GARDEN COURT
CHAMBERS

Age assessments

Ollie Persey, Garden Court Chambers

Wednesday 22 March 2023

Age assessments

- Age assessments: what they are and how they work <u>now</u>
- Reforms under the Nationality and Borders Act 2022
- Relevance of age assessment reforms to provisions in the Illegal Migration Bill

  2023

Age assessments- what happens now

- Home Office age assessment – upon port of entry/ seeking asylum
- Local authority age assessment – referral to children's services

Why does age matter?

- Detention/removal e.g. current protections in the Immigration Act 2014
- Children Act 1989
- Special educational needs/access to education
- Regulated/unregulated accommodation: The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021 No. 161)

Reforms in NABA 2022

- National Age Assessment Board ('NAAB): section
- Scientific methods
- First-tier Tribunal Appeals

National Age Assessment Board ('NAAB')

- Section 50 NABA 2022
- Where an age-disputed person is referred to the NAAB by a local authority, the NAAB assessment will be binding on both the Home Office, in relation to immigration functions, and the local authority when determining access to children's services.

- See in particular section 50(4):

  (4) Where a local authority—

  (a) conducts an age assessment itself, or

  (b) informs the Secretary of State that it is satisfied that an age-disputed person is the age they claim (or are claimed) to be,

  it must, on request from the Secretary of State, provide the Secretary of State with such evidence as the Secretary of State reasonably requires for the Secretary of State to consider the local authority's decision under subsection (3)(b) or (c).

- BASW statement on NAAB *"...concerns that, since the NAAB is part of the Home Office and therefore accountable to the Home Secretary, this could lead to age assessment work being influenced by political priorities such as reducing immigration, with worrying implications for child welfare."*

Scientific methods

- Section 52 NABA 2022
- Interim Age Estimation Science Advisory Committee (AESAC)
  - Recommendation 4: Biological age assessment can be carried out using an appropriate combination of dental and skeletal methods; assessment of development of the third molar using radiography, radiography of the hand/wrist or MRI of the knee, and MRI of the clavicle.
  - Recommendation 5: The use of ionising radiation must be limited, with the ultimate aim of eradicating its use. Continuing research into the use of non-ionising imaging, such as MRI, should be supported.
  - Recommendation 6: Where possible, the radiation dose should be limited through the use of recent pre-existing images, providing consent for the use of these images for age assessment had been freely obtained.
  - Recommendation 7: Further research into the impact of socioeconomic factors and their effect on growth and maturational timing, particularly those factors likely to be experienced by UASC, should be supported.
- Consent- regulations pending:
  - (b) where the age-disputed person does not have the capacity to consent to the use of the scientific method in question, the consent of—
    - (i) the person's parent or guardian, or
    - (ii) another person, of a description specified in regulations made by the Secretary of State, who is able to give consent on behalf of the age-disputed person.

Appeals

- Move to the First-tier Tribunal (Immigration and Asylum Chamber) not Health, Education and Social Care Chamber
- Legal aid will be same as other immigration appeals
- No *inter partes* costs

The Illegal Immigration Bill - Erasing Child Protections

Kathryn Cronin, Garden Court Chambers

Wednesday 22 March 2023

Defining Unaccompanied Children

- The Illegal Immigration Bill sections 15 – 20 concern "Unaccompanied Children". These are children [defined in clauses 2 & 3(3),(4)] as
  - under the age of 18 - and
  - at the 'relevant time' [the time of their entry or arrival in the UK] no individual (whether or not a parent) aged 18 or over had care of the child and
  - the child entered or arrived in the UK on or after 7.3.2023 - and
  - the child required leave to enter but entered without leave or via deception or required leave to enter or remain and does not have it - and
  - the child did not come directly from a country in which their life and liberty were threatened and passed through or stopped in another country outside the UK where their life and liberty were not threatened.

This definition is to be distinguished from the UASC definition [HC 395 para 352ZD].
The UASC cohort concerns asylum seeking children/ young people who were under 18 when their asylum application was submitted; applied for asylum in their own right; and are separated from both parents and not being cared for by an adult who in law or by custom has responsibility to do so.

The differences – UASC and Unaccompanied Children

- A child will be an unaccompanied child under the Bill only while they are under 18. The UASC cohort includes young adults who lodged their asylum claim when under 18.
- The UASC children and young people will have applied for asylum. The unaccompanied children may not have sought or seek asylum.
- The UASC child may have leave to remain (e.g. as a student) The unaccompanied child either entered without leave or by deception or is in the UK without leave to enter or remain
- The UASC child is in the UK unaccompanied by both parents and not being cared for by an adult who in law or by custom has responsibility to do so. [Note: The UASC definition fits with the private fostering provisions and supervision protections in the Children Act 1989l s66.] The care status of the unaccompanied child is set at the point of entry.
    - Take these relatively common examples illustrating these differences - a child asylum seeker who arrived unaccompanied but after arrival joins and is cared for by close relatives in the UK. Such child is not a UASC (as they have carers here) but is an unaccompanied child – and notwithstanding family ties will be affected by the unaccompanied child strictures and penalties.
    - A further anomalous example concerns a child brought to the UK by a close relative who abandoned the child here after entry - such child may become a UASC but is not an unaccompanied child. [Note: it can be assumed there will be challenges to clarify whether the child's relative escorting them to the UK "had care of the child"]

The differences – UASC and Unaccompanied Children (cont)

- The UASC's journey to the UK may be relevant to their protection claims but they are not defined by reference to their journeys. The unaccompanied child's journey to the UK and whether their life or liberty was threatened enroute is a core defining component.
- The UASC definition is directed to the child's protection. The unaccompanied child definition removes child protections and is directed to the child's exclusion.

Looked After Children and Children Act Protection

Under the *Children Act* 1989 ss17-22 – A 'looked after' child is one

- who is within the area of a local authority and is in need,
- who requires accommodation because there is no person who has parental responsibility for the child is lost or abandoned or their carer is prevented from providing the child with suitable accommodation or care
- and the child is in the local authority's care and has been provided with accommodation for a period of more than 24 hours. [CA s17(1); 20(1; 22(1)]

Looked After Children and Children Act Protection (cont)

The *Children Act* specifies particular duties and services for 'looked after' children, and 'relevant' and 'formerly relevant children' under 25. These include:

- A welfare duty - wide in scope
- CA section 20 requires local authorities to provide accommodation for children within their area who are in need and the Act defines the accommodation able to be utilised for this purpose. The *Care Planning, Placement and Case Review (England) Regulations* 2010 requires "regulated accommodation" for those 15 and under.
- A specific duty to promote the child's education experience.
- Care planning with an assigned 'personal adviser' who is to prepare and keep under review pathway plans, and to give various forms of assistance with employment, education or training which may extend until the young person is 25. The personal adviser is required to make sure that the Pathway Plan is implemented.

