

# ILPA information sheet

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## Discretionary Leave & Separated Children

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This information sheet provides information about the UK Border Agency policy on granting discretionary leave to separated (unaccompanied) children who have claimed and been refused asylum.

### Where to find the policy

The UK Border Agency's asylum policy instruction on Discretionary Leave is currently being revised, and has been removed from the Agency's website. However, the key elements of the policy are set out in the asylum process guidance on Processing an Asylum Application from a Child (particularly in sections 17 & 22). That guidance is available at:

<http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/processingasylumapplication1.pdf?view=Binary>

### When discretionary leave is to be granted under the policy

The UK Border Agency must consider a separated child's asylum application first. This requires the Agency to consider the following before making a decision under the policy (and to consider these in the order in which they appear below):

- whether the child is a refugee (and grant refugee leave for five years)
- whether the child is at risk of serious mistreatment contrary to Article 3 of the European Convention on Human Rights, which prohibits torture, inhuman or degrading treatment (and grant humanitarian protection for five years)
- whether the child qualifies for discretionary leave for reasons other than the policy (which may lead to a grant of discretionary leave for three years)

If none of the above applies, a separated child should normally be granted discretionary leave under the policy unless there are "*adequate reception arrangements in place in the country to which the child is to be removed.*" This must be considered in line with the Agency's statutory duty regarding the safety and welfare of children, under section 55 of the Borders, Citizenship and Immigration Act 2009 (see the August 2009 "Children – New Statutory Duty" information sheet [<http://tinyurl.com/7qboqrt>]) and giving a primary consideration to the child's best interests (see the January 2011 "Children's Best Interests" information sheet [<http://tinyurl.com/cmkt55>]).

If there is nobody to receive and take care of a child in the country to which it is proposed to return him or her, discretionary leave under the policy should normally be granted because of the lack of reception arrangements. If there is somebody to receive the child, an assessment will need to be

made of that person's capacity to take care of the child. If the person's capacity to do so is inadequate, discretionary leave under the policy should normally be granted. The policy gives further guidance as to "adequate reception arrangements", including:

*"Careful consideration should be given to how [any] reception arrangements that need to be in place to enable return will be accessed on arrival, taking into account the child's age, vulnerability and overall best interests. In most cases (and in all cases where the child is under 16) the child will need to be met at the airport by a suitable person in order to be safely transported to the longer term reception arrangements – for example the family home or alternative accommodation arrangement."*

### **Period for which discretionary leave will be granted under the policy**

Under the policy, discretionary leave is to be granted for whichever is the shorter of the following two periods:

- three years
- until the child is 17½ years of age

### **Conditions of discretionary leave**

Conditions of a grant of discretionary leave (unless it states otherwise) will include permission to work and to access mainstream welfare benefits. However, separated children should be receiving support from their local authority. A child who has been supported by the local authority may be entitled to ongoing support or assistance from that local authority even after he or she turns 18 (see the November 2010 "Leaving Care Judgments" information sheet [<http://tinyurl.com/6m3veph>]).

A person who applies for further leave (e.g. to extend his or her discretionary leave) before his or her leave has expired is treated as having his or her current leave continued (on the same conditions) until a decision is made on the application for further leave. In this case, the current leave continues up until further leave is granted or until the end of the period in which he or she can bring an in time appeal against a refusal of leave. If an in time appeal is brought, the current leave continues up until the appeal is finally decided.

### **Access to education**

All children in the UK are entitled to go to school. A separated child should be assisted by his or her local authority to access school, whether or not the child has discretionary leave. A child with discretionary leave should be considered to be a 'home student' (for fees purposes) for further education, including after he or she turns 18 (provided he or she still has leave). The position is, however, different in relation to higher education (though some universities may be willing to accept someone with discretionary leave as a home student).

### **When discretionary leave under the policy may be curtailed**

In certain circumstances discretionary leave may be curtailed – i.e. brought to an end before the period for which it was originally granted has come to an end. This may happen if:

- the discretionary leave was obtained by deception (e.g. a person who claimed to be a child is later found to have been an adult at the time of his or her claim)
- adequate reception arrangements are now available in the country to which it is proposed to remove the child (including where the child's parents have been traced and it is safe to return the child to his or her parents)
- the child is joined in the UK by his or her parent or an adult sibling (brother or sister) or other close family member, with whom the child could be safely removed to the country to which it is proposed to remove the child