

ILPA policy paper

Child first, migrant second: Ensuring that *every* child matters

ILPA Immigration Law Practitioners' Association

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Child first, migrant second: Ensuring that every child matters

Heaven Crawley

with a foreword by Peggy Ray

February 2006

ILPA Immigration Law Practitioners' Association

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Policy and law correct at the time of writing, November 2005

The Immigration Law Practitioners' Association (ILPA)
is the UK's professional association of immigration lawyers,
advisers and academics practising or engaged in immigration,
asylum and nationality law.

ISBN 1 901833 12 7

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Registered in England and Wales. Reg No 2350422.

Design: Pat Kahn Printing: Russell Press

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Foreword

by Peggy Ray

As family lawyers who deal with children's cases are becoming more and more familiar with the concepts of a systemic approach to children's problems, it is timely that the lack of a multi-agency, co-ordinated approach to the migrant children in this country is brought forcefully and eloquently to the fore in this policy paper. A child migrant may be the subject of adult decision making by members of her family or others which not only places her in the complexities of the immigration system but which also exposes her to such significant harm which in any other context would trigger powerful child protection mechanisms, where the welfare principle is paramount. That the Home Office procedures are not sensitively or appropriately moderated to take into account the position of such a child, in the ways exposed in this paper, is shocking to read.

This policy paper deserves the widest possible dissemination among not only the social workers and lawyers dealing with migrant children within the immigration system, but lawyers and all professionals working in the child protection arena. When children are subject to care proceedings immigration issues are often seen as peripheral and there is a risk that the long term issues of the delivery of after care services are given scant attention when scrutinizing care plans before the court. Expertise and procedures must be developed and maintained to ensure children are not either sent back to an unsafe situation immediately or when they reach the age of 18 as a result of administrative lapse. The concerns raised by ILPA in relation to the lack of independent advocacy services to migrant children echoes similar concerns in relation to children subject to the child protection procedures thirty years ago. It is a sad fact that the politicisation of the issue of asylum seekers can lead to the special vulnerability of the children caught up within the immigration system being disregarded. In dealing with the application of immigration policy,

as in the consideration of child protection policies, each child must be 'borne in mind' as an individual child, with particular needs and experiences. To all of us privileged to live within a civilised society, each child, of whatever history or background, really must matter to us and the safeguarding of her welfare must be our priority.

Peggy Ray

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Acknowledgments

ILPA and the author would like to thank all those who were interviewed or provided information as part of the research for this paper including Chris Beddoe (ECPAT UK), Patricia Durr (Children's Society), Karen Goodman (RAP, formerly London Borough of Hillingdon), Mike Kaye (Anti-Slavery International), Nancy Kelley (Refugee Council, formerly Barnardo's and Chair of the Refugee Children's Consortium), Adrian Matthews (Childrens Legal Centre), Georgina Nunny (London Borough of Lewisham) and Jane Suffian (National Leaving Care Advisory Service at Rainer).

Thanks are also due to those who provided feedback on earlier drafts of this paper including Jane Coker (solicitor, immigration judge AIT), Nadine Finch (barrister), Dr Matthew Hodes (Imperial College London), Helen Johnson (Refugee Council), Alison Stanley (solicitor) and Sue Shutter (ILPA).

The conclusions and recommendations of this paper were discussed at an expert roundtable in November 2005. Many of those whose contribution is acknowledged above also participated in the roundtable. In addition we would like to thank Syd Bolton (Medical Foundation), Beverley Clarke (IND), Felicity Collier (BAAF), Kathryn Cronin (barrister), Alison Harvey (ILPA), Davinder Sidhu (LSC), Alison Venner-Jones (DfES) and Iain Walsh (IND) for their contribution to the discussion.

Susan Rowlands, General Secretary, ILPA, coordinated the project for ILPA with administrative support from Kit Eaves, Elizabeth White and Helen Williams.

ILPA is grateful to the Nuffield Foundation for funding this project.

List of acronyms

ADSS	Association of Directors of Social Services
AIT	Asylum and Immigration Tribunal (previously IAA)
ARC	Application registration card
BASW	British Association of Social Workers
BID	Bail for Immigration Detainees
CAFCASS	Children and Family Court Advisory and Support Service
CRAE	Children's Rights Alliance for England
CRC	United Nations Convention on the Rights of the Child
CSCI	Commission for Social Care Inspection
DCA	Department for Constitutional Affairs (formerly LCD)
DfES	Department for Education and Skills (formerly DfEE)
DL	Discretionary leave
DoH	Department of Health
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
ECHR	European Convention on Human Rights
ECM	Every Child Matters
HMIP	Her Majesty's Inspectorate of Prisons
HMIE	Her Majesty's Inspectorate of Education
IFSW	International Federation of Social Workers
ILPA	Immigration Law Practitioners' Association
IND	Immigration and Nationality Directorate of the Home Office

IRC	Immigration Removal Centre
LAC	Local Authority Circular
LCD	Lord Chancellor's Department (now DCA)
LCSB	Local Children Safeguarding Board
LSC	Legal Services Commission
NASS	National Asylum Support Service
RCC	Refugee Children's Consortium
RCPCH	Royal College of Paediatrics and Child Health
SCEP	Separated Children in Europe Programme
SSD	Social service department
UASC	Unaccompanied asylum seeking children

Background and aims

In November 2004, ILPA published its *Working with Children and Young People subject to Immigration Control: Guidelines for Best Practice*.¹ During the process of producing the guidelines, it became evident that there is a tension between law and policy designed to protect and support children in the UK – including through the major reorganisation of children’s social services associated with the *Every Child Matters* (ECM) framework – and the experiences of children who are subject to UK immigration control. These children appear to be excluded from that framework or, because of their marginalisation from mainstream processes, unable to benefit equitably from its provisions and objectives.

The growing tension between family law, policy and practice and immigration law, policy and practice is closely associated with the politicisation of asylum and immigration policy and the growing use of the welfare state as a tool for controlling immigration. The plethora of changes to asylum and immigration law and policy over recent years include measures aimed at reducing the number of asylum applications, decreasing the costs of supporting asylum seekers, and removing individuals and families from the UK who are considered to be at the end of the process (Home Office 1998, 2001 and 2005a). The experiences of children and young people who are subject to immigration control are very different from those of adults. Despite the fact that these children had little or no choice in the decisions that have led to their current situation, the asylum and immigration system stands out as having the least formal, specialised provision for children and young people.

¹ The guidelines are available at www.ilpa.org.uk/publications/ilpa_working_with_children.pdf

The aim of this paper is to examine the impact of recent changes in asylum and immigration law and practice on children subject to immigration control within the context of the ECM framework. This is particularly important and necessary because of the lack of explicit sharing of information across the two areas of policy and practice. Many of those working in asylum and immigration law are unaware of the broader context of children's law and policy that they can draw upon to ensure that these children are able to access the services and care to which they are entitled under the Children Act 1989 and Children Act 2004. At the same time, there is considerable confusion and misunderstanding across the social care profession about what recent changes to immigration policy and practice mean for the delivery of services and support to children and young people who are subject to immigration control. Good practice is found in some social service departments (SSDs), particularly among some specialised teams working with separated asylum seeking children. However recent developments, various legal challenges, as well as policy debates around whether the safeguarding provisions associated with the Children Act 2004 extend to children subject to immigration control have served only to increase confusion about the relationship between these two areas of policy and practice. Some social workers and other professionals assume that the provisions of the Children Act 1989 and Children Act 2004 do not apply to children subject to immigration control. This can result in a failure to deliver appropriate services and support.

This situation has been further exacerbated by the increasing expectation within central government that SSDs, and individual social workers, should play a role in new procedures for controlling immigration, for example by removing access to support and housing, by assessing the age of those that the Immigration and Nationality Directorate (IND) does not believe to be children, by providing information on the whereabouts of children whose application for asylum has been refused, and by potentially assisting with the process of removing separated children to countries from which they originate under Government plans to pilot returns. There is growing discomfort within the social work profession about the shifting role that social workers are being expected to play in relation to children who are subject to immigration control. This role does not sit comfortably with the ethics of the social work profession (Bolton 2003).

There are also concerns that because these children are treated as migrants first and foremost and children second, they may fall through the very gaps in protection and support that the ECM framework was intended to prevent.

This paper focuses on the experiences of four particular groups of children who are subject to immigration control, which are illustrative of these tensions:

- Policy and practice relating to separated asylum seeking children including disputes over age, the determination of asylum claims, and local authority care;
- The use of poverty and detention as levers for controlling families subject to immigration control with inevitable consequences for the children in those families;
- The difficulties associated with identifying and supporting trafficked children and young people in the current policy context; and
- The invisibility of privately fostered children who continue to fall through gaps in social service provision and support.

The paper provides an analysis of the issues facing each group of children in the current context and the barriers that currently prevent them from getting access to the support to which they are properly entitled under the Children Act 1989 and existing legal and policy framework. Each section also provides concrete recommendations for ensuring that these children are included within the ECM framework.

The analysis and recommendations in this paper are aimed primarily at those working in immigration-related fields – IND officials, policy makers, legal representatives and immigration judges – who routinely come into contact with children subject to immigration control, and for whom a knowledge of the broader policy context within which children’s services are provided is important for ensuring that children are able to access the care and protection to which they are properly entitled. The paper is also aimed at policy makers, judges, social workers, and other practitioners who come into contact with children – or the broader issues affecting children – on a daily basis in other areas of policy and practice. The analysis in this paper is intended to ensure that they deliver support and services appropriate to that child’s needs regardless of his or her immigration status.

SECTION 2

The *Every Child Matters* framework

Today marks a turning point in the way we protect, nurture and support children. In the past there has been a piecemeal approach to reform that has papered over the cracks but left children at risk. The tragic death of Victoria Climbié made us realise that we simply can't go on like this anymore...The Green Paper is titled 'Every Child Matters'. This is no hollow slogan. It is a commitment that is driving all my work and that of all of us involved in working with and for children.

*Charles Clarke MP, then Education Secretary (now Home Secretary), September 2003*¹

Eight year old Victoria Climbié died in February 2000 after months of sustained abuse at the hands of her private foster-carers. Following Victoria's death, the Home Office and the Department of Health invited Lord Laming of Tewin to chair an independent statutory review of the circumstances surrounding her murder and to make recommendations to prevent, as far as possible, similar cases arising in the future. The report of the inquiry team was published in January 2003, and makes over a hundred recommendations for action.² The report concluded that Victoria's death had been entirely preventable. Twelve key occasions were identified where services could have successfully intervened to prevent Victoria coming to further harm; in each case the opportunity was missed. The inquiry team identified systemic problems that had militated against successful intervention.

¹ Comments made on the publication of the Government's Green Paper *Every Child Matters*

² Available at www.victoria-climbié-inquiry.org.uk/finreport/report.pdf

These included: low standards of professional practice; an absence of a person or persons with accountability; poor managerial support for front line workers; and the failure to share information within and between agencies.

The Government's response to the report of the Victoria Climbié Enquiry was set out in two documents: *Keeping Children Safe* (DoH, Home Office, DfES 2003) and a Green Paper entitled *Every Child Matters* (DfES 2003). The Green Paper focused on four key themes:

- Increasing the focus on supporting families and carers;
- Ensuring necessary intervention takes place before children reach crisis point and protecting children from falling through the net;
- Addressing the underlying problems identified in the report into the death of Victoria Climbié, namely weak accountability and poor integration; and
- Ensuring that people working with children are valued, rewarded and trained.

The Green Paper prompted an unprecedented debate about services for children, young people and families, which culminated in *Every Child Matters: Next Steps* (DfES 2004). The framework provided through this document forms the basis of a new approach to providing services to children entitled *Every Child Matters; Change for Children*.³ The *Every Child Matters* (ECM) framework aims to bring about root-and-branch reform of children's services at every level to ensure that children and young people achieve five main outcomes. The Government's stated aim is for every child, whatever their background or their circumstances, to have the support they need to:

- **Be healthy** (physically, mentally, emotionally and sexually), to follow a healthy lifestyle and choose not to take illegal drugs;
- **Stay safe** from maltreatment, neglect, violence and sexual exploitation, accidental injury and death, bullying and discrimination, crime and anti-social behaviour in and out of school, and to have security, stability and be cared for;

³ Detailed information about this policy framework and its different components can be found at www.everychildmatters.gov.uk/

- **Enjoy and achieve through learning** by being ready for school, attending and enjoying school, achieving stretching national educational standards at primary and secondary school, achieving personal and social development and enjoying recreation;
- **Make a positive contribution to society** by engaging in decision making and supporting the community and environment, engaging in law abiding and positive behaviour in and out of school, developing positive relationships and choosing not to bully or discriminate, developing self-confidence and successfully dealing with significant life changes and challenges and developing enterprising behaviour; and
- **Achieve economic well-being** by engaging in further education, employment or training on leaving school, being ready for employment, living in decent homes and sustainable communities, having access to transport and material goods and living in households free from low income.

The ECM framework is intended to bring about 'whole system change', and has resulted in a comprehensive reorganization of children's services with wide-reaching implications for education, health, social services, voluntary and community organisations, and other agencies. Responsibility for children's social care policy work has moved from the Department of Health into the Department for Education and Skills, and a Ministerial position dedicated solely to Children, Young People and Families has been created for the first time. Many of the reforms proposed in *Every Child Matters* required amendments to statute. Consequently, a Children Bill was presented to Parliament in March 2004 and subsequently received Royal Assent. The Children Act 2004 provides the legal 'backbone' for the programme of reform.⁴

The ECM framework is widely regarded as a positive step forward in improving children's services. There is nonetheless considerable scepticism among professionals working with children about whether it will, in practice, deliver the changes that are needed to improve the quality of care and protection available to children. Some of these concerns are related to the overall programme of reform and the fact that the proposed changes are not properly resourced.

