
Legal issues in the accommodation and support of asylum seeking and trafficked children under the Children (Scotland) Act 1995



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Contents

Introduction	1
Background to the Report.....	2
Definitions of Separated Children and Trafficked Children	2
Separated and Trafficked Children as Children in Need	4
Rights of Separated and Trafficked Children in International Law	5
Local Authority with Responsibility to Accommodate.....	7
A Closer Look at Age	7
The Legal Context: The Children (Scotland) Act 1995.....	10
Historic Legislative and Policy Framework.....	10
Accommodation and Support of Separated Children Ages 16 and 17	12
A Case Study: Amal and Bashir	16
A Comparative View: England & Wales	20
The Children Act 1989.....	20
Strategic Litigation in England and Wales.....	21
Current Position in England and Wales	23
Current Policy and Practice in Scotland	25
Freedom of Information Request	25
A Perspective from the Front Line	27
Legal Opinion of Senior Counsel	30
Conclusion.....	33
Key Findings	33
Key Recommendations for Legal Challenges	33
Annex 1 – Annex A of Scotland's Children: The Children (Scotland) Act 1995 Regulations and Guidance Volume 1 Support and Protection for Children and Their Families.....	35
Annex 2 – Annex from Department for Children, Schools and Families (2010), ‘Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation’	36
Annex 3 – Freedom of Information Request Letter.....	37
Annex 4 – Freedom of Information Responses.....	39
Annex 5 – Legal Opinion of Senior Counsel Janys M Scott QC	41
Annex 6 – Bibliography & Additional Resources.....	66

Introduction

In Scotland, a small but significant number of children arrive from abroad every year alone, separated from their families or any other adult with responsibility for looking after them, destitute and homeless. These children could be fleeing persecution or torture in their home countries, and may have been trafficked to Scotland or suffered some other form of exploitation on their journey here.

Local authorities in Scotland are responsible for looking after these children, when there is no one else who is capable of doing so. This responsibility arises under the Children (Scotland) Act 1995 (the 'Act').

The Young Persons' Project at the Legal Services Agency has represented separated children across Scotland since its launch in February 2012, and solicitors in the Women and Young Persons' Department, had represented child clients in the same circumstances for many years previously. It is through the earlier casework of the Department, that we first became aware that there is a concerning issue in Scotland having to do with the inconsistency of treatment by local authorities in respect of duties owed by them to separated children, in particular those who arrive at ages 16 and 17.

This inconsistency has serious consequences for the welfare and future of these children, and yet the Project was not able to discern any rational justification for the variation in practice between local authorities, and was concerned that this variation was unlawful.

As a consequence, the Young Persons' Project sought funding from the Strategic Legal Fund for Vulnerable Young Migrants to conduct research to evidence this inconsistency of treatment, and to assist legal practitioners to identify cases and legal arguments that could be employed to challenge current practice, with a view to improving the quality of social care provision to this group of children and to ensuring equality of treatment in future.

This report records the steps taken in the course of researching this issue. It will commence with a literature review which will consider the historical and policy context in Scotland and take a closer look at the relevant legislation. It will then consider the issue comparatively, by looking at historic and current practice by local authorities in England and Wales.

The report will then examine current practice in Scotland, by analysing the results of a freedom of information request made by the author of the 32 Scottish local authorities on the question of how these children are accommodated and supported in Scotland at present. It will then look at case studies drawn from the recent experience of a front-line organisation that supports separated children in Scotland, the Scottish Guardianship Service.

The report will then summarise a legal opinion of senior counsel Janys M Scott QC which examines the duties of Scottish local authorities towards separated children under Scots and international law. This opinion concludes that if a local authority accommodates separated children, it must nearly always do so under Section 25 of the Children (Scotland) Act 1995, and such children will therefore

be “looked after” children in terms of the Act. Furthermore, a local authority cannot escape this outcome by purporting to provide accommodation to such children under Section 22 of the Act.

The report will conclude with a summary of key findings and a set of recommendations to aid legal practitioners in identifying cases that could be suitable for pursuing a legal challenge, and legal arguments that can be employed to this end.

Background to the Report

This report sets out to examine the inconsistency of treatment by local authorities in respect of duties owed by them to separated children, including trafficked children, who arrive in Scotland at the age of 16 or 17, under the Children (Scotland) Act 1995 (the ‘Act’).

As the report deals with a specific set of issues which arise with regard to a narrowly defined group of children and young people, we provide at the outset some definitions for purposes of the discussion which follows.

Definitions of Separated Children and Trafficked Children

Separated Children is a term commonly used to describe children under the age of 18 who are outside their country of origin and separated from their parents or legal or customary care giver. They may arrive on their own or may be accompanied by an adult who is not their parent or legal or customary caregiver. In some cases, they may be removed from their legal or customary care giver through legal proceedings in the UK.

Some separated children may have made a claim for asylum because they fear persecution if they are returned to their home country, and will be referred to as **Unaccompanied Asylum Seeking Children (UASC)**.

A claim for **asylum** in the UK is made under the UN 1951 Convention relating to the Status of Refugees and its 1967 Protocol (‘UN Refugee Convention 1951’), Article 1A of which defines a refugee as someone who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence....., is unable, or owing to such fear, is unwilling to return to it.”

Trafficked Children are children who have been recruited, moved, harboured or received for the purposes of exploitation. This exploitation can take a range of forms, including sexual exploitation, forced labour, domestic servitude, forced marriage, and unlawful activities, such as drugs cultivation, stealing and sale of illegal goods. The UK has obligations arising under international law to positively identify child victims of trafficking and ensure they receive the support they need to begin to recover from their experiences of exploitation. These obligations arise under Article 4 of the European

Convention on Human Rights ('ECHR'),¹ Article 14 of the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims ('EU Trafficking Directive'),² and Articles 10 and 12 of the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 ('Trafficking Convention').³

The key definition for purposes of this report is taken from Article 2 of the EU Trafficking Directive which provides:

"The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation... Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs."

Under the EU Trafficking Directive, a child (defined as any person under 18) is a victim of trafficking even if none of the means listed in the above definition are used, based on the principle that a child cannot consent to her own exploitation.

¹ The UK is a signatory to the ECHR and the UK and Scotland have introduced legislation which gives further legal effect to certain rights within the ECHR in the form of the Human Rights Act 1998 and the Scotland Act 1998. The Human Rights Act ensures that all legislation must be read in a way which is compatible with the ECHR, and that all public authorities must act compatibly with the rights protected therein. The Scotland Act requires any Act passed by the Scottish parliament on a devolution issue to be compatible with the ECHR and if not, it will be invalid. The European Court of Human Rights have considered trafficking in the context of Article 4 of the ECHR (the prohibition against slavery and forced labour) and have found, for example, in *Rantsev v Cyprus and Russia*, Application No 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, the failure of a state to investigate allegations of trafficking and protect a potential victim of trafficking to be in breach of that article.

² The EU Trafficking Directive was transposed into the UK, including Scotland, on 6 April 2013. To date, no specific and comprehensive piece of legislation has been introduced, by either the UK or Scottish Parliaments, in relation to human trafficking, although there are bills before both parliaments on the issue. The Trafficking Directive does, however, have direct legal effect within the UK, including Scotland, with EU law having supremacy over national law.

³ The UK ratified the UN Palermo Protocol in 2006 and ratified the Trafficking Convention in 2008, which came into force in the UK, including Scotland, on 1 April 2009. Despite ratification, these instruments do not have direct legal effect in the UK, including Scotland, unless specifically incorporated into national legislation. Although some parts of these instruments have been incorporated, key provisions, including with regard to the definition of trafficking and measure to protect and promote the rights of victims, have not and therefore do not have direct legal effect. There is, however, a legitimate expectation that the UK, including Scotland, will comply with these provisions, and the governments purport to have done so, thus far, through the development of policy rather than specific legislation.

Separated and Trafficked Children as Children in Need

Separated Children and Vulnerability

A significant body of research has established that separated children and unaccompanied asylum seeking children, by virtue of their backgrounds and experiences, form a particularly vulnerable part of society and face distinct barriers to accessing services that will safeguard and promote their welfare.⁴

This research, together with best practice guidelines in the field of social care,⁵ has shown that common vulnerabilities can include:-

- Trauma caused by separation from family or customary carers or bereavement
- Trauma caused by persecution or torture (including witnessing or being subjected to physical, sexual and/or emotional abuse or neglect in home country, during journey to UK, or in UK)
- Language barriers
- Cultural barriers
- Feelings of shame
- Feelings of fear, anxiety and mistrust of authority
- Physical or mental disability
- Low level of education
- Poor mental health for other reasons

Furthermore, it has been recognised that the particularly vulnerable situation of separated children poses multifaceted challenges to the states that require to protect and support them.

For this reason, the UN Committee on the Rights of the Child published 'General Comment No 6 (2005): Treatment of unaccompanied and separated children outside their country of origin' to provide guidance on the protection, care and proper treatment of unaccompanied and separated children based on the entire legal framework provided by the UN Convention on the Rights of the Child 1989 ('UNCRC'), as discussed further below.

⁴ See, for example, Chase, E., Knight, A., & Statham, J., (2008) 'The Emotional Well-being of Young People Seeking Asylum in the UK, The British Association for Adoption and Fostering;' Simmonds, J., & Merredew, F. (2010) 'The Health Needs of Unaccompanied Asylum Seeking Children and Young People;' and Coram Children's Legal Centre (2012) 'Seeking Support: A Guide to the Rights and Entitlements of Separated Children.'

⁵ Social Care Institute for Excellence (2013) 'Good practice in social care with refugees and asylum seekers' and Department for Children, Schools and Families (2010), 'Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation.'

Additional Vulnerabilities of Trafficked Children

Child victims of trafficking may face additional barriers⁶ which can include:-

- Fear of traffickers in the UK and possibility of ongoing exploitation or imminent re-trafficking
- Fear of threats / physical harm to family abroad
- Isolation, if fearful of own cultural community in the UK

In summary, separated children (including unaccompanied asylum seeking children and trafficked children) are likely to present at the time they are identified by a local authority with a complex range of needs, which are based around underlying vulnerabilities common to this group of young people, by virtue of their backgrounds, experiences, and their journeys to becoming separated children in the UK.

Rights of Separated and Trafficked Children in International Law

Separated children are children first, and migrants second.⁷ They have equal rights to protection and support as any British citizen child in the UK.

Article 2 of the UNCRC requires all state parties to secure rights for children, *'without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'*

Article 3 of the UNCRC also states the best interests of the child must be *a primary consideration*.

The UK government ratified the UNCRC in 1991, undertaking to implement its principles in UK policy and legislation, although it has not formally incorporated its provisions in domestic law.

Government agencies, including the Home Office, are subject to statutory duties to safeguard and promote the welfare of children.⁸ The then-UK Border Agency's *Every Child Matters* guidance clearly states that *'every child matters even if they are someone subject to immigration control'* and goes on to state *'In accordance with the [UNCRC] the best interests of the child will be a primary consideration.'*⁹

The Scottish Government's *Getting It Right for Every Child ('GIRFEC')* policy framework takes care to point out that *"GIRFEC has its roots in the [UNCRC]...the 'E' in GIRFEC stands for 'every'..."*¹⁰

⁶ ECPAT UK (2011) 'On the Safe Side: Principles for the safe accommodation of child victims of trafficking' and Rigby, P., Malloch, M. & Hamilton Smith, N. (2012) 'Towards Better Survivor Care: A Report on Child Trafficking and Care Provision.'

⁷ Crawley, H. & ILPA (2006) 'Child First, Migrant Second: Ensuring That Every Child Matters.'

⁸ Section 55 of the Borders, Citizenship and Immigration Act 2009. See also the Supreme Court's judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148.

⁹ UKBA and Department for Children, Schools and Family (2009), 'Every Child Matters: Change for Children.'

¹⁰ Scottish Government (2014) 'GIRFEC: Proposal for the Development of Guidance to support the GIRFEC provisions in the Children and Young People (Scotland) Act 2014,' p. 4.

Furthermore, Section 1 of the recently enacted Children and Young People (Scotland) Act 2014 imposes a duty on the Scottish Ministers to: *“keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements and...take any steps identified by that consideration.”*

In many – but not all – areas of Scots law, separated children have the same rights as Scottish, native-born children, including to protection from harm and access to accommodation and support, education and free healthcare.

Nevertheless, in 2008 the UN Committee on the Rights of the Child expressed concern that the rights of the most vulnerable children in the UK were not effectively protected and was told to take a more proactive approach to raise awareness about, and prevent discrimination against, particularly vulnerable groups of children, including asylum-seeking and refugee children.¹¹

It is against this backdrop that the research informing this report has been carried out. It remains an issue of concern for the Project, that for some separated children, not only do they face the above mentioned barriers to accessing services, but also they are doubly disadvantaged if they are denied access to services by professionals who do not recognise that the principle of non-discrimination applies in this context.

It is worth noting two additional points with regard to the rights of separated children under international law, for purposes of this report:

First, that the definition of a “child” under the UNCRC is any person under the age of 18. Article 1 of the UNCRC provides:

For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

Second, that the UK is not only required to guarantee separated children (including asylum seeking and trafficked children) equal rights to protection and support as British children, but in some cases, has specific and heightened duties toward them, in line with obligations towards refugee children¹² and trafficked children¹³ arising under other relevant UN and EU international legal instruments.

¹¹ See UNCRC (2008), Concluding Observations (49th Session).

¹² See generally, UNCRC and UN Refugee Convention 1951. See also the EU Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (the ‘EU Refugee Qualification Directive’) which provides: *“The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the [UNCRC].* See also the EU Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (the ‘EU Asylum Procedures Directive’) which also provides at Article 17 guarantees for unaccompanied minors and also affirms: *“The best interests of the child shall be a primary consideration ...when implementing this Article.”*

¹³ See Article 12 of the Trafficking Convention and Article 14 of the EU Trafficking Directive.