The Illegal Immigration Bill Amendments to the Children Act care model

- **Clause 15** empowers the SSHD to provide or arrange accommodation in England for unaccompanied children in England – such accommodation being sparely defined as 'accommodation under this section'
- **Clause 15(3)** states that the SSHD may provide or arrange other types of support for a child residing in unaccompanied migrant children accommodation.
- **Clause 15(4)** treats these provisions has having effect 'at all times on or after 7.3.2023.

The Illegal Immigration Bill Amendments to the Children Act care model

- Clause 15 would validate the commissioned hotel arrangements used by the Home Office from 2021 to accommodate young and vulnerable children.

- Data shows that between July 2021 and June 2022, 1,606 unaccompanied children who arrived in England were placed by the Home Office in hotel accommodation, rather than in the care of local authorities. Records show that between July 2021 and August 2022, some 116 children, some children as young as 11, went missing from these hotels over that 10-month period. Case experience shows that traffickers monitor hotels and hostels where unsupervised children are known to be living and that many of the missing children will have been taken by traffickers or when living on the street will be recruited by traffickers.

- Clause 15(2) could **but does not** define "accommodation for unaccompanied migrant children" as "accommodation which safeguards the child's welfare and is 'appropriate' and in accordance with the Children Act 1989 s22A - 22D and regulations"

- The clause should contain a time limit on how long any child spends in Home Office accommodation.

Clauses 16 - 19

- Clause 16 (1-4) Under this provision the SSHD 'can decide' that a child is to cease residing in accommodation for unaccompanied migrant children - and on making such decision must direct a local authority in England to receive the child on a transfer date falling after the end of 5 working days beginning with the day when the local authority was given the direction. On placement the child becomes a child in need within the local authority area.

- Clause 16 (5-8) Under these clauses the SSHD may decide that an unaccompanied child being looked after by a local authority in England is to cease being looked after on a certain date (termed the transfer date). On making that decision the SSHD must direct the local authority to cease looking after the child on the transfer date (which will be a date more than 5 working days beginning with the day the local authority was given the direction). On the cessation of the child's looked after status, the SSHD must arrange for the child to reside in accommodation for unaccompanied migrant children from the transfer date.

Clauses 16 - 19

- **Clause 17** - The SSHD may direct a local authority to provide information to the SSHD for the purposes of helping the SSHD to make a transfer of status decision. The directed information is information about the support or accommodation provided to children looked after by the local authority or such information as may be specified in regulations made by the SSHD and must be in such form and manner as the SSHD may direct and before such time or the end of a period directed by the SSHD.

- **Clause 18** is directed to enforcing a local authority's duties under clauses 16 and 17. If the SSHD is satisfied that a local authority has failed to comply with a direction under clause 16 or a duty under clause 17 without reasonable excuse – the SSHD may make an order declaring the authority to be in default. The order may contain directions to ensure the direction or duty is complied with and the order must give the SSHD's reasons for the order. Any directions can be enforced by a mandatory order.

- **Clause 19** provides for the SSHD to make regulations enabling clauses 15-18 to apply to Wales, Scotland and Northern Ireland.

Clauses 16 - 19

The following concerns are manifest from these clauses:

- These provisions allow the SSHD to 'decide' a child is to cease being a 'looked after' child, to direct that cessation and direct a local authority to provide information 'to help' the SSHD make the decision (backed by enforcement powers and the issue of a mandatory order). These enforcement powers suggest the Home Office anticipates local authority resistance – particularly for certain vulnerable young people who will be adversely affected by such move. The early Dublin child JRs contested similar punitive, traumatic removals of children backed by Home Office enforcement staff but resisted by concerned social workers. That over-reaching was prevented by CJEU judgment.

- The SSHD is removing a protective Children Act status premised on social work assessments and decisions. The SSHD's decision removes essential protections otherwise supporting the affected children. The Act and Explanatory Statement provide no justification for or purpose to be served by this enhancement of SSHD powers/discretions.

Clauses 16 - 19

It is important to consider if/how this provision can be or is open to challenge.

i. 'looked after' status is assigned to children under the Children Act on the basis of social worker assessments and decisions.

The status imposes responsibilities on social workers and provides care and protection for the children. Children can lose a great deal by the cessation decision. They may have to leave an established foster family placement, cease their studies, break friendships and their dependence on social work guidance and assistance. Their voices are not to be heard or necessarily considered in the proposed cessation decision making.

Clauses 16 - 19

ii. Family and Civil courts have always emphasized their separate, distinct jurisdictions and that the lines of demarcation are to be respected. Munby J in In *Re A (children) (care proceedings: asylum seekers*) and *R (on the application of Anton (Family)) v Secretary of State for the Home Department* gave examples of these separate jurisdictions at [33] – [34] in the latter case noting the Family Court could not "restrain the exercise by the Secretary of State for the Home Department of his power to remove or deport a child who is subject to immigration control" any more than the wardship judge can prevent the Secretary of State for Defence sending a 17-year-old soldier to Iraq or prevent the Secretary of State for the Home Department sending a convicted 17-year old to a particular young offender institution, or prevent the same Secretary of State separating a baby from the convicted mother with whom the baby is living in a prison mother-and-baby unit. These are all decisions taken within the separate jurisdiction. Here the SSHD is seeking to remove a valid and significant decision within local authority jurisdiction to the detriment of the affected child. This is overreaching by the SSHD.

iii. The Act and Explanatory Statement provide no justification for the power or the mandatory enforcement provisions. If the child or young person is to be removed that can be arranged while the child is 'looked after' and in local authority accommodation and care.

Clauses 16 - 19

Given the vagaries and scope of the cessation power – local authorities and child advocates may wish to give consideration to local authority initiatives to seek a care order for highly vulnerable and young unaccompanied migrant children. The care order option was carefully considered by then Mr Justice Jackson in respect of young unaccompanied Afghani boys believed to be ten and nine years old.

