

Refugee & Migrant Children's Consortium

**Illegal Migration Act 2023, separated children and local authorities
Refugee and Migrant Children's Consortium conference, 6th October 2023**

CONFERENCE NOTES INCLUDING ADDITIONS POST RWANDA JUDGMENT

1. DATES AND WHO IS AFFECTED

The asylum system has become even more complicated recently as different policies apply to different cohorts of people who arrive in the UK and claim asylum at different times. For the purposes of understanding the Illegal Migration Act 2023, it is important to have three dates in particular in mind:

- **7 March 2023.** This is the date when the Bill was introduced to Parliament.
- **20 July 2023.** This is the date when the Act received Royal Assent.
- **Future dates** when the Home Office implements specific provisions through regulations

2. WHAT IS IN FORCE AND BAN ON LEAVE

The vast majority of the provisions of the Illegal Migration Act 2023 are not yet in force.

a) Ban on leave

The most important provision that is already in force is the ban on leave at section 30 of the Act. This applies to anyone who arrived on or after 7 March 2023. The idea of the leave ban is the Home Office saying that anyone who entered the UK without permission on or after 7 March 2023 will not be granted permission to stay or citizenship.

It is subject to some exceptions, including specifically to grant leave:

- To unaccompanied children;
- To victims of trafficking;
- Where human rights require leave to be granted;
- Under the Home Office's wide discretion to grant leave.

What type of leave will be granted to unaccompanied children is unknown. It could be temporary leave until they are 17½ or 18.

Whilst recently we have seen a high grant rate of refugee status (five years' leave) once unaccompanied children's asylum claims are eventually decided, what we are likely to see is that unaccompanied children arriving after 7 March 2023 will be left in limbo for some time. They may not get refugee status exactly as it is now, and it is unclear what the length of time such leave granted will be, or whether this will lead to a permanent form of status.

b) Mobile phones

The Home Office has also already laid regulations in September 2023 that will allow them more powers over people's phones and more powers to come to adverse credibility decisions if someone does not allow access to their phone.

3. INADMISSIBILITY AND DUTY TO REMOVE

a) Power to remove unaccompanied children

The Home Office already had the power to remove an unaccompanied child from the UK before the Illegal Migration Act 2023. It reiterated this power in the Act and signalled its intention to start using the power in certain circumstances. We might see an increase in the use of the power to remove under 18s, especially to Albania.

b) Inadmissibility and duty to remove

There are **four conditions** for the Act's provisions relating to removal and inadmissibility to apply (set out in Section 2 of the Act):

- The individual arrived in the UK without documentation permitting them to do so;
- They arrived on or after 20 July 2023 (the date of the Act's passage; this could be changed once regulations are tabled to put these provisions into force);
- They did not arrive directly from the country they were fleeing; and
- They do not have the documentation to be allowed to stay.

The Act places a **duty** on the Secretary of State to remove anyone who meets these conditions. There are no exceptions for children. However, in the case of unaccompanied children, the duty is suspended until they turn 18. Nonetheless, the Secretary of State retains the **power** (set out above) to remove an unaccompanied child prior to their 18th birthday (e.g. for family reunification or to return to a safe country (which now includes Albania)).

In addition, if a person meets the four conditions above, any asylum or human rights claim they might have will be deemed inadmissible and will not be considered. This is a departure from prior policies which explicitly exempt unaccompanied children from inadmissibility.

4. DETENTION

a) Powers to detain unaccompanied children not yet in force

The Home Office has not yet brought into force the new powers in the Illegal Migration Act 2023 to detain unaccompanied children. This means that the current 24-hour limit on unaccompanied children being detained still applies for all unaccompanied children.

If/when the Home Office commences the new powers to detain unaccompanied children under the Act, it will only be able to use them to detain unaccompanied children:

- Who arrived in the UK after 20 July 2023 (or later if the Home Office changes this date);
- After it has laid regulations in Parliament on the circumstances of detention for unaccompanied children, which could possibly include time limits;
- In some situations, an unaccompanied child will – unlike adults – be able to apply for bail after 8 days (rather than 28 days for adults).

