

## **Unaccompanied Asylum Seeking Children (UASC) in the UK: Protecting their Best Interests in the Controlled Migration Regime**

Shuvra Chowdhury\*

Ahmed Ehsanul Kabir\*\*

**Abstract:** In every year, unaccompanied children from different parts of the world are looking for asylum in the UK because of socio-economic and political reasons in their home countries. Due to the hostile environment policy of the UK government against the unaccompanied asylum-seeking children (UASC), they are treated as 'undeserving' by the immigration authority. Though the UK government has ratified the UNCRC, but the best interests of the UASC have not been ensured in many instances. Consequently, the protection of the UASC is basically considered as a last resort when no other alternatives are available. With a view to uphold the rights and interests of the UASC in the light of the core principles of the UNCRC, the Children Act, 1989 has already incorporated certain provisions. But, this protective framework of law is not free from flaws. As a result, the apex courts in the UK are providing a path for the UASC to combat with the hostile environment policy and to secure the protection by upholding their rights and interests. So, this article depicts how to ensure the best interest of the UASC within the framework of law relating to children in the antagonistic and controlled migration regime.

**Keywords:** Best interest principle, children law, hostile environment, immigration and asylum law, unaccompanied asylum-seeking children, and UNCRC.

### **1. Introduction**

In every year, a good number of unaccompanied children are arriving in the UK, leaving their country of origin for many reasons i.e. armed conflict, political upheaval, family abuses, female genital mutilation, trafficking for labour or sexual exploitation, domestic violence, accusation of witchcraft, force marriage, etc.<sup>1</sup> They are treated as illegal asylum seekers and their age is often

---

\* The author is an Assistant Professor at the Department of Law, Stamford University Bangladesh. She can be reached at: shuvrachowdhury83@yahoo.co.uk.

\*\* The author is an Assistant Professor at the Department of Law, Jagannath University. He can be reached at: kabirlcls@yahoo.com.

<sup>1</sup> Farhat Bokhari, 'Separated Children in the UK Policy and Legislation', in Emma Kelly and Farhat Bokhari (eds), *Safeguarding Children from Abroad: Refugee, Asylum Seeking and Trafficked Children in the UK* (Jessica Kingsley 2012) 156.

challenged by the immigration authority, consequently, their claims discredited by the helpless and hostile situations.<sup>2</sup> In 2011, 6% (1,277) applications for asylum were made on behalf of the unaccompanied children. The total number of unaccompanied asylum seeking children rise significantly in the year 2015 and 2016 with over 3000 new arrivals each year. In 2016, the Home Office's record showed that 2084 asylum applications were made by unaccompanied children,<sup>3</sup> most of them were granted of Unaccompanied Asylum Seeking Child (UASC) leave<sup>4</sup>, a temporary status granted only on the basis that they were still under 18, following a refusal of asylum or humanitarian protection. Due to the government's hostile environment policy, unaccompanied children in the UK will have limited protection in the immigration and asylum process. The unaccompanied asylum seeking children (UASC) are not only experiencing risks and uncertainty in their journey from the country of origin but also facing unfavourable treatment in the immigration system after their arrival in the UK. Though, the government of the UK has ratified the United Nations Convention relating to the protection of the the Rights of the Child (UNCRC), but it would not have any direct impact on the domestic legislation because of the dualist nature of the British Constitution. Some of the basic principles of the UNCRC have already been adopted in the domestic legislations for the protection and safeguard of the UASC. On the other hand, a number of legislations have been enacted to curtail the rights and protection of the UASC under the punitive framework and treated them as 'undeserving'. So, the protection of the UASC is considered at the end without giving any primary importance to the best interest of the children as enshrined in the UNCRC.<sup>5</sup> These perilous conditions of the UASC in the UK have propelled us to write down an article on this topic and also encouraged us to initiate an endeavor how to uphold the best interest of the UASC within the framework of law relating to children in the antagonistic and controlled migration regime.

---

<sup>2</sup> Francesca Meloni and Rachel Humphris, 'Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom', 2019 *Journal of Refugee Studies* 34.

<sup>3</sup> Home Office, *2016 National Statistics: Asylum, April to June 2016 25 August*, <[www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum#unaccompanied-asylum-seeking-children](http://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum#unaccompanied-asylum-seeking-children)> accessed 19 April 2020.

<sup>4</sup> Unaccompanied Asylum Seeking Child Leave, Immigration Rules 11 para 352ZC, Until 6 April 2013 Discretionary leave was granted on the same basis but outside the immigration rules.

