



Human Rights Law Clinic Papers 2019

Unaccompanied Asylum-Seeking Children in the United Kingdom

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Committee on the Rights of the Child, 'General comment No. 14 On the Right Of the Child To Have His Or Her Best Interests Taken As A Primary Consideration (art 3. para. 1)' (2013) CRC /C/GC/14

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'Every Child Matters' policy presented to Parliament in September 2003, bearing reference Cm 5860.

Borders, Citizenship and Immigration Act 2009

Children (Northern Ireland) Order 1995

Children (Scotland) Act 1995

Children Act 1989

Children Act 2004

Education Act 1996

Immigration Act 2014

UK Immigration Rules 2019

iii. Table of Abbreviations

UASC Unaccompanied Asylum Seeking Children

UNCRC United Nations Convention on the Rights of the Child

UNICEF United Nations Children's Fund

1. Introduction

Over the past few years, Europe has been the destination for thousands of displaced persons escaping violence, war and authoritarianism. A particularly vulnerable group seeking refuge in European countries, and who is subject to this massive lack of protection is unaccompanied asylum-seeking children. In 2018, 2,872 unaccompanied children sought asylum in the UK.¹ Under the UK Immigration Rules, an individual under the age of 18 who has no responsible adult (relative, parents or guardian) looking after them whose duty is to do so, by law or custom, is considered an ‘unaccompanied child’.²

This memorandum investigates the treatment of unaccompanied asylum seeking children in the UK. It aims to assess whether the UK abides by its international legal obligations to uphold the “child’s best interest” in their consideration of asylum claims of unaccompanied children. This brief observes the clear patterns of inconsistency between domestic law/practice and international law. Our analysis draws on Home Office documents and guidelines, local authorities’ reports, UK case law, journal articles, non-governmental organizations reports as well as international conventions and treaties pertaining to the treatment of the child. While unaccompanied asylum-seeking children (UASC) face numerous challenges in the course of their asylum claim, this report primarily focuses on three specific challenges in their experiences in the UK.

The brief is structured as follows: First, it evaluates the issues underpinning age assessments particularly with relation to non-Merton compliant assessment interviews, age disputes and consequences with regards to child best interest and protection issues. Second, it addresses the delays with in the asylum and immigration system, and the impact they have on asylum seekers turning 18. It also addresses the nature of the decisions made by the Home Office, in particular the UASC leave. Lastly, it explores the issue of uneven distribution of responsibilities within the local authorities by focusing on the access to accommodation and education. It also assesses the use of the National Transfer Scheme as a solution to overburdening. We conclude by seeking to provide recommendations to enhance UK best practice and abidance by its international legal obligations.

¹Refugee Council, ‘Legal Representation for Unaccompanied Asylum Seeking Children’ <http://www.asylumineurope.org/reports/country/united-kingdom/asylum-procedure/guarantees-vulnerable-groups-asylum-seekers/legal#footnote1_b49mxzr> accessed 17th March 2019.

² UK Immigration Rules 2019- 325ZD.

2. Background

The main international instrument governing the treatment of UASC is the Convention on the Rights of the Child (CRC) which was ratified by the UK in 1990, with the country's reservations on immigration withdrawn in 2008.³ The Convention impacts on the UK's responsibilities under international law, giving rise to state responsibility on the international plane. However, *domestically*, the Convention is not *directly effective* in the UK's courts, despite aspects of the convention having been incorporated into UK law.⁴

In this report, the focus of the analysis will be on article 3 of the Convention which stipulates that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.⁵ General Comment no. 6 of the Committee on the Rights of the Child further elaborates on this concept by stating that best interest determination 'requires a clear and comprehensive assessment of the child's identity'.⁶ Similarly, the Committee's General Comment no. 14 reiterates the duty of states to afford more extensive protections and detailed procedures to consider a child's best interest when a decision has a major effect on them.⁷

Finally, the UK has given effect to the best interest principle of the CRC in its own domestic legislation, particularly in section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act of 2009.⁸ Both sections provides a statutory duty upon all authorities to promote the 'welfare' of children, but the latter imposes this obligation on the Home Office for matters pertaining to immigration and asylum in particular.⁹ 'Every Child Matters' guidance for UK authorities also included these principles.¹⁰ It is crucial to note that section 55 only transposes the *spirit* of the CRC and not its explicit language; even with

³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC).

⁴ Jo Wilding and Marie-Bénédicte Dembour, 'Whose best interests? Exploring Unaccompanied Minors' Rights through the Lens of Migration and Asylum Processes (MinAs)' (The UK National Report 2015) <https://www.brighton.ac.uk/_pdf/research/crome/14-oct-15-final-minas-full-report.pdf> accessed 15 March 2019.

⁵ CRC (n 3) art 3. Article 3(1) stipulates that: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.

⁶ Committee on the Rights of the Child, 'General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin' (2005) CRC/GC/2005/6. It states that 'a determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.'

⁷ Committee on the Rights of the Child, 'General comment No. 14 On the Right Of the Child To Have His Or Her Best Interests Taken As A Primary Consideration (art 3. para. 1)' (2013) CRC /C/GC/14 para 20.

⁸ Children Act 2004 s11; Borders, Citizenship and Immigration Act 2009 s55.

⁹ Ibid.

¹⁰ 'Every Child Matters' policy presented to Parliament in September 2003, bearing reference Cm 5860.

its gradual application in issues of immigration control, the child's best interest is not the *paramount* consideration in the treatment of children.¹¹

¹¹ Jo Wilding, 'Unaccompanied Children Seeking Asylum in the UK: From Centres of Concentration to a Better Holding Environment' (2017) 29 *International Journal of Refugee Law* 270, 272. See for example *ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4 (Baroness Hale). The Court states that: 'despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration"'.

3. Evaluation of the Current Legal Framework

3.1 Age Assessments

Age assessment is the first critical aspect of the current legal framework governing UASC treatment. The need for age assessments usually rises when an individual first applies for asylum after arriving in the UK either at a port of entry or an Asylum Screening Unit. If a child does not have legal documents proving their age and their claim of being a minor is doubted, they have to undergo an initial age assessment interview by an immigration officer of the Home Office.¹² According to UK Home Office policy, the child is only treated as an adult 'if their physical appearance/demeanor very strongly suggest that they are significantly over 18 years of age'.¹³ Otherwise, the individual must be afforded the *benefit of the doubt* and treated as a minor until a comprehensive age assessment has been conducted.¹⁴ Once referred to a local authority, even if the Home Office considers the individual an adult, another age assessment has to be carried out. The findings of the authority's assessment is then communicated to the Home Office for a final decision.¹⁵ Meanwhile, the individual must be treated as a child by the authority and given proper support accordingly.¹⁶

It is important to note that age assessments represent a central aspect of the asylum process as an individual's age affects the level of services, if any, that they should be provided with in terms of education and accommodation.¹⁷ In the context of immigration, the Immigration Rules provide children with certain procedural safeguards, allowing the evidence they present to be assessed differently than that of adults.¹⁸ Age also affects protections awarded to separated children as it ensures that they are not detained nor exposed to inadequate reception arrangements.¹⁹

¹² Children's Legal Centre, 'The Age Assessment Process' (2017) 2 <https://www.childrenslegalcentre.com/wp-content/uploads/2017/03/Age-assessment-process.march_.2017.pdf> accessed 15 April 2019.