Local Authority with Responsibility to Accommodate

Separated children who arrive in Scotland from abroad are accommodated and supported by the local authority with responsibility for their care. This is generally the local authority in which they first arrive or the local authority area in which they have first contact with statutory authorities (such as the police, social work, or the Home Office).

The duty of Scottish local authorities to accommodate separated children arises under the Children (Scotland) Act 1995 (the 'Act'), which requires authorities to safeguard and promote the welfare of children in need in their area, with powers to do so by providing a range of services and accommodation.

This duty extends to children up to the age of 18 years old.¹⁴ The local authorities have additional powers to support and accommodate young people between the ages of 18 and 21. Local authorities furthermore have duties to provide after-care to such children up to age 19, with powers to do so up to age 21. These powers will be further extended in April 2015 by provisions of the Children and Young People (Scotland) Act 2014 to age 26.¹⁵

For the avoidance of doubt, the provisions of the Act apply to local authority duties towards all children in Scotland. The legislation contains no exceptions, limitations or conditions with regard to nationality, migration or residence. This means that a migrant child taken into the care of a local authority requires to be treated in exactly the same manner as a Scottish-born, native child similarly situated.

Whilst there is near universal acceptance that a separated child, as defined above, requires to be accommodated by the responsible local authority under the Act, there is some divergence of opinion and practice as to under what section of the Act local authorities should be accommodating and supporting these children.

This divergence of opinion also appears to take into account the age of the child at the time that he or she first presents to local authorities.

A Closer Look at Age

A "child" can be defined differently in different legal contexts within Scotland. In some contexts, a child at age 16 and over can be treated as an "adult" and can be subject to "adult" legal processes.¹⁶

¹⁴ This duty of the local authority and these powers are contained in Chapter 1, Part II of the Act, which defines a child as a person under the age of 18 years old (Section 93(2)(a) of the Act).

¹⁵ See Section 66(c) of the Children and Young People (Scotland) Act 2014.

¹⁶ In Scots law, children have certain rights from age 16, such as the right to leave home without the permission of their parents, and to enter legally binding contracts in their own name (Age of Legal Capacity (Scotland) Act 1991). The school leaving age, at which education is no longer compulsory, also falls around the age of 16 (Education (Scotland) Act 1980). Finally, age can also be a delimiting factor in how young offenders are treated in Scotland, with offences committed by children under the age of 16 generally dealt with in the Children's Hearing System, and the same behaviour in children over the age of 16 more likely to be prosecuted in the adult criminal justice system. See generally Scottish Government (2011) 'Assisting Young People aged

For this reason, in Scotland, a child can be defined (in policy and practice) as anyone under the age of 16, rather than 18. As noted above, this is not the case, however, with respect to the obligations of a Scottish local authority towards children in need of protection, for whom the operative legislation imposes a definition of child as anyone under the age of 18 years old.¹⁷

It is important for purposes of this report, however, to briefly consider how the accommodation of the children and adults who arrive in the UK from abroad, and who are destitute and homeless, varies in direct relation to the age of the person seeking support, with particular attention to the difference that arise for children at age 16 and over.

Children Under Age 16

It is generally the practice that a separated child arriving in Scotland under the age of 16 will be voluntarily accommodated¹⁸ by a local authority under Section 25 of the Act.

Not a great deal has been written about how exactly local authorities should meet their duties to separated children, in particular, under the Act. This is likely to be the case, both because separated children have historically constituted a minority of the total number of children required to be looked after by Scottish local authorities, and because the presumption is that a separated child will be treated the same as a Scottish native-born child similarly situated.

There is, however, one report of particular relevance. The Convention of Scottish Local Authorities ('COSLA') Strategic Migration Partnership commissioned a report by Dr Sarah Kyambi titled: "Establishing Migrants' Access to Benefits and Local Authority Services in Scotland," published March 2012 (the COSLA Report) which noted at page 50:

Most UASCs will also be 'looked after' children with accommodation provided for them under section 25 of the Children (Scotland) Act 1995 on the basis of no one having parental responsibility towards them. All UASCs under 16 should be provided for under section 25.

Children Age 16 or Older

There is, however, a divergence of practice with regard to the section of the Act under which separated children and trafficked children who arrive in Scotland ages 16 and 17 should be accommodated.

16 and 17 in Court: A toolkit for Local Authorities, the Judiciary, Court Staff, Police, Crown Office and Procurator Fiscal Service.'

¹⁷ See Section 93(2)(a) of the Act.

¹⁸ It is worth noting that this report deals only with voluntary accommodation of children by the local authority. It is possible for children to be mandatorily accommodated by local authorities and this can happen, for example, after the local authority has obtained a child protection order or a children's panel has placed a child under a compulsory supervision order, but this report focuses only on services and accommodation provided to children following voluntary agreement.

Again, there is not a great deal that has been written previously on this subject other than the COSLA Report, which also provides at page 50:

Some UASCs between the ages of 16-18 may only require to be supported at a lower level, but this would be based on an assessment of their needs. However, it is expected that most UASCs between 16-18 will be looked after by local authorities under section 25.

The COSLA Report therefore allows for the possibility that local authorities may accommodate such children ages 16 and 18 under other provisions of the Act. In our experience, this generally is done under Section 22 of the Act.

Adults Age 18 or Older

For completeness, an adult aged 18 or older arriving in Scotland who is seeking asylum and who presents as homeless and destitute will be provided with accommodation and support by the Home Office through its Asylum Support programme.¹⁹

An adult aged 18 or older arriving in Scotland who is a potential victim of trafficking and who presents as homeless and destitute may also be supported by Asylum Support if he or she has made a claim for asylum, or may in the alternative be able to access accommodation and support through organisations such as the Trafficking Awareness Raising Alliance (TARA) (in the case of victims of sexual exploitation) or Migrant Help (in the case of all other victims of trafficking) who have a specific role and remit with regard to supporting and protecting victims of trafficking in Scotland.

¹⁹ Sections 95 and 98 of the Immigration and Asylum Act 1999.

The Legal Context: The Children (Scotland) Act 1995

Historic Legislative and Policy Framework

The duty of Scottish local authorities to safeguard and promote the welfare of children, and to provide accommodation and support, arises under the Children (Scotland) Act 1995,²⁰ the overarching legislation in relation to local authority duties towards children and their families generally.

The transposition of the duties imposed in this legislation, and its associated regulations,²¹ into practice is also informed by the Scottish government policy titled *Getting it Right for Every Child*²² ('GIRFEC').

The GIRFEC approach, which includes a Practice Framework, advocates a tailored, needs-based approach to provision of services to children, and emphasises the benefits of multi-agency partnership working. GIRFEC is considered to be a 'road map' for best practice in improving social care services, especially to support vulnerable and difficult to reach children and young people.

According to a 2008 report by Action for Children, "21 years of children's policy in Scotland,"²³ there are a number of key policy trends exemplified by the passage of the Children (Scotland) Act 1995 and the Scottish government's commitment to the GIRFEC approach including:-

- Greater articulation of society's aspirations for all children in Scotland²⁴
- Adherence to the principle that the child's welfare should be the most important consideration in decision making
- 'Whole population' and 'whole child' approaches - integration of services for children in special circumstances along with those for general child population
- Interprofessional and inter-agency co-operation

In practice, the GIRFEC framework consists of 10 core components which are as follows:-

- 1 A focus on improving outcomes for children, young people and their families based on a shared understanding of wellbeing
- 2 A common approach to gaining consent and to sharing information where appropriate

²⁰ For the avoidance of doubt, this duty cannot arise under Section 12 of the Social Work (Scotland) Act 1968, which only empowers local authorities to accommodate adults age 18 and over.

²¹ See Children (Scotland) Act 1995 Regulations and Guidance – Volumes 1 & 2.

²² Scottish Government (2014) 'GIRFEC: Proposal for the Development of Guidance to support the GIRFEC provisions in the Children and Young People (Scotland) Act 2014.'

²³ Hill, M and Action for Children (2008) "21 years of children's policy in Scotland."

²⁴ As evidenced by a Scottish Executive vision statement for all Scotland's children, which states that they need to be: *safe, nurtured, active, healthy, achieving, included, respected and responsible.*

- 3 An integral role for children, young people and families in assessment, planning and intervention
- 4 A co-ordinated and unified approach to identifying concerns, assessing needs, and agreeing actions and outcomes, based on the Wellbeing Indicators
- 5 Streamlined planning, assessment and decision-making processes that lead to the right help at the right time
- 6 Consistent high standards of co-operation, joint working and communication where more than one agency needs to be involved, locally and across Scotland
- 7 A Named Person for every child and young person, and a Lead Professional (where necessary) to co-ordinate and monitor multi-agency activity
- 8 Maximising the skilled workforce within universal services to address needs and risks as early as possible
- 9 A confident and competent workforce across all services for children, young people and their families
- 10 The capacity to share demographic, assessment, and planning information – including electronically – within and across agency boundaries

It is against this legislative and policy framework that best practice social care processes have evolved in the Scottish local authorities, and GIRFEC principles are meant to inform decision-making, including needs assessments, at every stage in a local authority's engagement with a potential child in need.

It is also worth noting that guidance has been given at Annex A of *Scotland's Children: The Children (Scotland) Act 1995 Regulations and Guidance Volume 1 Support and Protection for Children and Their Families*, included as **Annex 1** to this report, in the form of an indicative list of the main needs of children which call for services and should therefore be identified in a needs assessment.

This list includes a number of vulnerabilities common to separated children:-

- Children who need protection
- Children who have disabilities/special needs (e.g., physical or learning disabilities, sensory impairments)
- Children/young people who are homeless
- Children who live in violent environments
- Children whose parents suffer from a mental illness
- Children whose health or development is suffering
- Children whose educational development is suffering (including those excluded from school)
- Children who have emotional, behavioural and mental health problems

The above list strongly suggests that for separated children, as a category, by definition, a needs assessment properly concluded in line with the regulations and the guidance under the Act would conclude that there is a high level of need for social care support, on the basis that such children would have presented with complex and multiple levels of need.

Accommodation and Support of Separated Children Ages 16 and 17

As discussed above, the duty of Scottish local authorities specifically to accommodate separated children arriving ages 16 and 17 is generally carried out in the form of voluntary accommodation of such children under either Section 22 or Section 25 of the Act.

There are significant differences in the consequence to the welfare of such children, depending under which section of the Act they are accommodated, which are explored further below. For purposes of furthering understanding of the issue raised in this report, below is a brief summary of the key features of each of these sections.

Section 25 of the Children (Scotland) Act 1995

Local authorities have the power under Section 25 to accommodate children either because the person caring for them is no longer able to do so, or in order to safeguard or promote their welfare.

This most often occurs because the local authority has determined that there is no one else who is able to safely care for a child at home, and therefore the child will require to be accommodated as well as to receive other forms of additional support, associated with that decision to accommodate.

25 Provision of accommodation for children, etc.

(1) 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.

(2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare.

(3) A local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare.

A child who is accommodated by the local authority under Section 25 of the Act is automatically deemed to be “looked after” by the local authority in terms of Section 17(6) of the Act.

This is important because a “looked after” child is owed additional duties, amounting to a heightened standard of care, by the local authority.

17 Duty of local authority to child looked after by them.

(1) Where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe—

(a) safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern);

...

(2) The duty under paragraph (a) of subsection (1) above includes, without prejudice to that paragraph’s generality, the duty of providing advice and assistance with a view to preparing the child for when he is no longer looked after by a local authority.

To summarise, the local authority has a duty to safeguard and promote the welfare of “looked after” children and this must be the local authority’s *paramount concern*.²⁵ This duty is strongly phrased, and similar in terms to the requirement of Article 3 of the UNCRC that a child’s best interests be a “*primary consideration*.”

A number of other obligations follow on from this duty. For example, local authorities must ensure that “looked after” children have individual care plans tailored to their needs, which are recorded in writing and take into account of the views of the child. These plans must also be subject to review at regular intervals and continuously adjusted to reflect the progress and changing needs of the child.²⁶

Local authorities have powers to accommodate or continue to accommodate young people between the ages of 18 and 21, and must consider whether it would be appropriate to exercise those powers, with regard to children who are formerly “looked after” by them.²⁷

A child who has formerly been looked after by the local authority must also receive additional support when leaving care and during after-care.²⁸ This arises first because the local authority has a duty under section 17(2) to provide advice and assistance with a view to preparing a child for when he or she is no longer looked after by the local authority and because Section 29 imposes a separate duty.

²⁵ See Section 17(6) of the Act.

²⁶ See Looked After Children (Scotland) Regulations 2009 and Guidance and the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 and Guidance.

²⁷ Section 25 of the Act.

²⁸ See Sections 17 and 29 of the Act, the Looked After Children (Scotland) Regulations 2009 and Guidance, and the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 and Guidance.

29 After-care.

(1) A local authority shall, unless they are satisfied that his welfare does not require it, advise, guide and assist any person in their area over school age but not yet nineteen years of age who, at the time when he ceased to be of school age or at any subsequent time was, but who is no longer, looked after by a local authority.

(2) If a person within the area of a local authority is at least nineteen, but is less than twenty-one, years of age and is otherwise a person such as is described in subsection (1) above, he may by application to the authority request that they provide him with advice, guidance and assistance; and they may, unless they are satisfied that his welfare does not require it, grant that application.

(3) Assistance given under subsection (1) or (2) above may include assistance in kind or in cash.

The duty of the local authority to provide after-care is amplified by the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 and Guidance which require that all young people in after-care must have a “pathway co-ordinator” to provide advice and support, ensure that the young person’s views are sought and taken into account and participate in a “pathway assessment” and preparation of a “pathway plan.”

This provision has recently been extended by the Children and Young People (Scotland) 2014 Act, with the consequence that from April 2015, formerly looked after children will be entitled to apply for continued provision of after-care services up to age 26.²⁹

Section 22 of the Children (Scotland) Act 1995

Section 22 of the Act, in contrast, empowers the local authority to provide a range of services to support children who are cared for at home. This happens, most often, when the child is living with a parent or carer and the local authority deems it is appropriate and safe for a child continue to do so, and to be supported (financially or through the provision of services) but not accommodated in a children’s unit or similar place of residence.