The Court noted (at [16]) that it had jurisdiction in care proceedings in respect of asylum-seeking children in cases of this kind, was satisfied that the threshold care order criteria had been crossed because the children had "certainly faced and, through their unaccompanied journey, suffered significant harm", and "the fact that the children may have been sent out of Afghanistan for their own benefit does not prevent the threshold for care proceedings being met." (at [15])

The Court (at [21]) noted that the local authority's decision to take care proceedings for the protection of children as young as ten and nine with no relatives in this country " was obviously correct" – and outlined the benefits of a care order for such young or traumatised or special need child asylum seekers. The listed benefits include that the local authority would have parental responsibility for the child, allowing it to make and carry through care arrangements; provide better access to specialist therapy or medical care and educational resources for the child; their social worker would be obliged to take an active role in relation to the child's asylum application and, most important, a care order would be most likely to provide the child with a plan for a permanent and established family life.

Clause 20

- **Clause 20** – This is a rare provision in the Bill – as one having some benefit to unaccompanied children. It includes unaccompanied children in the National Transfer Scheme that allows UASC children to be redistributed to other local authorities to provide a fairer, more equitable distribution of unaccompanied children across local authorities. The scheme's procedures are intended to ensure the safe transfer of the children from one local authority to another.

  The Department for Education & Home Office Guidance, National Transfer Scheme Protocol for Unaccompanied Asylum Seeking Children (updated 5.9.2022) is a welfare and child centred guide to engaging children in and preparing them for the transfer – a far cry from the punitive summary procedures removing children from looked after care to Home Office accommodation.

Illegal Migration Bill:
Detention and removal of children

Nicola Braganza KC

22 March 2023

Illegal Migration Bill

“EUROPEAN CONVENTION ON HUMAN RIGHTS

Secretary Suella Braverman has made the following statement under section 19(1)(b) of the Human Rights Act 1998:

I am ***unable to make a statement*** that, in my view, the provisions of the Illegal Migration Bill are compatible with the ***Convention rights***, but the Government nevertheless wishes the House to proceed with the Bill.” [all emphasis in these slides added]

=> *I implicitly agree that I am acting illegally, but nonetheless… it’s all about boats and votes, however cruel or unlawful.*

A year on from Nationality and Borders Act 2022…

Yet another Bill: -

"Make provision for and in connection ***with the removal*** from the United Kingdom of persons who have ***entered or arrived in breach of immigration control***; to make provision about ***detention*** for immigration purposes; to make provision about ***unaccompanied children***; to make provision about ***victims of slavery or human trafficking***; to make provision about leave to enter or remain in the United Kingdom; to make provision about ***citizenship***; to make provision about the ***inadmissibility*** of certain protection and certain human rights claims relating to immigration; to make provision about the maximum number of persons entering the United Kingdom annually using safe and legal routes; and for connected purposes" [Preamble]

Explanatory Notes

"The purpose of the Bill is to ***create a scheme whereby anyone arriving illegally*** in the United Kingdom ("UK") will be ***promptly removed*** to their home country or to a safe third country to have any asylum claim processed. …

• deter illegal entry into the UK;
• ***break the business model of the people smugglers and save lives***;
• promptly remove those with no legal right to remain in the UK; and
• make provision for setting an annual cap on the number of people to be admitted "

But is the effect of the Bill to create a scheme that contravenes international and domestic law? A ***scheme*** *where the most vulnerable in our society are made more vulnerable, denied access to the courts, detained on arrival for unlimited periods, treated inhumanely, stripped of safeguards and the most basic human rights protections – refugees, children, victims of trafficking and modern slavery, those fleeing the most severe human rights violations?*

Clauses

Duty to make arrangements for removal

2 Duty to make arrangements for removal - duty to remove
3 Unaccompanied children etc - power to remove
4 Disregard of certain claims, applications etc
5 Removal for the purposes of section 2 or ***3***

Detention and bail

11 ***Powers of detention***
12 Period for which persons may be detained
13 Powers to grant immigration bail

14 Disapplication of duty to consult Independent Family Returns Panel

Clause 2 – the *Four conditions*

Clause 2 duty – Duty to make arrangements for removal
(1) SSHD ***must make arrangements*** for removal of a person from UK if the person meets ***the "four conditions"***.

Clause 2 (2) first condition:-
(a) person requires leave to enter UK but entered
(i) without leave or
(ii) with leave to enter obtained by means which included ***deception by any person***,
(b) the person has entered the United Kingdom in breach of a deportation order
(c) requires entry clearance - but arrived in the UK without a valid entry clearance or
(d) Required not to travel to UK without an electronic travel authorisation (ETA) that is valid, but arrived without such an ETA

Clause 2 – *Second condition*

Clause 2 duty – ***second condition***

(3) The second condition is that the person ***entered or arrived*** in the United Kingdom as mentioned in subsection (2) ***on or after 7 March 2023***.

Clause 2 – *Third condition*

Clause 2 duty – ***third condition***

(4) The third condition is that, in entering or arriving as mentioned in subsection (2), the person ***did not come directly*** to the United Kingdom from a country in which the person's life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

(5) For the purposes of subsection (4) a person is not to be taken to have come directly to the United Kingdom from a country in which their life and liberty were threatened as mentioned in that subsection if, in coming from such a country, they ***passed through or stopped in another*** country outside the United Kingdom where their life and liberty were not so threatened.

Clause 2 – *Fourth condition*

Clause 2 duty – ***fourth condition***

(6) The fourth condition is that the person ***requires leave to enter or remain*** in the United Kingdom but ***does not have*** it.

(7) Any limited leave to enter or remain given under the immigration rules to a person within section 3(1) (unaccompanied children) is to be disregarded in determining whether the person meets the condition in subsection (6).

(11) The only circumstances in which the duty in subsection ***(1) does not apply*** to a person who meets the four conditions in this section are where—

(a) section 3(1) applies to the person (unaccompanied children),
(b) .....
(c) ......

Clause “3 – Unaccompanied children etc”

(1) The duty in section 2(1) ***does not require the SSHD*** to make arrangements for the ***removal*** of a person from the UK at a time ***when the person is an unaccompanied child***.

(2) The Secretary of State ***may make arrangements for the removal*** of a person from the United Kingdom at a time when the person is an unaccompanied child.

(3) For the purposes of this Act a person (“C”) is an “unaccompanied child” if—
(a) C meets the ***four conditions*** in section 2,
(b) C is ***under the age of 18***, and
(c) at the ***relevant time no individual*** (whether or not a parent of C) who was aged 18 or over ***had care of C***.

