

ILLEGAL MIGRATION BILL
IMPACT ON CHILDREN
All Party Parliamentary Group
SPEAKER: Charlotte Kilroy KC
1.30 pm 22 May 2023

1. Thousands of children every year claim asylum in the UK.
2. Most of these children are dependents on their parents' or carers' claims for asylum.
3. A significant minority are unaccompanied minors (**UAM**).
4. Of those children who claim asylum with their parents or carers, it is common for the majority to be under the age of 10 and many to be under the age of 5.¹
5. By way of example, in 2021, around 10,000 children claimed asylum, 6000 of whom were dependent on their parents claims.²
6. Not only are the numbers significant in themselves but they are significant as a percentage of total asylum seekers. Between 2010-2020 around 23% of those claiming asylum were children.³
7. In my short presentation I am going to focus on the implications of the Illegal Migration Bill for these children.
8. In its 16 June 2022 official report to the United Nations Committee on the Rights of the Child⁴, the UK government said this:

*"The UK remains fully committed to the United Nations Convention on the Rights of the Child (UNCRC)."*⁵
9. It also said this of decisions in the immigration and asylum arena:

¹ <https://www.refugeecouncil.org.uk/wp-content/uploads/2022/09/Asylum-Statistics-Annual-Trends-September-2022.pdf>

² Ibid

³ <https://sticerd.lse.ac.uk/dps/case/cb/casebrief41.pdf>

⁴ CRC/C/GBR/6-7

⁵ Ibid, §1

“UKG is committed to ensuring that the best interests of all children are a primary consideration in any decision that affects them.”⁶

10. If this Bill comes law, however, those statements will no longer be true. The Bill will put the UK in immediate breach of its obligations under the UN Child Rights Convention (UNCRC) and if implemented in its current form is likely to lead to violations of the rights of thousands of children. There are four **key** reasons why.
11. **First** in the design and passage of the legislation itself. The UNCRC requires the best interests of children to be made a primary consideration in all decisions which affect them, including, importantly, when passing legislation which affects them.⁷
12. But legislators have been asked to pass this legislation in ignorance of the impact on children.
13. Even though the Bill will apply to thousands of children, some very young, and even though the children to be affected are among the most vulnerable on the planet, having suffered a series of traumas including conflict or persecution in their countries of origin, being uprooted from home, traumas in the course of their journeys, mental and physical health issues, sex trafficking or slavery, there is no child rights impact assessment for this Bill⁸.
14. A narrowly defined subset of a larger group of unaccompanied minors have been given a temporary exemption from the duty to remove (clause 3), but the circumstances of children who claim asylum with parents or carers, or UAMs who fall outside the Bill’s definition in clause 3(5) are hardly mentioned in any of the official memoranda.
15. That is an immediate breach of the UK’s obligations under the UNCRC which will arise as soon as the Bill hits the statute books and comes into force.

⁶ Ibid, §287

⁷ Article 3 UNCRC; §99, UN Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (2013) CRC/C/GC/14 “**GC14**”

⁸ See UNICEF written evidence Joint Committee on Human Rights, 6 April 2023; <https://committees.parliament.uk/writtenevidence/119953/pdf/>

16. **Second**, the structure of the decision-making under the Bill is likely to give rise to multiple violations of rights under the UNCRC.
17. The Bill's flagship measure is an all-encompassing duty (clause 2) to make arrangements to remove as soon as reasonably practicable, imposed on the Home Secretary in relation to all those, including children, who have arrived without lawfully obtained leave to enter or remain.
18. There is no exception for children of any age, however much they have suffered on route, and there is no provision in the Bill for the Home Secretary to consider their individual circumstances or best interests, or make those best interests a primary consideration, before making a decision to remove them under clauses 5 and 7.
19. Indeed the Home Secretary is required to disregard human rights claims or judicial review challenges (clause 4).
20. On its face therefore the Bill contemplates multiple decisions to remove in breach of the obligation to make the best interests of the child a primary consideration, even though that obligation is not just binding, but the UKG embraced it and recommitted to it as recently as 16 June 2022.
21. What about the serious harm claim which can be made (see clauses 38-46) after the decision to remove has been made? If children can produce compelling evidence within 8 calendar days that there is real, imminent and foreseeable risk they will suffer serious and irreversible harm on their removal (clause 38-41) then the Home Secretary will be prevented from executing the removal decision (clause 46).
22. Under the UNCRC, however:
 - (1) The duty to make best interests a primary consideration arises before the decision not after.
 - (2) The duty falls on the decision-maker- who must put stringent processes in place to be able to effectively achieve it and provide

a right of appeal. The burden of showing what their best interests require does not fall on the children themselves.

(3) 8 calendar days is a woefully insufficient amount of time for the child to provide compelling evidence.

(4) The reasons why it may not be in the best interests for a child to be removed are many and various, they are not confined to a real, imminent and foreseeable risk of serious irreversible harm, and yet under the Bill the only issue the decision-maker must address prior to removal is that risk of serious and irreversible harm (clause 41).

23. So the provisions for a serious harm claim at clauses 38-41 are not an answer to the UK's breach of its obligations under the UNCRC.

