

Refugee & Migrant Children's Consortium

Best interests leave for unaccompanied migrant children

A 'durable solution' is a solution that meets all the child's protection needs, takes into account the child's views, and leads to a longer-term sustainable arrangement for the child rather than a short-term resolution. There are three forms of durable solution: return to the child's country of origin; settlement and integration into the host country; or relocation to a third country (including family reunion or resettlement).¹

As part of broader discussions on securing durable solutions for unaccompanied migrant children, this briefing examines the possible options for granting a form of leave to remain when it has been decided that a child should remain in this country. Many of the discussions to date have focused on children in the asylum system who are not granted refugee status, and focus on the use and impact of leave as an unaccompanied asylum seeking child ('UASC leave') which is only granted for three years, or until the child turns 17 ½. However, this issue is just as pertinent for unaccompanied children who are *not* seeking asylum, including child victims of trafficking and children who may have come to the UK at a young age but are 'undocumented', living without lawful immigration status.

Types of children

Unaccompanied children seeking asylum

There are a significant number of unaccompanied children in the asylum system who are not granted refugee status but instead are granted a temporary form of leave to remain. For example, in 2018, 2,872 asylum applications were made by unaccompanied children and a quarter were granted UASC leave.²

There is insufficient publically available data to ascertain exactly how many children granted UASC leave go on to secure further leave after turning 17 ½, how many voluntarily return and how many find themselves without leave post-18. One report shows that between July 2016 and June 2017, only 20 applications for further leave were granted to claimants who applied for further leave when aged between 17 and 18 years.³ In the same period the Home Office removed 402 adults who had previously claimed asylum as a child. Of the 402, 49 (12%) departed the UK when aged 18 years, while almost half (49%) were removed 5 years or more after they reached 18.⁴

Discussions with the Home Office also indicate that low numbers of children and young people are returning to their country of origin (either enforced post-18 or voluntary) and a significant number of those who arrived as children are years later found to still be in the UK but without

¹ UNHCR and UNICEF, What the UK can do to ensure respect for the best interests of unaccompanied and separated children, at <https://www.unhcr.org/5756e8c07.pdf>

² Statistics based on the decisions made on unaccompanied children's claims in in 2018. Of the 1,327 decisions made, 58% (771) were refugee status, 24% (319) were UASC leave. 14% (190) were outright refusals. See Refugee Council, 'Children in the asylum system, May 2019' at <https://www.refugeecouncil.org.uk/wp-content/uploads/2019/06/Children-in-the-Asylum-System-May-2019.pdf>

³ Independent Chief Inspector of Borders and Immigration, 'An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children', March 2018, at <https://www.gov.uk/government/publications/an-inspection-of-how-the-home-office-considers-the-best-interests-of-unaccompanied-asylum-seeking-children>

⁴ *ibid*

any form of leave. There is a significant cost to local authorities of young care-leavers who cannot be returned but who still need support⁵ as they live in limbo and a significant number of young people going missing from care. For example, the 'Becoming Adult' research project found that a large number of young people described intentionally disengaging from social care and experiencing exploitation, destitution, homelessness and poor physical and mental health. In 2017, 15% of all unaccompanied children went missing from care at least once.⁶

Research has also demonstrated that many young people who are forcibly returned after turning 18 either re-migrate back to Europe or elsewhere, or struggle upon return due to security issues, lack of education and employment opportunities and mental health concerns.⁷

Victims of trafficking

There are few routes to long-term immigration status for child victims of trafficking and no form of leave to remain in the UK designed specifically for these children. An individual may be granted leave on the basis of being a victim of trafficking and their personal circumstances mean they need to be granted/police investigation or proceedings, or many child victims who wish to regularise their status will apply for asylum. However, it can be difficult for these children to meet the definition of refugee provided in the Refugee Convention. Many face difficulties disclosing their experiences and fail to present as credible.⁸ Albanian young people are also particularly likely to be refused asylum and typically only granted status after an extended appeals process, if they have managed to secure expert legal advice.⁹

Figures obtained through FOI requests show that the Home Office accepted only 16 out of 326 applications for discretionary leave to remain and 136 out of 201 asylum claims made by child victims of trafficking in 2017-18.¹⁰