22 Promotion of welfare of children in need.

(1) A local authority shall—

(a) safeguard and promote the welfare of children in their area who are in need; and

(b) so far as is consistent with that duty, promote the upbringing of such children by their families, by providing a range and level of services appropriate to the children’s needs.

²⁹ Section 66(c) of the Children and Young People (Scotland) 2014 Act.

(2) In providing services under subsection (1) above, a local authority shall have regard so far as practicable to each child's religious persuasion, racial origin and cultural and linguistic background.

(3) Without prejudice to the generality of subsection (1) above—

(a) a service may be provided under that subsection—

(i) for a particular child;

(ii) if provided with a view to safeguarding or promoting his welfare, for his family; or

(iii) if provided with such a view, for any other member of his family; and

(b) the services mentioned in that subsection may include giving assistance in kind or, in exceptional circumstances, in cash.

Local authorities acting under Section 22 can provide support directly to children, or to any other family member if doing so would safeguard or promote the welfare of a child.³⁰ This support can consist of many types of assistance in kind, including cash, after school care or respite care, and assistance in the home.

Importantly, however, children do not automatically become “looked after” just because they receive services under Section 22.³¹

This means, if a separated child aged 16 or 17 is accommodated by the local authority under Section 22 of the Act, he or she is not automatically deemed to be “looked after” by the local authority and will not be guaranteed the additional support and heightened duty of care that he or she would be accorded as a “looked after” child.

Therefore, crucially, he or she may suffer on an ongoing basis from the negative consequences of having unmet needs whilst in care, and may lack any support whatsoever to prepare for leaving care and in after-care. If so, this experience for a child accommodated by the local authority is neither in keeping with the GIRFEC approach set out by the Scottish government, nor would it be lawful in Scots or international law.

³¹ Although children of some families who receive support under Section 22 are also deemed to be “looked after at home,” this does not happen automatically because of receipt of Section 22 support, but for reasons arising under other sections of the Act.

A Case Study: Amal and Bashir

The following section presents two case studies, designed to illustrate some of the differences discussed above in terms of the effects on the welfare and wellbeing of a child accommodated under Section 22, as opposed to Section 25, of the Act.

These case studies do not represent specific clients of the Project, but are drawn from the experiences of many separated children the Project has worked with over the years.

Amal and Bashir's Journeys

Amal is a 16 year old girl from Sudan. Her parents were killed when her village was invaded during a civil war, and her home was burned to the ground. She fled on foot along with some of her neighbours and found temporary refuge in a different part of Sudan.

One of her neighbours told her that she would arrange for Amal to travel to "safety" and gave her to a man who trafficked her to Scotland and told her she would have to work as a maid for a Sudanese family here. Amal was raped by her trafficker during her journey, who told her that if she spoke to the police about this he would personally send her back to Sudan. She suffers insomnia, nightmares and flashbacks.

When Amal arrived in Scotland, she was forced to work as a maid for a family, but managed to escape after a few weeks. She was found wandering in the streets disoriented, frightened and upset, and a concerned passerby called the police.

Bashir is a 17-year-old male from Afghanistan. He witnessed the death of his father and brother in his home village at the hands of an armed group fighting for control in his area. His uncle arranged for him to flee the country as the family were afraid that the group would return to kill Bashir as well.

The agents who led Bashir across Europe to the UK made him walk for many weeks, and locked him and fellow travellers in squalid rooms, sometimes for months. Bashir was raped by fellow travellers on more than one occasion. The agents said that if he was arrested by the police, they would send him back to Afghanistan. He suffers from low appetite, flashbacks and nightmares. He copes with these feelings by self-harming.

When Bashir arrived in Scotland, he was arrested by the police and taken to a police station. There it was noted by the police that he appeared to be cold, distressed, dirty and very afraid of them.

Commentary

Amal and Bashir's accounts of the reasons why they fled their homes and families, and their traumatic journeys to Scotland, make for difficult reading. Their accounts are not exaggerated,

however, but are representative of forms of abuse and trauma that are commonly found in accounts of asylum seeking and trafficked individuals who have made their way to Scotland.

As highlighted previously in this report, Amal and Bashir, as separated and unaccompanied asylum seeking children, exhibit a range of particular vulnerabilities that would be highlighted in a needs assessment conducted by a local authority social worker.

These needs are immediately identifiable, and include:-

- Safety and risk assessment – risk from trafficker and others in the immediate community
- Safety and risk assessment – self-harming
- Access to health care – physical injuries and sexual health checks/pregnancy
- Access to mental health care – access to early assessment by Child and Adolescent Mental Health Service ('CAMHS') and other specialist mental health services
- Appropriate accommodation – taking into account vulnerabilities and particular needs
- Linguistic and cultural barriers, low level of education – access to English classes, orientation in Scotland
- Isolation – access to peer networks
- Shame – due to sexual violence
- Fear – anxiety and mistrust of authority

Coming to Scotland

Amal was accommodated by the local authority under Section 25 of the Act, at a supported residential unit staffed 24 hours a day by adults who could help her, including with day-to-day tasks such as going shopping and preparing food.

A needs assessment was conducted by her social worker and a tailored care plan was drawn up to reflect her particular needs and how they would be met.

Her social worker enrolled her in English for Speakers of Other Languages (ESOL) classes and took her to the GP, who drew up an immunisation plan and helped her to access psychological support in the form of counselling. Her care workers at the residential unit taught her how to use the buses to get around the city, and got her a pass to use the local swimming pool. She has made some friends her age at her residential unit and residential unit workers report that she seems more confident and outgoing than when she first arrived.

Bashir was accommodated by the local authority under Section 22 of the Act, in a one-bedroom flat, on his own and without adult supervision.

Bashir was given cash support, but did not know how to cook, so ate mostly takeaways. Sometimes he would go hungry, because he was not able to budget his support to last the week. Bashir was later given access to a care worker who would stop by once a week to help him with shopping and cooking, but he was not always in when the care worker dropped by, and eventually this service was withdrawn.

No care plan was drawn up in respect of him and there was therefore a substantial delay before he was enrolled on ESOL classes. Bashir was not enrolled in the care of a GP and did not receive support for his mental health symptoms.

He was isolated, and grew bored, and his mental health deteriorated with the consequence that his self-harming increased. He eventually gained access to mental health services, but only as a result of a later crisis intervention.

Commentary

Amal and Bashir's journeys, which started out in parallel, now diverge as they access different forms of accommodation and support from the local authority.

Amal derives benefit from the heightened duty that the local authority has to safeguard and promote her welfare as their *paramount concern*, which in practice is underpinned by GIRFEC and a range of local authority processes that automatically apply when a "looked after" child enters care, such as looked after child health reviews by a looked after and accommodated child (LAAC) nurse and the drafting of a looked after child care plan, which is reviewed in meetings held at regular intervals.

As a consequence, Amal benefits from this tailored approach to her care and is becoming integrated into her new surroundings and community, notwithstanding the significant challenges she faced on arrival. She also has been assisted to access her rights to education and health care at the earliest appropriate stage in her journey.

Although it is arguably open to Bashir's social worker to provide the same level of support to him under Section 22, he does not benefit from the heightened duty of care afforded to children who are "looked after" by the local authority and therefore does not have the same right to demand the benefit of these processes in his case.

As a consequence, the support that Bashir receives meets a lesser standard of care and is less integrated and well-planned. It does not respond adequately to his needs and he becomes more, rather than less, vulnerable, and eventually requires a crisis intervention due to a deterioration in his mental health.

Planning for the Future

When Amal is ready to leave care, her social worker will help her to complete a leaving care plan which will set out how she will transition to after-care services and what services she will receive. This will not happen when Amal reaches a particular age, or depend in any way on the progress of her asylum claim, but will depend on when she and her social worker feel she is ready for this move. Part of Amal's leaving care plan may involve working with a new social worker on a leaving care team, who will be able to provide her with some continuity of support during this transition.

Bashir does not have a leaving care plan, or attend care planning meetings. When Bashir turns 18 – which is in less than a year's time – the local authority will arrange for him to move automatically to Home Office adult Asylum Support accommodation. He will then be accommodated in a shared flat along with older adult male asylum seekers until such time as his asylum claim is decided. The local authority may or may not continue to provide other forms of support to him once he moves.

Commentary

Amal has again benefitted from having been “looked after” by the local authority and the timing of her transition to leaving care and after-care services will be tailored to her particular needs. She will also benefit from the provisions of Section 29 of the Act in being able to access after-care services, potentially for a number of years after she reaches the age of 18.

Bashir, in contrast, does not benefit from any of the above protections, and is therefore vulnerable to a total withdrawal of social work services when he reaches age 18. This withdrawal of services can arguably occur even if it is not strictly in his best interests, and without detailed consideration of the negative consequences to him of doing so.

Lessons Learned from Amal and Bashir’s Journeys

The cases of Amal and Bashir provide some insight into the lived experiences of separated children within the Scottish care system, taking into account their backgrounds, journeys to Scotland, and the wide range of barriers they face in accessing services from the beginning.

These cases also seek to illustrate the stark differences in quality of care and outcomes that can result when a child is accommodated under one provision of the Act, rather than another.

The report articulates, in other sections, the reasons why such differences in treatment is unlawful. These case studies demonstrate, in practical terms, how the differences can have a real impact on how effectively local authorities are able to safeguard and promote the welfare of separated children, when they are accommodated as “looked after” children under Section 25 of the Act.

A Comparative View: England & Wales

The juxtaposition in Scotland between Sections 22 and 25 of the Children (Scotland) Act 1995 is similar to the position that existed in England and Wales prior to strategic litigation taken in what has become known as the Hillingdon Case³² in 2003.

This case, along with several that followed, led to a revision of guidance by the Department of School and Families in 2010³³ clarifying the position, with the consequence that it was thereafter beyond doubt in England and Wales that separated children arriving ages 16 and 17 required to be treated as “looked after and accommodated” by local authorities under Section 20 of the Children Act 1989 (a provision broadly similar to Section 25 of the Children (Scotland) Act 1995).

This section of the report examines the relevant provisions of the Children Act 1989, the position prior to 2003, and the strategic litigation that caused a clear change of practice in England and Wales.

The Children Act 1989

In England and Wales, local authority duties towards children and families arise under the Children Act 1989. For the avoidance of doubt, Section 105(1) of the Children Act 1989 clearly defines a “child” for as any person under the age of 18.

As in Scotland, there are two key provisions of the Act that were commonly used to accommodate separated children arriving at ages 16 and 17: Sections 17 and 20 of the Children Act 1989.

Section 17 of the Children Act 1989 gives local authorities a duty to provide support to children in need and their families, similar in terms to Section 22 of the Children (Scotland) Act 1995.

17 Provision of services for children in need, their families and others.

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children’s needs.

(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child’s welfare.

³² *R (B) v Hillingdon London Borough Council* [2003] EWHC 2075 (Admin), [2004] 1 FLR 439.

³³ Department for Children, Schools and Families (2010), ‘Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation.’

...

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or... in cash.

Section 20 of the Children Act 1989, in contrast, gives local authorities a duty to provide accommodation for children who require it, similar in terms to Section 25 of the Children (Scotland) Act 1995.

20 Provision of accommodation for children: general.

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

...

(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.

The similarities between Sections 17 and 20 of the Children Act 1989 and Sections 22 and 25 of the Children (Scotland) Act 1995, are not coincidental. The 2008 Action for Children report “21 years of children’s policy in Scotland”³⁴ notes:

Significant elements in the CSA 1995 were borrowed from the 1989 Act (for example, in relation to children in need, child protection orders and duties towards looked-after children).

Strategic Litigation in England and Wales

In England and Wales, prior to the Hillingdon case (*R (B) v Hillingdon London Borough Council* [2003] EWHC 2075 (Admin), [2004] 1 FLR 439) local authorities were acting in accordance with a circular published by the Department of Health³⁵ which stated that support should be based on a needs

³⁴ Hill, M and Action for Children (2008) ‘21 years of children’s policy in Scotland’, p. 5.

³⁵ Department of Health, Local Authority Circular (LAC (2003) 13) ‘Guidance on accommodating children in need and their families.’

assessment and, for the majority of separated young people, Section 20 support under the Children Act 1989 is likely to be the most appropriate course of action.

Prior to the Hillingdon case in 2003, therefore, the position in England and Wales was similar to that in Scotland. There was inequality of treatment of separated children arriving ages 16 and 17, with the consequence that some were accommodated under Section 20 (and therefore treated as “looked after”) whereas others were accommodated under Section 17 (and therefore did not benefit from “looked after” procedures).

The Hillingdon case was a judicial review of the practice of Hillingdon borough, which had accommodated separated children under Section 17 of the Act, with the consequence that they did not later have access to leaving care services. The judgment found that these young people had, in effect, been “looked after” by Hillingdon as if accommodated under Section 20 of the Act, and that they were therefore entitled to leaving care services.

This case was followed by a number of similar cases, including *R (H) v Wandsworth London Borough of Wandsworth* [2007] EWHC 1082 (Admin), [2007] 2 FLR 822, *R (G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299 and *R (M) v Hammersmith and Fulham* [2008] UKHL 14, [2008] 1 WLR 535. These judgments have supported the finding that separated children meet the definition of Section 20(1) of the Act and are therefore children “in need” such that they require to be accommodated under that provision of the Act.