It is not clear where unaccompanied children will be detained. It could be, as currently, in short-term holding facilities like Manston or it could be in new places of detention. The Home Office gave itself new powers to detain people in any place it considers appropriate, opening up the possibility of unaccompanied children being detained not only in detention centres but other places too.

There is a big question about how to implement the duties of the local authority in whose area an unaccompanied child is detained by the Home Office.

b) Detention provision in force from 28 September 2023

Of the detention provisions, what has come into force, on 28 September 2023, is a provision relating more generally to detention. The Home Office brought into force section 12 of the Act which reverses court cases that the Home Office lost on what period of detention is reasonable. Section 12 allows for detention for such period as the Home Office (not the courts) decides is reasonably necessary.

The application of Section 12 may be subject to legal challenges on the basis that detention must be objectively reasonable and must comply with international law, including Article 5 of the European Convention on Human Rights. For detailed information about Section 12, there is a relevant training webinar by Garden Court Chambers here:

<https://youtu.be/iWYcVaeX030?feature=shared>.

5. ACCOMMODATION

a) Home Office power to accommodate

The new Home Office power to directly accommodate unaccompanied children is not yet in force. When it is brought into force it will apply to unaccompanied children who arrived on or after 7 March 2023.

What is important is that the duties of the local authority under the Children Act 1989 remain intact. The most recent update from the Home Office in December is that they are still working on plans around accommodation and these sections of the Act. Nothing concrete has been shared to date.

b) Power to remove from local authority care

As well as the power to directly accommodate unaccompanied children, when the Home Office commences Section 17 of the Illegal Migration Act it will purport to have the power to direct a local authority to transfer an unaccompanied child out of their care and into Home Office accommodation.

6. TRAFFICKING

Unaccompanied children are not affected, but *accompanied* children (i.e. in families) will be affected if/when the Home Office brings into force provisions in the Act to cut off support (currently provided by the Salvation Army) from those who fall under the Act's scheme.

7. AGE ASSESSMENT

The following provisions of the Illegal Migration Act 2023 are not yet in force, although the government has just laid regulations that would allow the use of scientific methods of assessing age in the coming months (under the Nationality and Borders Act 2022).

Section 58 of the Illegal Migration Act 2023 introduces a regulation-making power to allow for an automatic assumption that a person is an adult if they refuse to undergo scientific methods of age assessment without good reason.

Section 57 of Illegal Migration Act 2023 states that for any person who meets or may meet the conditions for removal under section 2, where a decision on age is made by a 'relevant

authority' there will be no right of appeal against that decision (please note: the right of appeal against age decisions was introduced in the Nationality and Borders Act 2022 and is not actually in force yet anyway).

Decisions could still be challenged via judicial review but under section 57, this would not prevent the government from taking steps to remove the individual.

Also, under section 57 the court may now 'grant relief' only on the basis that decision was wrong in law, not wrong as a matter of fact. This overrules the 2009 Supreme Court judgment in *A v Croydon*, which made clear that it falls to the court to decide the age of the young person, not only determining whether they are a child or an adult, but also ascribing a date of birth).

FREQUENTLY ASKED QUESTIONS

Are local authorities' duties to support care leavers affected by the Act?

All duties set out by the Children Act 1989, including the duty to support young people through leaving care services, still stand. Local authorities' duty to support care leavers is not reduced by the Act.

Should local authorities seek more section 31 care orders for unaccompanied children?

Section 31 is unlikely to be the response or answer of local authorities because of the common practice of not seeking care orders for children age 16+ and the costs to local authorities. However, where a care order is appropriate for a child, it may significantly complicate any attempt by the SSHD to remove that child.

What information can the Home Office ask Local Authorities to disclose?

The legislation sets out that the information required is:

- information related to the accommodation and support provided; and
- Anything else specified in regulations.

The regulations have not yet been published.

What will happen to Albanian children and young people?