<sup>5</sup> Lisa Shamseldin, 'Implementation of the United Nations Convention on the Rights of the Child 1989 in the Care and Protection of Unaccompanied Asylum Seeking Children: Findings from Empirical Research in England, Ireland and Sweden' (2012) 20 *Int'l J Child Rts* 90, 94.

## **2. The best interest principle and unaccompanied asylum seeking children**

The best interest principle has been enshrined in art. 3 of the UNCRC. Except the USA, all the member States of the UN have been ratified the UNCRC. The provisions of the UNCRC are dedicated to all children irrespective of their background and status. There are four basic principles of the UNCRC which have been identified by the Committee formed to oversee the effective implementation of the rights and interests of the children as enshrined in the UNCRC at national levels i.e. best interest principle (art. 3(1)), prohibition of discrimination (art. 2), right to life, development and survival (art. 6) and freedom of expression (art. 12). Article 3 of the UNCRC guarantees that all States will protect the best interests of the children on a primary basis. To comply with the art. 3 obligation, it is the responsibility of the UK to identify and ensure the best interests of the children.<sup>6</sup> Though the UNCRC does not provide a definition of best interests but it refers to the general well-being of children which will include a number of factors, such as the personal opinion of the child, the importance of safe and child-friendly environment, unification with family and identity needs.<sup>7</sup> Baroness Hale confirmed in *ZH (Tanzania) v Secretary of State for Home Department (SSHD)* that the best interests principle is a 'binding international obligation'.<sup>8</sup> In addition, the best interest principle is a rule of procedure as well as substantive rights.<sup>9</sup> After the withdrawal of UK's reservation to the applicability of the UNCRC to immigration and asylum issues with effect from 18 November, 2008, the best interest principle has been incorporated in s. 55, Border, Citizenship and Immigration Act (BCIA), 2009. If any decision has been taken by the immigration authority without considering the best interest principle, that decision will become unlawful.<sup>10</sup> Further, the best interest principle has been described by the Department for Education (DfE) as a holistic idea which will embrace the psychological, physical, religious, ethical, social and educational development of the children.<sup>11</sup> So, the UASC who is deprived of their

---

<sup>6</sup> Jane Fortin, 'Are Children's Best Interests Really Best' – *ZH (Tanzania) (FC) v Secretary of State for the Home Department* (2011) 74 Mod L Rev 947.

<sup>7</sup> UNHCR, *Guidelines on Determining the Best Interests of the Child*, <<http://www.refworld.org/docid/4848c342.html>> accessed 20 April 2020.

<sup>8</sup> Judith Ferby, 'A Legal Analysis of Child-sensitive Asylum Procedures', *Journal of Immigration, Asylum and Nationality Law* (2014) 28 IANL 255.

<sup>9</sup> UN Committee on the Rights of the Child General Comment No 4, para 74 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3 para. 1) CRC/C/GC/14.

<sup>10</sup> *ibid.*

<sup>11</sup> Department for Education, *Care of Unaccompanied Migrant Children and Child Victims of Modern Slavery: Statutory Guidance for Local Authorities* (2017) <[http://consult.education.gov.uk/children-in-care/care-of-unaccompanied-and-trafficked-childr...0guidance\\_final.pdf](http://consult.education.gov.uk/children-in-care/care-of-unaccompanied-and-trafficked-childr...0guidance_final.pdf)> accessed 20 April 2020.

family are eligible to receive special support and protection measures under the best interests principle.

Under s.55 BCIA it becomes the responsibility of the Home Secretary of UK to protect the best interest of the UMC, so, the apex courts in the UK are giving directions by upholding the rights and interests of the UASC within the prevailing hostile environment policy.<sup>12</sup> From the case laws,<sup>13</sup> it can be traced the embodiment and manifestation of the best interest principle of the UASC in the UK. Nonetheless, there are some obstacles to the effective implementation process of the UNCRC obligations in the UK, which are vague and poorly defined best interest principle, insufficient and less-standardized care and support measures as well as absence of specific target of services.<sup>14</sup>

Unaccompanied migrant children include the UASC, victims of trafficking and those who have been arrived in the UK<sup>15</sup> for safety from persecution or economic reasons.<sup>16</sup> When an unaccompanied child is appeared before the Immigration officer, it is the responsibility of the officer to comply with the requirements as embodied in s.55, BCIA, 2009 i.e. to ensure and safeguard the well-being of unaccompanied children.<sup>17</sup> Nonetheless, the experiences of the UASC in the UK immigration have been depicted as 'confusing, stressful and degrading'<sup>18</sup>. In order to get the protection, unaccompanied migrant children must satisfy the judicial criteria of UASC<sup>19</sup> that

---

<sup>12</sup> Ruth Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in the United Kingdom's Asylum Law' (2019) Human Rights Law Review 772.