24. **Third**, the Bill gives the Home Secretary the power to detain children who don't fall within the narrow definition of UAM in the Bill (clause 10(2)).

25. This covers all children who are accompanied of whatever age from babies and toddlers to teenagers, and some children who are unaccompanied, for a potentially indefinite period of time while she is taking steps to comply with her duty to make arrangements to remove.

26. Not only is the detention period untrammelled in the Bill, but there is stated to be no access to bail or judicial review for the first 28 days (clause 12).

27. The UN Committee on the Rights of the Child has repeatedly emphasised the harms to children's physical and mental health and on their development from detention even where they are detained for a short period of time, and even when they are detained with their families.⁹

28. The UN Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment has stated that '*within the context of administrative immigration enforcement the deprivation of*

⁹ See UNICEF evidence (ref above); see also §5-13, Joint General Comment Nos 4 and 23 (2017) of Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, CMW/C/GC/4-CRC/C/GC/23

liberty of children based on their or their parents migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman and degrading treatment of migrant children.”¹⁰

29. The extensive powers to detain children conferred on the Home Secretary by this Bill thus risk further mass violations of children’s rights under the UNCRC (see in particular Articles 3 and 37 UNCRC).

30. **Fourthly**, once a child meets the conditions triggering the duty to remove under clause 2 of the Bill, they become exposed to a range of detriments, no matter their particular circumstances or what their best interests require, and without any consideration of either:

(1) They can be removed to a third country and remain there while their human rights claims are considered by the Home Secretary and the UK courts (clause 4). There is no time limit in the Bill on how long this consideration could take, and in the meantime their welfare, mental and physical health and/or development could be permanently damaged.

(2) They lose the right to apply for asylum (clause 4) and British citizenship (see clause 31).

(3) They lose critical protections under the Modern Slavery Act as victims of trafficking (clauses 21-22). That is even if they have arrived in the UK as slaves.

31. This kind of blanket detriment without consideration of individual characteristics or best interests is likely to lead to further serious breaches of the UNCRC.

32. Having identified these four key features, which are not the only ways in which the Bill is likely to violate the UNCRC, but key ones, I turn to the four questions posed by the AAPG in the agenda:

(1) Is the Bill compliant with the UK’s international legal obligations under the CRC: **No.**

¹⁰ UNICEF written evidence; Joint General Comment No 4/23 (2017) (ref above) at §9 quoting from A/HRC/28/68 §80

- (2) What are the likely impacts on the UK's adherence to its international obligations? **It is likely to involve serious violations of the UNCRC on a widespread basis.**
- (3) How will the Bill impact the UK's standing as a beacon for the rule of law internationally? **In terms of children's rights, the Bill if enacted and implemented in its current form would have a catastrophic effect on the UK's standing. The mass detention and deportation of thousands of refugee children of all ages from babies to teens, and their forcible removal without considering their welfare or best interests is a step back into the dark.**
- (4) How will the Bill impact on children? **If enacted and implemented in its current form it is likely to cause them serious harm for which they, and the UK, will be paying for decades, they in damage to their welfare, health and development, and the UK in terms of lost reputation and standing, and financial compensation.**
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ANNEX KEY MATERIALS

33. Article 3 UNCRC gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her both in the public and private sphere.

34. The UN Committee in the Rights of the Child General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (GC14)¹¹ provides authoritative guidance on Article 3 UNCRC:

(1) See GC14 §6- the child's best interests is a threefold concept, a substantive right, a fundamental interpretative principle and a procedural obligation.

(2) GC14 §6(c) states that the procedural obligation requires that:

“Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.”

(3) For legislation- that in practice means a Child Rights Impact Assessment (see §99 GC14).

(4) For individual decision-making it means proper fact-finding about the unique qualities of the individual child (§47-§48 GC14), which takes into account a wide range of factors relevant to their best interests including their well-being and development, and

¹¹ CRC/C/GC/14; https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf

their basic need for physical and emotional care (§§71-74). An important element to consider is the special vulnerability of a child refugee or asylum seeker (§75-76). There have to be formal processes for making these decisions (§87) both at an administrative and judicial level (see §85-98) which must include children being able to express their own views (§89-91), establishment of facts (§92) legal representation (§96) and access to rights of appeal in relation to decisions on best interests (§98). All these processes have to be completed within a timeframe which acknowledges that time doesn't mean the same for children as it does for adults (see §93)- i.e. as swiftly as possible while observing due process. The assessment must be carried out by the decision-maker and his or her staff (§47) and have strict procedural safeguards. The fact that the child is very young or in a vulnerable situation because for example they are a migrant does not deprive them of the right to express their views or to have an individualised assessment (§54 GC14).

35. Although the UNCRC is an international treaty, fundamental rights under the European Convention on Human Rights must be interpreted in harmony with the UNCRC, and GC14 is authoritative guidance on what the best interests principle involves (see Supreme Court decisions of *R(ZH Tanzania) v SSHD* [2011] 2 AC 166 at §21-38), *R(Mathieson) v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 at §39, *R(SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 at §105-106).

36. Section 55 of the Borders Citizenship and Immigration Act 2009 states:

Duty regarding the welfare of children

(1) *The Secretary of State must make arrangements for ensuring that –*

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are –

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).