These in turn led to guidance published by the Department for Children, School and Families³⁶ in 2010, clarifying the position. This guidance stated that in nearly all cases involving a separated child, the child would be a child ‘in need’ within the meaning of Section 20, and that where the criteria for Section 20 have been met, local authorities had no discretion to choose to instead accommodate the child under Section 17 powers:-

- 2.15** Where a 16 or 17 year old seeks help from local authority children’s services or is referred to children’s services by some other person or agency (including housing services) as appearing to be homeless or at risk of homelessness, or they are an unaccompanied asylum seeker without a parent or guardian with responsibility for their care, then children’s services must assess whether the young person is a child in need, and determine whether any duty is owed under section 20 of the 1989 Act to provide the young person with accommodation.
- ...
- 2.22** Local authority duties for accommodating young people under this section are not simply a matter for local policy. The duty is engaged whenever any authority has determined that the young person is in fact in need and requires accommodation as a result of one of the factors set out in section 20(1)(a) to (c) or in section 20(3).
- 2.23** There can be no doubt that where a young person requires accommodation as a result of one of the factors set out in section 20(1)(a) to (c) or section 20(3) then that young

³⁶ Department for Children, Schools and Families (2010), ‘Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation.’

person will be in need and must be provided with accommodation. As a result of being accommodated the young person will become looked after and the local authority will owe them the duties that are owed to all looked after children, set out in sections 22 and 23 and once they cease to be looked after, the duties that are owed to care leavers under that Act.

The Annex to the above guidance titled “Factors to be considered by children’s services when assessing 16/17 year olds who may be homeless children in need,” is of interest to the subject of this report, insofar as it lists a number of questions that might be posed in the course of a children’s services assessment as contemplated above, and therefore appears herein as **Annex 2s**.

Current Position in England and Wales

Following the revision of the abovementioned Department of Children, Schools and Families guidance in 2010, it appears beyond doubt in England and Wales that separated children arriving ages 16 and 17 will be accommodated under Section 20 of the Children Act 1989.

This position is confirmed by a 2012 report by the Coram Children’s Legal Centre (2012) entitled “Navigating the system: Advice Provision for Young Refugees and Migrants”³⁷:

All separated children...should receive a full, individual needs assessment, and the vast majority should be accommodated under Section 20 of the Children Act 1989, and provided with leaving care services when they are deemed ready to leave care, which will usually not be until they are 18...

No definition of ‘accommodation’ is provided in section 20 of the Children Act, although it is taken that it must be ‘suitable accommodation’ – i.e. it must, so far as is practicable, meet the needs of the child, and take their wishes into account. It is normally the case that children under the age of 16 are placed in foster care³⁸ and often older children will be placed in semi-independent accommodation with limited support (although there is no stated policy that prevents local authorities from placing a child aged 16-17 in foster care).

The consequences of accommodation under Section 20 of the Children Act 1989 are similar, therefore, to those for children under Section 25 of the Children (Scotland) Act 1995.

Such children are deemed to be “looked after” and are entitled to formal planning and independent review of their care. Looked after children are also entitled to services under the Children (Leaving Care) Act 2000 and associated regulations, which define eligibility and entitlement to planning for leaving care and to support up to the age of 21 (or 25 if in full-time education).

³⁷ Coram Children’s Legal Centre (2012) ‘Navigating the system: Advice Provision for Young Refugees and Migrants.’

³⁸ The 2010 guidance suggests a starting point that young people would be placed in foster care unless their needs otherwise suggest that they are able to cope with other forms of accommodation, or they wish to be placed in other types of accommodation and their needs are such that they can manage.

It can be observed, in summary, that the position in England and Wales governing the accommodation and support of separated children arriving ages 16 and 17 prior to 2003 was broadly similar to the current position in Scotland.

In England and Wales, however, clarification and improvement in this matter was brought about by a number of years of strategic litigation, followed by a formal change of guidance by the relevant government body.

This report suggests that there are lessons to be learned, both in relation to the efficacy of strategic litigation as a force for change in this context, and in the assessment framework set out in the Department for Children, Schools and Families 2010 guidance, which may have broad applicability to the needs assessments required to be conducted by Scottish local authorities at the time they first encounter vulnerable separated children in Scotland.

Current Policy and Practice in Scotland

The report will now turn to consider in greater detail the current policy and practice of local authorities in Scotland.

The report will analyse and comment on the results of a freedom of information request made by the author of the 32 Scottish local authorities to evidence under what provisions of the Act these children are accommodated and supported in Scotland at present, followed by consideration of the comments of a front-line service provider on the current situation.

Freedom of Information Request

The Project made a request under the Freedom of Information (Scotland) Act 2002 of the 32 Scottish local authorities to evidence under what provisions of the Children (Scotland) Act 1995 separated children were accommodated and supported in Scotland in financial years 2012 and 2013.

A copy of the freedom of information request appears at **Annex 3**.

The key questions posed were as follows:

In each of the last two financial years:-

- 1. How many separated children between the ages of 16-17 (inclusive) were supported by your Local Authority?*
- 2. Of the children identified in response to Question 1, how many of those children were Unaccompanied Asylum Seeking Children (UASC)?*
- 3. Of the children identified in response to Question 1, how many separated children were between the ages of 16-17 (inclusive) when they first became known to your Local Authority?*
- 4. Of the children identified in response to Question 3, how many of those children were Unaccompanied Asylum Seeking Children (UASC)?*

With regard to Questions 1 through 3, the local authorities were also asked to indicate, in each case, how many children were accommodated under Section 22, Section 25 and under any other section of the Act.

The Project received a reply from all of the 32 Scottish local authorities, although the author is still awaiting further clarification from 1 local authority, and has resubmitted a request to Glasgow City Council.

The majority of the local authorities replied to say that they were not aware of any separated children supported by the local authority in the preceding two financial years.

Glasgow City Council's response established that it accommodated the majority of separated children ages 16 and 17 in the reporting period (54 children in FY 2012 and 43 children in FY 2013).

The remainder of the local authorities reported that they were accommodating less than five separated children in the reporting period.

The full table of the freedom of information request responses appears at **Annex 4**.

A summary table containing only the responses for the local authorities that accommodated separated children in the last two financial years appears below:-

Separated Children ages of 16-17 Accommodated by Scottish Local Authorities in Fiscal Years 2012 and 2013

Local Authority	Q1 Total No of Separated Children ages 16/17	Q1 Section of Act	Q2 Total No of Q1 who were UASC	Q2 Section of Act	Q3 Total No of Q1 who were Aged 16/17 on Arrival	Q3 Section of Act	Q4 Total No of Q3 who were UASC & Section of Act
Aberdeen City	1	Section 25	0	n/a	n/a	n/a	0
Angus	1	Section 22	1	Section 22	1	Section 22	Section 22 = 1
Dumfries and Galloway	2	Section 25	1	Section 25	1	Section 25	Section 25 = 1
City of Edinburgh	1-5 ³⁹	Section 25 & Section 70	1-5	Section 25 & Section 70	0	n/a	0
Glasgow City⁴⁰	54/43	Section 22 = 2/2; Section 29 = 52/41	52/41	All Section 29	31/30	Section 22 = 2/2; Section 29 = 29/28	Section 29 = 29/28
North Lanarkshire	1-5 ³⁹	Section 25 & Section 70	1-5	Section 25 & Section 70	0	n/a	0
Perth and Kinross	1-5 ³⁹	Section 22	1-5	Section 22	1-5	Section 22	Section 22 = 1
South Ayrshire	1	Section 25	1	Section 25	0	n/a	0

³⁹ Certain local authorities provided a range rather than exact figures in response on the basis that providing exact figures would risk revealing confidential information that could lead to the identification of individuals in the care of the local authority.

⁴⁰ Glasgow City Council provided information for the 2012 and 2013 financial years. As it is unclear whether individual separated children were counted in both years, both figures have been included in the format (2012 figure/2013 figure).

Analysis of the Table

It is clear from the responses in the above table in relation to Question 3 that there is variation in the accommodation of separated children arriving ages 16 and 17 between the local authorities, with some choosing to accommodate under Section 22 and others choosing to accommodate under Section 29.

The response received from Glasgow City Council, however, merits further consideration, in part because it is clear from the figures that this local authority accommodates and supports the vast majority of separated children arriving in Scotland ages 16 and 17 (31 children in FY 2012 and 30 children in FY 2013).

Glasgow City Council has indicated that the majority of the separated children they accommodate ages 16 and 17 years old are supported under Section 29 of the Children (Scotland) Act 1995 (after-care provisions), *including children who arrived at ages 16 and 17 years old.*

The author requested clarification of this response, on the basis that it is not possible to provide initial accommodation under Section 29 of the Act, that section being a provision for the after-care of children who are formerly looked after by a local authority.

The author noted in correspondence to Glasgow City Council that the freedom of information response implies that these children were originally looked after and accommodated under another provision of the Act – assumed to be Section 25 of the Act – and for confirmation of the section used to provide initial accommodation to these children.

Glasgow City Council replied that the response had been reviewed and affirmed: *“young people aged 16 years and older...are generally looked after under Section 29 of the Children’s Scotland Act via a Pathways Plan.”*

It is felt that Glasgow City Council’s response to the freedom of information request has served to confuse, rather than clarify, matters, insofar as the local authority purports to initially accommodate young people under a section of the Act which cannot be used for this purpose.

The author has made a new freedom of information request to Glasgow City Council to press for clarification with regard to the provisions that governed the initial accommodation of the separated children currently accommodated under Section 29 of the Act and intends to publicly circulate the response, as a supplement to this report, in due course.

A Perspective from the Front Line

The foregoing has illustrated that there is inconsistency and lack of clarity as to how separated children are accommodated under the Children (Scotland) Act 1995, as reported by local authorities across Scotland, with the consequence that some children will potentially suffer unequal treatment. The differences that can arise in practice were also highlighted earlier in this report in the case study of Amal and Bashir.

These differences are not only of consequence to individual children accommodated by Scottish local authorities, but such lack of clarity can also pose serious challenges to professionals who work

alongside those children in advocacy and support roles, as illustrated in the following account from an organisation that provides front-line services to them.

Scottish Guardianship Service

The Scottish Guardianship Service (SGS)⁴¹ is a joint partnership between the Scottish Refugee Council and Aberlour Child Care Trust, which works with separated and trafficked children across Scotland.

The SGS employs guardians, who work on a one-on-one basis with young people to help them navigate the immigration and welfare processes, feel supported and empowered throughout the asylum process and assist them to access the help they need when they need it and help them make informed decisions about their future.

Catriona MacSween, Service Manager of the SGS, comments:

“The SGS has worked with young people across Scotland since it was piloted from 2010-2013 and we have seen a wide variation in the practice of local authorities when it comes to accommodating and supporting young people under different sections of the Act.”

“This is an issue that we have consistently raised as an area of concern because we see this differential treatment as unfair.”

The SGS have provided the following examples, drawn from their own professional experiences, of the consequences of this issue for the young people they work with:

Ying

Ying arrived age 16 from Vietnam. He made a claim for asylum and was granted Refugee Status 7 months after his arrival.

He was accommodated by the Local Authority and was looked after under section 25 of the Children (Scotland) Act 1995. He lived in supported accommodation. Ying and his social worker completed a Pathways Plan together in preparation for him leaving care and to plan for his future. Ying moved on to live in his own tenancy and he continued to attend college to study. He was provided with on-going leaving care support and benefited from continued contact from his social worker.

Honor

Honor arrived age 17 from Afghanistan. Honor witnessed horrific atrocities in his country and was traumatised from his experiences. He made a claim for asylum and was still awaiting his decision from the Home Office by the time he turned 18.

⁴¹ See Crawley, H. & Kohli, R. (2013) ‘She Endures with Me’: An evaluation of the Scottish Guardianship Service pilot.

He was accommodated by the Local Authority under section 22 of the Children (Scotland) Act 1995, but was told that he had to move on to adult Asylum Support now that he was age 18. Honor was settled and was beginning to recover from his experiences and felt happy in his supported accommodation but he felt that he had no choice and he was moved into the Asylum Support accommodation in an isolated part of the city. Social Work support was terminated and Honor was left to look after himself.

Catriona MacSween, Service Manager of the SGS, reflects:

“Our role is to inform young people about their rights and entitlements to ensure that they have some certainty about their future and what to expect. This inconsistency also makes it difficult for us to advise young people since it is not clear in practice how a local authority will respond to the needs of a particular individual, and it is hard to predict whether, for example, a young person will be offered support when leaving care, or whether he is at risk of suddenly being moved to adult Asylum Support accommodation and support being ended.”

“In our view, it would be a huge improvement – both for the young people and for our own practice – if there were greater clarity and consistency around this issue.”

The case studies and commentary provided by the SGS illustrate how this differential treatment complicates the work of front-line professionals who work alongside those young people in advocacy and support roles, because they are not able to provide a clear picture to them of what to expect during leaving care and after-care.

This perspective, taken together with the evidence drawn from the freedom of information requests discussed above, clearly depicts a mixed landscape in Scotland, with some local authorities accommodating separated children ages 16 and 17 under Section 25, and others choosing to do so under Section 22, with no discernible rational justification for this variation in practice.

There is a further lack of clarity with regard to the case of Glasgow City Council, which purports to initially accommodate separated children under Section 29 of the Act, a statement which the author hopes to clarify by means of a second freedom of information, the response to which will be published as a later supplement to this report.

Legal Opinion of Senior Counsel

The report will now examine and summarise the legal arguments articulated in an opinion of senior counsel Janys M Scott QC, sought by the Project in connection with this research, as to how separated children arriving ages 16 and 17 required to be looked after and accommodated under Scots and international law.

The Project posed the following questions of counsel:-

- *Whether a separated child who arrives in Scotland at the age of 16 or 17 requires to be “looked after” by the local authority (following the meaning in Section 17(6) of the Act);*
- *Whether separated children in Scotland should be accommodated under Section 22 or Section 25 of the Act;*
- *Whether local authorities fail to meet the obligation set out in Section 29(1) of the Act if they fail to assess the separated child’s individual needs and provide a tailored service; and*
- *Whether a failure to adhere to the above is unlawful in terms of the Children’s (Scotland) Act 1995, UNCRC and the EU’s Convention and Directive on Trafficking.*

Janys M Scott QC, in her opinion, first considers the issue in light of the relevant provisions of the Act, and notes that a child accommodated under Section 22 would be *“at a serious disadvantage...as compared with children accommodated under section 25, as there will be no prospect of receiving after-care under section 29.”*

She then considers the relevant English case law, which she notes relates not only to accommodation of unaccompanied asylum seeking children (UASC), but also to 16 and 17 year olds whose relationships with parents have broken down and who have been provided with accommodation ostensibly under housing legislation.