Undocumented children

There is also increasing concern about the identification and support of children in local authority care who are undocumented, living without lawful status in the UK, but who have not engaged with the asylum system and for whom it would not necessarily be appropriate to do so. These include children born in the UK to parents with irregular immigration status (a child born in the UK does not automatically acquire British citizenship in every circumstance), those who arrived on a visa (for example, as a visitor or student or as a dependent of a student) and remaining in the UK beyond the date at which that leave expires (often referred to as 'overstayers') and those whose asylum claim was unsuccessful and they have not been granted any alternative form of leave. Evidence is extremely limited but research estimates over 100,000 undocumented children in the UK¹¹, and over 2,000 of those children in the care

⁵ The cost to local authorities of caring for unaccompanied and former unaccompanied asylum seeking children continues to be an issue of concern. See, for example, https://www.emcouncils.gov.uk/write/Analysis_of_LA_Costs_-_July_2017.pdf

⁶ <https://becomingadult.net/>

⁷ Refugee Support Network, After Return: documenting the experiences of young people forcibly removed to Afghanistan, 2016 at <https://www.refugeesupportnetwork.org/resources/7-after-return-documenting-the-experiences-of-young-people-forcibly-removed-to-afghanistan>

⁸ ECPAT UK, ReACT: Reinforcing Assistance to Child Victims of Trafficking, 2017 at <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=1dcfdd01-44fd-4b0f-90c3-ccbc36649a80>

⁹ Becoming Adult: Forced returns and protracted displacement - Research Brief 7, Elaine Chase and Nando Sigona, 2017 at <https://becomingadultproject.files.wordpress.com/2017/12/ba-brief-7-low-res.pdf>

¹⁰ <https://www.buzzfeed.com/janebradley/child-trafficking-victims-refused-uk>

¹¹ See Pew Research Centre, Unauthorised Immigrants in the United Kingdom, 2019 and N. Sigona and V. Hughes, No way out, no way in: Irregular migrant children and families in the UK, University of Oxford, 2012

of a local authority.¹² Many of these children have lived in the UK their whole lives, not realising that their immigration status is an issue until they try to work or access further education.

Types of immigration status granted

For children who are not granted refugee status or humanitarian protection (either because their claims have been rejected or because they have not applied), the following grants of leave may be appropriate:

Unaccompanied asylum-seeking child leave ('UASC leave')

Where a child is not accompanied by an adult family member or carer in the UK when making a claim for asylum, then they are considered to be unaccompanied asylum-seeking child. Where a child's asylum claim is rejected but they cannot be returned to their country of origin because there are no 'adequate reception arrangements in the country to which they would be returned', then they should be granted UASC leave until age 17 ½ or for 30 months, depending on which is the shorter period.¹³ 'Adequate reception facilities' means reception arrangements that are safe, adequate and sustainable. However, there is no requirement that a child is returned to their family, and they may be returned to the care of social services in their country of origin.

UASC leave is renewable, but once a child turns 18 they cannot be granted this form of leave to remain as they will no longer meet the central requirement – that they are a child. It is also unlikely that the Home Office will grant a young person further leave to remain after they have reached their majority, as it is unlikely that they will have met the requirements for leave on the basis of family or private life or any other reason under the Immigration Rules (see below for information on these other types of leave). However, some young people may meet the requirements or make an application outside of the rules, and some may be able to make a fresh claim for asylum (or both).

Discretionary leave

Discretionary leave is only now granted in limited circumstances relating to human trafficking, leave on medical grounds, cases where return would breach someone's human rights, and other exceptional circumstances. Discretionary leave is not granted if there is another form of leave which can be granted instead.¹⁴ Discretionary leave will not normally be granted for periods longer than thirty months, although cases involving children require consideration of the child's best interests and therefore longer periods of leave should be considered, where a child requires stability and their future is in the UK, for example. Leave may be granted for non-standard periods which are shorter as well as longer. Given previous case law that found that Home Office policy granting short term grants of leave may be unlawful as it failed to consider the welfare and best interests of the child,¹⁵ should