(4) In subsection (3) “the ***relevant time***” means ***the time of C’s entry or arrival***
in the UK by virtue of which the duty in s2(1) would apply in relation to C apart from this section.

Clause “3 – Unaccompanied children etc”

“Clause 3 is ***likely to engage Article 8 where an unaccompanied child (UC) is not removed for potentially some years*** (until they turn 18) in which time, the UC may have built some considerable family and/or private life (although a majority of unaccompanied children who claimed asylum in 2022 are aged 16 or 17). However, the **delay to removal itself will not cause interference** with Article 8 rights and will be in **accordance with the law**, namely the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (best interests of the child) and section 17 of the Children Act 1989 (provision of services to children in need).”

(*nothing about proportionality or removal of unaccompanied children prior to 18*)

ECHR Memorandum

Clause “4 – Disregard of certain claims, applications etc “

(1) The duty in section 2(1) or ***the power in section 3(2)*** applies in relation to a person who meets the ***four conditions*** in section 2 **regardless o**f whether—

(a) the person makes a protection claim,
(b) the person makes a human rights claim,
(c) the person claims to be a victim of slavery or a victim of human trafficking as defined by regulations made by the SSHD under s69 of the Nationality and Borders Act 2022, or
(d) the person makes an application for judicial review in relation to their removal from the UK under this Act.

(2) If a person who meets the four conditions in section 2 makes a protection claim, or a human rights claim within subsection (5), the Secretary of State must declare the claim ***inadmissible*** (and see section 39(4) in relation to human rights claims not within subsection (5)).

Clause "4 – Disregard of certain claims, applications etc "

(3) A protection claim or a human rights claim ***declared inadmissible*** under subsection (2) ***cannot be considered under the immigration rules***.

(4) A declaration under subsection (2) that a protection claim or a human rights claim is ***inadmissible*** is not a decision to refuse the claim and, accordingly, ***no right of appeal*** under section 82(1)(a) or (b) of the Nationality, Immigration and Asylum Act 2002 (appeal against refusal of protection claim or human rights claim) arises.

Clause "4 – Disregard of certain claims, applications etc "

(5) A human rights claim is within this subsection if it is a claim that removal of a person from the UK to—

(a) a country of which the person is a national or citizen, or
(b) a country or territory in which the person has obtained a passport or other document of identity, would be unlawful under s6 of the HRA 1998 (public authority not to act contrary to Convention).

(7) In this section, references to a claim include a claim—

(a) ***that was made on or after 7 March 2023*, and**
(b) that has ***not been decided*** by the Secretary of State ***on the date*** on which this section ***comes into force***.

Clause 5 “Removal for the purposes of section 2 or 3 ”

(1) Where the SSHD is required by section 2(1) to make arrangements for the removal - must ensure that the arrangements are made—

(a) as soon as is ***reasonably practicable*** after the person’s entry or arrival in the United Kingdom, or
(b) where the person has ***ceased to be an unaccompanied child***, ***as soon as is reasonably practicable*** after the person has ceased to be an unaccompanied child.

(2) The following provisions of this section apply where—
(a) the Secretary of State is required by section 2(1) to make arrangements for the removal of a person (“P”) from the United Kingdom, or

(b) the Secretary of State ***may make arrangements*** for the removal of a person (“P”) from the United Kingdom ***under section 3(2).***

Clause 5 “Removal for the purposes of section 2 or 3 ”

(3) Subject as follows, P may be removed to—

(a) a country of which P is a national or citizen,
(b) a country or territory in which P has obtained a passport or other document of identity,
(c) a country or territory in which P embarked for the United Kingdom, or
(d) a country or territory to which there is reason to believe P will be admitted.

(4) - (6) deals with exceptions :
If P is a national of a country listed in section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (inadmissibility of certain asylum and human rights claims: safe States), P ***may not be removed to a country*** or territory within subsection (3)(a) or (b) if—

(a) P makes a ***protection claim or a human rights claim***, ***and***
(b) the Secretary of State considers that there are ***exceptional circumstances*** which prevent P’s removal to that country. (Defined in Cl 5(5))

Clause 7 “Further provisions about removal”

Where the Secretary of State may make arrangements for the removal of a person from the UK **under section 3(2)**.

(2) P may not be removed from the United Kingdom unless—

(a) SSHD or IO given ***a notice in writing*** to P stating—

(i) that **P is to be removed**, and

(ii) the **country or territory** to which P is to be removed, and

(b) the **claim period** (as defined for the purposes of section 40 (serious harm suspensive claims) and 41 (factual suspensive claims)) has **expired**.

(3) A notice under subsection (2) must—

(a) set out the periods mentioned in subsection (2)(b), and

(b) contain details of P’s right to make a suspensive claim under section 40 or 41 (suspensive claims).

Clause 11 – 13 Detention and bail

Clause 11 - makes provision for the detention of persons falling within Clause 2, together with their family members. Explanatory statement

To "codify certain common law principles relating to immigration detention, but places ***emphasis on the Secretary of State's opinion*** as to whether the time period of detention is reasonable, rather than leaving that determination to the court. ***This will apply across the totality of the statutory immigration detention powers***." ECHR Memorandum

If the IO/SSHD suspects that the person meets the **four conditions *in S2 of*** the IMA 2023, ***pending a decision as to whether the conditions are met***; (b) if the ***IO suspects*** that the SSHD has a duty to make arrangements for the removal of the person from the UK under that section, ***pending a decision as to whether the duty applies;*** pending whether leave should be granted, and ***pending the person's removal*** from the UK => detention

Clause 11 - Unaccompanied children

Clause 11 - Explanatory notes

“New paragraph (2C)(d) (para 16 of Sched 2 of the IA ‘71) enables an unaccompanied child to be either detained pending removal under Clause 3(2) or, where an unaccompanied child is temporarily exempt from the duty to remove by virtue of Clause 3(1), pending the granting of limited leave under the Immigration Rules, new section 8AA of the 1971 Act (see Clause 29) or section 65(2) of the 2022 Act (which provides for the giving of limited leave to victims of modern slavery).

Clause 11 – 13 Detention and bail

S55 Borders, Citizenship and Immigration Act 2009 - best interests ?
Duty to discharge immigration functions having regard to the need to safeguard and promote the welfare of children in the UK.

Article 3 (prohibition of inhuman and degrading treatment), Article 5 (liberty and security) and Article 8 (private and family life) ECHR – What are the circumstances of the detention? period of detention, conditions, the individual circumstances and vulnerabilities, disabilities, of the child – how are they going to get help? legal advice?