She then closely considers *R(G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299 and notes the decision of the House of Lords in this case clearly establishes:

“if the criteria for the provision of accommodation are met a local authority has no choice but to accommodate. An English authority cannot choose between section 17 provision of services and section 20 provision of accommodation. Section 20 involves an evaluative judgment, but not discretion. The leaving care provisions are then invoked and this is precisely to ensure that older children who are without family support are given just the sort of help with moving into independent living that children normally expect from their families.”

The opinion then considers the relevant Scottish case law, first dealing with case of *L v Angus Council* [2011] CSOH 98, 2011 SLT 853 and [2011] CSOH 196, 2012 SLT 304, an age assessment case, and Lord Stewart’s remarks to the effect that English case law is not binding in the interpretation of the Children (Scotland) Act 1995 in this context. It opines that Lord Stewart’s remarks in the first part of that case are strictly *obiter*, and that no submissions were made by the parties in respect of this

particular issue. In the second, Lord Stewart's comments on why the English and Scottish provisions might be distinguished are questioned.

She then turns to the linked cases of *ISA v Angus Council* [2012] CSOH 134 and *ALA v Angus Council* [2012] CSOH 135, also age assessment cases, and notes that although there was a line in cross-examination on this issue, "*Lord Stewart expressed no particular view on this in reaching his decision,*" and concludes that these two cases do not advance the present debate.

Janys M Scott QC then opines that there are strong arguments to persuade a court looking at this issue under Section 25 of the Children (Scotland) Act 1995 to consider the case law on Sections 20 of the Children Act 1989, as:

"The two statutes are couched in similar terms. They satisfy similar policy requirements. It is unlikely that Parliament intended a different regime to operate in respect of UASC depending on where in the UK they happened to be..."

For so long as the final court of appeal is the Supreme Court, it is highly unlikely that the Children (Scotland) Act 1995 will be materially differently interpreted from the Children Act 1989, to produce a significantly different result for children who happen to be in Scotland, rather than England."

She concludes by noting that this approach also results in compliance with the UN Convention on the Rights of the Child ('UNCRC'), and refers to the commitment of the Scottish Ministers embodied in the recently enacted Children and Young People (Scotland) Act 2014 to keeping under consideration steps which might secure better or further effect in Scotland the requirements of the UNCRC.

She specifically notes that if local authorities are neglecting their statutory duties to UASC ages 16 and 17, the Scottish Ministers have it in their power to issue clear guidance in relation to those duties.

Finally, she notes that in the case of trafficked children, Article 14 of the EU Trafficking Directive requires that states "*assist and support child victims of trafficking in human beings, in the short and long term, in their physical and psycho-social recovery, are undertaken following an individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs and concerns with a view to finding a durable solution for the child*" and notes that this description of the standard of care and support states are required to provide to child victims of trafficking fits more neatly with the provision of accommodation and support under Section 25 of the Children (Scotland) Act 1995 rather than the more *ad hoc* provision of services under Section 22 of the Act.

In conclusion, the opinion answers the questions posed as follows:-

1. A separated child or UASC who is residing or found to be in Scotland must be accommodated by the local authority for the area where he or she is residing or found when the child:

- *Is under the age of 18;*

- *Appears to require accommodation;*
- *Has no-one with parental responsibility for him or her, is lost or abandoned, or where the person who has been caring for him or her is prevented, whether or not permanently and for whatever reason, from providing suitable accommodation or care;*
- *Has been given the opportunity to express views about the provision of accommodation, those views not being determinative, but bearing in mind that the local authority is not required to provide accommodation that a young person over the age of 16 does not want.*

If the local authority find themselves providing accommodation, or arranging with others for the provision of accommodation, then it is likely that they will be held to be acting under section 25. This means that an authority cannot, by purporting to act under section 22 of the Children (Scotland) Act 1995, while actually providing or arranging for the provision of accommodation, avoid the duties that apply to children who are accommodated, including after-care duties under section 29.

2. *If a child is accommodated under section 25, or treated as so accommodated (notwithstanding that a local authority is purporting to act under section 22, as explained above), then that child will be a “looked after” child in terms of section 17(6) of the 1995 Act. The local authority must adhere to their statutory duties towards the child while he or she is accommodated. The duties and powers in relation to after-care of looked after children may arise thereafter.*

3. *If a child who has been provided with accommodation under section 25, or treated as so accommodated (as explained above), at any time when ceasing to be of school age, or thereafter, leaves accommodation, then the local authority have a duty to provide advice, guidance and assistance until the person concerned attains the age of 19 and thereafter a discretion to provide advice, guidance and assistance under section 29 of the 1995 Act. Duties under the Act are amplified by Regulations (SSI 2003/608) which require a “pathway co-ordinator”, “pathway assessment” and “pathway plan” and a supporter for the young person. Assistance should include accommodation or support in accommodation...*

4. *A failure by the local authority to carry out statutory duties may be enforced by judicial review.* *The United Nations Convention on the Rights of the Child is relevant in so far as it supports the interpretation of domestic law imposing these duties, particularly as regards 16 and 17 year olds where it appears there have been some lapses. The Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 and EU Directive 2011/36 on preventing and combatting trafficking of 5 April 2011 similarly reinforce the interpretation of the obligations of domestic law when dealing with trafficked children.*

Conclusion

In summary, this report has considered the issue of the accommodation and support of separated children (including asylum seeking and trafficked children) arriving at ages 16 and 17 in Scotland, with the aim of aiding legal practitioners to identify cases for pursuing a legal challenge, and legal arguments that can be employed to that end.

Key Findings

The key findings of this report can be summarised as follows:-

- Separated children (including asylum seeking and trafficked children) arrive in Scotland usually having suffered serious and complex trauma (including persecution and torture) and with multiple vulnerabilities.
- Separated children who are homeless and destitute require to be accommodated by Scottish local authorities under the Children (Scotland) Act 1995.
- There is however variation in practice in the accommodation of such children arriving ages 16 and 17 by Scottish local authorities, with some children being accommodated under Section 22 and other accommodated under Section 25 of the Act.
- Children accommodated under Section 22 are seriously disadvantaged as compared to those accommodated under Section 25.
- This variation in practice is discriminatory and unlawful.

Key Recommendations for Legal Challenges

The report recommends that if a separated child is being accommodated by a local authority under Section 22 of the Act, in circumstances suspected to be unlawful because the child should instead be accommodated under Section 25 of the Act, advice should be sought from a qualified legal practitioner with relevant experience.

The legal practitioner should:-

- Check whether the child:-
 - Is under the age of 18;
 - Appears to require accommodation;
 - Has no-one with parental responsibility for him or her, is lost or abandoned, or there is no one who can provide suitable care for the child; and
 - Wishes to be accommodated.

- If so, and the local authority has provided accommodation under section 22, challenge the local authority decision on the basis that:-
 - The duty to accommodate, which is a mandatory duty in this context, can only lawfully be met in Scots law under Section 25 of the Act, giving full consideration to the text and aims of the legislation, the associated regulations and guidance, and the stated policy of the Scotland government with regard to the care of children, as expressed in the “Getting it Right for Every Child” (GIRFEC) strategy.
 - The decision to accommodate under Section 22 is inconsistent with English case law and government policy, in relation to the parallel provisions of the Children Act 1989.
 - It is unlikely that Parliament intended there to be a difference in standards for the duty of care owed to separated children in Scotland as opposed to England.
 - It is unlikely that the Supreme Court, as the final court of appeal for both jurisdictions, would seek to interpret the provisions of the two Acts to allow a material different result for separated children in Scotland rather than England.
 - Accommodation of separated children under Section 25 of the Act is consistent with Scotland’s international human rights obligations arising under the UNCRC, the Refugee Convention, the EU Refugee Qualification Directive and the EU Asylum Procedures Directive, and also its obligations towards child victims of trafficking as outlined in the EU Trafficking Directive and the Trafficking Convention.

Annex 1 – Annex A of Scotland's Children: The Children (Scotland) Act 1995 Regulations and Guidance Volume 1 Support and Protection for Children and Their Families

1. The list which follows outlines the main needs of children which call for services and which should therefore be identified as a first step in planning services. The list is expressed in terms of children but they are as a rule associated with their families of which other members may also have needs and individual children may span more than one category of need.

2. The children listed will include children who are and who are not in need in statutory terms. If they do require assistance their needs may be special and require particular planning which should have regard to religious persuasion, racial origin and cultural and linguistic background.

3. The list is indicative rather than exhaustive. It is certainly not exclusive. Inevitably it shows areas of overlap and apparent omission. For example, children who have been adopted are included, but no special mention is made of children who may need to be adopted or who are in the process of being adopted. These children would be children looked after. Family conditions, like family breakdown or poverty and deprivation, may be factors underlying the needs in the list which follows.

- Children who are looked after by the local authority
- Children who need protection
- Children/young people who are no longer looked after by the local authority
- Young parents
- Children who have disabilities/special needs (eg physical or learning disabilities, sensory impairments)
- Young carers
- Children who have been adopted (and those who are in the process of adoption)
- Children/young people who misuse substances/alcohol
- Children/young people who are affected by HIV/Aids
- Children/young people who are homeless
- Children/young people in poor housing
- Children who are carers for relatives and who are in households affected by disability
- Children who live in violent environments
- Children whose parents suffer from a mental illness
- Children whose parents misuse substances/alcohol
- Children whose health or development is suffering
- Children whose educational development is suffering (including those excluded from school)
- Children who have emotional, behavioural and mental health problems
- Children/young people who are in conflict with the law because of offending behaviour (including those who offend against other children)

Annex 2 – Annex from Department for Children, Schools and Families (2010), ‘Provision of Accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation’

Factors to be considered by children’s services when assessing 16/17 year olds who may be homeless children in need,

	Dimensions of Need	Issues to consider in assessing child’s future needs.
1.	Accommodation	<ul style="list-style-type: none"> • Does the child have access to stable accommodation? • How far is this suitable to the full range of the child’s needs?
2.	Family and Social Relationships	<ul style="list-style-type: none"> • Assessment of the child’s relationship with their parents and wider family. • What is the capacity of the child’s family and social network to provide stable and secure accommodation and meet the child’s practical, emotional and social needs
3.	Emotional and Behavioural Development	<ul style="list-style-type: none"> • Does the child show self esteem, resilience and confidence? • Assessment of their attachments and the quality of their relationships. Does the child show self control and appropriate self awareness?
4.	Education, Training and Employment	<ul style="list-style-type: none"> • Information about the child’s education experience and background • Assessment as to whether support may be required to enable the child to access education, training or employment.
5.	Financial Capability and independent living skills	<ul style="list-style-type: none"> • Assessment of the child’s financial competence and how they will secure financial support in future • Information about the support the child might need to develop self-management and independent living skills,
6.	Health and Development	<ul style="list-style-type: none"> • Assessment of child’s physical, emotional and mental health needs.
7.	Identity	<ul style="list-style-type: none"> • Assessment of the child’s needs as a result of their ethnicity, preferred language, cultural background, religion or sexual identity.

Annex 3 – Freedom of Information Request Letter

Dear Sirs

Request for information under the Freedom of Information (Scotland) Act 2002

I write on behalf of the Young Persons' Project, which provides legal advice, assistance and representation to refugee and migrant children and young people (up to the age of 25) across Scotland.

I am writing to make a request for information under the Freedom of Information (Scotland) Act 2002 with regard to your Local Authority's accommodation and support of separated children⁴² under the Children (Scotland) Act 1995 (the Act) or otherwise.

To be specific, I am seeking information relating to young people up to the age of 18; who are separated from their legal or customary care givers and are currently being supported by the Local Authority.

These young people may be Unaccompanied Asylum Seeking Children (UASC) or may be seeking protection as child victims of trafficking under the National Referral Mechanism for Victims of Trafficking (NRM).

They may have been placed in a different Local Authority in foster care, or other forms of accommodation, or they may be detained but are still being financed by your own Local Authority. They may or may not have an allocated Social Worker but will normally be accommodated or financed or both by your Local Authority's Social Work Department, either under compulsory measures of care or through voluntary or discretionary provision.

I respectfully request information on the following:

In each of the last two financial years:-

1. *How many separated children between the ages of 16-17 (inclusive) were supported by your Local Authority?*

Of these,

- a. *how many were supported under section 22 of the Act;*
- b. *how many were supported under section 25 of the Act; and*
- c. *how many were supported under any other section of the Act (please specify the section)?*

⁴² "Separated children" is a term commonly used to describe children under the age of 18 who are outside their country of origin and separated from their parents or legal or customary care giver. They may arrive on their own or may be accompanied by an adult who is not their parent or legal or customary caregiver. In some cases, they may be removed from their legal or customary care giver through legal proceedings in the UK.

2. *Of the children identified in response to Question 1, how many of those children were Unaccompanied Asylum Seeking Children (UASC)?*

Of these,

- a. *how many were supported under section 22 of the Act;*
 - b. *how many were supported under section 25 of the Act; and*
 - c. *how many were supported under any other section of the Act (please specify the section)?*
3. *Of the children identified in response to Question 1, how many separated children were between the ages of 16-17 (inclusive) when they first became known to your Local Authority?*

Of these,

- a. *how many were supported under section 22 of the Act;*
 - b. *how many were supported under section 25 of the Act; and*
 - c. *how many were supported under any other section of the Act (please specify the section)?*
4. *Of the children identified in response to Question 3, how many of those children were Unaccompanied Asylum Seeking Children (UASC)?*

Of these,

- a. *how many were supported under section 22 of the Act;*
 - b. *how many were supported under section 25 of the Act; and*
 - c. *how many were supported under any other section of the Act (please specify the section)?*
5. *Were you aware of any separated children between the ages of 16-17 (inclusive) in your Local Authority area not supported by your Local Authority?*
- a. *If so, how many such children are you aware of, and what alternate forms of support (e.g. not from the Local Authority) did they receive?*

I would be grateful if I could receive the information in the form of electronic copies.

