but the status of the relative. The test for transfer is whether the relatives 'can take care of' the child. Where a child is placed with relatives who have leave to remain, there is no prohibition on them making an application for the public funds to which they are entitled.

Alternatively, where a child joins family members who have NRPf, then they may be eligible for a section 17 assessment and support if a child is in need, or the local authority may be able to help them apply to have the NRPf condition lifted.

There is no requirement under any part of the Dublin III Regulation that the UK based relative must meet some form of income threshold or that they are to have a 'no recourse to public funds' condition attached to a Dublin transfer. That would impose an obligation that does not exist in law. The second paragraph on page 55 stating that 'Relatives (as defined in the Dublin III Regulation) will need to support the child without recourse to public funds should be removed.

Annex B:

Paragraph 1 sets out that a relative must also establish that they can take care of the child. This is not the wording of the Dublin Regulation, which does not place the burden on the child or relative, but on the state. In addition, the amending Implementing Regulation 118/2014 include pro forma forms for the transfer of children, which refer to the test for 'able to' care for the child. This states "basic evidence of material capacity" and "evidence of capacity" – which relates to an expressed desire to care for the child.

It is very concerning that relatives may not be informed about access to benefits and services that mean they may be able to care for the child. It is also unclear why in the flow-chart a relative would be asked to confirm that they can care for a child without recourse to public funds, when there is no requirement to do so (see above). It is not in the spirit of the regulation that the social worker can make an assumption about whether a family can support the child.

The second section of the diagram contains three questions in each instance the implication is that the transfer will not therefore be granted; this is a considerably higher test to the regulation 'able to look after', and there is no justification in law for it. The accommodation requirement is particularly problematic, and financial support is not synonymous with 'able to' – although it is clear that a material capacity test is envisaged, there is no guidance on how this should be interpreted. A refusal of transfer because of the suitability of accommodation where the child has expressed a desire for reunification with their relative goes against the spirit of the Regulation in the pre-ambles and in Article 6.

The guidance should not be encouraging flexibility of the Dublin III deadlines. There is also no lawful basis for assuming that there is flexibility. Article 22 sets out a two month deadline for a receiving state to respond.

Paragraph 3 on page 59 of Annex B highlights the legal obligation under Dublin III to assess the ability of family members/relatives to take care of the child. As stated above, there is no requirement under the Dublin III Regulation that the UK based relative must meet some form of income threshold or that they are to have a 'no recourse to public funds' condition attached. The focus of these assessments will always need to be the best interests of the child. Paragraph 3 should

be re-drafted to state ‘...as legally bound by the Dublin III Regulation, to accept reunification cases with relatives (as defined under Dublin 8.2) where it is the best interests of the child and the relatives can take care of the child. This means that they are able to accommodate and financially support them, taking into consideration any financial and other support they may be eligible to once the child is living with them. In cases of reunification with ‘family members’ (as defined under Dublin 8.1) these will be accepted where it is in the best interests of the child and there is no requirement for the ‘family member’ to be able to take care of the child.’

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