<sup>13</sup> *ZH (Tanzania) v Secretary of State for the Home Department (SSHD)* [2011] UKSC 4[23]; 2 AC 166, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74, *JO and Others (Section 55 duty) v Nigeria* [2014] UKUT 517 [LAC], *MM (Lebanon) and Others v Secretary of State for the Home Department* [2017] UKSC 10, *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, *Kaur v Secretary of State for the Home Department* [2017] UKUT 14.

<sup>14</sup> Shamseldin (n 5) 90.

<sup>15</sup> Helen Connolly, 'For a while out of Orbit: Listening to what unaccompanied asylum-seeking/refugee children in the UK say about their rights and experiences in private foster care' (2014) *Adoption and Fostering*, vol. 38(4), 334.

<sup>16</sup> Katia Bianchini, 'Unaccompanied asylum-seeker children: Flawed process and protection gaps in the UK', (2012) <<http://www.fmreview.org/youan-and-out-of-place/>> accessed 21 April 2020.

<sup>17</sup> Anna Gupta, 'Caring for and about unaccompanied migrant youth', in Sue Clayton, Anna Gupta and Katie Willis (eds), *Unaccompanied Young Migrants* (Bristol University Press 2019) 79.

<sup>18</sup> Children's Commissioner for England, *Children's Voices: A Review of Evidence on the Subjective Wellbeing of Children subject to Immigration Control*, (Office of the Children's Commissioner 2017) <[www.childrencommissioner.gov.uk/wp-content/uploads/2011/Voices-Immigration-Control-1.pdf](http://www.childrencommissioner.gov.uk/wp-content/uploads/2011/Voices-Immigration-Control-1.pdf)> accessed 20 April 2020.

<sup>19</sup> P. Rigby and others, 'Problematising separated children: a policy analysis of the UK safeguarding Strategy: Unaccompanied asylum Seeking and refugee children' (2019) *Journal of Ethnic and Migration Studies* 2.

means under the age of 18 and has no parental authority.<sup>20</sup> After passing the assessment procedure, the UASC shall be protected and guided by the local authority in the UK as mandated under s.20 of the Children Act (CA), 1989.<sup>21</sup>

### **3. Restrictive framework of law**

The UK's punitive or restrictive framework of law is evident in the hostile environment policy and the complicated asylum process for the UASC.

#### **3.1. Hostile environment policy**

The unaccompanied migrant children are the main victims of the 'hostile environment' policy introduced by the UK government. Simon identified certain Acts of immigration and asylum law<sup>22</sup> which restricted the access to benefits and services to the UASC and also portrayed them as 'under-serving'.<sup>23</sup> The Localism Act, 2011 also treated the migrants as undeserving. This hostile environment policy undermines the availability and benefits of the rights of health, education, social security and standard of living of the UASC. Ruth believes that the 'hostile environment' policy<sup>24</sup> of the UK government is applied to the UASC who arrive in the UK illegally and their rights to stay have not been granted by law. He argues that this attitudes towards UASC infringe the internationally recognised obligations set by the UNCRC.<sup>25</sup> The hostile environment policy has also been manifested in the following activities of the UK's immigration and local authorities.

***Restrictions on carriers and employers:*** It is the responsibility of all airliners carrying passengers to the UK to check properly the pre-boarding formalities and the visa status before boarding them to the concerned airlines, otherwise the carriers will have to face penalty.<sup>26</sup> In addition, if the employers fail to inspect the category of visa of the employees whether the visa permits them to work in the

---

<sup>20</sup> Francesca Meloni and Rachel Humphris, 'Citizens of Nowhere? Paradoxes of State Parental Responsibility for Unaccompanied Migrant Children in the United Kingdom' (2019) *Journal of Refugee Studies* 4.

<sup>21</sup> Jo Wilding, 'Unaccompanied Children Seeking Asylum in the UK: From Centre of Concentration to a Better Holding Environment' (2017) *International Journal of Refugee Law*, vol 29, no 2 271.

<sup>22</sup> The Asylum and Immigration Act 1996, The Asylum and Immigration Appeals Act 1993 and Immigration and Asylum Act 1999.

<sup>23</sup> Simon Guentner, Sue Lukes, Richard Stanton, Bastian A Vollmer and Jo Wilding, 'Bordering Practices in the UK Welfare System' (2016) 36 *Critical SocPol'y* 391.