Albania has been added to the list of safe countries, so asylum claims by Albanian nationals must now be 'certified' unless the SSHD is satisfied that the claim is not 'clearly unfounded'. 'Certification' means that no appeal can be brought against the decision from within the UK. We are already seeing an increase in Albanian young people being removed where their asylum claim has been refused and certified by the Home Office.

If s.59 of the Act is brought fully into force, then asylum claims by Albanian nationals will be deemed inadmissible unless there are 'exceptional circumstances' which mean the Home Office should consider their claim. This means that the Home Office will not normally consider their asylum claim at all. If an Albanian claim were to be deemed inadmissible, then the person could be removed to Albania. As above, the Act does not exempt children from inadmissibility, and the Home Office retains the power to remove a child to a designated safe country such as Albania.

What are the implications of the Rwanda judgment?

The Supreme Court has unanimously agreed with the majority of the Court of Appeal that the government's plan to send asylum seekers to Rwanda for their claims to be determined there is unlawful. The court found that the plan breaches domestic law and multiple international conventions to which the UK is a party, due to serious shortcomings in the asylum system in Rwanda.

The UK can only remove asylum seekers back to their country of origin if they are from the list of designated safe countries (in section 80AA of the Nationality, Immigration and Asylum Act 2002) - presently, Albania, EEA States, and Switzerland. The Home Office is currently in the process of adding India and Georgia to this list as well. Although the Act enables the Home Office to remove asylum seekers to have their claims processed in a safe 'third' country, there are currently no active agreements with any safe 'third' countries to take asylum seekers from the UK, since Rwanda has been deemed unsafe by the courts.

The Government says it is considering next steps. In the meantime, it is difficult to see how the duty to remove can be brought into force while there is nowhere to send the asylum seekers who are arriving here.

FURTHER RESOURCES AND TRAINING

How can we support individual children affected by the Act?

Key points:

The importance of referring all children to good quality legal advice as soon as possible so that they can make arguments about why their claims should be considered in the UK.

The importance of social worker evidence around vulnerability and best interests to use in support of making these claims or challenging removal.

Consideration of the new Home Office powers around accommodation/removal should be taken into account when considering whether to apply for a care order for unaccompanied children.

The vital importance that local authorities do not rely on the significantly over 18 decisions made by the HO when children present or are referred to them given the serious consequences for children treated as adults, and importance of ensuring young people have access to legal advice to challenge any decisions that they are an adult.

The importance of proactive support and involvement in the immigration cases of the young people they support is going to be more essential than ever, when the process just got so much more complicated and given the lack of legal aid solicitors available. Social workers need to know what they can do within the immigration process to protect children (e.g. asking the Home Office for an extension of time when a young person gets a removal notice and they don't have a solicitor). This comes down to local authority leadership ensuring that anyone working with migrant young people in care receives regular mandatory training so that they have the knowledge needed to protect the children they are working with.

Given the drastically increased risk that children will go underground, especially Albanian children, it will become even more important that professionals are supported to build their knowledge and expertise around working with children at risk of going missing / exploited.

It is going to be even more important that the networks that support migrant young people are strengthened and get better at working together, so for example social care professionals working with local specialist charities who may be able build trust with the young person or support with referrals to legal aid solicitors.

It will become even more important that children are supported to have access to mental health support.

Legal challenges to the Illegal Migration Act 2023 and surrounding policy

1. Challenging the Home Office accommodating unaccompanied children in hotels

Following ECPAT's challenge, the High Court found that Kent County Council breached its Children Act 1989 duties by failing to accommodate and look after all unaccompanied children seeking asylum when notified of their arrival, as well as finding the Home Office to have acted unlawfully in routinely and systematically accommodating newly arrived unaccompanied children in hotels.