⁴ The full text of the Act is available at www.opsi.gov.uk/acts/acts2004/20040031.htm

Others relate to the perceived inability of the framework to deliver services to certain groups of children. Although explicit reassurance was given at the outset of the parliamentary process that the provisions of the Children Bill would apply to all children in the UK,⁵ Ministers have increasingly and repeatedly emphasised the need to prioritise immigration controls over the welfare of children subject to immigration control.⁶ This is reflected in the fact that the safeguarding duties in Section 11 of the Children Act 2004 do not extend to the IND, which in turn has been found by the second Joint Chief Inspectors' Report to undermine IND's ability to ensure that safeguards are taken into account in service decisions regarding children and their families (Joint Chief Inspectors 2005).⁷

The view that immigration controls take precedence over welfare considerations is not new. The UK's Reservation to the UN Convention on the Rights of the Child (CRC), which restricts the application of the principles of the CRC in the case of children and young people who are subject to immigration control,⁸ has been in place since the Convention was ratified in 1991

- ⁵ For example, according to Baroness Ashton, commenting on this point during Committee stage, '[the] wording of the Bill covers all children. There are no exceptions; noble Lords would not wish it otherwise, and neither would I'. See Hansard House of Lords, Vol.660 No. 77, 4 May 2004, Col. 1086 available at www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040504/text/40504-24.htm#column_1085
- ⁶ See, for example, comments made by the then Minister for Children, Young People and Families, at www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/16109.htm
- ⁷ The 2005 review was led by the Commission for Social Care Inspection and draws upon the individual and joint inspection activity of: Commission for Social Care Inspection; the Healthcare Commission; HM Inspectorate of Constabulary; HM Inspectorate of Probation; HM Inspectorate of Prisons; HM Crown Prosecution Service Inspectorate; HM Magistrates Inspectorate of Courts Administration; and the Office for Standards in Education
- ⁸ The Reservation states that: 'The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time'. Of the 192 signatories to the CRC, only three have entered declarations relating to the treatment of children who are non-nationals and only one has entered a Reservation.

The UK's Reservation to the CRC concerning immigration and nationality appears to legitimise unequal treatment of these vulnerable children by both central government and local service providers.

Joint Committee on Human Rights 2004, para 95

and has been widely criticised by both the international monitoring body for the CRC,⁹ and Parliamentary committees in the UK.

Although it only applies to those areas that relate specifically to immigration and nationality law, the Reservation has frequently been misinterpreted by professionals working with children as limiting the application of the provisions in the CRC to other aspects of a child's life. To this extent, the Reservation symbolises the tension between different areas of law and policy affecting children who are subject to immigration control in the UK.

Although the Reservation has existed for some time, the difference with the current approach is the extent to which local authorities and others responsible for providing support and protection to children and their families have been actively encouraged to exclude children subject to immigration control from both the provisions of the CRC and the Children Act 1989 and Children Act 2004. As a result, the two systems with which children subject to immigration control are most affected – social services and immigration – are increasingly at odds with one another. Because they have competing aims and objectives, each has tried to force the other to behave differently. The Home Office has attempted, in some cases successfully, to compel SSDs to act in particular ways towards this group of children, primarily through the use of financial constraints and levers for securing co-operation with new processes.

⁹ Committee on the Rights of the Child (2002) *Concluding Observations on the United Kingdom of Great Britain and Northern Ireland* Paragraph 47 and 48(g). In relation to the rights of asylum seeking and refugee children, the Committee criticised the Government stating that: 'The Committee is further concerned that...the ongoing reform of the asylum and immigration system fails to address the particular needs and rights of asylum-seeking children.' and recommended that the Government: 'address thoroughly the particular situation of children in the ongoing reform of the immigration and asylum system to bring it into line with the principles and provisions of the Convention'.

At the same time some SSDs have tried to ameliorate the worst effects on children by providing support within increasingly hostile practical and political contexts, or have been obliged to support these children as a result of legal challenges. This situation has caused difficulties for local authorities that are not properly reimbursed for these costs, and for individual children and their families who do not get the protection and support that they need.

These developments raise important questions about the extent to which SSDs can be expected to deliver on their obligations under child welfare law and at the same time play a role in controlling immigration. It is important to remember that the Children Act 2004 and ECM framework reinforce, rather than replace, the Children Act 1989. The key principles of the Children Act 1989 are set out in Annex 1. These principles include:

- An explicit acknowledgement that the welfare of the children is the paramount consideration in questions relating to the upbringing of a child;
- Recognition that delays in decision making are likely to prejudice the welfare of the child; and
- The underlying premise that wherever possible, children should be brought up and cared for within their own families, if necessary by providing help and assistance to parents to enable them to fulfil this role.

Given the context in which it was drafted, the ECM framework aims, at the most basic level, to ensure that children are healthy and stay safe. Both immigration services and SSDs have a responsibility for delivering this very basic objective to all children regardless of their immigration status. Children who are subject to immigration control are children first and foremost and therefore included within the provisions of the Children Acts 1989 and 2004. In this context the CRC provides a critical standard against which policy and practice towards children subject to immigration control must be assessed. Reflecting this, the reservation to the CRC should be removed and the immigration and asylum systems brought into line with its guiding principles.

SECTION 3

Children subject to immigration control

The vulnerability of children and young people subject to immigration control is an additional vulnerability to that experienced by all children. The number of children in the UK who are subject to immigration control is not known. It is widely believed that the number of children in this category has increased over recent years as a result of accelerating international mobility, ongoing and new international conflicts, and changes to asylum and immigration law which effectively place increasing numbers of people already in the UK liable to immigration control. A report of the Joint Chief Inspectors (2005) concludes that the lack of available information about the range of children in the UK who are subject to immigration control itself raises considerable concern about safeguarding arrangements.

There are various circumstances where children and young people are within the jurisdiction of the UK without a settled immigration status and/or in need of protection. Some children are subject to immigration control because their parents are seeking leave to remain or challenging a decision by the IND to remove them from the UK. Some of these children will have been born here; others will be seeking leave to remain or to challenge removal in their own right. In some cases children are brought into the UK for adoption and may be abandoned where the adoption order is refused or the arrangement fails. Some children are living in private fostering arrangements, of which the relevant local authority is not aware, or have been trafficked for labour or sexual exploitation or for the purpose of benefit fraud. Some children have fled to the UK either at their own instigation or at the wishes of their parent, guardians, or carers for safety and freedom from persecution, or for other reasons.

The UK, like other European countries, has seen an increase in the number of separated children arriving and claiming asylum over recent years. 'Separated children' is the term used in most countries to describe those children who are outside their country of origin and separated from their parents or legal or customary carer. In some cases they arrive on their own; in others they may be accompanied by an adult who is not their parent or legal or customary carer. Separated children are, by definition, children who have been deprived of their family environment. In 1999 IND reported that there were a total of 3,350 applications in the UK for asylum made by separated children. In 2002 the overall number recorded by IND had nearly doubled to 6,200 of which the majority (80%) of applications were made in country.¹ By 2004 the number of separated children seeking asylum fell dramatically to 2,990 cases (Home Office 2005b). Practitioners working with asylum seeking children also believe that the number of disputes over the age of those presenting as children has increased considerably over recent years. Data on the number of age disputed asylum applications was only made available for the first time by the Home Office in August 2005. This data shows that in 2004 a total of 2,345 asylum applicants presenting as children were disputed and treated as adults (Home Office 2005b). At the same time many other children are effectively separated from their parents but are not treated as unaccompanied because they arrive in the UK with someone who is not a parent or primary carer, for example, an older brother or sister, or an uncle. In addition, although some children *appear* to be accompanied on arrival in the UK, the adults with them are not necessarily able or appropriate to assume responsibility for them nor are they responsible for them in law. The Government's Green Paper *Every Child Matters* recognised that some of the children in greatest need are unaccompanied asylum seekers, who may have left their homes and communities in violent and traumatic circumstances and be in poor health (DfES 2002, para. 2.50).

Children also arrive with their families and come into contact with the asylum and immigration system as part of a family unit.

¹ It should be noted that this increase might have been partly attributable to changes in the way in which cases of separated children seeking asylum were recorded.

The majority of children arriving with their families present in London and Kent, near the main entry points to the UK, and in Croydon, where the IND is based. From 2000 onwards, NASS dispersed asylum seeking families needing accommodation to areas around the UK where housing was available, mainly in the Midlands and North of England. At the end of December 2004, 13,075 families were in receipt of NASS support. Of these families, 4,450 prefer to maintain links with their communities and have remained in London and the South East on a subsistence-only basis (Home Office 2005b).

In addition to those children who seek asylum in the UK, either on their own or with their families, this paper examines policy and practice relating to children who are trafficked and those who are in private fostering arrangements. Children in these two categories may not come into contact with the immigration authorities at all but may be in contact with other service providers who need to be alert to issues affecting these groups of children and know how to provide protection and appropriate services. Whilst the number of children who have been trafficked into the UK remains unclear, there is growing concern that the extent of this problem has not been fully recognised and that procedures for identifying trafficked children in need of support and protection are insufficient. At the same time there is growing concern about the extent to which children subject to immigration control are effectively hidden from view within private fostering arrangements. Some of these placements may put the child at risk.

SECTION 4

Separated asylum seeking children

4

Children who are separated from their parents or primary carers and who claim asylum in the UK struggle to negotiate an asylum system designed for adults and a child protection system focused on children who live in their own community within their own families. There is evidence that increasing numbers of children who arrive without accepted documentation have their age disputed by the Home Office and are treated as adults for the purposes of asylum determination and may be detained or even prosecuted. Even where a child's age is not disputed, it remains unlikely that his or her experiences will be properly considered under the terms of the 1951 UN Convention relating to the Status of Refugees ('Refugee Convention'). Many of these children also have difficulties accessing appropriate levels of local authority care and support.

Disputes over age

The issues facing separated children seeking asylum whose stated age is disputed by IND is of increasing concern to professionals working with asylum seekers. They have noted a significant increase in the number of children who state that they are under 18 years of age when they come into contact with the immigration authorities but are not accepted as such.¹ Home Office statistics on age disputed applications were published for the first time in 2005 and indicate that in 2004, 5,335 asylum applications were made by individuals who stated that they were less than 18 years of age. Of these, nearly half (44%) were age disputed and treated as adults

¹ This problem is not limited to separated children. Children who arrive with family members may also be age disputed, with implications for the credibility of the family's application and for the support and welfare that is made available to them. Because these children do not draw directly on social service resources they may never have their age formally assessed.

(Home Office 2005b). According to the Refugee Council Children's Panel ('the Children's Panel') more than half of the separated children that passed through their offices during 2004 were age disputed by the Home Office and/or a SSD.²

Disputes over age have very significant implications both for the way in which an individual's asylum application is dealt with and for that individual's ability to access services and support (including housing, education and welfare) and to be protected from abuse by others. If a child is incorrectly identified as an adult, he or she will not be entitled to the full protection of international law or be able to benefit from procedures for child protection and the principle of best interests will be undermined. In particular, a separated child whose age is disputed may be detained with adults in an immigration reception or removal centre (IRC),³ is unlikely to be provided with any kind of support and social care by social services or be able to access education and other training opportunities.⁴ The child may be dispersed to an area of the UK where he or she has no contacts or support, will not be subject to child protection procedures and will not be entitled to any leaving care services. A child whose age is disputed will also be treated as an adult for the purpose of asylum determination and may be subject to fast track determination procedures. Child-specific forms of persecution or reasons why it may be unsafe for a child in his or her country of origin will therefore not be taken into account when assessing the asylum claim. The fast tracking of age disputed cases can result in vulnerable children being returned to their countries of origin without the benefit of an in-country appeal and with no appropriate reception arrangements in place.

- ² As part of the process of determining whether a separated asylum seeking child is in need of services and should be supported, SSDs need first to determine whether or not that individual is indeed a child. As a result they have become increasingly involved in the process of age assessment.
- ³ There are no special detention facilities for age disputed separated children. They are held in immigration facilities with adults. In Oakington Reception Centre for example, there are 12 beds in each room, each one sharing one bathroom and a toilet
- ⁴ Where IND disputes the stated age, the words 'under 18 disputed' are then recorded on the Application Registration Card (ARC) in place of the stated date of birth. The ARC has to be presented in order to access services which are available to asylum seekers

There is a range of reasons why the age of an individual who claims to be a child is disputed. Sometimes the dispute arises because an adult claims to be a child because he or she believes that this will lead to better treatment or that he or she will be allowed to stay in the UK. At other times it arises because IND officials consider children to look or behave 'older' than they actually are. The fact that children have worked and taken on 'adult' responsibilities from an early age, the experiences and traumas associated with migration, differences in cultural norms, and some aspects of physical development, all contribute to the fact that children from other areas of the world may appear older than children brought up in a Western culture and context. Many children and young people arrive with false identity documents or no documents at all. A third of all births worldwide are not registered and many countries do not issue contemporaneous birth certificates. Birth dates are not important in some countries and cultures so that children and young people may not know their date of birth and be vague about when they were born. There may also be confusion over age because different calendars are used in some countries, for example, Iran and Sri Lanka. Converting from one calendar to another can be difficult. Mistakes are sometimes made and children or their interpreters can give the wrong date of birth.

IND policy in relation to relation to age disputed cases states that 'a claimant *must* be given the benefit of the doubt with regards to their age unless their physical appearance *strongly* suggests that they are aged eighteen or over' (IND 2005a emphasis in original).⁵ Where an applicant claims to be a child but his/her appearance strongly suggests that he/she is over 18, IND's policy is to treat the applicant as an adult and offer NASS support (if appropriate) until there is credible documentary or medical evidence to demonstrate the age claimed. These applications are flagged as 'disputed minors' and they are treated as adult cases throughout the asylum process. In practice the process of deciding whether individuals who claim to be under 18 years of age appears to be made on the basis of

⁵ See IND *Note on Unaccompanied Asylum Seeking Children* at www.ind.homeoffice.gov.uk/ind/en/home/applying/asylum_applications/unaccompanied_asylum.html and IND guidance on *Disputed Age Cases* (Third edition, August 2005) available at www.ind.homeoffice.gov.uk/ind/en/home/laws__policy/operational_processes/chapter_5_-_special_disputed_age_cases.html&harpid=2214

a rapid visual assessment that is not underpinned by any other expertise. Expert evidence and photocopied and original documentation supporting the child's stated age is frequently disregarded. This is despite recognition by the Royal College of Paediatrics and Child Health (RCPCH 1999) and individual medical experts that age assessment is a complex and difficult process requiring a thorough assessment of the social and cultural context from which a child originates alongside detailed medical and psychological observation.

Practitioners working with asylum seeking children whose age has been disputed are increasingly concerned that 15, 16 and 17 year old children are not given the benefit of the doubt and that they are treated as adults despite the fact that their appearance does not 'strongly suggest' that they are over 18 and that appearance alone is not a suitable basis for the assessment of age. They are concerned that the apparent increase in the number of age disputed cases is the result of an increasing propensity on the part of IND officials to dispute the age of those presenting as children and the inadequacy of current procedures for age assessment. This is reflected in recent evidence from Cambridgeshire Social Services, which indicates that nearly half of those whose age is disputed and who are assessed while detained at Oakington Immigration Reception Centre are under 18 years of age and should not be there at all (Crawley and Lester 2005).