¹³ Home Office Asylum Instruction, 'Assessing age' (2018) 10 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746532/assessing-age-v2.0ext.pdf> accessed 15 March 2019.

¹⁴ Ibid.

¹⁵ ADCS 'Age Assessment Guidance: Guidance To Assist Social Workers And Their Managers In Undertaking Age Assessment In England' (2015) <https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf> accessed 15 March 2019.

¹⁶ Children's Legal Centre (n 12).

¹⁷ Ibid.

¹⁸ Laura Brownlees and Zubier Yazdani, 'The Fact Of Age: Review Of Case Law And Local Authority Practice Since The Supreme Court Judgment In R(A) V Croydon LBC [2009]' (2012) Office of the Children's Commissioner for England <<https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Fact-of-Age.pdf>>

¹⁹ Ibid.

In the UK, despite the lack of a specific process to be followed regarding age assessments by local authorities, domestic courts have given guidance on the minimum standards to be followed. The leading case pertaining to age assessments is the *B v Merton* High Court case in 2003 which strongly rejected the reliance *only* on appearance for age identification. Instead, it encouraged reference to the applicant's history, family circumstances, education, ethnicity and culture.²⁰ The Merton judgment also asserted that the claimant must be *aware of the purpose* of the interview and be given the opportunity to explain any inconsistencies that arise.²¹ Elaborating on these principles, further case law has asserted that 'Merton-compliance' includes the necessity of conducting '*holistic*' age assessment interviews which take into consideration the multiplicity of factors behind an applicant's story as well as their own level of trauma, exhaustion and anxiety.²² It has also reiterated the need for the interviews to be fair, non-confrontational and based on the *benefit of the doubt*.²³ The UK transposed these principles in the 'Guidance to assist social workers and their managers in undertaking age assessments in England', issued in 2015 by the Association of Directors of Children's Services (ADCS), which also reiterates the concept of the benefit of the doubt.²⁴ This is mainly because 'the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care'.²⁵

While the language of the CRC is not explicitly stated in the main Merton case, its focus on maintaining a non-biased process and its prioritization of the benefit of the doubt embody the UK's international obligations in maintaining the best interest of the child. For instance, it directly reflects the CRC General Comment no. 6 which calls for age assessments not to rely solely on physical features and for the process to remain fair and objective.²⁶ Comprehensive assessments conducted through Merton are also consistent with UNHCR

²⁰ *B v London Borough of Merton* [2003] EWHC 1689 (Admin) [28], [37]. The judgment states that: "It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility." The case also established the necessity of local authorities conducting their own investigations, ensuring the presence of an interpreter and avoiding false assumptions about the applicants.

²¹ *Ibid* [55].

²² *IG v LB of Croydon* [2015] EWHC 649 (Admin) [7].

²³ *Ibid*. For further case law supporting the same minimum standards of Merton compliance, see *FZ v London Borough of Croydon* [2011] EWCA Civ 59; *R(AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin); *WK v Secretary of State for Home Department & Kent CC* [2009] EWHC 939 (Admin).

²⁴ ADCS, 'Age Assessment Guidance: Guidance To Assist Social Workers And Their Managers In Undertaking Age Assessment In England' (2015) <https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf> accessed 15 March 2019.

²⁵ *Ibid* 33.

²⁶ Committee on the Rights of the Child (n 6) para 31.

guidelines which call for respect for a child's dignity, and encourage the inclusion of a margin of appreciation in cases of uncertainty.²⁷

However, despite UK law and stated policy being consistent with international law, the UK's implementation of age assessments does not accord with these international obligations. In practice, many interviews are not Merton-compliant. First, according to primary research conducted by Wilding and Dembour, some children were not informed they were being assessed and did not fully understand the process before it started.²⁸ Second, in the interviews themselves, "holistic" assessments were not always followed. There have been reports of continued reliance on *visual* age assessments based on the physical appearance/demeanor of the children.²⁹ These have been declared illegal by court.³⁰ Rather than rely on comprehensive questions relating to the background of children, the inquiries were sometimes focused only on their journeys to the UK which do not impact their age. The lack of holistic procedures was also apparent in the use of X-rays in assessments, despite not being permitted for their wide margin of error.³¹ Additionally, in some cases, the interviews were found to be very confrontational, arbitrary and damaging to the best interest of the children in maintaining a proper relationship with the local authorities.³² Children were also interviewed by immigration officers rather than social workers, and those interviews were unlawfully carried out in detention rather than after release.³³

Finally, a wide culture of disbelief strongly undermined the principle of the benefit of the doubt in the assessment interviews. This was also coupled with the practice of some social service departments to age children as older in order to decrease the financial burden put on the local authorities.³⁴ Between July 2015 to June 2016, 634 individuals claiming to be minors were considered to be older than 18.³⁵ This hardly reflects a consistent use of the benefit of the doubt that is central to the Merton-compliance test as well as ADCS guidance for

²⁷ UNHCR, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A) 2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' (2009), para 75.

²⁸ Wilding and Dembour (n 4) 15.

²⁹ Ibid 17.

³⁰ *AA v Secretary of State for the Home Department* [2016] EWHC 1453 (Admin). The UK High Court ruled that the Home Office Policy that allows treating an UASC as an adult "if their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age" is unlawful, and that the applicant has to be determined to be a minor based on an objective basis.

³¹ Wilding and Dembour (n 4) 15.

³² Ibid 16.

³³ Ibid 17.