Impact:

- Ending hotel use: To stop the practice of unaccompanied children arriving in Kent being put in Home Office hotels and to reinforce the duties of local authorities to children in need in their areas under the Children Act 1989.
- Future Home Office accommodation powers: When/if the Home Office powers to accommodate unaccompanied children under the Illegal Migration Act 2023 are commenced, to be able to challenge the individual local authorities where children are on the basis of the judgment having made clear their duties.
- Future Home Office detention powers: When/if the Home Office powers to detain unaccompanied children under the Act are commenced, to similarly be able to challenge the local authorities where detention sites are based on their duties to children in need in their area.
- Judgment here: <https://www.judiciary.uk/wp-content/uploads/2023/07/ECPAT-v-Kent-Council-judgment-270723.pdf>

The decision also has the following retrospective impact for children and young people affected by the Home Office/local authority policies on hotel use - advice should be sought:

- Young people 18+ who would have been 13 weeks in care had they not been in a hotel and who are missing out on leaving care support
- Young people who are 18+ but would have been in care for fewer than 13 weeks (prior to turning 18) had they been in a hotel and are missing out on leaving care support.
- Children and young people who were in hotels could have a damages claim.
- Children and young people who suffered significant harm likewise may have a potential claim against Kent and/or the Home Office

2. Challenging the criminalisation of age-disputed young people arriving in the UK

A number of age-disputed young people have been prosecuted for criminal offences related to illegal entry and smuggling under the Nationality and Borders Act 2022 and are in adult prisons like HMP Elmley. The Home Office has routed them as adults and this age has then been accepted by the CPS and the criminal courts.

The cases are complex and young people have multiple legal representatives - community care for age issues and criminal representatives for the prosecution. There is poor practice in the criminal system and creates a number of issues for the young people. They will need good quality community care advice and criminal law advice.

3. Local authority perspectives on current and future challenges

There are increasing pressures on local authorities from:

- Increased numbers of referrals of unaccompanied children via the National Transfer Scheme especially with the closure of the hotels following the ECPAT UK judgment;
- Referrals of young people from adult hotels who were routed as adults by the Home Office at port;
- Self presentations.

Importance of local authorities including senior leadership holding the Home Office accountable for how the implementation of the Illegal Migration Act 2023 is compatible with the Children Act 1989.

Local authorities taking action

Third sector statement for local authorities on the Illegal Migration Act 2023

This resource provides further information on the impact of the Illegal Migration Act 2023 and what local authorities can do to challenge, prepare for, and mitigate the impact of the Act on local authorities and residents.

[Third Sector Statement for Local Authorities on the Illegal Migration Act 2023 – Kids In Need Of Defense UK.](#)

Special Interest Group

Attendees may be interested in joining a *Special Interest Group for Local Authority and NGO colleagues regarding children in care and care leavers with immigration issues*, co-chaired by Maya Pritchard at South London Refugee Association and Sarika Kohli at Derby City Council. As a member you would be invited to join quarterly meetings and will be added to a mailing list that will provide you with information to support your practice in relation to addressing the immigration needs of young people in care. We hope that networks like this will support practitioners in keeping up to date with, and understanding, possible changes to law following the Illegal Migration Act 2023.

If you would like to join this special interest group please email Maya Pritchard Maya@slr-a.org.uk

Immigration support pledge

The passing of the Illegal Migration Act 2023 means establishing best practice to support looked after children and care leavers with immigration issues is ever important. To enable local authorities to work towards best practice you are invited to adopt a pledge that has been developed by South London Refugee Association.

By adopting this pledge a local authority commits to:

- identify all looked-after children and care leavers with immigration and nationality issues;
- connect looked-after children and care leavers with good quality legal support as soon as possible;
- take a proactive and informed role in supporting looked after children and care leavers through any immigration applications and appeals;
- enable those who are eligible to apply for permanent status and British citizenship.

To support the implementation of the commitments in the immigration support pledge we have co-developed a learning package for local authorities which includes policy resources and guidance. To access these please follow this link to SLRA's website: [Immigration support pledge – SLRA \(slr-a.org.uk\)](https://www.slr-a.org.uk/immigration-support-pledge).

To find out more about adopting the pledge please contact Bettina Patel bettina@slr-a.org.uk