Concerns about the consequences for children of disputes over age have resulted in a series of incremental measures intended to improve the process of age assessment. Hillingdon Social Services, for example, have produced their own *Best Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers* to help staff undertake the age assessment process in a more systematic way than previously. These guidelines and the accompanying assessment framework have now been adopted by a number of SSDs. Despite this, many of the difficult issues associated with procedures for age assessment and the overall approach towards individuals whose age is disputed but who are potentially children remain unresolved. Although the Children's Panel routinely refers all age disputed cases to SSDs in London for an assessment of an individual's age, the Home Office does not itself routinely ask SSDs to assess those whose stated age is disputed.

Outside London, there are less well-established mechanisms for this referral to be made by organisations and individuals who come into contact with such children. Where SSDs become involved in the assessment process, there is currently no statutory procedure or guidance issued to local authorities as to how to conduct an age assessment. Although many SSDs now use the best practice guidelines produced by Hillingdon, these guidelines do not necessarily result in best practice because their purpose is not properly understood and appropriate training and support is not provided to the social workers given responsibility for undertaking the assessment process. There appear to be wide discrepancies and inconsistencies in the procedures followed by different local authorities, and therefore in the outcomes for individual cases.

In part at least, this is due to the fact that SSDs do not have the resources or expertise to undertake the process of age assessment, which can be extremely time-consuming and difficult. In some cases there is little incentive for local authorities to identify individuals as children given that the authority will then be required to take responsibility for that child and for leaving care arrangements after he or she turns 18, often without adequate financial support from central government. Specific concern about the quality of age assessments undertaken by SSDs is reflected in several important recent legal rulings involving Merton Social Services⁶ and Enfield Social Services.⁷ Many local authorities are also concerned about the implications of their involvement in the process of age assessment for their subsequent relationship with a child if he or she is found to be in need. There is also evidence that even where SSDs assess an individual applicant to be a child this assessment is not always accepted by the Home Office or may not resolve the difficulties experienced by children in accessing appropriate services and support because application registration cards (ARCs) issued after December 2003 will display the word 'disputed' on the visible part of the ARC next to the claimed date of birth.⁸

⁶ *R (on the application of B) v London Borough of Merton* [2003] EWHC 1689

⁷ *C v The London Borough of Enfield* [2004] EWHC 2297

⁸ There is a procedure for getting a new ARC issued on request once the dispute over age has been resolved in the child's favour. It is not known whether this is happening in practice or even whether such requests are being made by legal representatives and social workers.

Determination of asylum claims

Children and young people suffer many of the same human rights abuses as adults, but may also be targeted simply because they are dependent and vulnerable. Children are tortured and mistreated by state officials; they are arbitrarily or unlawfully detained, often in appalling conditions. In some countries they are subjected to the death penalty. Countless thousands are killed or maimed in armed conflicts; many more have fled their homes and become refugees. Because children are 'easy targets', they are sometimes threatened, beaten, or raped in order to punish family members who are not so accessible. Children and young people forced by poverty or abuse to live on the streets are sometimes detained, attacked, and even killed in the name of 'social cleansing'. Many children and young people work in exploitative or hazardous jobs, or are the victims of child trafficking and sexual exploitation.

There is evidence that for those children who are accepted as being under 18 years of age, their specific experiences *as children* are not properly taken into account in the determination of asylum claims. Because the current asylum determination process is adult-focused, it often fails to detect a child's need for international protection from persecution. Regardless of their experiences, most separated asylum seeking children are only granted discretionary leave (DL), either for three years or up to their 18th birthday, or for 12 months if they come from a particular country.⁹ In 2004, 3,055 initial decisions were made on separated children who were aged 17 or under at the time of the initial decision. Only 2% of these children were recognised as refugees and granted asylum whilst nearly three quarters (72%) were granted a period of discretionary leave. 14% of all children were refused any kind of status. At the same time

⁹ Discretionary leave (DL) is time-limited permission to stay, granted where the Home Office does not accept that either refugee status or humanitarian protection is appropriate. DL is normally given for three years or until the child's 18th birthday, whichever is the shorter period. The period of DL may be shorter for separated asylum seeking children from 'white list' countries. In these cases a child who is refused asylum, who has no family to return to and where adequate reception arrangements cannot be established is usually granted a period of 12 months DL, or leave to his or her 18th birthday, whichever is the shorter period. For further information see IND's guidance on *Processing Claims from Children* (August 2005b)

the Government has been planning to introduce a scheme for the forced return of separated children whose asylum claims have been refused to countries that it considers to be safe. IND is currently in discussion with the authorities in Albania and Vietnam about the mechanism for delivering this. As yet no agreement has been reached to ensure that an individual child would always be returned to the safety of his or her family or other care arrangements appropriate for ensuring the child's long-term well being.

The chances of an error being made in a child's asylum case are high and are significantly increased by the fact that children currently have neither an independent guardian nor, in many cases, an appropriate legal representative. Separated children have the right to be legally represented throughout the process but often find it difficult to find a suitably trained and experienced legal representative.

Changes to legal aid provision – which are thought to have reduced both the quality and quantity of legal advice and representation available in asylum cases (BID and Asylum Aid 2005, GLA 2005) – have had a particular impact on separated children claiming asylum because the task of representing children is more complex and time-consuming. At the same time the Children's Panel is often misquoted as providing a guardianship type role for unaccompanied children in the UK. This is based on a misconception that the Panel provides a long-term service support and that every child is covered by the service. In reality, the Panel is only able to meet some of the needs, for some of its clients, some of the time. For example, in 2004 the Panel received 3,868 referrals and of those, 990 were allocated a named adviser.¹⁰ Although the Panel saw many more children through drop-in and surgery work, it does not have the capacity to provide named advisers to all children throughout the process. Moreover the role of the Panel is not a statutory one and, although the Home Office funds it, there is no obligation on SSDs to work together with the Panel's advisers or vice versa. The Panel has no mandate to report or make recommendations to either local authorities or the Home Office. It does not act as an 'appropriate adult' or litigation friend in legal proceedings.

¹⁰ Unpublished information provided by the Refugee Council

Many separated asylum seeking children have difficulty in securing a proper assessment of their experiences before they turn 18. Those granted a period of discretionary leave may currently apply for this to be varied or extended and such an application, if made shortly before their 18th birthday, is known as an in-time application. The young person remains lawfully in the UK (and can therefore continue to work, receive benefits and be provided with services under the 'leaving care' provisions of the Children Act 1989) until either the time limit for appealing has expired, or, where an appeal is brought, until the appeal has been finally determined. The Immigration, Asylum and Nationality Bill 2005 includes a number of provisions under the heading 'Appeals' that will potentially have a major impact on unaccompanied asylum seeking children reaching the age of 18.¹¹ Organisations working with separated children, including the RCC,¹² have expressed concern at the loss of substantive rights and the support implications of these proposals.

In addition children over the age of ten (i.e. the age of criminal responsibility in England, Wales and Northern Ireland) are, like adults, liable to prosecution under Section 2 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 if they fail to produce an 'immigration document' (i.e. a passport or a document which is designed to serve the same purpose as a passport) at a leave or asylum interview. While the numbers of children prosecuted are low,¹³ the potential vulnerability of those subject to prosecution is considerable since they are largely separated asylum seeking children who have recently arrived in the UK, often having been subject to the pressures of an agent/facilitator (or possibly even trafficker).

¹¹ The first draft of the Bill proposed the abolition of all in-country variation appeals. At the same time it amended Section 3C of the Immigration Act 1971 and proposed removing the current extension of leave while an appeal is pending. If the Bill were to be passed in this form it would mean that young people refused an extension of DL with no in-country right of appeal would become 'overstayers', which would preclude them from continuing to access further education, working, obtaining benefits or receiving support under the leaving care provisions of the Children Act 1989 while they exercise any further right of appeal.

¹² See Second Reading Briefing (July 2005) available at www.the-childrens-society.org.uk/media/pdf/RCCCommons2Rfinal.pdf

¹³ Home Office figures indicate that between implementation of Section 2 on 22 September 2004 and 2 July 2005, a total of 372 people had been arrested and charged under Section 2, of which 281 had been convicted. Among those convicted were 11 children, 10 of whom were age disputed by IND

Local authority care

The provision of support to destitute adult asylum seekers and their dependent children has, since April 2000, been the responsibility of NASS. Separated asylum seeking children (and other separated children), remain the responsibility of the local authority in the area in which they seek assistance. Although there has been a fall in the number of children who are treated as unaccompanied for the purpose of asylum determination, there are large numbers of separated asylum seeking children in the UK who are being cared for by SSDs mainly in the South East of England. In March 2005 the number of separated asylum seeking children supported by local authorities was estimated at around 6,000, of whom about three quarters were aged 16 or 17 years old (Home Office 2005b). These children come from a wide range of countries reflecting the international situation. They receive assistance as 'children in need' under Section 17, or are accommodated under Section 20 of the Children Act 1989. A Government grant reimburses only a proportion of costs to SSDs.¹⁴

It is important to recognise that assessing the needs of children who are subject to immigration control is a complex task, often restricted by a lack of available information about the child, especially where he or she is separated (Joint Chief Inspectors 2005). Nonetheless, there is evidence that in many cases the outcome of the assessment process is predetermined by whether a child is accompanied or unaccompanied, under or over 16 years of age, and what resources are available to support them. Very often assessments made under the *Framework for the Assessment of Children in Need and their Families* (DoH, Home Office and DfEE 2000)¹⁵

- ¹⁴ The Government accepts that the provision of services for all children and young people should be funded centrally and, in 1996, introduced a grant for unaccompanied asylum seeking children. Social service departments claim each year for the costs of services provided to each child and are reimbursed for these costs. The Home Office now administers this grant and issues guidance each year to local authorities advising them how to claim.
- ¹⁵ See DoH, Home Office and DfEE (2000). This framework has been developed which to provide a systematic way of analysing, understanding and recording what is happening to children and young people within their families and the wider context of the community in which they live. It should be used by all professionals and other staff who are involved in undertaking assessments of children in need and their families under the Children Act 1989

are compromised to make them fit practical circumstances, such as the availability and cost of placements.

In practice, therefore, assessments resulting in services being provided under Section 17 or Section 20 have come to mean specific and differing packages of entitlements for separated children. Section 20 brings with it a wide range of services and support. Children will often be placed with a foster carer or in a residential home and should have an allocated social worker and, if over 16, a personal adviser, a care or pathway plan and financial support (although this may not in fact be the case in practice). They will also be entitled to full leaving care services. Those provided for under Section 17 will not receive any of these services, apart from financial support and accommodation, which can be anything from supported lodgings or a bed and breakfast accommodation to a privately rented shared house or hostel. Many 16 and 17 year old separated asylum seeking children live in inappropriate placements with no adult to care for them and there is evidence that many are not receiving the level of support necessary to meet their needs (Audit Commission 2000).

The Department of Health clarified the policy relating to social services responsibilities on providing assistance to families of children in need and to separated children in June 2003 in a local authority circular.¹⁶ This guidance was issued in light of amendments to the Children Act 1989 by The Adoption and Children Act 2002,¹⁷ which mean that the provision of accommodation under Section 17 does not make a child 'looked after' (and hence entitled to a leaving care service). Importantly, the guidance makes explicit the presumption that a separated child who is in the UK without anyone who has parental responsibility for him or her should be accommodated

¹⁶ LAC (2003) 13 *Guidance on accommodating children in need and their families*, available at www.dh.gov.uk/PublicationsAndStatistics/LettersAndCirculars/LocalAuthorityCirculars/AllLocalAuthorityCirculars/LocalAuthorityCircularsArticle/fs/en?CONTENT_ID=4003946&chk=kx09kw

¹⁷ The amendment came into force on 7 November 2002.

under Section 20 of the Children Act 1989 and thus becomes 'looked after' with all that this entails.¹⁸

Despite this guidance many local authorities continued to provide assistance to separated children seeking asylum under Section 17 of the Children Act 1989 with the result that children who turned 18 were denied their subsequent entitlement to leaving care services and instead entered the NASS system and could be dispersed. This was litigated in a judicial review brought by four former separated children who had claimed asylum and who had been housed and assisted by the London Borough of Hillingdon until they were 18.¹⁹ They contended that the local authority owed them a continuing duty of care under the Children Act 1989 as amended by the (Leaving Care) Act 2000 as 'former relevant children'. The contention of the authority was that they had no such duty as they had only provided 'services' (including assistance with accommodation) under Section 17. In a decision that has become widely known as the 'Hillingdon judgement', the court held that the authority did have a duty to them as they had been eligible children whilst being assisted by Hillingdon and became former relevant children on reaching 18. The court did not accept that separated children requiring housing did not also require services. It also held that separated children who had no one with parental responsibility for them in the UK should be accommodated under Section 20 of the Children Act and therefore would become entitled to leaving care services. Any separated child assisted under Section 17 prior to 7 November 2002 was, for the purposes of leaving care provision, also a looked after child and entitled to such support. One of the consequences of the Hillingdon judgment is that once it is accepted that a separated child is a former relevant child, he or she will not be dispersed by NASS at 18 if he or she still has an extant asylum application.

¹⁸ The circular states that: 'Where a child has no parent or guardian in this country, perhaps because he has arrived alone seeking asylum, the presumption should be that he would fall under the scope of Section 20 and become looked after, unless the needs assessment reveals particular factors which would suggest that an alternative response would be more appropriate. While the needs assessment is carried out, he should be cared for under section 20.'

¹⁹ *Behre (and Others) v London Borough of Hillingdon* [2003] EWHC 2075 (Admin)

Instead NASS will reimburse the local authority to continue to support the child where he or she is presently living.²⁰

Although there is some evidence that policy and practice has changed as a result of the Hillingdon judgment, there remain inconsistencies in the services available for separated children aged 16–18 and support for over-18s who were not previously in care (Joint Chief Inspectors 2005). Indeed some local authorities have not implemented the law, as clarified by the Hillingdon judgment. This is partly due to broader problems and changes associated with children's services which has resulted in a lack of awareness and knowledge of the issues facing this group of children and the legal requirements that local authorities are under to provide appropriate support and care.