If this request is too wide or unclear, I would be grateful if you could contact us as I understand that under the Act, you are required to advise and assist requesters.

If our request is denied in whole or part, I ask that you cite one of the Freedom of Information Act exemptions for each piece of information you refuse to release.

Annex 4 – Freedom of Information Responses

Accommodation of Separated Children Ages 16-17 Supported by Scottish Local Authorities in Fiscal Years 2012 and 2013

Local Authority	Q1 Total Number of Separated Children Ages 16/17	Q1 Section of Act	Q2 Total Number of Q1 who were UASC	Q2 Section of Act	Q3 Total Number of Q1 who were Aged 16/17 on Arrival	Q3 Section of Act	Q4 Total Number of Q3 who were UASC & Section of Act	Q5 Any Other Separated Children Ages 16/17
Aberdeen City	1	Section 25	0	n/a	n/a	n/a	0	0
Aberdeenshire	0	n/a	0	n/a	n/a	n/a	0	0
Angus	1	Section 22	1	Section 22	1	Section 22	Section 22 = 1	0
Argyll and Bute	0	n/a	0	n/a	0	n/a	0	0
Clackmannanshire	0	n/a	0	n/a	0	n/a	0	0
Dumfries and Galloway	2	Section 25	1	Section 25	1	Section 25	Section 25 =1	0
City of Dundee	0	n/a	0	n/a	0	n/a	0	0
East Ayrshire	0	n/a	0	n/a	0	n/a	0	0
East Dunbartonshire	0	n/a	0	n/a	0	n/a	0	0
East Lothian	0	n/a	0	n/a	0	n/a	0	0
East Renfrewshire	0	n/a	0	n/a	0	n/a	0	0
City of Edinburgh	1-5 ⁴³	Section 25 & Section 70	1-5	Section 25 & Section 70	0	n/a	0	0
Comhairle nan Eilean Siar (Outer Hebrides)	0	n/a	0	n/a	0	n/a	0	0
Falkirk	0	n/a	0	n/a	0	n/a	0	0
Fife	0	n/a	0	n/a	0	n/a	0	0

⁴³ Certain local authorities provided a range rather than exact figures, on the basis that providing exact figures would risk revealing confidential information that could lead to the identification of individuals in the care of the local authority.

Local Authority	Q1 Total Number of Separated Children Ages 16/17	Q1 Section of Act	Q2 Total Number of Q1 who were UASC	Q2 Section of Act	Q3 Total Number of Q1 who were Aged 16/17 on Arrival	Q3 Section of Act	Q4 Total Number of Q3 who were UASC & Section of Act	Q5 Any Other Separated Children Ages 16/17
Glasgow City ⁴⁴	54/43	Section 22 = 2/2; Section 29 = 52/41	52/41	All Section 29	31/30	Section 22 = 2/2; Section 29 = 29/28	Section 29 = 29/28	0
Highland	0	n/a	0	n/a	0	n/a	0	0
Inverclyde	0	n/a	0	n/a	0	n/a	0	0
Midlothian	0	n/a	0	n/a	0	n/a	0	0
Moray	0	n/a	0	n/a	0	n/a	0	0
North Ayrshire	0	n/a	0	n/a	0	n/a	0	0
North Lanarkshire	1-5 ⁴³	Section 25 & Section 70	1-5	Section 25 & Section 70	0	n/a	0	0
Orkney	0	n/a	0	n/a	0	n/a	0	0
Perth and Kinross	1-5 ⁴³	Section 22	1-5	Section 22	1-5	Section 22	Section 22 = 1	0
Renfrewshire ⁴⁵	--	--	--	--	--	--	--	--
Scottish Borders	0	n/a	0	n/a	0	n/a	0	0
Shetland	0	n/a	0	n/a	0	n/a	0	0
South Ayrshire	1	Section 25	1	Section 25	0	n/a	0	0
South Lanarkshire	0	n/a	0	n/a	0	n/a	0	0
Stirling	0	n/a	0	n/a	0	n/a	0	0
West Dunbartonshire	0	n/a	0	n/a	0	n/a	0	0
West Lothian	0	n/a	0	n/a	0	n/a	0	0

⁴⁴ Glasgow City Council provided information for the 2012 and 2013 financial years. As it is unclear whether individual separated children were counted in both years, both figures have been included in the format (2012 figure/2013 figure). As indicated in the body of the report, we have made a new freedom of information request to Glasgow City Council to clarify the response indicating that children are initially accommodated by that local authority under Section 29 of the Children (Scotland) Act 1995.

⁴⁵ Renfrewshire Council requested we specify the medium for receipt of the information. We have responded, and await a reply at date of publication.

Annex 5 – Legal Opinion of Senior Counsel Janys M Scott QC

OPINION OF SENIOR COUNSEL

for

LEGAL SERVICES AGENCY

re

**ACCOMMODATION AND SUPPORT FOR
UNACCOMPANIED ASYLUM SEEKING
CHILDREN**

Introduction

[1] The Legal Services Agency is engaged in consideration of the position of Unaccompanied Asylum Seeking Children (“UASC”) in Scotland. These are children and young people under the age of 18 who are outside their country of origin and separated from parents or legal or customary caregivers. Such children and young people may have arrived in Scotland alone, or be accompanied by a person who is not the parent or legal or customary caregiver. Some such children may have been removed from the legal or customary caregiver. Where the children concerned are under the age of 16 they will generally be accommodated under section 25 of the Children (Scotland) Act 1995, and may ultimately receive after-care services under section 29. Some young people over the age of 16 have been differently treated. They have been given support which is said to be provided under section 22 of the 1995 Act, and in consequence they have not been treated as “looked after children”, nor have they been entitled to after-care services under section 29 of the 1995

Act. I am asked to consider the position of the children who are not treated as accommodated under section 25.

The law

[2] The law in this area is set out in the Children (Scotland) Act 1995, the material sections of which are as follows:

17.— Duty of local authority to child looked after by them.

(1) Where a child is looked after by a local authority they shall, in such manner as the Secretary of State may prescribe —

(a) safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern);

(b) make such use of services available for children cared for by their own parents as appear to the authority reasonable in his case; and

...

(2) The duty under paragraph (a) of subsection (1) above includes, without prejudice to that paragraph's generality, the duty of providing advice and assistance with a view to preparing the child for when he is no longer looked after by a local authority.

(3) Before making any decision with respect to a child whom they are looking after, or proposing to look after, a local authority shall, so far as is reasonably practicable, ascertain the views of —

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental rights in relation to him; and

(d) any other person whose views the authority consider to be relevant, regarding the matter to be decided.

(4) In making any such decision a local authority shall have regard so far as practicable —

(a) to the views (if he wishes to express them) of the child concerned, taking account of his age and maturity;

(b) to such views of any person mentioned in subsection (3)(b) to (d) above as they have been able to ascertain; and

(c) to the child's religious persuasion, racial origin and cultural and linguistic background.

...

(6) Any reference in this Chapter of this Part to a child who is “looked after” by a local authority, is to a child —

(a) for whom they are providing accommodation under section 25 of this Act;

(b) who is subject to a compulsory supervision order or an interim compulsory supervision order and in respect of whom they are the implementation authority (within the meaning of the Children's Hearings (Scotland) Act 2011);

...

22.— Promotion of welfare of children in need.

- (1) A local authority shall –
 - (a) safeguard and promote the welfare of children in their area who are in need; and
 - (b) so far as is consistent with that duty, promote the upbringing of such children by their families, by providing a range and level of services appropriate to the children's needs.
- (2) In providing services under subsection (1) above, a local authority shall have regard so far as practicable to each child's religious persuasion, racial origin and cultural and linguistic background.
- (3) Without prejudice to the generality of subsection (1) above –
 - (a) a service may be provided under that subsection –
 - (i) for a particular child;
 - (ii) if provided with a view to safeguarding or promoting his welfare, for his family; or
 - (iii) if provided with such a view, for any other member of his family; and
 - (b) the services mentioned in that subsection may include giving assistance in kind or, in exceptional circumstances, in cash.
- (4) Assistance such as is mentioned in subsection (3)(b) above may be given unconditionally or subject to conditions as to the repayment, in whole or in part, of it or of its value; but before giving it, or imposing such conditions, the local authority shall have regard to the means of the child concerned and of his parents ...

25.— Provision of accommodation for children, etc.

- (1) 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.
- (2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare.
- (3) A local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare.
- (4) A local authority providing accommodation under subsection (1) above for a child who is ordinarily resident in the area of another local authority shall notify the other authority, in writing, that such provision is being made; and the other authority may at any time take over the provision of accommodation for the child.
- (5) Before providing a child with accommodation under this section, a local authority shall have regard, so far as practicable, to his views (if he wishes to express them), taking account of his age and maturity; and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.
- (6) Subject to subsection (7) below –
 - (a) a local authority shall not provide accommodation under this section for a child if any person who –
 - (i) has parental responsibilities in relation to him and the parental rights mentioned in section 2(1)(a) and (b) of this Act; and

- (ii) is willing and able either to provide, or to arrange to have provided, accommodation for him, objects; and
 - (b) any such person may at any time remove the child from accommodation which has been provided by the local authority under this section.
- (7) Paragraph (a) of subsection (6) above does not apply –
- (a) as respects any child who, being at least sixteen years of age, agrees to be provided with accommodation under this section; ...
- (8) In this Part of this Act, accommodation means, except where the context otherwise requires, accommodation provided for a continuous period of more than twenty-four hours.

26. – Manner of provision of accommodation to child looked after by local authority.

- (1) A local authority may provide accommodation for a child looked after by them by –
- (a) placing him with –
 - (i) a family (other than such family as is mentioned in paragraph (a) or (b) of the definition of that expression in section 93(1) of this Act);
 - (ii) a relative of his; or
 - (iii) any other suitable person;
 - (b) maintaining him in a residential establishment; or
 - (c) making such other arrangements as appear to them to be appropriate, including (without prejudice to the generality of this paragraph) making use of such services as are referred to in section 17(1)(b) of this Act.
- (2) A local authority may arrange for a child whom they are looking after –
- (a) to be placed, under subsection (1)(a) above, with a person in England and Wales or in Northern Ireland; or
 - (b) to be maintained in any accommodation in which –
 - (i) a local authority in England and Wales could maintain him by virtue of section 23(2)(b) to (e) of the Children Act 1989; or
 - (ii) an authority within the meaning of the Children (Northern Ireland) Order

29. – After-care.

- (1) A local authority shall, unless they are satisfied that his welfare does not require it, advise, guide and assist any person in their area over school age but not yet nineteen years of age who, at the time when he ceased to be of school age or at any subsequent time was, but who is no longer, looked after by a local authority.
- (2) If a person within the area of a local authority is at least nineteen, but is less than twenty-one, years of age and is otherwise a person such as is described in subsection (1) above, he may by application to the authority request that they provide him with advice, guidance and assistance; and they may, unless they are satisfied that his welfare does not require it, grant that application.
- (3) Subject to section 73(2) of the Regulation of Care (Scotland) Act 2001 (asp 8), assistance given under subsection (1) or (2) above may include assistance in kind or in cash.
- (4) Where a person –
- (a) over school age ceases to be looked after by a local authority; or
 - (b) described in subsection (1) above is being provided with advice, guidance or assistance by a local authority, they shall, if he proposes to reside in the area of

another local authority, inform that other local authority accordingly provided that he consents to their doing so.

(5) It is the duty of each local authority, in relation to any person to whom they have a duty under subsection (1) above or who makes an application under subsection (2) above, to carry out an assessment of the person's needs.

(6) Each local authority shall establish a procedure for considering representations (including complaints) made to them by any person mentioned in subsection (1) or (2) above about the discharge of their functions under the provisions of subsections (1) to (5) above...

For the purposes of these sections “child” is defined in section 93(2)(a) as a person under the age of 18 years. This allows a transition from children’s services to adult services at the age of 18 as the general social welfare duties of local authorities under section 12 of the Social Work (Scotland) Act 1968 do not apply until a person attains the age of 18.

Provision of accommodation to separated children

[3] I am advised that local authorities faced with separated children, including UASC, have no difficulty with providing accommodation under section 25 to those who are under the age of 16, but in the case of 16 and 17 year olds some authorities are inclined to provide support under section 22, to allow these young people to secure their own accommodation. The distinction is likely to be on the grounds that under 16 a child does not have legal capacity to enter into a transaction in respect of accommodation, but from the age of 16 young people do have legal capacity in terms of section 1 of the Age of Legal Capacity (Scotland) Act 1991. Looking at the immediate objective this resolves the problem for the young person, but it leaves him or her at a serious disadvantage. He or she will not be treated as a child who is “looked after” by the local authority for the purposes of section 17(6) of the Children (Scotland) Act 1995, and so will not be entitled to the safeguards applicable to children under that section. Furthermore he or she will be at a disadvantage on attaining 18, as compared with children accommodated under section 25, as there will be no prospect of receiving after-care under section 29.

[4] The key to this issue lies in the terms of section 25 of the Children (Scotland) Act 1995. This imposes a duty on local authorities to provide accommodation for any person under the age of 18 years who appears to them to require such provision for a number of reasons at least one of which is likely to apply to a separated child (section 25(1)). It is the essence of the difficulty in many such cases that no-one has parental responsibility for such children. While most aspects of 'parental responsibility' mentioned in section 1(1) of the 1995 Act cease to apply when a child attains 16, the responsibility to provide guidance continues until a person attains the age of 18. The 1995 Act is clear that for the purposes of section 25 "child" includes a person under the age of 18 (see section 93(2)). Many separated children may be characterised as "lost or abandoned" . No-one will generally be providing suitable accommodation or care. If therefore an unaccompanied asylum seeker who is under the age of 18 presents himself or herself to the local authority with a request for accommodation, *prima facie* this results in an obligation on the local authority to provide accommodation. While the local authority is required to have regard to the views of the young person concerned (section 25(5)), this does not abrogate the duty to provide accommodation if the circumstances specified in section 25(1) apply.