³⁴ Joint Committee on Human Rights, 'Human Rights of Unaccompanied Migrant Children and Young People in the UK' (2013) <<https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>> accessed 15 March 2019

³⁵ Marie-Bénédicte Dembour, 'Surely not! Procedurally Lawful Age Assessments in the UK' (December 2016) <<https://cpb-eu-w2.wpmucdn.com/blogs.brighton.ac.uk/dist/e/1030/files/2016/12/%E2%80%98Surely-not-for-blog-27xkf82.pdf>> accessed 15 March 2019.

authorities.³⁶ This problem is intensified by the fact that sometimes, interviewees were not given the opportunity to clarify discrepancies in the interview because they were deemed untrustworthy by their interviewers.³⁷ These discrepancies often arise from the stressful nature of the interviews as well as the impact of trauma and memory loss, which could lead to accounts that seem chronologically inaccurate. This is made even worse by linguistic and cultural differences that obscure the answers given, and heighten the impression that the individual is lying.³⁸ Many interviewers, especially inexperienced ones, are unaware of such obstacles facing children, and therefore are more reluctant to apply the benefit of the doubt.³⁹

These procedural shortcomings and the failure to properly apply domestic law represented in the Merton test persist across different regions in the UK. Wales, for instance, which is the same legal jurisdiction as England, transposed the Merton principles into an age assessment “toolkit”.⁴⁰ However, the same issues with enforcing compliance persist.⁴¹ Similarly, Northern Ireland follows the ADCS guidance and has reported to have the same significant problems with age assessments and disputes that are based on ill-informed assumptions about applicants’ behavior and appearance,⁴² as well as lack of qualified social workers that could follow the guidance.⁴³ As for Scotland, its thorough additional guidance on age assessments still does not adequately investigate the contested nature of interviews, their possible inaccuracies, or their lack of full implementation of the benefit of the doubt.⁴⁴

³⁶ House of Lords, 'Children in Crisis: Unaccompanied Migrant Children in the EU' European Union Select Committee report (2016) <<https://publications.parliament.uk/pa/ld201617/ldselect/ldeducom/34/34.pdf>> accessed 15 March 2019; Written evidence from Greater Manchester Immigration Aid Unit (UME0004).

³⁷ Ibid.

³⁸ Dembour (n 35) 15.

³⁹ Ibid 16.

⁴⁰ Jonathan Price, 'Local Authority Services for Separated Migrant and Asylum-Seeking Children in Wales under Part 6 of the Social Services and Well-Being (Wales) Act 2014' (2016) 14 <<https://welshrefugeecouncil.org.uk/sites/default/files/msiw/pdf/MSiW%20Briefing%20-%20Unaccompanied%20Asylum%20Seeking%20Children.pdf>> accessed 15 March 2019.

⁴¹ Ibid.

⁴² Michael Potter, 'Refugees and Asylum Seekers in Northern Ireland' Northern Ireland Assembly Research and Information Service Research Paper (2014) <<http://www.niassembly.gov.uk/globalassets/Documents/RalSe/Publications/2014/ofmdfm/6314.pdf>> accessed 15 March 2019.

⁴³ Mary Anne Webb and Kathleen Toner, 'Separated children and child trafficking in Northern Ireland' Barnardo's Northern Ireland (2011) <http://www.barnardos.org.uk/ni_child_trafficking_pp_briefing.pdf> accessed 15 March 2019. See also Teresa Geraghty, Celine McStravick and Dr Stephanie Mitchell, 'New to Northern Ireland: A Study Of The Issues Faced By Migrant, Asylum Seeking And Refugee Children In Northern Ireland' NCB Northern Ireland (2010) <http://www.barnardos.org.uk/new_to_northern_ireland_a_study_of_the_issues_faced_by_migrant_asylum_seeking_and_refugee_children_in_northern_ireland.pdf> accessed 15 March 2019.

⁴⁴ Paul Rigby, Maria Fotopoulou, Ashley Rogers and Andriana Manta, 'Responding to Unaccompanied Minors in Scotland: Policy and Local Authority Perspectives' University of Sterling (2018) <<https://www.scottishinsight.ac.uk/Portals/80/Responding%20to%20Unaccompanied%20Minors%20-%20Policy%20and%20LA.pdf>> accessed 15 March 2019.

Consequently, age dispute cases have increased, with numbers rising to 712 cases of for applicants who claimed to be children in 2017.⁴⁵ Since 2009, disputes over age have been resolved through Court judicial reviews whose decision is binding on the UK Border Agency and the local authority.⁴⁶ Between 2010 and 2015, at least 127 children have been found to be falsely considered as adults in detention in the UK.⁴⁷ As a viciously adversarial process, age disputes subject applicants to extremely challenging cross-examinations of their identity that might not be in their best interests.⁴⁸ The conflicting approaches to age disputes mean that an applicant could be treated as a child and an adult at once by the social services department and the Home Office. Discrepancies in the assessed age could lead to UASC having no access to services, with different departments relying on conflicting assessments to exclude the applicant from their responsibility.⁴⁹ The destabilizing effect of age disputes means that even asylum decisions are significantly delayed until they are settled.⁵⁰

Age assessments that do not comply with Merton guidelines or best interest principles lead to multiple child protection issues. Vulnerable children are illegally held with adults in detention and immigration centers or even end up living in adult accommodation. This exposes them to a wide range of abuses due to lack of social worker supervision. They also forego important educational opportunities and are at high risk for exploitation and abuse.⁵¹ Children treated as adults are also vulnerable to the risk of deportation and/or dispersal, as well as the possibility of being considered adults in any criminal proceedings they might undertake.⁵² Overall, such issues show that the pitfalls that are meant to be averted by the Merton compliance principle and guidelines such as the ADCS only end up becoming common practice. Age becomes intertwined with asylum's culture of disbelief and structural underfunding, leading to pressure to overestimate age.⁵³

Ultimately, age assessments, rather than being "holistic", become a hit-and-miss endeavour that shows the extent to which the UK treats best interest of the child as a primary consideration and not *the* primary one, making it far from a central concept in the process.⁵⁴

⁴⁵ Refugee Council, 'Children in the Asylum System' (2018) <[https://www.refugeecouncil.org.uk/assets/0004/2701/Children in the Asylum System Feb 2018.pdf](https://www.refugeecouncil.org.uk/assets/0004/2701/Children_in_the_Asylum_System_Feb_2018.pdf)> accessed 15 March 2019.

⁴⁶ Brownlees and Yazdani (n 18) 9.

⁴⁷ Written evidence from Maeve McClenaghan (UME0012).

⁴⁸ Written evidence from Jo Wilding (UME0013).

⁴⁹ Heaven Crawley, 'When Is A Child Not A Child? Asylum, Age Disputes And The Process Of Age Assessment' Ilpa Research Report (2007) 16-17 <<http://www.ilpa.org.uk/resource/13266/when-is-a-child-not-a-child-asylum-age-disputes-and-the-process-of-age-assessment>> accessed 17th March 2019

⁵⁰ Joint Committee on Human Rights (n 34) 12.

⁵¹ Ibid 63.

⁵² Ibid 59.

⁵³ Wilding and Dembour (n 33) 17.

⁵⁴ *ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4

The UK's failure to properly identify children by abiding *fully* with the Merton concepts then leads to less rights afforded to them under the CRC, and in turn represents a failure to fulfill its international legal obligations.