Social work with children subject to immigration control is an increasingly challenging and specialist role. Many practitioners identify immigration issues as an important area not currently addressed in core training and new issues are emerging that require a skilled response such as age assessment and responding to the needs of young people who have been trafficked for exploitation. For local authorities that do not have specialist teams or where specialist teams have been disbanded because of the drop in asylum applications made by separated children, providing these services can be very difficult. The reality for many local authorities outside the South East is that separated asylum seeking children are few in number and the lack of a critical mass itself inhibits the commissioning of appropriate services.

All of these problems are compounded by the lack of additional resources available to help SSDs provide for separated asylum seeking children, and by a broader context which pushes the needs of separated children down the already stretched list of priorities facing local authorities in delivering children's services. The Joint Chief Inspectors (2005) report that the complexity of funding arrangements for separated asylum seeking children means that strategic planning of services is harder for this group of children than for others. Although central Government has agreed to fund some of the increased costs of providing leaving care services

²⁰ For further information see the Children's Legal Centre (2004) and Refugee Council (2005)

associated with the Hillingdon judgment, the additional funds are intended to offset the costs arising to those local authorities with larger numbers of separated children seeking asylum; no payment is made to any local authority in respect of its first 44 eligible care leavers.²¹ Only around 20 local authorities meet this criterion. For any additional care leavers beyond the first 44, local authorities may claim a flat rate of £140 per week up to a maximum level, a figure that is widely regarded by SSDs as being insufficient to cover the costs of providing a full and comprehensive leaving care service.

In addition, as discussed in the previous section, there are proposals in the Immigration, Asylum and Nationality Bill 2005 which, if introduced, will have the effect of ending local authority support to separated asylum seeking children who have turned 18 as soon as any application for a further period of discretionary leave has been refused. Local authority care for separated asylum seeking children remains a concern for many practitioners working in this area.

Services for young people leaving care are improving, but many still live in poverty and isolation. There is a need to reassess the funding requirements for this very vulnerable group, and to create a fairer, less discriminatory service for young asylum seekers.

Voice for the Child in Care 2004, 72

²¹ DfES which administers the grant decided to focus the available resources on those local authorities with significant numbers of care leaver unaccompanied asylum seeking young people. Therefore at the time of writing only those authorities who support, on average throughout the 52 weeks of the year, 45 or more such care leavers will be eligible to receive payments, and only in respect of young people above the eligibility point of 44. See LAC (2004) 6 *Unaccompanied Asylum Seeking Children Leaving Care Costs: 2004–05* available at [www.dfes.gov.uk/childrenandfamilies/docs/CSSLAC\(2004\)6.pdf](http://www.dfes.gov.uk/childrenandfamilies/docs/CSSLAC(2004)6.pdf)

Ensuring that separated asylum seeking children matter

In the context of the ECM framework, it is important to identify concrete mechanisms through which to ensure that separated asylum seeking children matter and that they are able to be healthy, stay safe, enjoy and achieve, make a positive contribution and achieve economic well being. The mechanisms necessary to deliver these outcomes include appropriate and independent procedures for age assessment, child sensitive asylum decision making, access to specialised legal advice and representation, properly resourced local authority care and a system of guardianship which protects the best interests of children subject to immigration control and ensures that practitioners in different areas of policy and practice are aware of all issues affecting a child that need to be taken into account in making decisions about that child's future. The role of social services is very clearly to ensure that children are supported and protected under the Children Act 1989 and not to assist the Home Office with the delivery of measures for controlling immigration.

Procedures for age assessment

It is widely acknowledged that age assessment is difficult to do with certainty, particularly where it involves children who are aged between 15 and 18 years. Age assessment is a process, not a single event and the margin of error can sometimes be as much as five years on either side (RCPC 1999). No professional can determine age solely on the basis of the appearance of the applicant. In general, a professional must seek to elicit the general background of the applicant, including his or her family circumstances and history, educational background and activities during the previous few years. Ethnic and cultural information may also be important. Over recent years, SSDs have increasingly taken on responsibility for the process of age assessment. There is growing concern within many SSDs however, that social workers are not properly qualified or experienced to undertake age assessments, and that their involvement in this process consumes considerable time and resources that could better be spent on providing services to children. For SSDs already struggling financially to

meet the needs of separated asylum seeking children, the outcome of the process may also be influenced by considerations of the long-term implications for the department of assessing an individual as being under 18 years of age. Whilst it is appropriate for a SSD to determine whether an individual is in need, and therefore requires support, the specific issue of whether he or she is over 18 years of age is of greater interest and relevance to IND because this information is then used to inform the asylum process.

The difficulties of age assessment and the dangers of conflating different roles and responsibilities suggest the need for an entirely different approach to the issue of age dispute. IND policy is to give the claimant the benefit of the doubt unless their physical appearance strongly suggests that they are aged 18 or over. This should also be the case in practice. Where the benefit of the doubt is not given, access to legal advice and representation should be provided to ensure that a formal assessment of age is routinely undertaken and the child's application properly presented.²² No age disputed individual should be put through adult asylum procedures. Given the possible conflation of roles and resource implications involved in requiring social workers to undertake assessments of age which are then used in the immigration control process, there should be further detailed consideration of alternatives to current arrangements, for example through the use of an independent age assessment panel. ILPA has secured funding to undertake detailed in-depth research on the issues resulting from disputes over age and will be developing detailed recommendations on the most appropriate procedural framework for assessing age.

Child-sensitive asylum determination

Good initial decision-making is in the best interests of children. It is also in the interests of the asylum system more generally. The principle of best interests means that children and young people who are subject to immigration control need a timely resolution

²² It is notable that the highest number of individuals whose age is disputed and who are often subsequently found to be children is at Oakington Immigration Reception Centre where there is on-site legal advice provided by the Refugee Legal Centre and the Immigration Advisory Service.

to their case and certainty about the future. If the right decision is made, both the child and the local authority responsible for supporting and looking after that child are able to plan properly for the future. Unfortunately the evidence on outcomes for separated children in the asylum determination system over recent years suggests that efforts to speed up the decision making process have resulted in a situation where asylum applications made by children are not properly considered. Despite considerable evidence of child-specific persecution in many areas from which separated asylum seeking children come, very few separated children are granted refugee status. The majority of separated children are granted discretionary leave and their status remains uncertain until they turn 18.

There is an urgent need to establish a more child focused asylum system which includes procedures that take into consideration the broken narratives of children, the additional difficulties they have in expressing a coherent account of their experiences, and child-specific experiences of persecution. Policies and practices that constitute violations of the specific rights of the child may lead to situations that fall within the scope of the Refugee Convention. For example, there is considerable evidence of children and young people being recruited into the armed forces and militia from as young as ten years, and of children being forced into prostitution or child labour. These violations of human rights amount to 'serious harm'. In addition violations of human rights may be subjectively more serious when experienced by children and young people than when experienced by adults. For example, the circumstances of forced conscription into military service are very likely to constitute serious harm for children where they may not for adults. In examining the factual elements of the claim made by a child or young person, particular attention should always be given to the way in which the child or young person's age and status will have affected his or her experiences of persecution. The gender of the child or young person may also have particular consequences. For example, in some countries young girls may be expected to undergo female genital mutilation or forced marriage, whilst in others young boys may be more likely to be forcibly conscripted.

ILPA's best practice guidelines on working with children subject to immigration control set out in considerable detail the specific steps that can and should be taken to ensure that legal representatives and decision makers have the information needed to make a well-informed and proper decision about a child's protection needs (ILPA 2004). In August 2005 IND published new guidelines on processing applications from children (IND 2005b). The guidelines acknowledge the difficulties that children may have in establishing the credibility of their account and state that the benefit of the doubt should be applied more liberally than when dealing with an adult. However there is no detailed guidance for IND caseworkers on child-specific forms of persecution. Such guidance should be provided. In addition IND should ensure that accelerated asylum determination procedures are not applied to children and that children are not prosecuted under Section 2 of the 2004 Asylum and Immigration Act. No child should be returned to his or her country of origin unless and until it is clear that it is safe to do so, and there is evidence that he or she will be properly supported on return.

4

Legal advice and representation

In October 2002 the UN Committee on the Rights of the Child recommended that the UK Government 'carry out a review of the availability of legal representation and other independent advocacy to unaccompanied minors and other children in the immigration and asylum system.'²³ Although the LSC is currently considering the issue of legal advice and representation for separated children,²⁴ no formal review of the current system of provision has been undertaken to date, and there is growing evidence that separated children seeking asylum, including those whose age is disputed, are unable to secure access to the specialist legal advice needed to ensure that they are properly supported and receive a timely and well-considered decision of their asylum claim. There is clearly a pressing need for good quality legal advice and representation to be available for children attending screening and substantive asylum interviews and throughout the decision making process.

²³ *Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland* (October 2002), para. 48 (f)

²⁴ As indicated to stakeholders in September 2005.

This legal advice and representation can help to ensure that all aspects of the child's experiences are taken into account in the decision making process and that relevant medical and other evidence is made available to the decision maker.

All separated children seeking asylum – and indeed all children subject to immigration control – should be represented throughout all legal proceedings by specialised representatives. The role of a legal representative is to ensure that a child or young person is able to present all the information relevant to his or her immigration or asylum application. Acting for a child involves a high degree of commitment, expertise, knowledge and training. The legal representative should be present at all immigration interviews, should be skilled in advising and representing children and young people and, in asylum cases, should be aware of child specific forms of persecution. The specific role and duties of the legal representative are outlined in ILPA's best practice guidelines on working with children subject to immigration control (ILPA 2004, paras. 2.32 and 5.13–5.15) and in Annex 2.

Properly resourced local authority care

Article 18 (1) of the EU Directive on Minimum Standards for the Reception of Asylum Seekers of January 2003 states that the best interests of the child should be a primary consideration for member states when implementing the provisions of the Directive that involve children (European Council 2003). The only way to ensure that separated children receive the care and support to which they are legally entitled is through a needs-led system of support for all separated children subject to immigration control in which the local authority is responsible for the child's care and welfare.

The Children (Leaving Care) Act (2000) recognised and tried to remedy the imposition of 'abrupt transitions' on looked after children who were pushed out of care without proper preparation and before they were ready to leave. The Act also recognised that the interrupted education and other effects of poor care experiences requires that care leavers be supported beyond their 18th birthday. The consequences and effects for separated asylum seeking children are arguably even greater and therefore the leaving care duties imposed on local authorities are as important, if not more so, for this group of young people. It is therefore essential that

the leaving care entitlements of separated children under the Children (Leaving Care) Act 2004 be protected. Local authorities should continue to assume responsibility for separated children presenting in their area under the terms of the Children Act 1989. The nature of the support given by local authorities should be based on a full and careful needs assessment based on the *Framework for the Assessment of Children in Need and their Families*, conducted by a childcare professional, which includes assessment of physical and mental health and of educational needs. Local authorities will need increased resources from central government to assist them in meeting their legal obligations. The grant paid for the support of unaccompanied asylum seeking children should not distinguish between under and over 16 year olds and should meet in full the reasonable costs of their support, enabling local authorities to plan service provision properly. The costs of providing leaving care support should be reimbursed to all local authorities, regardless of the number of children they are responsible for.

Local authorities – working with the guardian and legal representative – should develop parallel or ‘twin-track’ pathway plans for separated asylum seeking children who have been given discretionary leave to remain in the UK until that time (Joint Chief Inspectors 2005). Indeed social workers need to plan for three possible outcomes for those turning 18 who do not have status beyond this age. The three possible outcomes are a grant of status and leave to remain in the UK, return to the country of origin or remaining in the UK without any status being granted.²⁵ This is known as ‘triple planning’ and should be part of their regular statutory planning through the care plan, pathway plan and review process (Save the Children 2005). ‘Triple planning’ will enable the authority – and the child – to plan for every eventuality, including a potential decision to return the young person from the UK to his or her country of origin. In order to deliver this, social workers will need to be provided with appropriate guidance and support on how to undertake and develop appropriate pathway plans realistically for young people who may have to leave the country (including, for example, what skills,

²⁵ According to Save the Children (2005), these so-called ‘end of line’ cases are the fastest-growing group of young people in social services care.

education and training would be most useful) and how to protect young people when all their appeals are exhausted, giving the broadest interpretation to the type of support they can be given to avoid a breach of their Convention rights.

Guardianship

A major weakness of the system for children involved in immigration proceedings is that decisions which necessarily go to the heart of a highly vulnerable child's welfare...are undertaken by unqualified administrative officers and beyond the scrutiny of the family courts, much better qualified to understand the welfare and protection issues involved. If any administrative process or court system could be said to need the advice and assistance of an independent legal guardian it is the immigration jurisdiction
Refugee Children's Consortium 2005, 3

There is no systematic provision of independent expert oversight of matters involving separated children who are subject to immigration control. Children may go unrepresented in their asylum application, may be placed in inappropriate accommodation during and after this time and may not understand the implications of the determination of their asylum application. In particular, the long-term solutions for each child may not be fully explored. Although it is the general duty of every local authority to safeguard and promote the welfare of children within its area who are in need, there are resource and other constraints on the level of care that they can provide for individual separated children and no automatic transfer of parental responsibility.²⁶ At the same time the Children's Panel has limited capacity to follow up the referrals that it makes and no powers to ensure that the wide range of bodies in contact with a child act in his or her best interests. This is despite the requirement of the EU Reception Directive that separated children should be provided with a guardian.²⁷

²⁶ It is only where a local authority has taken care proceedings or an emergency protection order under Section 44 of the Children Act that there will be any assumption of parental responsibility by it. Unrelated adults may obtain parental responsibility through residence, guardianship or adoption orders.

²⁷ See also Baldaccini (2005) for a discussion of the implications of Article 19 of the EU Reception Directive

Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation. Regular assessments shall be made by the appropriate authorities.

European Council 2003, Article 19 (1)

In this context a wide range of organisations represented under the umbrellas of the Separated Children in Europe Programme (SCEP)²⁸ and Refugee Children's Consortium (RCC)²⁹ have called for a formal system of guardianship to be established for children who are subject to immigration control, including separated asylum seeking children, children who have been trafficked and children in private fostering arrangements. The guardian would have a statutory role and would be appointed by a statutory body to safeguard the best interests of the child and provide a link between all those who may provide services to that child. The role of the guardian in the immigration context would be wider than that of a Children's Guardian within the CAFCASS system.³⁰ The guardian would be responsible for ensuring that the welfare needs of the child are properly safeguarded within the context of their status determination by the immigration authorities and the courts, and for ensuring that the support and care needs of this especially vulnerable group of children are met by all agencies charged with those functions. The guardian would be expected to intervene if public bodies acted in contravention of their legal duties towards the child, and if the legal representative did not fulfil his or her role.