<sup>24</sup> The phrase 'hostile environment' was first used by Theresa May (in her capacity as Home Secretary) in an interview in 2012 with the Daily Telegraph newspaper. The creation of this hostile environment agenda is implemented through legislation i.e. s 20 – 28 and 38 – 47 Immigration Act 2014 and s 34 – 35 and s 39 – 45 Immigration Act 2016.

<sup>25</sup> Brittle (n 12) 753.

<sup>26</sup> The Immigrations (Carriers Liability) Act 1987, The Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002 sch 8, and Carriers' Liability Regulations 2002.

UK or not, then the employer will be penalised under the both civil and criminal jurisdictions.<sup>27</sup> In 2014, the Immigration Act imposed an obligation on the landlords to confirm the status of the prospective tenant otherwise the landlords have to face a penalty.

**UASC discretionary leave:** Sheona and Richard identify that in most of the cases of asylum claims by the unaccompanied migrant children, 'UASC leave' has been granted rather than providing asylum or humanitarian protection.<sup>28</sup> There is a clear difference between right of the asylum holders and UASC discretionary leave. In discretionary leave, after attaining the age of 17.5 years, they should be refused leave and prepared to return. The perception is once they have attained 18, the 'best interest' consideration will not be applicable to them, so they can be detained or removed. As a result, many abscond from local authority care.<sup>29</sup> These provisions of Immigration Act, 2014 and 2016 are the glaring example of 'hostile environment'.<sup>30</sup> At present, all children in UK are eligible to get the support under the heading of 'leaving care' till to attain the age of 21 or 25 if they are engaged in the educational institutions on full time basis. But this is not applicable for the UASC those have refused leave to remain.

**Detention:** The UK immigration will have the authority to detain people if they enter into the UK without leave and also detain when they are waiting for removal and deportation.<sup>31</sup> When the asylum seekers are waiting for their claims to be resolved, they can be placed in detention.<sup>32</sup> Moreover, the government may detain a person if he commits any activities which are amounting to a threat to national security or breaches the conditions of stay in the UK.<sup>33</sup> In addition to detention, destitution and deportation can be used as sanctions in the asylum system.<sup>34</sup> Though, the Home office guidance<sup>35</sup> recommends that the method of detention can be exercised on a rare situation but in reality detention is used on a regular basis and for a long duration of time. Sometimes, the UASC are detained

---

<sup>27</sup> Asylum and Immigration Act 1996, s 8, Asylum and Immigration Act 1996, s 8(1), 8(4). Section 8 has been amended by both Section 21 of the Immigration, Asylum and nationality Act 2006 and Section 35 Immigration Act 2016. Immigration, Asylum and Nationality Act 2006, s 15.

<sup>28</sup> Sheona York and Richard Warren, 'Dilemma and Conflicts in the Legal System' in Sue Clayton, Anna Gupta and Katia Willis (eds), *Unaccompanied Young Migrants* (Bristol University Press 2019) 43.

<sup>29</sup> *ibid*, 46.

<sup>30</sup> Proposed and introduced by Theresa May at that time Secretary of State for the Home Department.

<sup>31</sup> Immigration Act 1971, sch 2 para 16.

<sup>32</sup> The Asylum and Immigration Appeals Act 1993.

<sup>33</sup> *ibid*, Nationality, Immigration and Asylum Act, 2002, s 62 introduced a free-standing power for the Secretary of State to authorize detention.

<sup>34</sup> Ala Sirriyeh, 'Sanctuary or sanctions: children, social worth and social control in the UK asylum process', in Malcolm Harrison and Teela Sanders (eds), *Social Policies and Social Control* (Bristol University Press 2014) 81.

<sup>35</sup> Home Office, *Enforcement Instructions and Guidance*, para 55.1.3 <assets.publishing.service.gov.uk> accessed on 20 April 2020.

because of the assumption that they are not ‘genuine asylum seekers but abusers of the system’.<sup>36</sup> There is a duty on UKBA under section 55 BCIA, 2009 to protect and uphold the well-being of the children. So, the UK government has initiated new policy which is alternative to detention in the name of ‘pre-departure accommodation’ for the UASC.

### **3.2. Difficulties in the Asylum Process**

There are specific legal barriers faced by the UASC in the asylum process i.e. credibility test, lack of legal advice and delay in decision giving. Moreover, assessment of age is also very crucial for the UASC to receive the protection under the protective framework of law.