3.2 The Immigration and Asylum Process

3.2.1. Delays within the system

The immigration and asylum process is fraught with challenges that compromise the child's best interest in favor of immigration control.⁵⁵ The current legal framework governing immigration suffers from two major problems: First, there are delays caused by various factors such as time taken to obtain legal representation, the issue of resolving age disputes, transfers under the National Transfer Scheme(NTS) and long waiting periods in the Home Office decision-making proceedings. The impact of these delays in practice has massive consequences for for UASC, in particular those transitioning turning 18.

Under international law, the UK has the duty to uphold children's rights in compliance with the CRC, particularly section 3 on the child's best interest. In addition, the UK is bound by the guidelines under the EU Asylum procedures directive (on the minimum standards of procedures for granting and withdrawing refugee) when determining a child's asylum claim.⁵⁶ Under article 23(2) of the EU Asylum Procedure Directive, Member States are required to complete asylum applications in a timely manner, usually 6 months.⁵⁷ Where this is not the case, the applicant must be informed of the delays and a new time frame for completion must be given.⁵⁸ Furthermore, recital 14 of the Directive goes on to state that "specific procedural guarantees must be laid down for unaccompanied asylum children and for those procedural guarantees to have the best interest of the child as primary consideration".⁵⁹ The UK has reflected these duties in their domestic laws under section 55 of the BCIA 2009 and in the Immigration Act 1971 and the Immigration Rules made under it. Furthermore, the Home Office has published a guide which provides criteria to be followed in assessing children's asylum claims.⁶⁰

⁵⁵ Joint Committee On Human Rights (n 34) 15.

⁵⁶ Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13.

⁵⁷ Ibid art 23(2).

⁵⁸ Ibid art 23(3).

⁵⁹ Ibid recital 14.

⁶⁰ Home Office Asylum Instruction, 'Children's Asylum Claims '(2018)<
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/650514/children-s-asylum-claims-v2_0.pdf > accessed 10 March 2019.

However, in practice these laws and regulations are not followed as children experience delays as early as the initial stage of asylum proceedings. This is especially true in the allocation of a legal representative which they are entitled to Under paragraph 352ZA of the UK Immigration rules.⁶¹ These delays in obtaining legal representation are due to the legal aid cuts which have led to many firms being forced to close and resulted in the remaining ones being overburdened. In turn, it also affected the assignment of good quality legal representatives.⁶² This is evident in places such as East England where UASC have to wait between 2 to 3 months to be assigned a legal representative.⁶³ Furthermore, delays in acquiring a legal representative put the child's application at a standstill. In particular, the child can not submit their Statement of Evidence Form (SEF) nor attend or schedule their substantive interview, both of which are crucial to their asylum claim moving forward.⁶⁴ Such practice is contrary to the best interest of the child because minors are more vulnerable, and in most cases are unaware of their rights which are clarified by their legal representative.⁶⁵ In addition, lack of a legal representative means no one is there to protect the child's right to be heard, as stated under article 12 of the CRC.⁶⁶ Subsequently, ignoring the right to be heard automatically undermines the child's best interest.⁶⁷

The second factor influencing delays is the National Transfer Scheme (NTS). In an attempt to remedy the situation of overcrowding of UASC in local authorities, the department of education launched the NTS by virtue of section 69 of the Immigration Act 2016. The NTS permitted local authorities 'with a ceiling exceeding 0.007 percent of UASC to child population to transfer new arrivals to local authorities with a lesser number of children'.⁶⁸ This was initially run in England but was later on expanded to include Wales, Scotland and Northern Ireland.⁶⁹ The scheme aimed to ensure that all UASC received adequate care and services regardless

⁶¹ Immigration Rules (n 1) Part 11.

⁶² Wilding (n 11).

⁶³ David Bolt, 'An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children'(Independent Chief Inspector of Borders and Immigration 2017) 42 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/695310/An_inspection_of_the_best_interests_of_unaccompanied_asylum_seeking_children_March_2018.pdf> accessed 20th February 2019.

⁶⁴ United Nations International Children's Emergency Funds(UNICEF), Catherine Gladwell, Georgina Chetwynd, 'Education for Refugee and Asylum Seeking Children: Access and Equality in England, Scotland and Wales' (Refugee Support Network, July 2018) 41 < <https://downloads.unicef.org.uk/wp-content/uploads/2018/09/Access-to-Education-report-PDF.pdf>> accessed 18th March 2019.

⁶⁵ibid.

⁶⁶ United Nations International Children's Emergency Funds (UNICEF), Gerison Landsdown, "Every Child's Right to Be Heard : A Resource Guide on the UN Committee on the Right of the Child General Comment No.12' (save the children Fund 2011) 32 < https://www.unicef.org/adolescence/files/Every_Childs_Right_to_be_Heard.pdf> accessed 17th April 2019" In any decision made by adults as to the best interests of the child, due weight must be given to the child's expressed wishes in accordance with his or her age and maturity".

⁶⁷ Ibid 33.

⁶⁸ Ibid 31.

⁶⁹ UNICEF (n 64)10.

of which local authority they ended up in.⁷⁰ For a transfer to be made through the NTS, a decision to transfer the child must be made within 48 hours of their arrival. Further delays are not considered to be in the child's best interest.⁷¹

In practice, even after the decision is made within the correct time frame of 48 hours, most children experience delays in transfer of two to four months, which result into children settling in local authorities of first contact.⁷² During this period of time, children create connections with the local community and other applicants and as a result don't want to be transferred.⁷³ As a consequence, this increases the threat of the UASC going missing as a means of avoiding moving.⁷⁴ In one of the NTS progress reports, it was revealed that an estimate of 31 children had gone missing during the transfer process.⁷⁵ Delays also affect their access to services such as education, health and accommodation which they are entitled to under Article 17 and 20 of the Children Act 1989.⁷⁶ These delays can be further prolonged by age disputes discussed in the previous section.

The third issue related to the delays is the decision-making process itself. Between 2016 and 2017, UASC experience delays from twelve months to two years for a response from the Home Office. During this time, there was no form of communication or notice of delay to the children or their legal representative.⁷⁷ This violates the rule stated in General Comment 14 of the UN Committee⁷⁸ that the "best interest of the child" must be used as a procedural guideline.⁷⁹ Such practices are also contrary to the UK immigration Rules which require that a decision be determined in a timely manner, usually within 6 month, and that any delays in completion be communicated to the UASC or their legal representative.⁸⁰ Moreover, in the

⁷⁰ Ibid "This was particularly important for gateway authorities such as Kent and Hillingdon with a large population of UASC."

⁷¹ Elder Rahimi Solicitors, 'Systematic Delays in the Processing off the Claims for Asylum Made in the UK by Unaccompanied Asylum Seeking Children(UASC)' (March 2018) 12 < http://www.elderrahimi.co.uk/UserFiles/Files/p_nS4kT4.pdf> accessed 23rd March 2019

⁷² Refugee & Migrant Children's Consortium, 'Briefing on the National Transfer Scheme, August 2017' <<http://refugeechildrensconsortium.org.uk/national-transfer-scheme/>> accessed 17th March 2019.