²⁸ The Separated Children in Europe Programme (SCEP) was established in 1997 as a response to the rise in the number of separated children arriving in European countries and seeks to improve the situation of separated children through research, policy analysis and advocacy at the national and regional levels. It is a joint initiative of UNHCR and Save the Children.

²⁹ The Refugee Children's Consortium (RCC) is a group of NGOs who work 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 standards.

³⁰ See www.cafcass.gov.uk/English/Publications/information/TheRoleofCafcass.pdf

In order for a guardianship system for children who are subject to immigration control to be effective and workable, it should include the following features:

- A named guardian should be appointed to a child within a set number of days from the date that the child comes to the attention of any statutory authority (ie social services, IND, UKIS, police etc) and before any substantive steps are taken in the determination of his or her asylum or immigration application;
- A person appointed to act as a guardian to a child in immigration and asylum proceedings must be properly qualified, experienced and trained in the specific needs and circumstances of this particular group of children, and he or she must be monitored;
- The system must include a complaints procedure and provisions for a child to apply to a court to change the guardian appointed to him or her;
- The number of children for whom a guardian is responsible must be strictly limited. Whilst it is not envisaged that guardians would have regular day-to-day contact with children, they should be able to instruct other organisations to do so. They must be available to the child and easily contactable by him or her and have sufficient time to build a trusting relationship with him or her.

The system of guardianship could be run by an existing organisation, for example CAFCASS, a non-governmental organisation, an independent body, or it could be the responsibility of a new statutory body established to fulfil this role. Additional scoping work should be undertaken by the appropriate agencies and organisations to identify a best practice model of guardianship that is appropriate to the UK context.

SECTION 5

Asylum seeking children in families

Children who are in the UK as the members of families seeking asylum are increasingly subjected to government policy and practice that places the need to control immigration above the need to safeguard and protect the best interests of children. Government efforts to reduce asylum applications and prevent perceived abuse of the system over recent years have been closely associated with increased use of agents of the welfare state as a mechanism of immigration control. Whilst the use of the welfare system to control immigration is not new,¹ children living with their families have until recently been protected from its worst effects. At the same time policies to speed up asylum processing and remove asylum seekers who have been refused from the UK have clearly had a negative impact on asylum seeking children in families, not least because the decision making process fails to take into account the particular needs and vulnerability of this group (Crawley and Lester 2005).

5

Child poverty

There is extensive research which shows that growing up in poverty has adverse outcomes for children. It is also widely recognised that some groups of children are more at risk of poverty than others. For example, although children from minority ethnic households have varying rates of child poverty, overall they are more likely than children in white households to be poor (House of Commons 2004). The Government has committed itself to the eradication of child poverty 'within a generation' and the ECM framework includes a commitment to ensuring that children grow up in households free from low income in order to achieve economic well being as part of the five framework outcomes.

¹ For more information see Zetter et al (2003).

Children in asylum seeking and refugee families are among the poorest and most deprived children in the UK, for a number of reasons directly related to immigration policy and practice:

- The Government's view is that the chief cause of child poverty is unemployment and there is strong evidence to support this. Yet asylum seekers are not allowed to work to support themselves and their families whilst a decision is being made on their application for asylum;²
- The differential between financial support received by families seeking asylum from NASS and other families in receipt of income support has increased. Although children under 18 receive 100% of income support levels, their parents are entitled to only 70%, which means that the family as a whole receives less than the Government's set minimum income level;
- Families who are supported by NASS are unable to access other 'gateway benefits' that are available to other families on income support, including Disability Living Allowance;³
- Regulations, which came into force in June 2004, removed the right of asylum seekers to apply for a single additional payment, every six months, of £50 for essential 'living needs'⁴ (CRAE 2004);
- Although a single one-off payment of £300 may be paid to asylum seekers supported by NASS, to help with costs arising from the birth of a baby, low income families on income support can receive a maternity grant (also known as a Sure Start maternity grant) of £500; and

² Asylum seekers who were granted permission to work in the UK before 23 July 2002 are still allowed to work. Since that time asylum seekers have not been able to work or undertake vocational training in the UK until they have been given a positive decision on their case. After January 2005 the transposition of the EU Reception Directive into the Immigration Rules has enabled some conditional access to the labour market for asylum seekers who have been waiting for an initial decision for more than one year, where the delay is not attributable to the asylum seeker. For further information see Baldaccini (2005)

³ The only exception to this is free school meals

⁴ Regulation 4 of the Asylum Support (Amendment) (No 2) Regulations 2004. Single additional payments were originally introduced following criticism that NASS support was inadequate

- Although the Government accepts that bed and breakfast accommodation is very damaging to children,⁵ and has pledged that no homeless family with children should be placed in bed and breakfast accommodation, the definition of 'homeless' family refers only to families regarded as homeless under the Housing Act 1996 and does not apply to those seeking asylum in the UK.

In addition, there is evidence that refugee and asylum seeking children are under-represented in early years provision, including in Sure Start Children's Centres, early years education and childcare (Audit Commission 2000). There are many reasons for this including housing mobility and the impacts of dispersal, lack of knowledge about local services, poverty, cultural factors, and language barriers. Some asylum seeking children are not in education at all and many face barriers in securing school places. Even where families are given leave to remain in the UK, many then enter the general homeless families population and live transient lives, which cut them off from support networks, both formal and informal. The difficulties they face include accessing schools, social service support, nurseries and GPs, as well as being cut off from extended families and other community support.

Children in asylum seeking families do not benefit equitably from Government efforts to eradicate child poverty. Indeed it could be argued that child poverty is being utilised as a tool of immigration control. Nowhere is this approach more evident than in relation to Section 9 of the Asylum and Immigration Act 2004. Section 9 came into force on 1 December 2004 and extends the provisions in Section 54 and Schedule 3 of the Nationality, Immigration and Asylum Act 2002. Although this policy has not yet been rolled out and is only operating in a limited number of pilot areas,⁶ the Government now has the power to withdraw asylum support from asylum seeking families with dependent children if they cannot explain why they have not taken any practical steps to leave the UK voluntarily when their application has not been successful.

⁵ *Improving Standards of Accommodation for Homeless Households Placed in Temporary Accommodation Consultation Paper*, ODPM May 2003 para. 4.9

⁶ Section 9 is being piloted in three areas at the time of writing: Central/East London, Greater Manchester and West Yorkshire. For a full list of participating Local Authorities see Kelley and Meldgaard (2005)

If families are deprived of support, the children in those families (but not their parents) may need to be accommodated under Section 20 of the Children Act 1989. It falls to individual local authorities – and in particular individual housing and social service departments – to decide whether to implement the measure.

The provisions of Section 9 were fiercely debated during the passage of the Act (see, for example, House of Commons 2003). The stated purpose of the policy is to encourage the ‘voluntary’ return of families who have reached the end of the asylum determination process. According to the Home Office, the policy is not designed to make families destitute and children will only be separated from their parents and accommodated by a local authority to avoid them becoming destitute as a result of the actions of their parents. In other words the Government argues that responsibility for destitution – and therefore the need to accommodate children under Section 20 – lies with the parents.

The separation of children from their parents, even for short periods of time can result in life long emotional damage and many professionals working with children are concerned that Section 9 undermines the Children Act 1989 and places children’s health and development at risk. It also places social workers in an impossible ethical position. Under Section 17 of the Children Act 1989, local authorities have a duty to safeguard and promote the welfare of children living in their areas and to promote, wherever possible, their upbringing by their families. At the same time local authorities and others working in education and health have a duty under the Children Act 2004 to cooperate to improve the well being of children in their area (Section 11).

Article 9 of the United Nations Convention on the Rights of the Child states that children should only be removed from their families when it is in their best interests. Reflecting this, Cunningham and Tomlinson conclude that, ‘Section 9 flies in the face of the UK’s domestic and international human rights commitments. Moreover in flatly contradicting accepted childcare principles, Section 9 undermines the Labour Government’s stated ambition to ensure that ‘every child matters’ (2005: 253). It also undermines core principles of social work including the international requirements of the ethical code for social workers⁷ and the General Social Care Council’s *Code of Practice for Social Care Workers* published in 2002.⁸

Section 9 has been, and continues to be, widely criticised. The Commissioner for Human Rights has described it as 'inhumane' (Council of Europe 2005) and Peter Gilroy of Kent County Council and formerly Chair of the Association of Directors of Social Services (ADSS) Asylum Task Force as the 'most problematic' of the Government's proposals in the 2004 Act from a local government perspective (House of Commons 2003). Most recently Professor Al Aynsley-Green, Children's Commissioner for England, has expressed his concerns that State powers to remove children from their families should only be used where it is clear that this is in the best interests of the child and not simply to be tough on failed asylum applicants.

I believe that every child really does matter and that must include every child who is here going through the asylum process... I am especially concerned about the effect of asylum policy and the level of support offered to the children of families seeking asylum, particularly those facing the traumatic possibility of being separated from their parents and taken into care. It is vital to ensure that the state should only use its powers to take children away from their families where it is clear that it is the best thing to do for the child and not simply to be 'tough' on failed asylum applicants.

Professor Al Aynsley-Green, Children's Commissioner for England, 2005

The British Association of Social Workers (BASW) similarly deplores the policy that it says will result in enforced homelessness. A group of local authorities – ten in Greater Manchester and one in Lancashire – have recently demanded an urgent review of Section 9 legislation.

⁷ *The Ethics of Social Work: Principles and Standards* was adopted by the International Federation of Social Workers (IFSW) at its General Meeting in Colombo, Sri Lanka, in July 1994. It consists of two documents, *The International Declaration of Ethical Principles of Social Work*, and *International Ethical Standards for Social Workers*. The International Declaration of Ethical Principles 'assumes that both member associations of the IFSW and their constituent members adhere to the principles formulated therein'. The British Association of Social Workers (BASW), as a member association of the IFSW, subscribes to the principles and standards set out by the IFSW in these documents.

⁸ Available at www.gssc.org.uk/NR/rdonlyres/8E693C62-9B17-48E1-A806-3F6F280354FD/0/Codes_of_Practice.doc

Ten councils in Yorkshire and Humberside have also expressed 'grave concerns' about the measures to the Home Office. All the councils in the areas where Section 9 is being piloted have now publicly criticised it.⁹

It is inhumane to withdraw all means of basic support from children and their families rendering them destitute. This brutal power is not only an infringement on the human rights of children and families but also calls into question our standing in the international community given our commitment and obligations as a nation state to the Human Rights Act 1998 and the European Convention on Human Rights. Furthermore, the possibility of children's social services removing children from their families as a result of Section 9 is incompatible with UK childcare legislation which upholds the fundamental right of all children to live with and be cared for by their parents.

*BASW statement on the implementation of Section 9 of the Asylum and Immigration Act 2004, August 2005*¹⁰

The concerns expressed by local authorities are reflected in research on the impact on families of Section 9 undertaken by Barnardos (Kelley and Meldgaard 2005). All of the 33 authorities interviewed as part of the research considered that Section 9 is wholly incompatible with the Children Act 1989, and some fear Section 9 will damage the welfare principle and child centred practice more generally. This evidence also suggests that local authority staff responsible for working with families whose support has been withdrawn may not have the necessary training or experience to balance child welfare and human rights considerations alongside the imperatives of immigration control.

⁹ 'Councils unite to slam asylum policy', *Community Care* 19 August 2005, available at www.communitycare.co.uk/Articles/2005/08/19/50641/Councils+unite+to+slam+asylum+policy.html?key=SECTION

¹⁰ Available at www.basw.co.uk/articles.php?articleId=344

Detention

It is estimated that around 2,000 children are detained with their families every year for the purpose of immigration control (Crawley and Lester 2005). Current UK policy and practice means that children subject to immigration control can and do remain in detention for lengthy periods. Over recent years a number of organisations including UN Committee on the Rights of the Child (2002), BID (Cole 2003) and Amnesty International (2005) have expressed concerns about the detention of children in the UK for the purpose of immigration control.

The detention of children for the purpose of immigration control has been one of the major concerns in a number of inspections by Her Majesty's Chief Inspector of Prisons (HMIP 2004, 2005a, 2005b, 2005c, 2005d) and Her Majesty's Chief Inspector of Education (HMIE 2003). HMIP has expressed serious concerns about conditions for children in immigration facilities and has recommended that the detention of children should be an exceptional measure and for very short periods – no more than a matter of days (HMIP 2002). In December 2003, the Government accepted the recommendation of an earlier inspection report, that there should be an independent assessment of the welfare, developmental and educational needs of each detained child and that this assessment should be used to inform decisions on detention and its continuation. The Government proposed that welfare assessments would be introduced initially at Dungavel, where they would take place 21 days after a child was detained, and then rolled out to reception and removal centres in England, where detained children would have welfare assessments after 28 days detention. Despite this commitment, a system for welfare assessments is not yet in place and HMIP has been particularly critical of the failure to introduce welfare assessments for children in detention. The recent reports of inspections of Dungavel and Tinsley House Immigration Removal Centres (HMIP 2005b, 2005c) stress that no progress has been made in relation to an independent assessment of the welfare and developmental needs of children and that internal procedures laid down for detaining children are not being followed. This is reflected in the concerns expressed by Joint Chief Inspectors in their second report on measures to safeguard children in the UK context.

The Immigration and Nationality Directorate has not issued detailed guidance or procedures setting out the care regime for children in immigration removal centres (equivalent to the relevant Prison Service Order), nor has it ensured that appropriate child protection systems and links are in place, or that independent assessments are made about the welfare and developmental needs of each child. There are no effective protocols with relevant local agencies that have responsibilities for detained children under the Children Act 1989 and related legislation. Both of these features are essential to provide a framework for the consistent safeguarding and care of children in immigration removal centres.

Joint Chief Inspectors 2005, 99

Concern about the impacts of detention on children is related not only to the condition of detention itself but also the process by which children come to be detained and the mechanisms for their release. The effectiveness of these processes clearly has implications for whether children are detained and the length of their detention. Some of these concerns relate to the decision making process itself. As is the case with separated children seeking asylum, there is evidence that some applications for asylum made by family members are determined without addressing or considering the experiences of the children in the families concerned. Very few children in families have their narratives explored or considered by the Home Office and they are likely simply to be included in the family's application even though they may have their own experiences of persecution.