**Credibility Test:** In immigration and asylum applications, decisions have been taken considering the credibility of the UASC as in civil matters, burden of proof lies with the applicant. Sheona and Richard argues that the decisions making about the UASC is always guided by credibility though, this is applicable to the adult asylum seeker. The focus on the credibility can be found in the primary legislation<sup>37</sup> and also in the Home Office guidance.

The UASC should not be required to give details of their experiences like a matured person. In the UK’s Immigration Rules, there is a particular section on the UASC regarding their procedural rights. Judith Ferby argues that there should be three particular characteristics of the meaningful assessment of UASC i.e. flexibility that means procedures not unduly restrictive, shared responsibility and benefit of doubt.<sup>38</sup> Unfortunately, these features are rarely seen in the entire assessment process of the UASC.

After arrival in the UK, UASC are the subject of screening interview to know about the personal information, brief history of journey to the UK and the causes of the claim. It was held in *AN (a Child) & FA (a child) v SSHD*<sup>39</sup> that a child can be interviewed when an appropriate adult is present but the reports show that interviews are carried out without a solicitor or a responsible person.

John acknowledges that asylum process is a ‘double hybrid’ as it blends the ingredients and ideas from executive and punitive law involving the procedures of inquisitorial and adversarial systems. Whereas, Immigration courts are required to assess the testimony of the UASC but the government has not drafted any guidelines for assessing the credibility.<sup>40</sup> Moreover, the

---

<sup>36</sup> Bokhari (n 1) 3.

<sup>37</sup> Asylum and Immigration (Treatment of Claimants) Act 2004, s 8.

<sup>38</sup> Ferby (n 8) 254.

<sup>39</sup> [2012] EWCA Civ 1636.

<sup>40</sup> John R Campbell, ‘Examining Procedural Unfairness and Credibility Findings in the UK Asylum System’, (2020) Refugee Survey Quarterly 39, 60.

caseworkers in the Home office are not properly trained up to conduct a thorough interviews of the UASC. Due to the hostile and confrontational nature of the interviews, the UASC are unwilling to provide information which may have crucial importance to their applications. There is a strict time constraint on the part of the interviewers which forced them to conclude the interview promptly and to reach a decision without assessing all the essential evidences.<sup>41</sup>

Even the Immigration judges are facing obstacles to communicate with the UASC for assessing the credibility effectively because of wrong translation, interpretation difficulties in oral hearing and improperly maintained serial of transcription of interviews.<sup>42</sup> According to Bryne, the direct application of conventional features of credibility i.e. 'demeanour, corroboration, consistency and accuracy' will distract the information gathering process and lead to inappropriate decision in the asylum process.<sup>43</sup> Now, the 'core principles' enunciated by the Court of Appeal in AM (Afghanistan) and SSHD and Lord Chancellor<sup>44</sup> will play as a guide to the determination of asylum application made by a UASC who is unable or less-able to participate effectively in the asylum proceedings.

**Complicated Age Assessment Process:** Crawley states a 'culture of disbelief' that pervades the asylum process generally. The UASC are experiencing particular hostility because of the assumption that they have lied about their age and not getting the benefits of child-focused interviewing techniques, legal representation or the presence of an appropriate adult. The worse thing is that the UASC was treated like 'a slave in the slave market' by the immigration officer of the Heathrow airport.<sup>45</sup>

To entitle the services offered by the CA 1989, the UASC have to face subsequent interview by the local authorities if there is any doubt about the age of the UASC. But local authorities are conducting interviews on regular basis even where no causes of suspicions or doubts are evident. In absence of any documentary evidence to prove the age of the UASC and subsequent doubt by the Home Office about their age, the age assessment procedure will be conducted by the local authority on the basis of the appearance and demeanour of the UASC. If the home office treats them as an adult, the local authority will have the

---

<sup>41</sup> *ibid*, 61.

<sup>42</sup> Evidentiary barriers include giving less weight to initial interviews, different versions of statements, less importance to the full account of the applicants and inconsistency in the examination process.

<sup>43</sup> R. Bryne, 'Assessing Testimonial Evidence in Asylum Proceedings: Guiding Standards from the International Criminal Tribunals' (2007) *International Journal of Refugee Law* 19(4) 609.

<sup>44</sup> [20017] EWCA Civ 1123.