⁷³ Bolt (n 63) 42.

⁷⁴ Ibid.

⁷⁵ Bolt (n 63) –" the 13 October 2017 National Transfer Scheme progress report".

⁷⁶ Refugee & Migrant Children's Consortium (n75); Also reflected in Section 22 and 25 of the Children (Scotland) Act 1995, articles 18 and 21 of the Children (Northern Ireland) Order 1995.

⁷⁷ Elder Rahimi Solicitors (n71) 8.; The Children's Society, 'Distress Signals: Unaccompanied Young People's Struggle for Mental Health Care' (2018) 38 < https://www.childrensociety.org.uk/sites/default/files/distress-signals-report_0.pdf > 23rd March 2019

⁷⁸ Committee on the Rights of the Child (n 7) para 20.

⁷⁹ Elder Rahimi Solicitors (n 71) 9 ; United Nation International Children's Emergency Funds(UNICEF), United Nations High Commissioner for Refugee(UHCR), 'Safe & Sound: What States Can Do to Ensure Respect for The Best Interests of Unaccompanied and Separated Children In Europe' (October 2014) 3 <www.unicef.org/protection/files/5423da264.pdf> accessed 19th April 2019.

⁸⁰ UK Immigration Rules (n 1) 350 to 352ZB.

case of *R (ABC)*⁸¹, the court held that delays in settling a child's asylum claim is detrimental to the child's best interest. Although this case was about barring a child's asylum claim due to the suspicion of being involved in a serious crime, it is still relevant to other UASC because delays affect them regardless of the cause.⁸²

Case law further shows that some delays could be unlawful if they are thought to be unreasonable. In the case of *R. (FH; K; A; V; H; SW; HH; AM; SI & ZW) v Secretary of State for the Home Department*⁸³, the court held that delays may be considered illegal if they were excessive or they did not fully comply with Home Office practices or policies.⁸⁴ Moreover, it is also applicable where 'the claimant is suffering some particular detriment which the Home Office has failed to alleviate'.⁸⁵ This judgment was echoed in the case of *Jawad v Secretary for State Department*.⁸⁶

As a consequence of all of these different delays, some UASC who already arrived in the UK turn 18 prior to the completion of their asylum application.⁸⁷ This means that their application is no longer considered on the basis of being a child, but rather as an adult. Moreover, child-specific protections such as the UASC Leave, free legal representation, having an independent interpreter and the prohibition of detention of minor will not be extended to them.⁸⁸ Furthermore, while the Home Office assesses the risk of return, being considered an adult may increase the chances of return to their country of origin.⁸⁹ This is evident in the 402 adults that were removed by the Home Office in the period between July 2016 and June 2017, despite previously claiming asylum as children.⁹⁰ In addition, when those children become adults, the Home office is no longer bound by the child's best interest principle.⁹¹

⁸¹ *R(ABC) V Secretary of States for the Home Department* [2011] EWHC 2937(Admin)

⁸² Elder Rahimi Solicitors (n 71)38.

⁸³ *R. (FH; K; A; V; H; SW; HH; AM; SI & ZW) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin)

⁸⁴ *Ibid* [30].

⁸⁵ *Ibid*.

⁸⁶ *Jawad v Secretary for State Department* [2010] EWHC 1800 (Admin)- "The Administrative Court held that the delay in determining the claimant's application for asylum had been asylum particularly where that failure was wholly unexplained and contrary to the defendant Secretary of State's published policy, namely, the Home Office Better Outcomes: The Way Forward 'Improving the care of unaccompanied Asylum seeking children',"

⁸⁷ Elder Rahimi Solicitors (n71) 29.

⁸⁸ Immigration Act 2014 s 5; Coram Children's Legal Centre (CLC), 'UASC leave'(2017) <<https://www.childrenslegalcentre.com/resources/uasc-leave/>> accessed 27th February 2019; Kelly Devenney, 'When Unaccompanied Young Asylum Seekers Turn 18, Many Face an Immigration Cliff Edge' (*The Conversation*, 6th February 2019)<<https://theconversation.com/when-unaccompanied-young-asylum-seekers-turn-18-many-face-an-immigration-cliff-edge-106734>> accessed 17th March 2019 .

⁸⁹ Nando Sigona, Elaine Chase, Rachel Humphris, 'Protecting the 'best interest' of the Child in Transition to Adulthood' (Becoming Adult Research brief 3) 3< <https://becomingadultproject.files.wordpress.com/2017/12/ba-brief-3-low-res.pdf> > accessed 13th April 2019

⁹⁰ Bolt (n 63) 56.

⁹¹ *Ibid* 3. "Under section 20 of the Children Act 1989, former UASC who were cared for by the local authority for more than 13 weeks before turning 18 are entitled to support form the local authority".

3.2.2. *The UASC Leave to Remain*

The second issue within the immigration and asylum process is the nature of the decisions made, specifically when it comes to the UASC Leave to Remain. The UASC leave is a limited 30-month leave to remain granted to children under the age of 17 ½ whose asylum and humanitarian protection claims have been refused.⁹² Once the leave expires, the child has to apply for further leave. And if they are turning 18, they will have to apply for a different kind of leave altogether.⁹³

According to the Home office, the Leave is instrumental in protecting and upholding the child's wellbeing while also maintaining immigration control.⁹⁴ Contrary to the Home Office's perception, the UASC leave does not *prioritize* the best interest of the child as a primary consideration as it does not provide them with certainty as to their long term immigration status.⁹⁵ While waiting on a decision, the children experience more uncertainty due to the lack of a form of identification that proves that they are in the country legally. They could only obtain this through the pending Leave document.⁹⁶ In turn, this results into a "limbo state"⁹⁷ where they are unable to integrate in society, hindering their access to services such as education and employment.⁹⁸ Furthermore, the Leave tends to expire at a critical point in the children's lives especially after the passing of section 2 of the Education and Skills Act 2008 which required that children stay in education or be given some kind of training until they turn 18 years old.⁹⁹ This means that for some, the Leave expires when they are due for their end of secondary school examination or are about to apply for colleges admissions.¹⁰⁰ Equally, the children's health is affected by the uncertainty that comes with being granted UASC leave, which has been thought to correlate with depression in UASC.¹⁰¹

This compounded effect of uncertainty violates article 3 of the CRC, pertaining to best interest. It also undermines the state obligation under article 22 of the Convention to carry out

⁹² Gina Clayton, *Immigration and Asylum Law* (7th edn, Oxford University Press 2016) 432.

⁹³ *Ibid.*

⁹⁴ Bolt (n63) 55.