There are also significant concerns about the effectiveness of existing review procedures for ensuring that the detention of children is not prolonged. There is evidence that immigration-related issues dominate the review process and that the welfare of children is not a key consideration in the continuing decision to detain (Crawley and Lester 2005). For children held with their families in immigration detention, there has been no legal decision equivalent to the Howard League judgment about the application of children's welfare or human rights legislation

(Joint Chief Inspectors 2005).¹¹ Reviews of the decision to continue to detain a family are not informed by the experience of staff in immigration removal centres (IRCs) who are involved in the direct care of children. These problems are exacerbated by the lack of access to good quality legal advice and representation, which undermines the effectiveness of bail – for which there is no automatic right – as a mechanism for safeguarding children who have been detained. In addition there are no effective safeguards for ensuring that children are not subject to abuse while in detention or when removed from the UK with their abuser. The Joint Chief Inspectors (2005) have concluded that even basic child protection procedures are not currently being followed in many immigration detention centres, a finding reflected in research undertaken by others (see, for example, Cole 2003; Amnesty International 2005; Crawley and Lester 2005).

The issues associated with detention raise serious questions about the extent to which the welfare of these children can be safeguarded within the ECM framework. Section 11 of the Children Act 2004 places a duty on key people and bodies to make arrangements to ensure that their functions are discharged with regard to the need to safeguard and promote the welfare of children. The duty does not give agencies any new functions, nor does it over-ride their existing functions. It simply requires them to carry out their existing functions in a way that takes into account the need to safeguard and promote the welfare of children. The Immigration Service (as well as NASS) is excluded from the new duties under Section 11 to safeguard children's well being and from the institutional arrangements – most notably Local Children Safeguarding Boards – designed to achieve that purpose. The Joint Committee on Human Rights (2004) has expressed its concern and disappointment about this exclusion, particularly given the otherwise exhaustive list of those to whom the new duty applies, including for examples, detention facilities for children who are not subject to immigration control. The Refugee Children's Consortium and others share these concerns.

¹¹ In 2002, a landmark judgment in an action brought by the Howard League for Penal Reform ruled that children in prison are owed the same duties by local authorities under children and human rights legislation as if they were living in the community, subject to the requirements of imprisonment. See *R (on the application of the Howard League for Penal Reform) vs. Secretary of State for Home Affairs and others* (Admin) 29 November 2002

Ensuring that asylum seeking children in families matter

It is important to identify concrete mechanisms to ensure that asylum seeking children in families are seen to matter within the context of the ECM framework. The mechanisms necessary to ensure this include parity in the welfare support and benefits available to asylum seeking families and changes to Section 9 of the 2004 Asylum and Immigration Act, as well as proper consideration of alternatives to the detention of children for the purpose of immigration control and of how to ensure that the welfare of children who are detained with their families is properly safeguarded. As with all of the issues affecting children subject to immigration control that are addressed in this paper, the role of social services is very clearly to ensure that children are supported and protected under the Children Act 1989 and the Children Act 2004 and not to assist the Home Office with the delivery of measures for controlling immigration.

Welfare and support

It is clear that without parity in the level of welfare and support provided to children who are in asylum seeking families (including income support and access to gateway benefits), this group of children will be unable to achieve economic well being which is one of the five intended outcomes of the ECM framework. Income support levels in the UK currently represent the minimum amount that is needed to live on. Asylum seeking families with children are currently expected to live on considerably less than this. Not only does this have long-term implications for the ability of these children to stay healthy and make a positive contribution in the future, but it also undermines the overall goal of eradicating child poverty in the UK. All children in the UK should be treated in the same way and should have access to the same levels of welfare and support regardless of their immigration status. The current Immigration, Asylum and Nationality Bill provides an opportunity to amend the legislation and remove the provisions of Section 9 as these relate to asylum seeking families.

Alternatives to detention

Children should not be detained for the purpose of immigration control because of the negative physical, mental and educational consequences of detention. This includes the detention of children as part of fast track or accelerated procedures for asylum determination. The detention of children is not compatible with the principles and provisions of the UN Convention on the Rights of the Child. The best interests of children and young people should be the paramount consideration.

Alternatives should be developed for ensuring compliance where this is considered necessary. The Home Office should pilot a system of incentivised compliance based on the Assisted Appearance Programme in the United States and a similar system in Sweden. These approaches provide a combination of: freedom from detention; a graduated scale of supervision; individualised needs and risk assessment, and support, primarily through provision of information and legal advice; and legal representation from the beginning of the asylum determination process (see also Crawley and Lester 2005).

For those children who are detained with their families, the priority should be to ensure that there is an independent assessment of the welfare, educational and developmental needs of each child within a matter of days. This information should inform decisions about the necessity and impact of continued detention and should be collected on a regular basis, including from those members of staff in closest contact with these children. The placement of social workers in immigration removal centres – an approach that is currently being developed in relation to families held in Yarl's Wood IRC – is not an adequate mechanism for meeting the welfare needs of children who are detained. Neither is it a satisfactory alternative to formal and independent welfare assessments being undertaken as recommend by Her Majesty's Chief Inspector of Prisons and agreed to in principle by the Home Office. Social workers are unable to provide a good service to children who are detained because the setting itself undermines this objective and negates good practice.

At the same time all families with children who are detained must have access to free legal advice and representation.

Legal representatives should advise immediately on temporary release, admission, and bail and any application for bail involving children should be listed immediately. It will be necessary to develop the capacity of lawyers to take civil actions against the authorities where children are detained unnecessarily and/or without proper safeguards in place.

It is also important to recognise that although immigration agencies are excluded from the duty under Section 11 of the Children Act 2004, all children, regardless of their immigration status, are covered by the provisions of the Children Act 2004. The Children Act 2004 imposes a general duty of care on all professionals who come into contact with children. In this context the Joint Chief Inspectors have concluded that 'it would be reasonable to suggest that these children have the same entitlements as the Howard League judgment determined for children in prison custody' (Joint Chief Inspectors 2005: 104). All children and young people who are subject to immigration control are owed duties for their safeguarding and promotion of their welfare. Immigration Service staff working in immigration removal centres will need to be made fully aware of this through the delivery of appropriate guidance and training. At the same time Local Safeguarding Children Boards (LSBCs) should be encouraged to include representatives from the Immigration Service and NASS where appropriate, for example if the local authority area includes a port of entry or immigration removal facility. Although these agencies are not explicitly named in the Children Act 2004, the failure to include them will result in gaps in the ability of the ECM framework to protect and safeguard all children. Indeed Section 13 of the Act places a duty on the children's services authority to ensure that the LSBCs include representatives of relevant persons and bodies as the authority considers should be represented on it.¹²

¹² Relevant persons are defined as 'persons and bodies of any nature exercising functions or engaged in activities relating to children in the area of the authority in question.'

SECTION 6

Trafficked children and young people

Under the Children Act 1989, children should be safe and protected by effective intervention if they are in danger. This principle is reinforced in the safeguarding principles associated with the ECM framework and the Children Act 2004. This is clearly not possible if the authorities do not know about children's presence in the UK because they have been trafficked into the country.

Scale of the problem

Human trafficking for sexual exploitation and other forms of forced labour is one of the fastest growing areas of international criminal activity although this phenomenon has only recently begun to receive significant public attention (Bump and Duncan 2003). 'Trafficking' means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, or abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments of benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Trafficking and smuggling is not the same thing and whilst the distinction between them is not always clear, it is important that the two are not confused. Smuggling refers to the facilitation of illegal entry for a fee paid to an agent. Trafficking refers to the movement of people for exploitation. Traffickers use violence, threats and other forms of coercion to force their victims to work against their will. They may also restrict their victims' freedom of movement, force them to work long hours in dangerous conditions and withhold payment. Trafficking involves the threat or use of violence, deception and/or coercion to the victim of trafficking or someone close to them, so that the person is forced to submit to exploitation.

It is important to acknowledge that the evidence about trafficking is limited and that there is a lack of specific information on the extent to which children are trafficked into, and through, the UK. The exploitation of victims through trafficking is, by its nature, not readily visible. The only substantial research into and through the UK is that undertaken by ECPAT UK (Somerset 2001, 2004). Most of the children described in these studies were trafficked for domestic work or for the purpose of sexual exploitation, but there were also cases of trafficking for benefit fraud, restaurant work and involvement in illegal activities. Those trafficked to the UK for sexual exploitation and domestic labour includes boys as well as girls and young people with disabilities or learning difficulties. Children and young people who are trafficked enter the UK through a variety of different mechanisms. These include:

- Separated children and young people who are told to ask for asylum on arrival in the country. They are placed in care and at a later date are removed or abducted by their traffickers. Often the children make contact with the traffickers as they have been instructed to do;
- Children and young people who enter the country with adults who are, or purport to be, parents or family members, or are brought into the country on some other basis therefore do not come into contact with social services or any other agencies and are then exploited by these adults; and
- Children and young people who are separated from their parents or carers when they arrive in the UK and are collected by an adult (sometimes loosely referred to as a 'sponsor') who claims responsibility for them and exploits them.

Whatever the circumstances of their arrival, trafficked children are extremely vulnerable and it is the responsibility of the professionals who come into contact with them to provide appropriate support and protection. There is evidence that because of the limited information available regarding the scale of the problem in the UK context, many of those coming into contact with these children – including immigration officers, social workers and legal representatives – do not identify them as actual or potential victims of trafficking. Nor do these professionals recognise such children as having particular safeguarding and welfare needs.

Identification issues

One of the biggest problems in understanding the extent and impacts of child trafficking into, or through, the UK stems from the difficulties associated with identifying actual or potential victims. The Government's own *Crime Reduction Toolkit on Trafficking of People*¹ acknowledges that the victims of trafficking are likely to be suffering from extensive fears and worries, and are likely to be mistrustful of the police. Trafficked children and young people are highly unlikely to reveal what has happened to them when they initially come into contact with the authorities or other professionals. A number of additional factors may particularly affect the willingness of trafficked children and young people to discuss their experiences. These include:

- Fear of retaliation from traffickers against themselves or their families;
- Concern about the reaction of their families when it is discovered that the child or young person has not earned the anticipated income or that he or she fled from the trafficker;
- An unwillingness to discuss what has happened to them because of trauma or shame;
- Concern about how their family, friends and the community will react if they find out they have been working as prostitutes or were sexually abused; and
- A distrust of authorities in the UK and abroad and a fear that they will be prosecuted or deported.

There may also be difficulties in determining the age of some trafficked children. Often they have been told to lie about their age by the traffickers (claiming to be either older or younger than they are, sometimes for reasons unrelated to the trafficking). Many trafficked children and young people will be without documentation that can confirm their identity. Identifying children who are victims of trafficking appears to be a major problem even in those countries with legislation that aims to protect trafficking victims. In the US, for example, only a small number of children have been certified as being victims of trafficking

¹ Available at www.crimereduction.gov.uk/toolkits/tp00.htm

(and therefore eligible for protection and assistance) (Bump and Duncan 2003).² This is despite the existence of the Trafficking Victims Protection Act 2000, which makes adult and child victims of trafficking eligible for a number of different services and benefits regardless of their immigration status.

Given that trafficking victims may be unwilling to discuss their experiences with immigration officials with whom they come into contact, other professionals – in particular, social workers and legal representatives – have an important role to play in identifying children who have been trafficked. Although local authority staff are often amongst the first to be confronted with the consequences of trafficking, the current framework used for assessing children in need does not include specific reference to the risk factors affecting this group of children (DoH, Home Office and DfEE 2002). Neither are these issues addressed in the Integrated Assessment Framework or in the general training of professionals using this or similar frameworks in assessment interviews. Although 26 of the 33 councils in London that were interviewed as part of the ECPAT research reported concerns about trafficked children, none had any guidance explaining the issue or what to do if staff had concerns about a child. Some social workers do not know what trafficking is, while others wrongly believe that there is no need to investigate relationships between children and their supposed relatives or sponsors because they think that immigration services carry out such checks (Somerset 2004). These findings were confirmed in the second report of the Joint Chief Inspectors (2005) which found that some local authorities are less familiar with issues of trafficking – and therefore how to identify potential victims – than others.

² For example, each year immigration officials apprehend approximately 100,000 unaccompanied children at US borders. Ninety-five percent of these children voluntarily chose to return immediately to their home countries when faced with the alternative of being taken into US custody. As Bump and Duncan (2003) suggest, it seems likely that a proportion of those children who return and of the 5,000 who are detained annually are unidentified victims of trafficking.

Lack of support

There is evidence of worrying shortcomings amongst agencies in the UK in effectively tackling trafficking, and a lack of basic knowledge about the issue particularly among social service providers. Currently the response from social services, police and the immigration authorities is at best piecemeal. There is no special assistance on offer for children and no safe house providing specialist care and protection for children in the UK. Without this special protection children remain at risk even whilst in the care of SSDs.

The European Convention on Action Against Trafficking in Human Beings,³ which was opened for ratification in May 2005, aims to prevent and combat trafficking in human beings, to protect the human rights of the victims of trafficking and to provide a comprehensive framework for the protection and assistance of victims and witnesses, also taking gender equality aspects into consideration, as well as to ensure effective investigation and prosecution. It also aims to promote international cooperation on action against trafficking in human beings. The Convention expands the scope of the UN definition of trafficking (set out in the Palermo Protocol) to expressly include internal trafficking within the borders of one state and trafficking not necessarily involving organized criminal groups. It provides a framework for the enhanced protection of the human rights of trafficked persons by providing for minimum levels of support and increased protection for victims. The Convention would give temporary residence permits to victims endangered by return to their home countries and to those who assist with prosecutions.

Given the focus of this paper it is worth noting that there are specific references to the experiences of children who are trafficked throughout the European Convention on Action Against Trafficking. For example, there is a presumption that a child should be accepted as a child where his or her age is uncertain and accorded special measures pending verification, and a requirement for representation of all unaccompanied children who are identified as trafficking victims by a legal guardian, organization or authority who should act in the best interests of the child (Article 10).

³ Council of Europe CM(2005)32 Addendum 1 final (May 2005)

According to Article 14 (2) of the Convention, a residence permit for child victims, when legally necessary, should be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions. At the time of writing the UK has not ratified the Convention.