<sup>45</sup> Heaven Crawley, 'Between a rock and a hard place: negotiating age and identity in the UK asylum system', in Nigel Thomas (ed), *Children, Politics and Communication*, (Bristol University Press, Policy Press 2009) 90.



right to assess the age of the UMC further for determining their entitlement under the CA, 1989. Where the child disagrees with the outcome, the legal remedy is to challenge this by judicial review.<sup>46</sup>

The home office guidance for the measurement of age now have to follow the Merton Judgement<sup>47</sup> which includes a number of basic principles. Finally, the Association of Directors of Children's Services (ADCS, 2015) has published the best practice guidance for social workers on conducting age assessment compliant with the Merton judgement and other relevant case laws. For the purpose of assessing age, the use of skeletal, dental X-rays and radiography have been raised the question of ethics because it exposes radiation without therapeutic value.

**Lack of legal aid:** There is a significant reduction in the availability of legal aid for immigrant advice, after introducing amendment in 2013 in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), 2012. As a result, UASC were not eligible for legal aid in their asylum claims.<sup>48</sup> Sheona and Richard believes that this change deteriorates the immigration delivery service for the UASC. Two initiatives were taken in 1999<sup>49</sup> and 2004<sup>50</sup> to upgrade the quality of legal service in this area but both schemes were flawed from the beginning. It has been rightly remarked by Crawley that reform project relating to the UMC becomes ineffective because of the assumption that most of the UASC are taking chance in the asylum process.<sup>51</sup> Meanwhile, the provisions on reduction of legal aid has already been amended in 2019<sup>52</sup>. This amendment provides guidelines for separated children<sup>53</sup> who are entitled to receive the legal aid for civil legal services in their asylum claims. In addition, it is evident that initial claims made by the UASC are failed because of the poor case preparation and wrong case strategies.<sup>54</sup>

---

<sup>46</sup> Gina Clayton and Georgina Firth, *Immigration and Asylum Law* (8<sup>th</sup> edn, OUP 2018) 78.

<sup>47</sup> *B v London Borough of Merton* [2003] EWHC 1689 [Admin.].

<sup>48</sup> Ayesha Christie, 'The Best Interests of the Child in UK Immigration Law' (2013) 22 Nottingham L.J. 39.

<sup>49</sup> Immigration and Asylum Act 1999 introduced a new regulatory body "office of the Immigration Supervision Commissioner (OISC).

<sup>50</sup> The Services Commission (LSC) introduced a separate accreditation scheme.

<sup>51</sup> Crawley (n 46) 90.

<sup>52</sup> The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019, Art. 2 of the Amended Order 2019 amends Sch 1 of the LASPO, 2012. <http://www.legislation.gov.uk/ukdsi/2019/97801-11188903> last accessed 20 April 2020.

<sup>53</sup> s 3(b) – separated means not being cared for by a parent, not being cared for by a person with parental responsibility for the Child (within the meaning of s 3 of the CA, 1989 (4) or looked after by a local authority (within the meaning of s. 107(6)(5) The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid for Separated Children) (Miscellaneous Amendments) Order 2019 <<http://www.legislation.gov.uk/ukdsi/2019/97801-11188903>> accessed 20 April 2020.

<sup>54</sup> York and Warren (n 28) 44.

**Lack of participation:** Prof. Helen identifies that there is an abundance of evidences portray lack of participation on the part of the UASC at every level of the asylum process,<sup>55</sup> which is a clear defiance of art. 12(1) of the UNCRC.<sup>56</sup> The UASC's non-participation in the asylum process have been utilized to devalue their claims.<sup>57</sup> Prof. Helen further identifies that adversarial nature of asylum proceedings also undermines the UASC's right to participation. Without giving little attention to the children's opinions, thoughts, feelings and desires rather the immigration officials are framing questions by using vague, confusing and closed question techniques. Moreover, they are not focusing questions which might support the UASC's claims rather concentrate on peripheral details inappropriately and intrusively i.e. the child's sexuality, intimate relationships and experiences of abuse, etc. This questioning procedure can be termed as hostile and interrogatory, where the UASC's are feeling attacked and intimidated. Consequently, the Home office guidance proves ineffective to safeguard the right to participation of the UASC.

**Delay in decision making:** Though the Home Office guidance provides the best practice model for a UASC's case but in practice the reality is different. There is specific time-limit for a decision to be given but statistics show that a significant number of cases have been waiting for more than two years. Consequently, the appeals are refused when the UASC have turned into 18. Therefore, long delay in the litigation process are causing disadvantage to the asylum claims of the UASC.

#### **4. Protective framework of law**

It is the responsibility of the local and also the immigration authorities to safeguard and look after the rights and welfare of the UASC. With a view to uphold the rights of the UASC in the light of the best interest principle of the UNCRC, the CA, 1989 has already incorporated certain provisions. The protective framework of law is not free from flaws, as a result, the UASC have been deprived of their statutory rights and protection.