⁹⁵ Refugee & Migrant Children's Consortium, 'Independent Chief Inspector of Borders and Immigration (ICIBI) Call for Evidence : The Home Office's Consideration of Children's 'best interests' '(31st October 2017)<<http://refugeechildrenconsortium.org.uk/icibi-childrens-best-interests/>> accessed 17th April 2019.

⁹⁶ Office of the Children's Commissioner: Adrian Matthews 'What's Going to Happen Tomorrow?: Unaccompanied Children Refused Asylum'(April 2014)70,71<<https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Whats-going-to-happen-tomorrow.pdf>> accessed 20th February 2019.

⁹⁷ Wilding and Dembour (n 4)11.

⁹⁸ Refugee & Migrant Children's Consortium (n95).

⁹⁹ Bolt (n 63) 55.

¹⁰⁰ Refugee & Migrant Children's Consortium(n95).

¹⁰¹The Children' Society, 'Into the Unknown: Children's Journeys through the Asylum Process'(2014)4,5 <<https://www.childrenssociety.org.uk/sites/default/files/tcs/into-the-unknown--childrens-journeys-through-the-asylum-process--the-childrens-society.pdf> > accessed 17th March 2019.

‘appropriate measures to ensure that a child, whether unaccompanied or accompanied, who is seeking refugee status receives appropriate protection entails, inter alia, the responsibility to set up a functioning asylum system’¹⁰² Ironically, the wait might not be worthwhile because the chances of the child being granted further leave are pretty slim with only 20 applicants being granted further leave between 1 July 2016 and 30 June 2017, all aged between 17 and 18 years.¹⁰³

3.3 Uneven Sharing of Responsibility

If taken at face value, it would seem that the UK’s domestic legislation regarding taking responsibility for unaccompanied children is particularly tailored to maintain their best interests. UK obligations are represented in Sections 17 and 20 of the Children Act of 1989. These impose a responsibility on local authorities to look after children in need *located in their specific areas*, to protect and promote their well-being as well as accommodate them.¹⁰⁴ Such provisions were meant to ensure that children do not experience long distance transfers between different local authorities. Yet, the Children Act provisions underpinned by specific CRC rights only led to disproportionate distributions of children across the country.¹⁰⁵ In 2015, the majority of local authorities in England had low and normal intakes, with only 7 of them responsible for 43 percent of UASC in the country.¹⁰⁶ Regional concentrations showed that London and the South East took the highest intake of UASC, while the North, North East, North West and South West regions of England had extremely low numbers.¹⁰⁷ These disparities are further aggravated by insufficient funding, leading to the reluctance of local authorities to become responsible for more UASC.¹⁰⁸ Given this over capacity, local authorities ‘cannot provide appropriate levels of support to meet the needs of these young people due to the demand pressures.’¹⁰⁹

3.3.1. Accommodation

This uneven distribution of UASC particularly affects their access to accommodation, where

¹⁰² Committee on the Rights of the Child (n 6) para 19.

¹⁰³ Bolt (n 63) 56.

¹⁰⁴ Children Act 1989 s17 and s20.

¹⁰⁵ Wilding (n 11) 270, 271.

¹⁰⁶ Ibid 274.

¹⁰⁷ Ibid 275

¹⁰⁸ Wilding (n 11) 278. Wilding stated that the rates are subject to change, but in 2016, local authorities were paid £95 per day per child aged 15 or under, and for those aged 16 or 17, were paid £71 per day. Once a child turned 18, and if they are eligible to acquire leaving-care services, the local authority gets £150 *per week*, significantly decreasing its funding.

¹⁰⁹ Q 48 (Andrew Ireland), written evidence from Kent County Council (UME0034) and Jo Wilding (UME0013).

over concentration in specific geographical regions creates a gap between their rights in principle (particularly their best interests as laid out in law) and their lived experiences. General Comment no. 6 states that the selection of accommodation choices should take into account the particular vulnerabilities of UASC who are separated from their families and their countries of origin, as well as their gender and age, while also considering their opinions and best interests.¹¹⁰ Additionally, under article 20 of the CRC, the UK is obliged to provide assistance and special protections to any ‘child temporarily or permanently deprived of his or her family environment.’¹¹¹ Similarly, article 22 reaffirms the duty to protect and assist children seeking refugee status.¹¹²

As such, children under the care of local authorities are provided with different kinds of accommodation: foster care, children’s homes or semi-independent accommodation. Foster care is perceived to be the optimum option for UASC, especially from a best interest perspective and from the testimonies of children themselves. It provides a nurturing family environment and the opportunity to be integrated in the local context.¹¹³ Yet, the large numbers of UASC lead to lower availability of foster placements, causing most older individuals (16 and 17 years old) to be placed in the significantly unfavourable conditions of semi-independent living.¹¹⁴ The over-willingness of local authorities to place older children in such accommodations is particularly problematic due to the lack of trained staff who are aware of their specific needs, causing UASC to be more prone to going missing under these circumstances.¹¹⁵ Many UASC reported not having a choice or having a limited say in their own accommodation placements, also in violation of the child’s right to be heard.¹¹⁶

Unfortunately, these varying and uncertain levels of support resulting from uneven distributions of UASC are not just limited to England. Despite this domestic legal framework in place, large discrepancies are also present in the allocation of children between different regions. In Wales, Part 6 of the Social Services and Well-Being (Wales) Act 2014 covers the duty to provide support and accommodation for “looked after children” in the care of local

¹¹⁰ Committee on the Rights of the Child (n 6) para 40.

¹¹¹ CRC (n 2) art 20.

¹¹² Ibid art 22.

¹¹³ Wilding (n 11) 279.

¹¹⁴ Ibid.

¹¹⁵ Joint Committee On Human Rights (n 34) 50.

¹¹⁶ Blanka Hancilova And Bernadette Knauder, ‘Unaccompanied Minor Asylum-seekers: Overview of Protection, Assistance and Promising Practices’ (2011) International Organization for Migration Report <http://iom.hu/PDF/Unaccompanied_Minors_Asylum-seekers_Overview_of_Protection_Assistance_and_Promising_Practices.pdf> accessed 12th March 2019.

authorities.¹¹⁷ However, there are no exact figures of UASC in Wales, and data only shows that the numbers are very small in comparison to England.¹¹⁸

In Scotland, the same duties are covered under the Children (Scotland) Act 1995.¹¹⁹ Numbers of children in Scotland are uncertain but comparatively lower than England, estimated at around five arriving to the country each month. Uneven distributions also extend to Scottish local authorities where Glasgow is the most overburdened.¹²⁰ The variations in practice in Scotland do not just emerge from the differences in allocations, but also in the accommodation of 16 and 17 year old children under the different Sections 22 and 25 of the Act. Section 25 automatically considers children to be “looked after” by the local authority, allowing them additional protections and standards of care. Alternatively, Section 22 administers services but not equal heightened care for them. The latter is therefore discriminatory.¹²¹

Similar issues appear in Northern Ireland despite having the duty to accommodate and care for UASC covered under the Children (Northern Ireland) Order 1995.¹²² The country does not have individual statistics on supported UASC, but their numbers are known to be very low.¹²³ Problems also arise for older children who are transferred to hotels in cases of overcrowding, leading to multiple support and protection issues.¹²⁴ Violation of the right to be heard is replicated in this case because older children are unable to enjoy the support of better accommodation, nor influence the decision being made regarding their well-being.¹²⁵

Consequently, the discrepancies in the accommodation provided impede the access of UASC to their rights. In semi-independent living, the “bed-bread-bath care” given to children is inadequate for their psychological recovery.¹²⁶ Social workers become unwilling or unable

¹¹⁷ Social Services and Well-being (Wales) Act 2014 part 6.