"Article 14 rights (when taken together with Article 8) ***may also be engaged*** by both children and adults for the differential treatment that both experience under clause 3 on the basis of "age". However, the Government considers that any age discrimination is limited since accompanied children will be removed with their parents and that it would not be a ground that would require very weighty reasons to justify the differences in treatment, and as such the Government considers that the difference in treatment is in pursuit of a legitimate aim and objectively justifiable." (Memorandum)

Clause 11 – 13 Detention and bail

UNCRC - Art 37 - States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily…detention shall be in conformity with the law and only as a measure of last resort and for the shortest appropriate period of time;

…(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Clause 12 Period for which persons may be detained

By amendments to existing statutory immigration detention powers -

A person may be detained for such period as, ***in the opinion of the Secretary of State***, is reasonably necessary to enable the examination or removal to be carried out, the decision to be made, or the directions to be given.

"The powers to detain under paragraph 16 apply irrespective of any impediment to those statutory purposes for the time being. The effect of this clause is ***to clarify that it is for the Secretary of State, rather than the Courts, to determine what is a reasonable period to detain*** an individual for the specific statutory purposes (for example, to effect removal from the UK). If the Secretary of State ***does not consider*** that the examination, decision, removal or directions will be carried out, made or given ***within a reasonable period*** of time, the ***person may be detained for a further period*** that is, in the opinion of the Secretary of State, reasonably necessary to enable arrangements to be made for release that the Secretary of State considers to be appropriate."
Explanatory notes

Clause 12 Explanatory Statement

“Clause 12:

- replaces in part the common law *Hardial Singh* principles with a codified statutory version of the second and third principles.
(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
(ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
(iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, they should not seek to exercise the power of detention;
(iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.

Clause 12 Explanatory Statement

"88 As well as codifying, in part, the Hardial Singh principles, this clause also overturns the common law principle established in *R(A) v SSHD* [2007] EWCA Civ 804 (and later authorities) that it is for the court to decide, for itself, whether there is a reasonable or sufficient prospect of removal within a reasonable period of time."

Clause 13 Powers to grant immigration bail

A person who is being detained

- must not be granted immigration bail by the First-tier Tribunal until after the end of the period of 28 days beginning with the date on which the person's detention under that provision began.

- cannot challenge the decision to detain or refuse bail ***in any court*** unless decision in ***bad faith* or a *procedurally defective way*** that amounts to a ***fundamental breach of the principles of justice***

- *Habeas corpus* unaffected

Clause 14 Disapplication of duty to consult Independent Family Returns Panel

In section 54A of the Borders, Citizenship and Immigration Act 2009 (IFRP)

(3A) The duty under subsection (2)(a) **does not apply** where the proposed removal is for the purposes of s2 IMA 2023 (duty to make arrangements for removal) or under section 7 (power to remove family members).

(3B) The duty under subsection (2)(b) **does not apply** where the proposed detention is under—
(a) paragraph 16(2C) or (2D) of Schedule 2 to the Immigration Act 1971 (detention under authority of immigration officer relating to removal under the Illegal Migration Act 2023), or
(b) section 62(2A) or (2B) of the Nationality, Immigration and Asylum Act 2002 (detention under authority of Secretary of State relating to removal under the Illegal Migration Act 2023).

See Explanatory Notes paragraphs 95 & 96 provide no reason why.

Thank you

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The Illegal Migrants Bill
Children: residence & citizenship

Amanda Weston KC

Garden Court Chambers

The duty to remove under clause 2(1)

Key features:

- A duty on the SSHD to make arrangements for removal if the person meets the **four conditions** for removal (referred to as "the duty to remove" and "the four conditions") (clause 2(1)).

- The power to remove is **discretionary** in relation to an unaccompanied child (clause 3(2)).

Duty to remove: the 4 conditions

- a. That the person entered the UK **without leave to enter**, or with leave to enter **obtained by deception**, in **breach of a deportation order**, **without valid entry clearance** (where required), or without an **electronic travel authorisation** (where required) (clause 2(2)(a)(i) and (ii), (b), (c) and (d));

- b. That the person **entered** the UK **on or after 7 March 2023** (clause 2(3));

- c. That the person **did not come directly** to the UK from a country in which the person's life or liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion. This includes passing through or stopping in another country outside the UK where their life and liberty were not so threatened (clause 2(4) and (5)); and

- d. The person **requires leave to enter or remain in the UK and does not have it** (clause 2(6)).

Key impact

- Aim of the Bill is to make all forms of irregular migration a BARRIER to any protection status UNLESS the person arrived directly from the country from which protection is sought/an unsafe third country
- A child is a 'person' for the purposes of the duty to remove BUT
- Clause 3 turns the duty to remove where the 4 conditions are met to a power
- This raises a question of whether the power to remove a child (U18)in such circumstances could be exercised compatibly with the Human Rights Convention

What does the Govt say about compatibility of Clause 3?

"Clause 3 is likely to engage Article 8 where an unaccompanied child (UC) is not removed for potentially some years (until they turn 18) in which time, the UC may have built some considerable family and/or private life (although a majority of unaccompanied children who claimed asylum in 2022 are aged 16 or 17).

However, the delay to removal itself will not cause interference with Article 8 rights and will be in accordance with the law, namely the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (best interests of the child) and Section 17 of the Children Act 1989 (provision of services to children in need."

(Govt Memorandum on compatibility)

Clause 5: duty of removal once aged 18

Duty to ensure that when an unaccompanied child turns 18 the arrangements for removal are made as soon as reasonably practicable (clause 5(1)(b)).

Any limited leave to enter or remain given under the immigration rules to an unaccompanied child is to be **disregarded** in determining whether the person meets the **fourth condition** under clause 2(6) (clause 2(7)).

Clauses 29 – 36: lost residence and citizenship

Entry, settlement and citizenship

- 29 Entry into and settlement in the United Kingdom
- 30 Persons prevented from obtaining British citizenship etc
- 31 British citizenship
- 32 British overseas territories citizenship
- 33 British overseas citizenship
- 34 British subjects
- 35 Disapplication of sections 31 to 34
- 36 Amendments relating to sections 31 to 35

Clause 29: children barred from settlement and citizenship

- Clause 29(3) amends the Immigration Act 1971 to insert section 8AA, "Persons ineligible for leave to enter and remain, entry clearance and ETA". Under proposed section 8AA, a person who has **ever** met the four conditions set out in clause 2 (above), or who falls into the definition of **removal of family members**, must not be given leave to enter or leave to remain, subject to proposed subsections (3) to (5).