[5] The duty under section 25 differs from the obligations of a local authority under section 22. The latter imposes general duties to provide services, it is not concerned with the needs of individual children. Thus an individual child cannot make demands of a local authority by reference to section 22 (see *Crossan v South Lanarkshire Council* 2006 SLT 441). In reaching her decision in *Crossan* Lady Smith was satisfied that the issue before her was essentially the same issue as that addressed by the House of Lords in *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208. In that case single mothers resident in England were seeking accommodation for themselves, with their children, (*inter alia*) under section 17 of

the Children Act 1989. Lady Smith was prepared to treat section 17 as equivalent to the Scottish section 22 and accepted the proposition that the general duties imposed in both those sections were not owed to individual children. The analysis is useful both in itself in understanding the nature of the duties in question, but also in demonstrating that the Scottish courts have been prepared to look at the Children Act 1989 in order to assist in the interpretation of local authority duties under the Children (Scotland) Act 1995.

[6] The critical difference between providing assistance under section 22 and providing accommodation under section 25 lies in the duties which follow from provision of accommodation. A child provided with accommodation is “looked after” by the local authority in question (see section 17(6)). This means that the local authority is bound to safeguard and promote the welfare of the child and that this is to be their paramount concern (section 17(1)(a)). The authority also must make such use of services available for children cared for by their own parent as appear reasonable (section 17(1)(b)). This links with a power to request the help of other authorities, found in section 21. There is a requirement before making a decision about these matters to ascertain and have regard, so far as practicable, to the views of the child and to the child’s religious persuasion, racial origin and cultural and linguistic background (see section 17(3) and (4)). The case must be regularly reviewed under article 31. The Looked After Children (Scotland) Regulations 2009, SSI 2009/210 are invoked. These Regulations impose duties of assessment and planning. Various types of care regimes are covered by the Regulations, including fostering and placement in residential establishments. These are not however the only ways in which accommodation may be provided. It is open to the authority to make any other arrangements that appear to them to be appropriate (section 26(1)).

After-care services

[7] Importantly, when a child is looked after, the general duty to safeguard and promote welfare includes a duty of providing advice and assistance with a view to preparing the child for when he or she is no longer looked after by the local authority (section 17(2)). This leads to the duty of the local authority in section 29 to provide advice, guidance and assistance to a person who was looked after by the local authority at the time he ceased to be of school age or at any subsequent time. This duty continues until the person attains the age of 19. The authority are only relieved of the duty if satisfied that the young person's welfare does not require them to provide such advice, guidance and assistance (section 29(1)). Once such a person attains the age of 19, the duty flies off, but is replaced by a discretion to provide advice, guidance and assistance, if the young person concerned remains under the age of 21 and makes an application (section 29(2)). Assistance may be in kind or in cash (section 29(3)). If the duty applies, or the discretion is activated by an application, then the local authority must carry out an assessment of needs (section 29(5), inserted by the Regulation of Care (Scotland) Act 2001, section 73). There is also a power in section 30 to provide financial assistance to persons under the age of 21 who have been looked after by the local authority.

[8] In order to apply the after-care provisions it is necessary to understand when a person ceases to be of school age. The term "school age" is construed in accordance with section 31 of the Education (Scotland) Act 1980 (see definition in 1995 Act, section 93(1)). That section provides:

"Subject to sections 32(3) and 33(2) and (4) of this Act, a person is of school age if he has attained the age of five years and has not attained the age of sixteen years."

Section 33(2) provides that there are two dates upon which a person is "deemed" to have attained the age of sixteen. A person ceases to be of school age on one of those two dates. If

the person's birthday is on or after March 1 and before October 1 he or she ceases to be of school age on the "summer leaving date". This is the last day of May. If the person's birthday falls on or after October 1 and before March 1 then he or she ceases to be of school age at the beginning of the Christmas holiday period. This is defined as a period of consecutive days which includes 25 December and in which the school does not meet for the purposes of providing school education. The first day of the Christmas holiday period is the "winter leaving date". If the pupil is not actually attending school, the winter leaving date is December 21.

[9] The duties of a local authority are amplified by the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003, SSI 2003/608. These regulations distinguish between young people who are compulsorily supported under section 29(1) (ie those under the age of 19) and those who are discretionarily supported under section 29(2) (ie those aged 19 to 21). All must however have a "pathway co-ordinator" to provide advice and support, ensure that the young person's views are sought and taken into account and participate in a "pathway assessment" and preparation of a "pathway plan". The young person is also entitled to a supporter to provide advice and assistance, assist in giving views and participate in the pathway assessment and preparation of the pathway plan. The regulations set out detailed provision for such assessments and plans, including review of pathway plans. A "responsible authority" is obliged to provide a compulsorily supported person or a discretionarily supported person with accommodation or to support that person in suitable accommodation. The Regulations are accompanied by detailed guidance, published in 2004. There is however an inconsistency between the regulations and primary legislation, in so far as section 29 imposes obligations and gives powers to a local authority as regards any young person "in their area", where the Regulations give responsibility to the local authority that last looked after the person concerned, which may or may not be the

authority that last provided accommodation. The confusion is unhelpful, but in the event of dispute, the duties in the primary legislation should take priority, albeit that leaves uncertainty about the detailed “pathway” provisions set out in the Regulations.

General

[10] It is however clear beyond peradventure that accommodating a separated child under section 25 will involve a local authority in a great deal more than straightforward provision of a place to live. The authority will assume immediate obligations in relation to the welfare of the person concerned, and will also find themselves with obligations in relation to after-care until that person is 19 and liable to have to meet applications until he or she attains 21. There is little in the statutory scheme to indicate that the legislature had UASC in mind. Indeed the guidance offered to local authorities (published 2008) on being “a good corporate parent” is entitled “These Are Our Bairns”. It does not mention any possible international context. On the other hand, the legislation *prima facie* applies to all children, no matter where they have come from. If they are “found within” a local authority area and the other conditions mentioned in section 25 apply, the authority has a duty to accommodate and this will in turn lead to the care and after-care duties that follow.

English case law

[11] There is a wealth of English case law capable of casting light upon the issue in Scotland and I proposes to examine these cases first, before turning to such Scots authorities as there are. Local authorities in England have been faced with the same dilemma between provision of services under section 17 of the Children Act 1989 (broadly equivalent to section 22 of the Children (Scotland) Act 1995) and provision of accommodation under section 20 (similar to the Scottish section 25). If accommodation is arranged or supported under section 17, then the burden on the local authority is far less onerous than if

accommodation is provided under section 20. The issue has arisen not just in the context of UASC. It has arisen in relation to 16 and 17 year olds whose relationships with parents had broken down and who have been provided with accommodation ostensibly under housing legislation (eg *R (M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535 and *R (G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299). It has arisen in the context of children whose educational needs have resulted in the provision of a residential school placement (*R (O) v East Riding of Yorkshire County Council* [2011] EWCA Civ 196, [2011] 3 All ER 137). The message from the English courts has been clear. Local authorities owe duties to persons under the age of 18 to provide accommodation when the statutory conditions for doing so are fulfilled. Councils should not be able to “sidestep” after-care duties by claiming to act under other legislation. If a local authority does actually arrange accommodation, they cannot avoid consequential further obligations by the label they attach to their action.

[12] The most recent case in point is *R(G) v Southwark London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299. This bears closer examination. A 17 year old fell out with his mother and became homeless. He applied to the local authority for accommodation under section 20, but the authority referred him to the Homeless Persons Unit, which provided accommodation under the Housing Act 1996. He claimed judicial review of the decision that he did not require to be accommodated under section 20 of the Children Act 1989. The young person finally succeeded in the House of Lords, where it was held that a child, even one on the verge of adulthood, was considered and treated by Parliament as a vulnerable person to whom the state, in the form of the relevant local authority, owed a duty that went wider than the mere provision of accommodation. If a person aged 16 or 17 applied for accommodation under section 20 and satisfied all the criteria under that section, the local children’s services authority owed a duty to the child to provide him with accommodation

under that section. The authority could ask other authorities for help in discharging the duty, but could not avoid its responsibility by referring the child on or using other statutory powers to provide him with accommodation.

[13] In *R (G) v Southwark London Borough Council* the House of Lords applied with approval a list of criteria taken from the judgment of Ward LJ in *R (A) v Croydon London Borough Council* [2008] EWCA Civ 1445, [2009] LGR 24 CA. It is helpful to consider these in more detail. The questions posed are:

(1) *Is the applicant a child?* If the applicant is under the age of 18 he or she is a child. I return below to cases where there is doubt over this.

(2) *Is the applicant a "child in need"?* This question does not require to be answered in Scotland. In England the requirement to provide accommodation only arises in respect of a "child in need". The Supreme Court conceded that some children who were temporarily deprived of a home were able to provide their own accommodation and would not be in need, but pointed to the long term impact of a lack of permanent housing. Section 25 of the Children (Scotland) Act 1995 imposes a duty in respect of "any child" without imposing a qualification of assessment of whether the child is "in need". It is taken for granted in the Scottish legislation that a child without a home should generally be able to call on the local authority for accommodation.

(3) *Is the child within the local authority area?* This is acknowledged by the House of Lords to be straightforward. Simple presence triggers the duty, albeit in Scotland where the child is ordinarily resident in the area of another local authority, that authority may be asked to fund the accommodation under section 86 of the Social Work (Scotland) Act 1968.

(4) *Does the child appear to the local authority to require accommodation?* This is a question giving rise to the need to draw a distinction between cases where the child has a home to

go to, whether on his own, or with family or friends, but needs help getting there, or getting into it, or having it made habitable or safe, which would be help with accommodation capable of provision under the equivalent of section 22, and a child who needs “accommodation” .

(5) *Do one of the statutory conditions in the section (in Scotland section 25(1)) apply?* The House of Lords encourage a wide construction, to avoid children suffering from the shortcomings of parents or carers. The need for a wide construction is derived from the speech of Lord Hope in *R (G) v Barnet London Borough Council*. It was however accepted in *R (G) v Southwark London Borough Council* that there will be instances where young people have had independent accommodation, but have lost this and become homeless and as a result would require assistance under the Housing Act 1996, rather than under the Children Act.

(6) *What are the child’s wishes and feelings regarding the provision of accommodation?* The House of Lords accepted that a local authority was not required to provide a service, in the form of accommodation that a 16 or 17 year old did not want. In Scotland the legislation refers to “views”, but the legal principle does not differ with the terminology. A person aged 12 or over is presumed of sufficient age and maturity to express a view for the purposes of section 25(5).

(7) *What consideration (having regard to the young person’s age and understanding) is duly to be given to his or her wishes and feelings (or in Scotland “views”).* The House of Lords point out that children are often not good judges of what is in their best interests. The implication is that a child or young person’s views are not determinative.

Other questions in the original list relate only to cases where there are people with parental responsibility and will not generally apply to the case of a separated child.

[14] It is clear from the decision of the House of Lords in *R(G) v Southwark London Borough Council* that if the criteria for provision of accommodation are met a local authority has no choice but to accommodate. An English authority cannot choose between section 17 provision of services and section 20 provision of accommodation. Section 20 involves an evaluative judgment, but not a discretion. The leaving care provisions are then invoked and this is precisely to ensure that older children who are without family support are given just the sort of help with moving into independent living that children normally expect from their families. The power to ask other authorities, such as the housing authority, for help did not mean that the children's authority could avoid their own functions by "passing the buck", but rather that they could ask the other authority to use its powers to help them discharge theirs.

[15] The decision of the House of Lords was taken in the context of a child who had fallen out with his mother, but is consistent with earlier decisions relating to UASC, and in particular *R (H) v Wandsworth London Borough Council* [2007] EWHC 1082 (Admin), [2007] 2 FLR 822. In that case Holman J considered three such children. In the first (the "Wandsworth case") a 17 year old Iranian boy was presented with three "options", involving the two relevant statutory provisions, in a document he did not understand, with the benefit of an Afghani interpreter. Wandsworth maintained that the boy selected a section 17 option. Holman J described the procedure adopted by Wandsworth as "little short of bizarre". He held that it was unlawful and quashed a decision to the effect that the accommodation had been provided under section 17 rather than section 20. He held that accommodation had been provided under section 20 and that the boy was a looked after child and was entitled to after-care services. A similar view was taken in the second case where the London Borough of Hackney provided a young person with temporary accommodation together with three other young asylum seekers. The authority purported

to act under section 17, but were held to have provided the accommodation under section 20. In contrast, in the final case, the local authority simply paid the deposit on a private let for a young asylum seeker. She signed a private tenancy agreement and then obtained and funded her rent out of housing benefit. She had not been provided with accommodation under section 20 and her claim to after-care services failed.

[16] The *Wandsworth* decision was cited by the House of Lords in *R(G) v Southwark London Borough Council* as one of a series of cases with the message that if a section 20 duty has arisen and the children's authority have provided accommodation for the child, they cannot "sidestep" the issue by claiming to have acted under some other power (*per* Baroness Hale at para 9). The same message is present in *R (B) v Hillingdon London Borough Council* [2003] EWHC 2075 (Admin), [2004] 1 FLR 439 where the local authority argued that they provided "housing" for children who required "somewhere to live" as opposed to providing "accommodation". Sullivan J held that this was mere sophistry, based on a distinction without a difference. Whatever the local authority thought it was doing, it was in ordinary language providing the claimants with accommodation, because on any reasonable view they required this. That was sufficient for the purposes of the case and it did not matter whether the accommodation was provided under section 17 or section 20. That case is now 10 years old and matters have moved on, in particular as a result of the decision of the House of Lords in *R(G) v Southwark London Borough Council*.