¹² Coram Children's Legal Centre, 'This is my home': Securing permanent status for long-term resident children and young people in the UK, 2016, at https://www.childrenslegalcentre.com/wp-content/uploads/2017/06/Thisismyhome_FullReport.pdf

¹³ See Home Office, Children's Asylum Claims, v.3, August 2019, p65, at

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/825735/children_s-asylum-claims-v3.0ext.pdf

¹⁴ Home Office, Discretionary Leave, version 7.0, paragraph 3.1

¹⁵ *SM & Anor v Secretary of State for the Home Department* [2013] EWHC 1144 (Admin) This case involved five children aged between six and ten who were all born in the UK to parents who did not have leave to remain. They had eventually been granted discretionary leave to remain for three years (under pre-2012 rules) on the basis of Article 8 of the European Convention on Human Rights (ECHR). The initial Home Office decision was challenged on the basis that the policy which existed at the time did not allow decision makers sufficient discretion to consider the wellbeing of children under section 55 of

A child who is identified as a victim of trafficking through the National Referral Mechanism may be granted discretionary leave where they are assisting police with their inquiries, or their personal circumstances require this. Discretionary leave as a victim of trafficking is usually granted for a year, but may be longer if required. It is possible at the stage of grant to make representations that a child should be granted discretionary leave for longer period, if this is in their best interests, with reference to the Home Office's duty under section 55.

Leave under the Immigration Rules based on long residence

Children who are in the UK either by themselves or with family members will both have a family life. As children get older and attend school and other activities, they also begin to build their own private lives based around these activities. Rule 276ADE of the Immigration Rules provides that children under 18 years old are eligible for limited leave to remain on the basis of long residence where:

- They have spent seven years continuously in the UK (this time does not need to be lawful, but any time spent in prison will not count);
- It would not be reasonable to expect them to leave the UK;¹⁶ and
- They meet the suitability and eligibility requirements.¹⁷

What is reasonable will depend on the circumstances of the child and their family.

Where a case meets the Immigration Rules, then leave will usually be granted for 2 ½ years. Leave must then be renewed until the applicant has completed ten years in the UK on this route and is then eligible to apply for indefinite leave to remain.

Leave based on family and private life outside the rules

The current Immigration Rules are an expression of the how the government interprets the UK's human rights obligations and how it intends to decide applications based on private and family life rights. However, whatever decisions the Home Office make based on the Immigration Rules, the courts have held that the full body of Article 8 case law also applies and the courts have emphasised that the best interests of children are a primary consideration and factors relating to immigration control must not form part of the best interests of the child assessment. Therefore the Home Office will need to look first at the Immigration Rules, and if a case does not meet the rules, will then need to give consideration to Article 8 rights under case-law. Where an application is refused by the Home Office, the applicant could be successful at appeal on the basis of Article 8.

Leave will usually be granted for 2 ½ years. Leave must then be renewed until the applicant has completed ten years in the UK on this route and is then eligible to apply for indefinite leave to remain.

Indefinite leave by discretion

Where the Home Office receives an immigration application from a child and they are considering granting leave, they must also consider what type of leave should be given. This is part of the statutory obligation under section 55 of the Borders, Citizenship and Immigration Act

the Borders, Citizenship and Immigration Act 2009 and the children should have been granted indefinite leave to remain, in line with their best interests. The court noted that short periods of leave could be detrimental to a child's welfare.

¹⁶ Immigration Rules, paragraph 276ADE(1)(iv)

¹⁷ Immigration Rules, paragraph 276ADE(1)(i)

2009 to safeguard and promote the wellbeing of children. The guidance on grants of limited or discretionary leave state that where there is compelling evidence that justifies a longer period of leave or Indefinite Leave to Remain (ILR) in the best interests of a child, then this may be granted. However, it appears that this discretion is very rarely used – in 2015-2016, only 25 children were granted discretionary ILR.¹⁸

Leave as a child in care

Where a child is ‘in the care of’ a authority, published Home Office policy allows for the child to be granted four years limited leave to remain, followed by ILR.¹⁹ This policy, first published in 2011, states that “decisions about the future of children in the care of the local authority should be left primarily in the hands of their social services department as they will be best placed to act in the child's best interests.” If social services “advise that it would be appropriate for the child to remain in the United Kingdom, consideration should be given to granting the child leave to remain.” Where the child’s future lies in the UK, they may be granted leave to remain for 4 years, after which indefinite leave to remain may be granted.