- As defined in Cl 8 'family members' includes P's children and 'a child living in the same household as P in circumstances where P has care of the child'

Proposed 'safeguards'

- The provision of limited leave to remain for unaccompanied children (there is also Limited LTR for victims of slavery or human trafficking).

- An unaccompanied child may therefore be given limited leave to remain, but this may not be renewed once the child turns 18 and;

- Limited leave under this exception cannot be taken into account for the purposes of determining whether the fourth condition under Cl 2(6) (requires leave but does not have it) is met.

Cl 29: What about when a child turns 18?

Once an unaccompanied child turns 18, they must not be given leave to enter or leave to remain, subject to proposed subsections (3) to (5):

a. SSHD may give limited leave to remain where **she considers*** that it is necessary to do so to comply with the ECHR or another international agreement, or that there are compelling circumstances in relation to the person which means it is appropriate to do so;

b. SSHD may give indefinite leave to remain where **she considers** it is necessary to comply with the ECHR or another international agreement (nb no compelling circumstances provision)

c. Where a person has been removed and is outside the UK SSHD may grant limited leave to enter / grant entry clearance / grant an ETA where **she considers** that it is necessary to do so to comply with the ECHR or another international agreement, or that there are compelling circumstances which means it is appropriate to do so.

*note – insertion of 'subjective test' – impact on remedy/jurisdiction? Clash with s 6HRA?

Govt position on compatibility of Cl 29?

- Because Clause 29 confers a discretion on the Secretary of State to waive the re-entry and limited leave to remain bans where the refusal to do so would breach ECHR, the provisions relating to entry and limited leave to remain are compatible with Article 8 ECHR because they are capable of being operated in a compliant manner.

- Neither Article 8 nor potentially any of the other ECHR articles guarantee someone the right to be granted a particular type of residence permit, such as settlement. In most cases, a grant of limited leave is sufficient to enable individuals to exercise their ECHR rights unhindered. There may however be some extremely rare cases where a grant of settlement is required for someone to enjoy their ECHR rights. The exceptions to the settlement ban ensure that the Secretary of State can grant settlement where to deny it would be a breach of ECHR rights. Accordingly, the Government considers the provisions relating to settlement to be compatible with the ECHR.

Cl 30: permanent barrier to citizenship

- A person (including a child) who is an 'ineligible person' within the meaning of Cl 30 is **not entitled (Cl 31)** to be registered as a British citizen, a British overseas territories citizen, a British overseas citizen or a British Subject. This applies to both unaccompanied children and children arriving with family members) (clauses 30 to 34). Who is 'ineligible'?

- A person falls within this subsection if the person has ever met the four conditions in section 2 (conditions relating to removal from the United Kingdom); and

- A person ("P") falls within this subsection if P was born in the United Kingdom on or after 7 March 2023, and either of P's parents has ever (whether before or after P's birth) met the four conditions in section 2. (the '**sins of the fathers'** clause)

Modifications in subcl (5) – (7) extend the breaches in cl2 to overseas territories

Cl 31 – removal of registration by entitlement

- Children caught by Cl 30 (3) or (4) will lose the following rights to registration:

  - section 1(3) or (4) of the British Nationality Act 1981 (registration of minor as British citizen);

  - section 3(2) or (5) BNA (acquisition of British citizenship by registration: minors);

  - section 4(2) BNA (acquisition of British citizenship by registration: British overseas territories citizens etc);

  - section 5 BNA (acquisition of British citizenship by registration: British overseas territories citizens having connection with Gibraltar);

Cl 31 -Loss of discretionary registration

- In relation to an application for British citizenship made by or in relation to an ineligible person, the Secretary of State may not—

(a) cause the person to be registered as a British citizen under any of the following provisions—

(i) section 3(1) of the British Nationality Act 1981 (acquisition of British citizenship by registration: minors);

(ii) section 4A of that Act (acquisition of British citizenship by registration: further provision for British overseas territories citizens);

(iii)…. (further adult provisions including naturalization under s 6 BNA)

Cl 35: Exceptions to denial of citizenship

Disapplication of sections 31 to 34

(1) This section applies in relation to a person who would otherwise be an ineligible person for the purposes of sections 31 to 34 (see section 30).

(2) The Secretary of State may determine that the person is not to be an "ineligible person" for the purposes of sections 31 to 34 if the **Secretary of State considers** that excepting the person from any of those sections is **necessary in** order to comply with the United Kingdom's obligations under—

(a) the Human Rights Convention, or

(b) another international agreement to which the United Kingdom is a party.

Observations

- Cl 30(3) & (4) is probably the most potentially toxic, hateful and problematic proposed piece of legislation I have seen seriously tabled. It may be a 'dead cat' on the table. I hope so.
- It would mean that vulnerable children in care including those born in the UK whose parents' lack of status results in them becoming 'ineligible' will not be able to have their citizenship status regularized in their best interests on application by their corporate parent the LA unless it is 'necessary' for ECHR/other instrument reasons
- This provision, and the denial of settlement save on ECHR/other instrument grounds , means the sins of the father being visited on the child. Given SSHD's position is that citizenship rarely if ever engages art 8, how is this likely to be a safeguard? See judgment of Ouseley *J in R (MM & GY & TY) v SSHD* [2015] EWHC 3513 (Admin)

Where is the CRIA?

- No child rights impact assessment (s 55 BCIA 2009 Guidance requires child rights impact assessment – that is why the PRCBC challenge to the citizenship fees increases for children was successful)
- Where is the consultation period with the UK's children's commissioners BEFORE putting draft legislation before Parliament?
- Where is consultation with stakeholders, third sector providers, LAs and children's NGOs?
- See Children's Commissioner's open letter to SSHD:

  https://www.childrenscommissioner.gov.uk/news/letter-to-the-home-secretary-on-the-illegal-migration-bill/

The Illegal Immigration Bill - Erasing Child Protections

Kathryn Cronin

This session looks at the Bill's erosion of established Children Act protections affecting migrant children. These are protections which have long been held to apply to all children in the UK. The "Every Child Matters" mantra encapsulated this presumption. These changes are to be effected by bringing migrant child status, rights and protection issues within the Home Secretary's remit and control and refashioning them by reference to the single objective of immigration deterrence and control. As the earlier sessions have made clear the result will be to create a large class of people present in the UK but with no hope of securing lawful status; and modern slavery victims and vulnerable children denied essential protections and remedial assistance.