¹¹⁸ ‘Safeguarding and Promoting the Welfare of Unaccompanied Asylum Seeking Children and Young People’ (All Wales Child Protection Procedures Review Group, 2011) <<http://www.childreninwales.org.uk/resource/safeguarding-promoting-welfare-unaccompanied-asylum-seeking-children-young-people-wales-practice-guidance/>> accessed 19th April 2019.

¹¹⁹ Children (Scotland) Act 1995 part 2. Section 25 states that: ‘a local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because— (a) no-one has parental responsibility for him; (b) he is lost or abandoned; or (c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.’ Section 22 is also sometimes applied.

¹²⁰ Rigby (n 44) 9.

¹²¹ ‘Legal Issues In The Accommodation And Support Of Asylum Seeking And Trafficked Children Under The Children (Scotland) Act 1995’ (2012) Legal Services Agency <[http://www.lsa.org.uk/docs/SLF%20Report%20FINAL%20\(2\).pdf](http://www.lsa.org.uk/docs/SLF%20Report%20FINAL%20(2).pdf)> accessed 15 March 2019.

¹²² Children (Northern Ireland) Order 1995.

¹²³ ‘Response to the inquiry into the situation of unaccompanied and separated minors in Europe’ (2017) Barnardo’s and Barnardo’s NI <http://www.barnardos.org.uk/inquiry_into_the_situation_of_unaccompanied_and_separated_minors_in_europe.pdf> accessed 15 March 2019.

¹²⁴ Geraghty (n 43).

¹²⁵ Ibid 19.

¹²⁶ Wilding (n 11) 276.

to provide any additional support to children who have expressed issues with their accommodations.¹²⁷ A system that does not control where UASC receive their services cannot invest in procurement strategies for accommodation and other support services. Areas with a high concentration of children will also suffer from higher costs that impact the quality of services already provided. Equally, areas with low numbers will lack the expertise and knowledge to deal with the range of protection issues facing them.¹²⁸ In accommodation, it seems that the UK is not adequately upholding its obligations in maintaining the children's best interest and well-being in practice.

3.3.2. Education

Access to education, like accommodation, is affected by a high concentration of UASC in one local authority. Children have the right to education under article 28 and 29 of the CRC.¹²⁹ According to CRC General Comment 6, states are required to provide unaccompanied children with equal access to education 'during all phases of the displacement cycle' and without any discrimination.¹³⁰ Additionally, 'the unaccompanied or separated child should be registered with appropriate school authorities as soon as possible and get assistance in maximizing learning opportunities.'¹³¹

In the UK, UASC are entitled to education by virtue of section 17 of the Children Act 1989.¹³² Furthermore, education is free and compulsory for children between the age of 5 and 16 years old.¹³³ Adequate and appropriate education must be provided regardless of the child's immigration status. In the case of UASC, all local authorities are required to enrol children in mainstream education 20 school-days upon their arrival. Yet, no local authority has been able to achieve this.¹³⁴ In *R (KS and ZU) v London Borough of Croydon*¹³⁵, it was held that 'the failure to facilitate education for UASC was unlawful. This is because under the Education Act 1996 the local authorities are under a duty to provide full-time, suitable

¹²⁷ Hancilova and Knauder (n 49) 49.

¹²⁸ 'Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children' Home Office Immigration and Nationality Directorate (2007) <<https://dera.ioe.ac.uk/229/1/1505-3790.pdf>> accessed 15 March 2019.

¹²⁹ CRC (n 2) art 28; CRC (n 2) art 29 "States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity"

¹³⁰ Committee on the Rights of the Child (n 6) 14,15.

¹³¹ Ibid.

¹³² Children Act 1989, s 17.

¹³³ Education Act 1996, s 7, s 8.

¹³⁴ Department for Education, 'Promoting the education of looked after children and previously looked after children Statutory guidance for local authorities' (February 2018)⁴ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683556/Promoting_the_education_of_looked-after_children_and_previously_looked-after_children.pdf>accessed 13th April 2019.

¹³⁵ *R (KS and ZU) v London Borough of Croydon* [2011] ELR 109(Admin)

education taking into consideration the child's individual needs.¹³⁶ This recognition of education as a vital part of children's growth and also an essential part of their integration into society transposes the best interest principles present under the legal framework of the CRC.

However, in practice, high intake authorities struggle with implementing such domestic and international standards. It is common practice for them to wait 21 days before trying to enrol a child into a school system because they are likely to be transferred.¹³⁷ Even where an attempt is made to enrol children into school, UASC wait between 3 months to 7 months, depending on the local authority, before being admitted into an education system.¹³⁸ Also, children in semi-independent accommodations (some of which are under 16 years old), tend to have to wait for 11 months before being able to access education because they are unable fill in the complex online application.¹³⁹ This is despite the fact that they have a social-worker whose responsibility includes helping the children enrol into schools or colleges.¹⁴⁰

In turn, the overcrowding in local authorities leads to limited access to services for children.¹⁴¹ An example of this is English lessons, where children in higher intake authorities receive fewer hours of learning. While in lower intake authorities, like Brighton and Hove for instance, UASC are allocated two to three hours of English lessons per week in addition to their normal English lessons.¹⁴² Such access is also impeded by the long journeys children have to take in order to get to school or college.¹⁴³ In Kent, a high-intake authority, some UASC have to travel more than one hour by train in order to get to colleges in London because schools in the areas do not have any available places.¹⁴⁴ This is contrary to the best interest of the child because they are entitled to attend school within their council like other children.

Ultimately, issues resulting from overcrowding are aggravated by structural factors that affect education all throughout the UK. In all regions, local authorities whether high intake or low face challenges in providing adequate education for UASC. In Scotland for example, there is an issue of 'inappropriate placement decisions' that allocate UASC to schools instead of colleges.¹⁴⁵ This violates the best interest principle and is detrimental to the child's academic growth. Similarly in Wales, there is a lack of adequate educational support for UASC

¹³⁶ Coram Children Legal Centre, 'Access to Compulsory Education for Migrant Children' <<https://www.childrenslegalcentre.com/resources/school-education-migrant-children/>> accessed 1st April 2019

¹³⁷ UNICEF (n 64) 30.