##### **4.1. Exclusion from the care leaver support**

S.17 of CA 1989 provides a general duty on local authority to safeguard and promote the welfare of the UASC and to undertake an assessment of their needs and provide accommodation, education and therapeutic services. Most separated

---

<sup>55</sup> Asylum processes include: initial reception and screening, social work assessment and family tracing, care placement and access to schools and appropriate accommodation.

<sup>56</sup> UNCRC, art 12(1) provides, the child who is capable of forming his or her own views has the right to express those views freely in all matters affecting the child.

<sup>57</sup> Helen Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) Journal of Immigration, Asylum and Nationality Law, 32 IANL 258.

children are given support under section 20 of the CA, 1989 and will be looked after by the local authority. It is expected from the local authority to provide support to the UASC following the 'Hillingdon Judgement',<sup>58</sup> but exceptions have been seen in many circumstances.

Earlier unaccompanied children who have turned 18 and have been granted leave to remain, or who have an outstanding asylum or other human rights claims or appeal, are entitled to the same level of care and support from the local authority as any other care leaver.<sup>59</sup> After the Immigration Act, 2016 now the unaccompanied migrants children are excluded from leaving care support who were earlier supported and protected by the local authority. Anna states that major factors relating to the treatments of UASC are the tension between the child welfare and immigration control, culture of disbelief, suspicion and racism towards the UMC and the cuts to local authority budgets.<sup>60</sup> Moreover, the UASC are deprived of their rights because of the combined effects of discrimination in the local authority and lack of knowledge at the social worker level.

#### **4.2. Risks in the private foster care<sup>61</sup>**

For the care of a child who is under the age of 16 or under the age of 18 if disabled are placed under the private foster care without the direct affiliation of the local authority. This foster care provider must be someone other than the parent or close relative<sup>62</sup> and the care providing period will extend beyond the 28 days timeframe. If the child has been recognized as a 'child in need'<sup>63</sup> then the local authority will give financial support to the private foster care. The UASC have been experiencing a lot of difficulties in the private foster care among them some are prevalent i.e. poor and overcrowded accommodation, lack of educational, recreational and health facilities, financial and sexual exploitation, discriminatory attitude, physical and psychological abuses and negligence to

---

<sup>58</sup> *London Borough of Hillingdon v Secretary of State for Education and Skills* [2007] EWHC 514. According to Hillingdon judgement 'All accompanied children should, on arrival, be supported under section 20 of the CA 1989 until an assessment has been completed, based on assessment on need, most unaccompanied children including 16 and 17 year olds, should be provided with section 20 support, the majority of unaccompanied young people will be entitled to leaving care services, sec. 17 ( which generally provides less care and support than section 20) can be used to accommodate unaccompanied children in exceptional circumstances.'

<sup>59</sup> Care Leavers (England) Regulations 2010 as amended in 2014.

<sup>60</sup> Gupta (n 17) 83.

<sup>61</sup> Children Act 1989, s 66.

<sup>62</sup> *ibid*, s 105 defines close relative as parents, step-parents, siblings, brothers or sisters of a parent, grandparents and aunts and uncles (whether full blood, half-blood, by marriage or civil partnership).

<sup>63</sup> *ibid*, s 17.

their needs and demands.<sup>64</sup>Jo Wilding concludes that the laws and practices which exist for the protection of the UASC do not fully comply with the 'best interests' principle as enshrined in the UNCRC, because of insufficient funding and mismanagement in care services.<sup>65</sup>

## **5. Recommendation**

To protect the best interests of the UASC in the prevailing hostile environment, a number of initiatives to be taken to improve their conditions.

*First*, a comprehensive guidance can be issued to uphold the wellbeing of the UASC throughout their stay in the UK. In addition, the best interests principle must be considered properly during the asylum and immigration process. To improve the existing decision-making model in the asylum process, a formal best interest determination process can be introduced. Moreover, a child-focused independent advisory group can be established composing of experts from voluntary organisations, academia and practice, to provide guidance how to consider the best interests of the UASC most effectively. All the future legislations and policies affecting the UASC must be given due regard to the best interest principle and the provisions of the UNCRC. The government can work with child welfare and safeguarding experts to develop a specific training programme to improve awareness and understanding of the UNCRC and its application to the UASC, particularly with respect to properly considering children's best interests.