Ensuring that trafficked children matter

One of the basic principles of the ECM framework is that children should be kept safe from maltreatment, neglect, violence and sexual exploitation and, correspondingly, that they should be provided with security, stability and be cared for. The failure to protect children who have been trafficked from physical and mental harm, and to provide them with security and support where they are identified, represents a failure of the most fundamental objectives of the current framework and profoundly undermines the principle that every child matters. Concrete steps are therefore needed to ensure that there are improvements in the mechanisms for identifying victims of trafficking, for providing specialist support and security, and for ensuring a multi-agency approach that provides these children with protection under the Children Act 2004.

Identifying victims of trafficking

The process of identifying children who are actual or potential victims of trafficking is the most urgent issue agencies face.⁴ Reflecting this, the Metropolitan Police and Immigration Service, together with other government welfare agencies and the NSPCC, recently monitored the arrival of unaccompanied children at London's Heathrow Airport, the country's busiest entry port. According to the report of that exercise – known as Operation Paladin Child – 1,738 children arrived alone from non-EU countries between August and November 2003, the majority of whom were travelling legitimately for education or holidays. A small number of children gave 'grave cause for concern' and police were subsequently unable to locate 12 of the children (Metropolitan Police et al, 2004).

⁴ Separated children who enter the asylum system are most likely to be identified as victims of trafficking, because of their contact with legal representatives and social services

The main difficulty with this evidence however is that although it provides an insight into the wide range of circumstances under which separated or unaccompanied children enter the UK, it tells us very little about trafficking: neither child protection concerns nor disappearance are verification that trafficking has occurred.

This evidence suggests that more sophisticated and effective mechanisms are needed to identify actual and potential victims of trafficking. Immigration officers and other professionals have a key role to play in anti-trafficking activities. The first contact with unidentified child victims is most likely to be made by either immigration officers at ports of entry, police or local law enforcement officers or social service, health and education providers (Bump and Duncan 2003). Although the need for more child protection officers at major ports of entry was a key recommendation of the Paladin Child report, it has not been implemented and there remain very few specialist staff working at ports. Immigration officers are not child protection officers and it is dangerous to expect them to combine the full range of knowledge and skills required for specialist child protection work with immigration control. In addition there is some evidence that immigration officers and staff are not adequately trained on trafficking issues and identification of trafficking victims. This suggests that the Home Office's Trafficking Toolkit should be the basis for more training and that the recommendations arising from the Paladin report should be revisited.

Similarly, social, health and education professionals need to be given more training to identify actual or potential victims of trafficking and to support child victims. As reforms of children's services get underway, there are fewer specialist teams of staff with knowledge and experience of the issues facing children who are subject to immigration control. Few social work courses include specific reference to this issue. The Home Office's Trafficking Toolkit should be disseminated more widely and the DfES should produce guidance, resources and training for all SSDs on the identification, care and protection of children at risk entering the country, and in particular on victims of trafficking. This training and guidance should encourage social workers to photograph every separated child with whom they come into contact for identification purposes and to contact the police where there is suspicion that a child either is, or is at risk of, being exploited or trafficked.

Specialist support and legal status

It is widely recognised that the particular physical, psychological and psychosocial harm suffered by trafficked children and their vulnerability to exploitation means that they should be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions.⁵ Trafficked children and young people need access to additional specialist support services if they are to achieve the five outcomes set out under the ECM framework.

Once children have been trafficked it is difficult to break the cycle of abuse. Children are at high risk of being successively criminalized and of being exposed to further abuses and the risk of potential re-traumatisation by police and judicial practices. Sometimes families do not want children who have been trafficked returned to them because of the stigma attached, and in the worst cases children are re-trafficked. The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Families may also have been actively involved in the trafficking process and will suffer unwelcome economic consequences if the child is returned.

Trafficking in children is child abuse; counter-trafficking work to prevent children being trafficked is therefore child protection work. Children and young people who continue to be at risk will need to be protected to secure their safety. A system of protocols and referral procedures should be developed and disseminated to ensure that all Home Office staff follow a simple procedure to arrange for children who are actual or potential victims of trafficking to be provided with proper care. Children who have been trafficked should be given permanent protection through the Refugee Convention and ECHR where this is appropriate.

Any child who is a victim of trafficking should be taken out of the immigration system whilst a decision is being made about his or her future. This decision should be taken according to the circumstances of the individual child. Under the Children Act 1989, professionals working with children who have been trafficked have an obligation to listen to the child and find out what he or she wants.

⁵ See, for example, the report of the UN High Commissioner for Human Rights to the Economic and Social Council (July 2002)

For some children, where it is clear that the family was not responsible for, or aware of, the fact that the child was being trafficked, it may be in the child's best interest to be united with his or her family as quickly as possible. Where this is the case it is imperative that children be accompanied and then supported once home, thereby ensuring that they do not fall into the grips of the trafficker again, suffer reprisals, and/or be re-trafficked. For other children a reflection period may be needed in order for the child to be able to work out what he or she wants to happen next. In some cases the only practical way to prosecute traffickers is to use the testimony of victims. If children and young people fear that they will be arrested and removed when they make a complaint there is little prospect of convicting the traffickers. The decision about whether to give the child a reflection period or to grant a period of leave to remain should not be dependent on whether he or she is prepared to give evidence, but instead be based on the best interests of that particular child. Not all trafficked children will be capable of consenting to the risks associated with giving testimony in a trafficking prosecution and should not be asked to do so.

A multi-agency approach

Although there has been greater political recognition of the problem of trafficking over recent years, the current system for addressing the numerous complex issues relating to trafficking in children is hindered by several systemic gaps found in the UK as elsewhere.⁶ No effective comprehensive plan exists to identify, serve and protect child victims from the point of encounter to family reunification or placement in a foster programme. Whilst the *National Plan for Safeguarding Children from Commercial Sexual Abuse* (DoH 2001) recognises the need for co-ordination and co-operation, it has not been delivered in practice.

There is a need for a national strategy that would ensure effective monitoring and registration of unaccompanied children at all ports of entry in the UK, swift and appropriate social services follow up

⁶ See, for example the analysis of the situation in the US by Bump and Duncan (2003)

for all children at risk, and a comprehensive care package for victims. This requires strategic communication and cooperation between different government departments and agencies involved in child trafficking cases. Such an approach is entirely consistent with the intentions of the ECM framework and the programme of organisational and workforce reform with which it is associated. The issue of trafficking can only be dealt with through a multi-agency approach, incorporating police, the immigration authorities, social services and voluntary organisations. The challenge is for the key players in the anti-trafficking field to join forces to build a regime that effectively addresses the need to identify and provide services to child victims of trafficking.

SECTION 7

Children in private fostering arrangements

It is clearly not possible for children to be safe and protected by effective intervention as required under the Children Act 1989 if they are in private fostering arrangements that are not known to either the relevant local authority or to the Home Office. The invisibility of privately fostered children and the lack of access to appropriate support is a growing cause of concern among social workers working with children, many of whom do not have a specialist knowledge of immigration matters and who may assume that these children are known to the immigration authorities when in reality they are not.

The invisibility of privately fostered children

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Private fostering is where a child goes to live with someone – other than a parent or close relative – and the arrangement is made privately between the parent and the carer. Private fostering is defined in the Children Act 1989 as: *a child under the age of 16 (or under 18 if disabled) being placed for more than 28 days in the care of someone who is not the child's guardian, or close relative, by private arrangement between parent and carer.* In 2001, a DoH leaflet estimated that about 10,000 children in England are privately fostered. This estimate is widely regarded as conservative.¹

¹ The DoH ceased to collect statistics in 1991. According to BAAF, the numbers in local authorities' own records are generally recognised to be meaningless because they only include a tiny number of privately fostered children and their carers. The recently introduced National Minimum Standards for Private Fostering (discussed below) requires that local authorities once again keep records and monitor the numbers of privately fostered children and private foster carers living in the local authority's area, and that new notifications are recorded on the statistical data return and submitted to the DfES. This may increase the visibility of privately fostered children over the longer term.

Whilst the practice is most common among parents from West Africa living in the UK (who are thought to make up an estimated 80–90% of all private fostering arrangements), other children are also known to be in private foster care, including:

- Children who attend language schools;
- Adolescents temporarily estranged from their parents;
- Children in boarding schools who do not return to their parents during vacations;
- Children on holiday exchanges;
- Children brought from abroad with a view to adoption;
- Children whose parents work unsocial hours (the Chinese community in particular is known to foster privately); and
- Children of asylum seekers whose parents are not in this country, but were brought in by someone and so were not unaccompanied at the time of arrival or not recorded as such.

BAAF have estimated that the number of children who are privately fostered in the UK could be anything from 15,000–20,000 and may be even higher. Whilst not all these children will be subject to immigration control, the categories outlined above suggest that many of them are likely to be.

Under the Children Act 1989 (Section 67 (1)), it is the duty of every local authority to satisfy itself that the welfare of children who are privately fostered within its area is being satisfactorily safeguarded and promoted and to secure that such advice is given to those caring for them as appears to the authority to be needed. People caring for a child for whom they do not have parental responsibility, as part of a private fostering arrangement which will last 28 days or more, must inform their local authority prior to, or within 48 hours, of the child's arrival.

Despite this requirement, studies show that local authorities are often not notified about private fostering arrangements. There is evidence that only a very small proportion of private foster carers notify local authorities at all, partly through ignorance or reluctance on the part of carers and parents to bring such arrangements to the attention of the authorities.² Local authorities have historically

² According to the DoH (2001) it is likely that more than 50% of private foster placements are not notified to local councils.

considered private fostering to be a low priority and have not devoted sufficient effort to identifying and inspecting private foster placements in line with regulations. Where local authorities are informed, it is nearly always after the fostering has started. Other professionals in health and education who have contact with these children do not realise their status and/or do not refer them to the relevant SSD. And although Immigration Service staff are required to notify the relevant SSD where a private fostering arrangement is found to be taking place, in practice this does not always happen.

As a result, private fostering remains an underground activity and the children living in these arrangements remain largely invisible from both the immigration and social service systems. This situation has continued for many years. In his review of safeguards for children living away from home ('the Utting Report'), Sir William Utting identified private fostering as 'the least controlled and most open to abuse of all the environments in which children live away from home' (Utting 1997). Without notification, local authorities are not able to check whether the carers have previously committed offences against children, or whether they are generally suitable. Privately fostered children do not necessarily understand the arrangement, are not informed of their rights and can be traumatised by the experience (Philpot 2001). Not surprisingly, Lord Laming's report into the death of Victoria Climbié recognised the potential vulnerability of children who are privately fostered and also recommended that the Government review private fostering arrangements. The result of this review was set out in *Keeping Children Safe*, which was published in 2003. The Government's response to the review has been to strengthen the existing notification scheme rather than introducing a system for the regulation and approval of private foster carers as many had hoped they would.

The Government's new measures on private fostering in Section 44 of the Children Act 2004 and replacement regulations (the Children (Private Arrangements for Fostering) Regulations 2005) came into force on 1 July 2005. The new measures, along with National Minimum Standards for Private Fostering,³ are intended to strengthen

³ Available at www.everychildmatters.gov.uk/_files/B569AE6EFC2CA9D4E36C80291E34E571.doc

and enhance the Children Act 1989 private fostering notification scheme. They are also intended to focus local authorities' attention on private fostering by requiring them to take a more proactive approach by identifying arrangements in their area. Each local authority will be required to appoint an individual officer with responsibility for monitoring the effectiveness of private fostering activities and the general duty of co-operation. LSCBs will have a role in ensuring that the new inspection regime covers the effectiveness of interagency cooperation on private fostering. The Act also gives the Government power to establish a registration scheme within four years 'in the event that the strengthened notification scheme is found wanting.'

The Government believes that these measures will improve notification rates and compliance with the existing legislative framework for private fostering. Many of those working with these children are concerned that notification rates will not significantly increase. Even if private foster carers are aware of the requirement for them to notify local authorities of a placement, they may be reluctant to do so because of concerns about the immigration-related consequences of notification. This problem is likely to increase the more that SSDs become associated with measures designed to control immigration.

Lack of support

Privately fostered children are a particularly vulnerable group and may not receive the services and protection to which they are entitled. It is important to acknowledge that the absence of a framework for regulating private fostering arrangements does not mean that these arrangements are inevitably negative for the children involved. Nonetheless private foster carers and those children in private foster care almost universally lack the kinds of support available in local authority fostering placements. The problem with private fostering arrangements is that the needs and rights of children for support, protection, physical and emotional development are being neglected by an inadequate system of regulation. The fact that private fostering arrangements are generally informal and unregulated therefore places both children and carers in a vulnerable position.

There is very little research on the motivations and experiences of those who take part in private fostering, either as parents or carers, or of the consequence for those fostered.⁴

Ensuring that privately fostered children matter

Privately fostered children and their parents must be afforded the same standard of safeguarding as those children who are child minded or accommodated by the local authority. This requires that private fostering arrangements are subject to a registration and approval scheme, and that Immigration Service staff fulfil their duty of care towards children under the Children Acts (1989 and 2004) and refer all children who are believed to be entering the UK as part of a private fostering arrangement to the relevant local authority.

A registration and approval system

There have been increasing calls for private fostering, like other kinds of social care, to be regulated. The Utting Report (Utting 1997) recommended that private foster carers should be required to seek approval and registration from their local authority and that non-compliance should become a criminal offence. The Government rejected this recommendation considering that the current regulatory system was strong enough and that the failure to comply with the notification system was the problem and that this could be addressed through an awareness-raising campaign. In the event a public awareness campaign did not materialise, although a leaflet and guidance to professionals and parents in England went out in 2001 and 2002 respectively (DoH 2001).

As noted above there is concern that the new National Minimum Standards for Private Fostering and enhanced notification arrangements will not deliver improved outcomes for children who are privately fostered. Some of these concerns are related

⁴ The Thomas Coram Research Unit are currently undertaking a study to investigate the motivations and experiences of those who foster privately and well as the motivations and experiences of parents who place their children for private fostering, and to investigate the experiences of young adults who have been privately fostered

to the standards themselves and how they will be monitored and enforced. The Commission for Social Care Inspection (CSCI) for example, which is tasked with inspecting that the standards are upheld by local authorities, has expressed concern that the standards are not set out under the *Every Child Matters* outcomes as all other National Minimum Standards are, and that the standards do not reflect the breadth of the outcome framework. A survey by the CSCI found that children being privately fostered in the UK want tighter checks on their welfare than the safeguards proposed by the Government (CSCI 2005).⁵ Neither is it clear to CSCI how a decision will be taken in relation to the sunset clause within the Children Act 2004 which allows for the introduction of a registration scheme for private foster carers if the National Minimum Standards do not deliver better outcomes for children.