¹³⁸ Coram Children's Legal Centre (n 136)

¹³⁹ Wilding (n 11) 281.

¹⁴⁰ Coram Children's Legal Centre (n 136)

¹⁴¹ Wilding and Dembour (n 4)

¹⁴² Wilding (n 11) 280.

¹⁴³ Ibid 281.

¹⁴⁴ Ibid 280.

¹⁴⁵ UNICEF (n 66) Annex 1 - Scotland.

transferred under the NTS.¹⁴⁶ Equally in England, UASC experience challenges in accessing ESOL due to a reduction in funding.¹⁴⁷

The cumulative effect of this uneven distribution of responsibility, both in education and accommodation, is a discourse of representing UASC as an incoming burden on local authorities, with the primary goal becoming a more “fair” distribution from their point of view.¹⁴⁸ This ultimately undermines, and even overlooks, the best interest of children in discussions of allocation policies, especially when there are such large gaps in the quality of services and care which are based solely on where they happen to be located.

3.3.3. National Transfer Scheme

As previously discussed, the NTS was introduced as an attempt to resolve the issue of overcrowding of UASC in local authorities. It was put in place to unburden local authorities such as Kent County council and London Borough council who have a high number of unaccompanied asylum seeking children.¹⁴⁹ Initially, the Scheme was successful with 149 UASC transfers from Kent county council between 1st July 2016 and 21st October 2016 and an additional 549 by 7th September 2017.¹⁵⁰ However, transfers started taking longer, shifting from the intended 5 days to an average of 30 days by November 2017. London was considered to be the slowest, with a transfer rate of 109 days.¹⁵¹

One of the main issues with the NTS is the lack of funding, especially given the spontaneous arrival of children. Local authorities did not want to take on any more children when they were already struggling to finance the children they were looking after. This is because the Home office only provided 50 percent of the cost needed to care for a UASC, with an allocation of £ 41,610 a year for UASC under age of 16 and £ 33,215 for UASC that are 16 and 17 years old in comparison to the £ 55,000 needed by the local authorities to care for a UASC for a year.¹⁵² Furthermore, these funds did not include services costs such as education or health care.¹⁵³ This issues of funding has led to some local authorities such as

¹⁴⁶ Ibid Annex 1 - Wales.

¹⁴⁷ Nienke Alberts, Graeme Atherton, 'Falling through the cracks - enabling access to higher Education for Unaccompanied Asylum Seeking Children'(AccessHE Report)12 <<https://www.accesshe.ac.uk/yYdIx0u7/AccessHE-Report-Falling-Through-the-Cracks-WEB.pdf>> accessed 20th April 2019.

¹⁴⁸ Vaughan Robinson, 'Dispersal policies in the UK' in Vaughan Robinson, Roger Andersson, and Sako Musterd(eds), *Spreading the 'Burden'? A Review of Policies to Disperse Asylum Seekers and Refugees* (Bristol University Press 2003) 105.

¹⁴⁹ Bolt (n 63) 39.

¹⁵⁰ Ibid 40.

¹⁵¹ Ibid 41.

¹⁵² Ibid 43.

¹⁵³ Ibid 44.

Leicestershire and Nottinghamshire County Councils opting out of the scheme.¹⁵⁴ In turn, this resulted into the introduction of mandatory participation by virtue of the Immigration Act 2016, compelling local authorities to take part if they have the capacity to take on more children.¹⁵⁵ In practice, such measures do not provide an effective solution to the structural issue of limited resources.

Consequently, these delays are the most paradoxical aspect of the NTS because they clearly show that the scheme did not run with the best interest of the child in mind. In the implementation, the lack of efficiency of the scheme disproportionately affects the children's wellbeing. This does not only violate provisions set out in section 55 of the BCIA but also goes against the rules in the NTS protocol.¹⁵⁶ The best interest assessment should be carried out through the transfer and should be considered above the 0.07 percent ceiling.¹⁵⁷ This means that despite the local authority exceeding the 0.07 percent ceiling, it might be in the child's best interest to remain in the local authority of first entry, this can be where the child has relatives in the area or if it is professionally advised that the child remains in the local authority.

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¹⁵⁴ Ibid 43.

¹⁵⁵ London Council, 'Unaccompanied Asylum Seeking Children (UASC)' <<https://www.londoncouncils.gov.uk/our-key-themes/asylum-migration-and-refugees/unaccompanied-asylum-seeking-children-uasc>> accessed 1st May 2019.

¹⁵⁶ Home Office, Department for Education, 'National Transfer Scheme Protocol for Unaccompanied Asylum Seeking Children' (March 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750913/NTS-Protocol-Final-October-2018.pdf> accessed May 30th April 2019; Refugee Children's Consortium, 'National Transfer scheme' (August 2017) <http://refugeechildrensconsortium.org.uk/wp-content/uploads/2017/08/RCC_National-Transfer-Scheme-Briefing_August2017.pdf> accessed 1st May 2019.

¹⁵⁷ Ibid.

¹⁵⁸ Coram Children's Legal Centre (n 136).

4. Conclusions and Recommendations

To conclude, it seems that the biggest dilemma in the treatment of UASC by the UK is that the extensive domestic legal framework present, which mostly transposes international law's reference to best interest, is not fully implemented in practice. This is true for all the challenges presented in this memorandum: the age assessment process, the immigration and asylum process and the distribution of responsibility among local authorities.

Consequently, the following are some of the recommendations to Human Rights Watch relating to the situation of UASC in the UK: For age assessments, to recommend stronger compliance with the Merton principles as it encapsulates the UK's international obligations with regards to child's best interest. We also urge the application of the benefit of the doubt to minimize age disputes. All interviews should be fully *holistic* and carried out by qualified officials that are trained in child-specific needs, in line with the CRC. For immigration, delays of all forms in the process ought to be addressed through abiding by domestic legal guidelines in relation to time frames allocated. This would help ensure that the domino effect of delays that affects access to services and protections would be circumscribed. Finally, the issue of uneven sharing of responsibility among local authorities should be addressed by reviewing the scheme already in place. Improving the NTS should be a priority for the UK government as a central solution to overburdening, particularly by increasing its current funding. The NTS should aim at ensuring timely transfers and giving precedence to adequate education and accommodation placements. This would be an effective prioritization of the best interest and well-being of children.

Ultimately, one way for the UK to tackle its practical difficulties is to fully incorporate the CRC into domestic law; allowing Convention rights and especially the best interest to be *the primary* consideration throughout all proceedings. We recommend that this be coupled with the adoption of an official Best Interests Determination process as a protection framework for all unaccompanied children.

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