‘Best interests leave’ - a proposal

“A durable solution should ensure that the child’s rights are protected in the future. Such a solution should take into consideration the immediate needs of the child but also address developmental considerations. One key component is to ensure that the child is able to develop into adulthood in an environment in which his or her rights and needs as defined by the UN Convention on the Rights of the Child are safeguarded and which protects him or her from serious harm”.

It has been widely recognised that granting leave to children with a cut-off point of 18 or 17 ½ undermines the ability of the child, and the local authority supporting that child, to make long-term plans for their future, and can have significant negative mental health implications for the child. they should be granted a more lasting form of leave so that their ability to meet their maximum potential as adults is not put into jeopardy by uncertainty and delay

The courts have held in relation to an old policy that there are problems with the Home Office granting short periods of leave without considering a child’s need for stability and their best interests,²⁰ and that ‘where there is strong evidence to suggest that the child’s life would be adversely affected by the grant of limited leave’, ILR should be granted.²¹ In spite of this, however, the new system of short periods of leave and drawn-out routes to settlement persists.

In discussions, there has been a level of agreement that children should be provided with a ‘durable solution’ that provides long-term security and looks beyond the age of 18. At present, though, the immigration options available to a case-worker are, arguably, limited.

As outlined above, there already exists in policy an option for children who cannot be reunited with family or return to their country of origin. . It would be possible to extend the use of this leave to as part of a package of changes to improve the process of delivering ‘durable solutions’ for unaccompanied children. This package would also include the development of a

¹⁸ FOI requests have been sent to the Home Office for more up to date data, but these have been refused.

¹⁹ See Section 8, Home Office, Immigration Directorate Instructions, Ch 8, Section 5A, Annex M: Children, July 2011 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263209/children_annex_m.pdf

²⁰ *SM & Others v Secretary of State for the Home Department* [2013] EWHC 1144

²¹ *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2014] EWCA Civ 1216, para 78.

multi-agency best interests determination process, which would inform the decision as to whether a child is returned, re-settled in a third country or integrated in the UK.

Concerns may be raised that granting longer term status to unaccompanied children would act as a 'pull factors' for those coming to the UK. However, it is important to note that there is little to no evidence of this and that this leave would only be granted after a full consideration of the child's circumstances and a multi-agency best interests determination process. It would not create an obligation on the UK to allow all children who arrive here to remain, but rather would ensure that for those children who cannot be reunited with family and whose futures clearly lie in the UK, there is leave option that allows for them to truly begin a process of integration into this country.

Suggested policy wording

Unaccompanied migrant children

Decisions about the future of an unaccompanied migrant child should be made following a multi-agency best interests determination process. This assessment must cover, but is not limited to:

- a) the views of the child concerned (considered in the light of his or her age and maturity);*
- b) the child's physical, mental, emotional, social, health and educational needs;*
- c) the likely impact including psychological effects, on the welfare and development of the child of the removal;*
- d) the child's age, gender, background, religion, culture and any characteristics of the child the assessor considers relevant;*
- e) any harm which the child is at risk of suffering if removal takes place;*
- f) the citizenship rights of the child including whether they face barriers in realising their rights to citizenship, British or otherwise, and whether they may be stateless.*

If the outcome of the best interests determination process is that it would be appropriate and in the child's best interests for them to remain in the United Kingdom, the child shall normally be granted leave to remain for five years, or indefinite leave to remain if appropriate. After five years of limited leave to remain, indefinite leave to remain shall be granted.

In the event that the child turns 18 during the best interests determination process, or following a grant of leave, the above policy shall still apply.

More information

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The Refugee and Migrant Children's Consortium (RMCC) is a group of over 50 NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international human rights and welfare standards. For more information and a list of members, please visit www.refugeechildrensconsortium.org.uk