Defining Unaccompanied Children

The Illegal Immigration Bill sections 15 – 20 concern "Unaccompanied Children". These are children [defined in clauses 2 & 3(3), (4)] as

* under the age of 18 - and
* at the 'relevant time' [the time of their entry or arrival in the UK] no individual (whether or not a parent) aged 18 or over had care of the child and
* the child entered or arrived in the UK on or after 7.3.2023 - and
* the child required leave to enter but entered without leave or via deception or required leave to enter or remain and does not have it - and
* the child did not come directly from a country in which their life and liberty were threatened and passed through or stopped in another country outside the UK where their life and liberty were not threatened.

This definition is to be distinguished from the UASC definition [HC 395 para 352ZD]. The UASC cohort concerns asylum seeking children/ young people who were under 18 when their asylum application was submitted; applied for asylum in their own right; and are separated from both parents and not being cared for by an adult who in law or by custom has responsibility to do so.

The differences – UASC and Unaccompanied Children :

- A child will be an unaccompanied child under the Bill only while they are under 18. The UASC cohort includes young adults who lodged their asylum claim when under 18.
- The UASC children and young people will have applied for asylum. The unaccompanied children may not have sought or seek asylum.
- The UASC child may have leave to remain (e.g., as a student) The unaccompanied child either entered without leave or by deception or is in the UK without leave to enter or remain.
- The UASC child is in the UK unaccompanied by both parents and not being cared for by an adult who in law or by custom has responsibility to do so. [Note: The UASC definition fits with the private fostering provisions and supervision protections in the Children Act 1989l s66.] The care status of the unaccompanied child is set at the point of entry.

  Take these relatively common examples illustrating these differences - a child asylum seeker who arrived unaccompanied but after arrival joins and is cared for by close relatives in the UK. Such child is not a UASC (as they have carers here) but is an unaccompanied child – and notwithstanding family ties will be affected by the unaccompanied child strictures and penalties.

  A further anomalous example concerns a child brought to the UK by a close relative who abandoned the child here after entry - such child may become a UASC but is not an unaccompanied child. [Note: it can be assumed there will be challenges to clarify whether the child's relative escorting them to the UK "had <u>care</u> of the child"]
- The UASC's journey to the UK may be relevant to their protection claims but they are not defined by reference to their journeys. The unaccompanied child's journey to the UK and whether their life or liberty was threatened enroute is a core defining component.
- The UASC definition is directed to the child's protection. The unaccompanied child definition removes child protections and is directed to the child's exclusion.

Looked After Children and Children Act Protection

Under the *Children Act* 1989 ss17-22 – A 'looked after' child in one

- who is within the area of a local authority and is in need[1],
- requires accommodation because there is no person who has parental responsibility for the child is lost or abandoned or their carer is prevented from providing the child with suitable accommodation or care.
- and the child is in the local authority's care and has been provided with accommodation for a period of more than 24 hours. [CA s17(1); 20(1; 22(1)]

The *Children Act* specifies particular duties and services for 'looked after' children, and 'relevant' and 'formerly relevant children' under 25[2]. These include:

- a welfare duty - wide in scope[3]
- CA section 20 requires local authorities to provide accommodation for children within their area who are in need and the Act defines the accommodation able to be utilised for this purpose.[4] The *Care Planning , Placement and Case Review (England) Regulations* 2010 requires "regulated accommodation" for those 15 and under.[5]
- A specific duty to promote the child's education experience.[6]
- Care planning with an assigned 'personal adviser'[7] who is to prepare and keep under review pathway plans, and to give various forms of assistance with employment, education or training which may extend until the young person is 25.[8] The personal adviser is required to make sure that the Pathway Plan is implemented. [9]

[1] Under the Children Act 1989 section 17(10) a child is taken to be in need if: the child is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him/her of services by a local authority …; the child's health or development is likely to be significantly impaired, or further impaired, without the provision of such services; or the child is disabled'

[2] That is to children and young adults as defined in CA 1989 ss23A(2) and 23C(1) See CA 1989 ss 22 -23E

[3] Courts have issued mandatory orders where local authorities have failed to carry out lawful assessments of the child's needs. *J, R (on the application of) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin), [2005] 2 FLR 860; *W, R (on the application of) v. London Borough of Barnet* [2003] UKHL 57, [2004] 1 FLR 454, [2004] 2 AC 208.

[4] CA 1989 s22(5);(7);(8); 22C.

[5] CA s22C defines the way in which looked after children are to be accommodated and maintained. See: The Care Planning, Placement and Case Review (England) Regulations 2010 SI 959/2010 reg 27A.

[6] CA 1989 ss22 (3A), 23CA.

[7] CA 1989 ss 22;23B; 23D.

[8] CA 1989 Part III, Schedule 2.

[9] CA 1989 s23CZA

The Illegal Immigration Bill Amendments to the Children Act care model

- **Clause 15** empowers the SSHD to provide or arrange accommodation in England for unaccompanied children in England – such accommodation being sparely defined as 'accommodation under this section'
- **Clause 15(3)** states that the SSHD may provide or arrange other types of support for a child residing in unaccompanied migrant children accommodation.
- **Clause 15(4)** treats these provisions has having effect 'at all times' on or after 7.3.2023.

Clause 15 would validate the commissioned hotel arrangements used by the Home Office from 2021 to accommodate young and vulnerable children. Data shows that between July 2021 and June 2022 1,606 unaccompanied children who arrived in England were placed by the Home Office in hotel accommodation rather than in the care of local authorities.[10] Records show that between July 2021 and August 2022, some 116 children, some children as young as 11, went missing from these hotels over that 10-month period.[11] Case experience shows that traffickers monitor hotels and hostels where unsupervised children are known to be living and that many of the missing children will have been taken by traffickers or when living on the street will be recruited by traffickers.

Clause 15(2) could **<u>but does not</u>** define "accommodation for unaccompanied migrant children" as "accommodation which safeguards the child's welfare and is 'appropriate' and in accordance with the Children Act 1989 s22A - 22D and regulations"

The clause should contain a time limit on how long any child spends in Home Office accommodation.

[10] Helen Bamber Foundation and ECPAT UK issued a Freedom of Information (FOI) request to the Home Office on the 31st March 2022 to obtain data on the number of unaccompanied children seeking asylum placed in hotels accommodation between June 2021 and March 2022. See press release dealing with the FOI response, Electronic Immigration Network, (EIN) 17.8.2022.