The British Association for Adoption and Fostering (BAAF) believes the best way to protect and safeguard privately fostered children is by implementing a registration and approval system for the most vulnerable children – those under the age of 11. Under this system, private foster carers could be approved to care for a named child or approved as generally available so that their name could be included on a list held by the local authority. Organisations such as BAAF recognise that regulation is not a panacea but also maintain that a mandatory scheme for the registration and checking of private foster carers would represent another tool for ensuring that children in private fostering arrangements are able to achieve the outcomes set out in the ECM framework. In addition, regulation would almost inevitably lead to improvements in the support and information available to privately fostered children and their carers.

⁵ The survey of privately fostered children found that they thought a social worker should visit them every month at first to ensure they were safe, and not every six weeks as planned. They also wanted to be able to talk to the social worker away from their carer's house and to be given a telephone number to ring if they felt unsafe. Children in informal or private foster arrangements want high levels of notification, high levels of support and high levels of information. Their expectations are very similar to those of children in conventional fostering arrangements.

The role of the Immigration Service

The Immigration and Nationality Directorate must demonstrate commitment to improving the spread of best practice by immigration officers in safeguarding vulnerable children who seek to enter the United Kingdom in keeping with 'Keeping Children Safe, September 2003', [paras 98 & 99]. Arrangements need to be developed whereby Immigration inform Social Services immediately if an immigration officer considers, or has reason to believe, a child to be at risk of harm. In addition to applying the above criteria to children seeking entry the IND should apply the same duty of care for children who come to their attention after entering the UK

Birmingham ACPV (2004), Report into the death of Toni-Ann Byfield, Recommendation 12

Responsibility for ensuring that children who are subject to immigration control and are in private fostering arrangements are properly cared for lies not only with SSDs but also with the Immigration Service. Immigration officers play a key role in ensuring that separated children who arrive at UK ports of entry are collected by an adult who is known to the child and is able to take responsibility for his or her welfare. If a parent or carer with parental responsibility is not meeting the child, and the application for leave to enter is for more than 28 days, IND has a responsibility to inform social services in the area where the child is staying because this constitutes a private fostering arrangement. Any failure on the part of Immigration Service staff to report private fostering arrangements to the relevant local authority increases the vulnerability of these children and runs counter to all the efforts to join up different areas of policy and practice that were established through the Children Act 2004. Failure to take these relatively simple steps also increases the risk that children who are being trafficked – possibly under the guise of a private fostering arrangement – remain invisible. If there is no mandatory system of regulation, then the need for procedures at points of entry that can identify and refer children who are likely to be entering private fostering arrangements becomes even more pressing.

SECTION 8

Child first, migrant second – the way forward

The analysis of policy and practice presented in this paper suggests that despite Government reassurances that every child matters, children who are subject to immigration control are systematically excluded from some of the measures intended to deliver the five outcomes associated with the ECM framework. UK policy and practice in many other areas is based on the principle that children should be treated differently from adults *because they are children*. By contrast, children who are subject to immigration control are currently treated as migrants first and foremost. Their needs and vulnerabilities as children are routinely ignored. This problem is exacerbated by the recent introduction of policies that encourage local authorities to exclude these children from the provisions of the CRC and the Children Act 1989 as part of the wider Government objective of controlling immigration. Social workers who are supporting and protecting children are increasingly being required to behave as if they are immigration officials. These roles are ultimately incompatible.

If the Government is serious about ensuring that the ECM outcomes matter for each and every child, there will need to be an entirely different approach from that which has developed over recent years. The tension between policies for safeguarding and protecting children and controlling immigration – whilst evident in current policy and practice – is neither inevitable nor inexorable. As with all other areas of policy it is possible to reconcile seemingly conflicting aims and objectives and carry out existing functions in a way that takes into account the need to safeguard and promote the welfare of children. Indeed the failure to do so undermines the overall approach. The starting point is an acknowledgement that children subject to immigration control are children first and migrants second.

This does not mean that immigration controls cannot be implemented or that the Children Act 1989 needs to be changed. Rather what it means is that those responsible for implementing and delivering immigration control will need to work around the need to safeguard children and adapt their approach accordingly. This is the same as for those working in other areas of policy and practice. At a very minimum those who come into contact with children – whether working at ports of entry, in the Asylum Screening Unit, local enforcement offices, in immigration reception or removal centres or in removal teams – will need to act on their duties in the Children Act 2004 Act to cooperate to safeguard the children they are in contact with. In its simplest form the concept ‘safeguarding’ requires that children are kept safe from harm, such as illness, abuse or injury. Where there are concerns about children and young people’s welfare, all agencies must take appropriate action to address those concerns, working to agreed local policies and procedures in full partnership with other local agencies (Joint Chief Inspectors 2002, 2005). At a very minimum this will require a child protection approach to immigration control at ports, and in relation to those children who are detained.

At the same time, social workers, legal representatives and other professionals in day-to-day contact with children who are subject to immigration control will need to continue to meet their responsibilities towards these children, but also find better and more effective ways of delivering the support and services that they need. The most important factor affecting both the experiences of – and outcomes for – this group of children is the proper and consistent application of the Children Act 1989 and in particular the welfare principle. Children’s services authorities are obligated under the Children Act 2004 to improve the well being of all children in their area and to make arrangements to safeguard and promote their welfare (Sections 10 and 11). The primary role of social services departments and individual social workers is child welfare and support. They should strongly resist any attempt to change this role, generally or in relation to specific groups of children, including those who are subject to immigration control.

It is inconsistent with the ECM framework for immigration control to be viewed as effectively ‘trumping’ family and other areas of law and policy affecting children subject to immigration control.

While children are living in this country, they must be afforded equal rights and treatment under UK law. The emphasis should be placed on ensuring that the policies and practice of immigration control is compatible with our national and international obligations towards children as one of the most vulnerable groups in our society. Legislation should be used where necessary to bring asylum and immigration law and policy into line with the Government's aspirations for child protection and the promotion of children's welfare. If we are serious about safeguarding and protecting children in the UK we need to put children's rights, welfare and protection rather than immigration control at the heart of the process. *Every child must matter*, including those subject to immigration control. Anything less than this undermines the very principles on which the ECM framework is based.

Summary of recommendations

- The UN Convention on the Rights of the Child (CRC) provides a critical standard against which policy and practice towards children subject to immigration control should be assessed. The Reservation to the CRC should be removed and the immigration and asylum systems brought into line with its guiding principles;
- The role of social services is to ensure that all children, including children who are subject to immigration control, are supported and protected under the Children Act 1989 and Children Act 2004. Assisting the Home Office with the delivery of measures for controlling immigration is not an appropriate role for social services. This principle should be reflected in the policy and practice of all social service departments;
- The benefit of the doubt should always be given to individuals whose age is disputed. No age disputed individual should be put through procedures for determining the asylum claims of adults. There should be consideration of alternatives to current arrangements in which social workers assess the age of children who will potentially be supported by that authority, for example through the use of an independent age assessment panel;
- A child focused asylum system should be established which includes procedures that take into consideration the broken narratives of children, the additional difficulties they have in expressing a coherent account of their experiences and child-specific experiences of persecution. IND should provide guidance on child-specific forms of persecution, should ensure that accelerated asylum determination procedures are not applied to children;
- Children and individuals whose age has not been formally and independently assessed should not be prosecuted under Section 2 of the 2004 Asylum and Immigration Act. The Act specifically includes prosecution of children and should be amended;

- No child should be returned to his or her country of origin unless and until it is clear it is safe to do so and there is evidence that he or she will be properly supported on return;
- All separated children seeking asylum – and indeed all children subject to immigration control – should be represented throughout any legal proceedings by specialised representatives;
- There should be a needs-led system of support for separated children subject to immigration control. Local authorities should continue to assume responsibility for separated children presenting in their area under Children Act 1989. Provision and support for separated children including those leaving care should be properly resourced by central government;
- Local authorities – working with the guardian and legal representative – should develop triple track pathway plans for separated asylum seeking children who have been given discretionary leave to remain in the UK. Social workers will need to be provided with appropriate guidance and support on how to undertake and develop appropriate pathway plans realistically for young people who may have to leave the country (including, for example, what skills, education and training would be most useful) and how to protect young people when all their appeals are exhausted, giving the broadest interpretation to the type of support they can be given to avoid a breach of their Convention rights;
- A statutory guardianship system should be established for children who are subject to immigration control. The system of guardianship could be run by an existing organisation, for example CAFCASS, a non-governmental organisation or independent body, or it could be the responsibility of a new statutory body established to fulfil this role. Additional work should be undertaken by the appropriate agencies and organisations to identify a best practice model of guardianship which is appropriate to the UK context;
- All children in the UK should have access to the same levels of welfare and support regardless of their immigration status. There should be parity in the level of welfare and support provided to children who are in asylum seeking families (including income support and access to gateway benefits). Section 9 should not be implemented and ideally should be repealed;

- Children should not be detained for the purpose of immigration control because of the negative physical, mental and educational consequences of detention. This includes the detention of children as part of fast track or accelerated procedures for asylum determination. Alternatives should be developed for ensuring compliance where this is considered necessary and the Home Office should pilot a system of incentivised compliance;
- There should be an independent assessment of the welfare, educational and developmental needs within a matter of days of any child being detained;
- All families with children who are detained must have access to free legal advice and representation. Legal representatives should advise immediately on temporary release, admission, and bail and any application for bail involving children should be listed immediately;
- All children and young people who are subject to immigration control are owed duties for their safeguarding and promotion of their welfare. Immigration Service staff working in immigration removal centres will need to be made fully aware of this through the delivery of appropriate guidance and training;
- Local Safeguarding Children Boards should be encouraged to include representatives from the Immigration Service and NASS where appropriate;
- Additional child protection officers should be stationed at major ports of entry in order to identify potential victims of trafficking and other children who need to be safeguarded from harm or abuse. The recommendations arising from the Paladin report should be revisited and implemented;
- Children who have been trafficked should be given permanent protection through the Refugee Convention and ECHR where this is appropriate;
- The Home Office's Trafficking Toolkit should be circulated more widely and used for training Immigration Service staff and other professionals working with children. The DfES should produce guidance, resources and training for all SSDs on the identification, care and protection of children at risk entering the country, and in particular on victims of trafficking;

- Private fostering arrangements should be subject to a registration and approval scheme. Under this system, private foster carers could be approved to care for a named child or approved as generally available so that their name could be included on a list held by the local authority; and
- Immigration Service staff should fulfil their safeguarding obligations and refer all children who are believed to be entering the UK as part of a private fostering arrangement to the relevant local authority.

ANNEX 1

Important principles in the Children Act 1989

- When a court determines any question with respect to the upbringing of a child, the welfare of the child is the paramount consideration.
- In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child
- In any proceedings in which any question with respect to the upbringing of a child arises, a court should take into account: the ascertainable wishes and feelings of the child concerned (considered in the light of his or her age and understanding); his or her physical, emotional and educational needs; the likely effect on him or her of any change in his or her circumstances; his or her age, sex, background and any characteristics which the court considers relevant; and any harm which he or she has suffered or is at risk of suffering.
- Wherever possible, children should be brought up and cared for within their own families.
- Parents with children in need should be helped to bring up their children themselves. This help should: be provided in partnership with the parents; meet each child's identified needs; be appropriate to the child's race, culture, religion and language; be open to effective independent representations and complaints procedures; and draw upon effective partnership between the local authority and other agencies, including voluntary agencies.
- Children should be safe and be protected by effective intervention if they are in danger.

- A local authority can only arrange for, or assist in arranging for, any child 'in their care' and for whom they have a court order to be removed from the UK with the approval of the court. The court can only consent for a separated child to be removed from the UK if it is satisfied that living outside the UK would be in the child's best interests and that suitable arrangements have been, or will be, made for his or her reception and welfare in the country in which he or she will live.
- It is the duty of every local authority to satisfy itself that the welfare of children who are privately fostered within its area is being satisfactorily safeguarded and promoted and to secure that such advice is given to those caring for them as appears to the authority to be needed.
- Children should be kept informed about what happens to them, and should participate when decisions are made about their future.
- Parents will continue to have parental responsibility for their children, even when their children are no longer living with them. They should be kept informed about their children and participate when decisions are made about their children's future.

ANNEX 2

The role of the legal representative

The role of a legal representative is to ensure that a child or young person is able to present all the information relevant to his or her immigration or asylum application. Acting for a child involves a high degree of commitment, expertise, knowledge and training. In order to fulfil this role the legal representative will need to:

- Assess the child's understanding, maturity and capacity to give instructions, to understand the nature of the proceedings and to have an appreciation of the possible consequences of the application both in the long and short term;
- Take a child's social history and a statement about the basis of his or her application unless the maturity of the child makes it inappropriate to do so obtain the child's permission to pass on information about his or her social history to the responsible adult in order to reduce the need for this information to be collected repeatedly;
- Inform themselves about conditions in the country from which the child or young person has originated;
- Be sensitive to issues of age, gender, race, sexuality, culture, religion and any mental health problems or learning difficulties both in dealing with the child as client and the issues in any particular case;
- Be sensitive to the effects of trauma and to the impact that the child's experiences prior to, and since, arriving in the UK may have on his or her ability to provide information;
- Collect information from third parties, including the responsible adult and other individuals or organisations who have been working with the child during his or her stay in the UK;

- Be professional in all dealings with the child or young person, with the child's parent or carer or responsible adult, and any other persons or organisations involved in the case;
- Provide the Home Office with a written statement of the basis of the application;
- Explain the purpose of any immigration interview which the child is expected to attend;
- Attend all interviews and represent the child's interests;
- Recognise the limits of their experience and expertise and seek advice from mentors, experts and specialists as appropriate;
- Commission expert reports, medical reports and other additional information as necessary to support the application;
- Keep the child informed about the progress of the application by the means most appropriate to his or her level of understanding, and ensure that an older child who is a client has sufficient information to be able to make informed decisions;
- With the child's consent, communicate with the responsible adult about the progress of the application and be aware of any changes in the child's situation that may be relevant;
- Be aware of local authorities' duties to separated children and young people and refer to other organisations and agencies where appropriate;
- Meet deadlines imposed by IND and if unable to do so then explain why the deadlines cannot be met and seek extensions where appropriate with supporting information; and
- Advise the child of decisions that are made in relation to the application, advise the child of any right of appeal, and ensure that any appeal papers are submitted in time.

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ISBN 1 901833 12 7