*Second*, there should be a strategy document for dealing with the UASC which outlines the responsibility and detailed service standards in relation to the protection, health and development of children, as well as long-term care planning in their best interests. The Department for Education can be tasked with coordinating the development and continuing oversight of the strategy, and appointing a national lead for its implementation. The responsibility to grant funding to the local authorities should be in the hand of the Department of Education for the care of the UASC. Such funding should be allocated according to the real costs that arise in safeguarding the UASC within each local authority area.

*Third*, there must be a clear focus on welfare needs as well as immigration control when gathering information from the UASC relating to an asylum claim. A well-understood distinction between the screening process and substantive information-gathering must be drawn. Screening a child should be expressly limited to gathering biographical and biometric data at the outset of a claim, while gathering information with which to assess a claim should begin

---

<sup>64</sup> Connolly (n 15) 335.

<sup>65</sup> Wilding (n 21) 270.

only when children are settled and supported. Furthermore, children must be provided with proper access to interpreting facilities and rest periods, and should be engaged with in a way that takes proper account of their age, status and background.

*Fourth*, the Government should record and publish statistics of all those who claim to be children whose age is disputed. As part of developing age assessment guidance, the Government should evaluate how to incorporate a greater range of expert input into the process. In particular, the Royal College of Paediatric and Child Health (RCPH) can be commissioned to develop guidelines for a stronger contribution from paediatric consultants in assessing age. In addition, x-rays should not be used in assessing age.

*Fifth*, the UASC should be provided with funded specialist legal advice and representation during the asylum process. During a period of discretionary leave, decision-making should be encouraged as soon as there is sufficient evidence against which to evaluate a claim. Where it is in the best interests of the child to remain in the UK, indefinite leave to remain should be granted as early as that judgment can be made, to enable children to access higher education and enter the labour market. Where return is considered to be appropriate, a care plan should be constructed to inform and prepare a child for return in adulthood. In either case, support should persist until the objectives of a properly considered care plan are met. Moreover, the government should affirm its commitment to uphold Articles 29 and 30 of the UNCRC and ensure equal access to education to children regardless of their immigration status. It should assess how primary and secondary education is provided to the UASC, with a view to ensuring that their educational needs are met.

*Sixth*, a pilot tribunal can be established with adapted procedures, drawing on expertise from both the child and family and immigration courts, to take on responsibility for the decision-making, welfare and support arrangements of unaccompanied asylum-seeking children in a small number of cases. Its work can be independently reviewed, in order to identify possible adaptations to the decision-making framework more generally that may emerge.

*Seventh*, all decisions on returning children to their country of origin should be made only after a full assessment of whether return is in the best interests of the child. Such a decision should be made in the light of a full country-of-origin report framed according to the UNCRC, and after a full assessment of the needs of the child and the care arrangements that they will return to. Return arrangements should also be subject to independent evaluation afterwards to determine their suitability.

*Eighth*, A legal guardian can be appointed for unaccompanied asylum seeking children who should provide support in relation to the asylum and

immigration process, support services and future planning, help children develop wider social networks, and ensure that children's views are heard in all proceedings that affect them.

*Nineth*, the Government should conduct or commission a mapping exercise that sets out a comprehensive picture of local authority support services for the UASC. This exercise should in particular seek to identify the best performing local authorities in order to develop them as centres of excellence for the benefit of unaccompanied migrant children throughout the United Kingdom.

*Tenth*, the UASC must be properly supported in the transition to adulthood. The Government must ensure that children receive bespoke and comprehensive plans that focus on educational goals, reintegration and rehabilitation. Such plans should give proper consideration to all possible outcomes for the child, including family re-unification and reintegration whether in the home country, the UK or a third country. Care plans should take full account of the wishes of the child, and remain applicable up to the age of 21, or 25 if the young person remains in education, to enable children to realise their maximum potential.

## **6. Conclusion**

The UASC are the most vulnerable segment of the British society, who do not have their own voice to raise about their rights and deprivation. There are some provisions of laws, rules and regulations to protect and safeguard their rights in compliance with the best interest principle of the UNCRC but unfortunately the promulgation of those provisions is heavily influenced by the culture of disbelief and 'hostile environment' policy. The UASC have been stigmatized as 'precarious' and facing a lot of obstacles and barriers in the entire journey from their initial interviews to final disposal. So, this article tries to propagate the rights of these less-privileged and deprived part of the British community who are staying on the basis of discretionary leave and passing their adolescence under the veil of immigration restrictions and welfare limitations. Finally, effective implementation of the above-mentioned recommendations can safeguard and promote the rights of the UASC in compliance with the best interest principle of the UNCRC and pave the way to establish a better system for the UASC in the UK.