[17] The English cases indicate that it does, however, matter whether the local authority itself provides accommodation. *R(G) v Southwark London Borough Council* followed the case of *R (M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535 where a young woman was provided with accommodation by the housing department, no reference having been made to the local authority children's services department. The

House of Lords held that the housing department should have referred her to the children's services department, but as that had not occurred and the children's services department had not provided her with accommodation, she had not been "looked after" and was not entitled to after-care services. A similar judgment was issued in *R(GE) v Secretary of State for the Home Department* [2013] EWHC 2186 (Admin), [2014] PTSR 124 by Mark Ockelton sitting as a deputy High Court judge. There accommodation had been provided to a "minor" by the United Kingdom Border Agency. She had been entitled to assistance under the 1989 Act, and in particular had been entitled to be provided with accommodation under section 20, but this had not happened, and accordingly she was not entitled to after-care services. The case contains a useful review of decided cases, including mention of *R (G) (Shelter intervening) v Lambeth London Borough Council* [2011] EWCA Civ 526, [2012] PTSR 364, where a social worker, instead of analysing whether a duty was owed under section 20, wrote a report supporting the child's application to the housing department. The Court of Appeal held that the social worker's actions should be imputed to the children's services authority, which had accordingly accommodated the child. This did however contrast with cases where there was no causal link between the action attributed to the social services department and the provision of accommodation, and so no possible resort to section 20.

[18] There is an area of difficulty in relation to asylum seekers presenting as children, who are assessed to be adults. The House of Lords has decided, at least for the purposes of English law and procedure, that a dispute about a person's age in this context is a question to be determined by the court on the evidence (*R(A) v Croydon London Borough Council* [2009] UKSC 8, [2010] PTSR 106). However in the subsequent case of *R(R) v Croydon London Borough Council* [2013] EWHC 4243 (Admin), a claimant said he was 15 and was referred by the UKBA to the local authority. The authority assessed the claimant to be 18 and referred him back to the UKBA, who provided accommodation while the dispute was determined.

By the time there was a finding for the claimant to the effect that he was 15 when he arrived in the UK, he had attained 18 and was no longer eligible for provision of accommodation under section 20. The judge in that case was prepared to deem that accommodation had been provided by the local authority under section 20, because the authority had referred the claimant back to the UKBA who had provided the accommodation. This may however be stretching a point and the case has not met with universal approval, as can be seen from the comments of Temporary Judge Ockelton in *R(GE) v Secretary of State for the Home Department*.

Scottish case law

[19] Despite the wealth of English case law there are only two sets of reported cases in Scotland relating to UASC, both decided by Lord Stewart and both concerning disputes about age. *L v Angus Council* [2011] CSOH 98, 2011 SLT 853 and [2011] CSOH 196, 2012 SLT 304 related to a stowaway from Morocco who claimed to be 15 and sought judicial review of a local authority assessment that he was over the age of 18. His claim for an interim order was refused, as was his claim on final determination. The principal issue in the case related to procedure in relation to assessment of age and to the appropriate remedy. Lord Stewart did not accept the ruling of the House of Lords in *R(A) v Croydon London Borough Council* in relation to necessary fact finding exercise. His remarks about the Children (Scotland) Act 1995 are strictly *obiter*.

[20] In the substantive case (ie [2011] CSOH 196) Lord Stewart remarked that section 20 of the Children Act 1989 differed from section 25(1) of the Children (Scotland) Act 1995, but accepted that no submission had been made to him on the proper construction of the Scots statute (paras [24] and [25]). He questioned whether the qualifying circumstances for local authority support under section 25(1) would be met in the circumstances of that case,

suggesting a narrow construction, but without reference to the fact that section 20(1) is in almost identical terms, and there is guidance in *R (G) v Southwark London Borough Council* to the effect that a broad construction should be applied to the criteria for assistance in section 20(1). That case is not mentioned in the headnote of the report in SLT, but Lord Stewart does appear to have looked at it (see para [148]). Lord Stewart opines that there are reasons to distinguish section 20 of the English Act from section 25 of the Scottish Act (para [117]) but his reasons are not explained until later (see para [148] ff). In so far as the reasons emerge, it is my respectful opinion that he is incorrect and that his reasoning cannot be sustained. He notes that:

- The words “in need” are omitted from section 25. However this gives section 25 broader application than the equivalent English section, not the narrower construction he appears to favour.
- Parental responsibilities in Scotland apply, he says up to the age of 16. He is incorrect. The parental responsibility of guidance extends to 18 in terms of section 1(2)(b) of the 1995 Act, and in any event section 25(1) applies to children up to the age of 18 without qualification.
- He expresses the view that section 20(1) of the Children Act 1989 is qualified by section 20(3), ie that there is a “serious prejudice to welfare” test before provision of accommodation is mandatory in England. He cannot be correct about this. Section 20(3) is an additional basis for provision of accommodation as can be seen from the section itself. There is no mention in *R (G) v Southwark London Borough Council* of section 20(3) as a necessary part of the test for providing accommodation. Section 20(1) of the 1989 Act is freestanding, as is section 25(1) of the 1995 Act.

[21] The same Lord Ordinary decided *ISA v Angus Council* [2012] CSOH 134 and *ALA v Angus Council* [2012] CSOH 135. These cases again related to age assessment, this time of two Nigerian brothers who were visa-overstayers. The brothers were placed with foster carers who were paid in terms of section 22 of the Children (Scotland) Act 1995. Lord Stewart accepted that he was required to carry out a fact finding exercise in relation to age as a result of earlier procedural decisions in the case (*ALA* paras 7 – 9 and *ISA* paras 11 – 14). He did not accept that an age assessment carried out by Angus Council was to establish whether the brothers were entitled to be provided with accommodation under section 25 (see *ISA* paras 18 and 20). While there was a line in cross-examination of the relevant Team Manager of the Throughcare/ Aftercare Team at Angus Council to the effect that the Council were attempting to avoid their responsibilities under section 25 and consequent after-care (see *ISA* para 247), Lord Stewart expressed no particular view on this in reaching his decision. His comment in *ALA* at para 6 tends to indicate some confusion between being assessed to be “in need” for the purposes of section 22 and satisfying the criteria for provision of accommodation under section 25. He was also under the misapprehension that after-care services and support extended to age 25. These two cases do not therefore advance the debate.

[22] It is my opinion that were the court in Scotland required to make a decision about the extent of the local authority duty to provide accommodation for an UASC under section 25 of the Children (Scotland) Act 1995, as opposed to provision of services under section 22, there are strong arguments to persuade the court to take a similar view to that taken by the English courts in relation to sections 20 and 17 of the Children Act 1989. While the comments of Lord Stewart in *L v Angus Council* do represent a hurdle, these were *obiter* and made without the benefit of full submissions and can be shown to be based on certain misapprehensions. The two statutes are couched in similar terms. They satisfy similar

policy requirements. It is unlikely that Parliament intended a different regime to operate in respect of UASC depending on where in the UK they happened to be. The terms of the 1989 Act have already been used to assist in interpretation of the 1995 Act in *Crossan v South Lanarkshire Council*. There is a difference of context between the decision in *Crossan* and cases of UASC, but there is a similarity of context between the English cases relating to such unaccompanied children and cases that may arise in Scotland. The issues are virtually identical. For so long as the final court of appeal is the Supreme Court, it is highly unlikely that the Children (Scotland) Act 1995 will be materially differently interpreted from the Children Act 1989, to produce a significantly different result for children who happen to be in Scotland, rather than in England.

[23] For what it is worth, interpreting the Children (Scotland) Act 1995 in a manner which is consistent with the interpretation of parallel provisions in the Children Act 1989 results in compliance with the provisions the United Nations Convention on the Rights of the Child. Article 1 of the Convention defines “child” as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier. In Scotland children attain capacity at the age of sixteen, but for the purposes of provision of accommodation under section 25 of the Children (Scotland) Act 1995 “child” includes any person under the age of eighteen. In terms of UNCRC article 3 states are to ensure children “such protection and care as is necessary for his or her well-being”. Article 22 of UNCRC applies to refugee children and in cases where no parents or other members of the family can be found requires “the child” to be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment. This Convention is not directly applicable (unlike the European Convention on Human Rights), but it is incumbent on states parties that have ratified the Convention, to give effect to it. The Convention was ratified by the United Kingdom on 16 December 1991. If there were any

ambiguity about the terms of the legislation as regards provision of accommodation and care to UASC then the Convention would reinforce the point that duties to separated children extend up to the age of 18.

[24] The distinction being drawn in Scotland between children under 16 who are provided with accommodation and children aged 16 and 17 who are merely provided with services is difficult to justify having regard to UNCRC. The Scottish Ministers are now committed to keeping under consideration whether there are steps which they could take which would or might secure better or further effect in Scotland of the requirements of the Convention (Children and Young People (Scotland) Act 2014, section 1). If local authorities are neglecting their statutory duties to UASC aged 16 and 17 then the Scottish Ministers have it in their power to issue clear guidance in relation to these duties.

Trafficked children

[25] Some UASC will be the victims of trafficking. Trafficking is an international phenomenon. EU Directive 2011/36 on preventing and combatting trafficking was adopted on 5 April 2011. This Directive is the latest manifestation of a number of international instruments dealing with trafficking, including the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005. Given the EU Directive repeats and expands on previous instruments it is sufficient for present purposes to look at the terms of the Directive. The United Kingdom initially opted out of the Directive on the basis that its provisions were already largely in force domestically, but then applied to opt in. This request was accepted and the Directive has been in force in the United Kingdom since 18 October 2011. In consequence all parts of the United Kingdom, including (at least for the present) Scotland are bound to implement the Directive.

[26] Article 2 adopts a broad definition of trafficking. It requires measures to ensure punishment of:

“The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation.”

Recital (8) to the Directive draws attention to the fact that children are more vulnerable than adults and at greater risk of becoming victims of trafficking. In the application of the Directive the child’s best interests must be a primary consideration, in accordance with both the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child. Recital (23) states that particular attention should be paid to unaccompanied child victims of trafficking. Member states are required to apply reception measures appropriate to the needs of the child and ensure procedural safeguards. Where appropriate a guardian and/or representative should be appointed to safeguard the child’s best interests. The recital refers to the need to find a durable solution for the child.

[27] Article 1 provides that for the purposes of the Directive “child” means any person below 18 years of age. If a person’s age is uncertain but there are reasons to believe that a person is a child, article 13 requires he or she must be presumed to be a child, in order to receive immediate access to assistance, support and protection. These measures are spelled out in articles 14 and 15, and are consistent with the terms of Recital 23. Article 14 refers to individual assessment and measures to assist the child in their physical and psycho-social recovery and provision of access to education. This article also provides for appointment of a guardian or representative where there is a conflict of interests between the child and the

usual holders of parental responsibility. Article 15 covers protection of children when there are criminal investigations and proceedings. Particular attention to assistance and support of unaccompanied child victims is required by article 16. This article mentions in particular the need for measures to find a durable solution based on individual assessment of the best interests of the child.

[28] The Directive does not specify how member states should provide assistance, support and protection. This is clearly a matter for the states. However the ‘packages’ of assistance envisaged by the measure are much more consistent with duties of care applicable to looked after children and hence to the accommodation of trafficked children under section 25, than to the rather more *ad hoc* provision of services on a more general basis under section 22 of the Children (Scotland) Act 1995. The Directive thus reinforces the importance of adhering to the provisions of the prevailing legislation when there is reason to believe that the person concerned is under 18 and a victim of trafficking. I do note however that there is non-statutory provision of a Scottish Guardianship Service designed to assist in fulfilling national obligations under the Trafficking Directive to children below the age of 18.

Conclusions

[29] Agents have posed various questions, which in my opinion fall to be answered as follows:

1. A separated child or UASC who is residing or found to be in Scotland must be accommodated by the local authority for the area where he or she is residing or found when the child:

- **Is under the age of 18;**
- **Appears to require accommodation;**

- Has no-one with parental responsibility for him or her, is lost or abandoned, or where the person who has been caring for him or her is prevented, whether or not permanently and for whatever reason, from providing suitable accommodation or care;
- Has been given the opportunity to express views about the provision of accommodation, those views not being determinative, but bearing in mind that the local authority is not required to provide accommodation that a young person over the age of 16 does not want.

If the local authority find themselves providing accommodation, or arranging with others for the provision of accommodation, then it is likely that they will be held to be acting under section 25. This means that an authority cannot, by purporting to act under section 22 of the Children (Scotland) Act 1995, while actually providing or arranging for the provision of accommodation, avoid the duties that apply to children who are accommodated, including after-care duties under section 29.

2. If a child is accommodated under section 25, or treated as so accommodated (notwithstanding that a local authority is purporting to act under section 22, as explained above), then that child will be a “looked after” child in terms of section 17(6) of the 1995 Act. The local authority must adhere to their statutory duties towards the child while he or she is accommodated. The duties and powers in relation to after-care of looked after children may arise thereafter.

3. If a child who has been provided with accommodation under section 25, or treated as so accommodated (as explained above), at any time when ceasing to be of school age, or thereafter, leaves accommodation, then the local authority have a duty to provide advice, guidance and assistance until the person concerned attains the age of

19 and thereafter a discretion to provide advice, guidance and assistance under section 29 of the 1995 Act. Duties under the Act are amplified by Regulations (SSI 2003/608) which require a “pathway co-ordinator”, “pathway assessment” and “pathway plan” and a supporter for the young person. Assistance should include accommodation or support in accommodation. There is unfortunately confusion about which authority should provide these items as the primary legislation imposes the duty of providing advice, guidance and assistance on the local authority where the young person is present, but the Regulations impose duties on the local authority that last looked after the person concerned.

4. A failure by the local authority to carry out statutory duties may be enforced by judicial review. The United Nations Convention on the Rights of the Child is relevant in so far as it supports the interpretation of domestic law imposing these duties, particularly as regards 16 and 17 year olds where it appears there have been some lapses. The Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005 and EU Directive 2011/36 on preventing and combatting trafficking of 5 April 2011 similarly reinforce the interpretation of the obligations of domestic law when dealing with trafficked children.

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