[11] See: BBC News 13.10. 2022; Joint ECPAT UK (Every Child Protected Against Trafficking) and Missing People report, When Harm Remains: an update report on trafficked and unaccompanied children going missing from care in the UK, April 2022

Clauses 16 - 19

- Clause 16 (1-4) Under this provision the SSHD 'can decide' that a child is to cease residing in accommodation for unaccompanied migrant children - and on making such decision must direct a local authority in England to receive the child on a transfer date falling after the end of 5 working days beginning with the day when the local authority was given the direction. On placement the child becomes a child in need within the local authority area.

- Clause 16 (5-8) Under these clauses the SSHD may decide that an unaccompanied child being looked after by a local authority in England is to cease being looked after on a certain date (termed the transfer date). On making that decision the SSHD must direct the local authority to cease looking after the child on the transfer date (which will be a date more than 5 working days beginning with the day the local authority was given the direction). On the cessation of the child's looked after status, the SSHD must arrange for the child to reside in accommodation for unaccompanied migrant children from the transfer date.

- Clause 17 The SSHD may direct a local authority to provide information to the SSHD for the purposes of helping the SSHD to make a transfer of status decision. The directed information is information about the support or accommodation provided to children looked after by the local authority or such information as may be specified in regulations made by the SSHD and must be in such form and manner as the SSHD may direct and before such time or the end of a period directed by the SSHD.

- Clause 18 is directed to enforcing a local authority's duties under clauses 16 and 17. If the SSHD is satisfied that a local authority has failed to comply with a direction under clause 16 or a duty under clause 17 without reasonable excuse – the SSHD may make an order declaring the authority to be in default. The order may contain directions to ensure the direction or duty is complied with and the order must give the SSHD's reasons for the order. Any directions can be enforced by a mandatory order.

- Clause 19 provides for the SSHD to make regulations enabling clauses 15-18 to apply to Wales, Scotland and Northern Ireland.

The following concerns are manifest from these clauses:

- These provisions allow the SSHD to 'decide' a child is to cease being a 'looked after' child, to direct that cessation and direct a local authority to provide information 'to help' the SSHD make the decision (backed by enforcement powers and the issue of a mandatory order). These enforcement powers suggest the Home Office anticipates local authority resistance – particularly for certain vulnerable young people who will be adversely affected by such move. The early Dublin child JRs contested similar punitive, traumatic removals of children backed by Home Office enforcement staff but resisted by concerned social workers. That over-reaching was prevented by CJEU judgment.

- The SSHD is removing a protective Children Act status premised on social work assessments and decisions. The SSHD's decision removes essential protections otherwise supporting the affected children. The Act and Explanatory Statement provide no justification for or purpose to be served by this enhancement of SSHD powers/discretions.

- It is important to consider if/how this provision can be or is open to challenge.
  i. 'looked after' status is assigned to children under the Children Act on the basis of social worker assessments and decisions. The status imposes responsibilities on social workers and provides care and protection for the children. Children can lose a great deal by the cessation decision. They may have to leave an established foster family placement, cease their studies, break friendships and their dependence on social work guidance and assistance. Their voices are not to be heard or necessarily considered in the proposed cessation decision making.
  ii. Family and Civil courts have always emphasized their separate, distinct jurisdictions and that the lines of demarcation are to be respected. Munby J in In *Re A (children) (care proceedings: asylum seekers*)[12] and *R (on the application of Anton (Family)) v Secretary of State for the Home Department*[13] gave examples of these separate jurisdictions at [33] – [34] in the latter case noting the Family Court could not "restrain the exercise by the Secretary of

[12][2003] EWHC 1086 (Fam), [2003] 2 FLR 921

[13] [2004] EWHC 2730 (Admin), [2004] EWHC 2731 (Fam), [2005] 2 FLR 818.

State for the Home Department of his power to remove or deport a child who is subject to immigration control" any more than the wardship judge can prevent the Secretary of State for Defence sending a 17-year-old soldier to Iraq or prevent the Secretary of State for the Home Department sending a convicted 17-year old to a particular young offender institution or prevent the same Secretary of State separating a baby from the convicted mother with whom the baby is living in a prison mother-and-baby unit. These are all decisions taken within the separate jurisdiction. Here the SSHD is seeking to remove a valid and significant decision within local authority jurisdiction to the detriment of the affected child. This is overreaching by the SSHD.

iii. The Act and Explanatory Statement provide no justification for the power or the mandatory enforcement provisions. If the child or young person is to be removed that can be arranged while the child is 'looked after' and in local authority accommodation and care.

Given the vagaries and scope of the cessation power – local authorities and child advocates may wish to give consideration to local authority initiatives to seek a care order for highly vulnerable and young unaccompanied migrant children. The care order option was carefully considered by then Mr Justice Jackson in respect of young unaccompanied Afghani boys believed to be ten and nine years old.[14] The Court noted (at [16]) that it had jurisdiction in care proceedings in respect of asylum-seeking children in cases of this kind, was satisfied that the threshold care order criteria had been crossed because the children had "certainly faced and, through their unaccompanied journey, suffered significant harm", and "the fact that the children may have been sent out of Afghanistan for their own benefit does not prevent the threshold for care proceedings being met." (at [15]) The Court (at [21]) noted that the local authority's decision to take care proceedings for the protection of children as young as ten and nine with no relatives in this country " was obviously correct" – and outlined the benefits of a care order for such young or traumatised or special need child asylum seekers. The listed benefits include that the local authority would have parental responsibility for the child, allowing it to make and carry through care

[14] J Child Refugees [2017] EWFC44; [2017] 4 WLR 192.

arrangements; provide better access to specialist therapy or medical care and educational resources for the child; their social worker would be obliged to take an active role in relation to the child's asylum application and, most important, a care order would be most likely to provide the child with a plan for a permanent and established family life.

- **Clause 20 –** This is a rare provision in the Bill – as one having some benefit to unaccompanied children. It includes unaccompanied children in the National Transfer Scheme that allows UASC children to be redistributed to other local authorities to provide a fairer, more equitable distribution of unaccompanied children across local authorities. The scheme's procedures are intended to ensure the safe transfer of the children from one local authority to another.

  The Department for Education & Home Office Guidance, National Transfer Scheme Protocol for Unaccompanied Asylum Seeking Children (updated 5.9.2022) is a welfare and child centred guide to engaging children in and preparing them for the transfer – a far cry from the punitive summary procedures removing children from looked after care to Home Office accommodation.