Alternatives to the detention of children for immigration purposes:

A contribution to the review from the UK Children's Commissioners

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1. Introduction

1.1. The UK Children's Commissioners welcome the announcement to end the detention of children and the invitation to contribute to the review.

1.2. The UK Children's Commissioners have been unanimous in opposing the detention of children for immigration purposes recognising that such detention is damaging. As a result we wish to assist the Government in delivering on their commitment to end the detention of children for immigration purposes.

1.3. We accept that the State has the right to control its borders and that this may mean requiring children and their parents to leave the UK when they no longer have that right. When this becomes necessary children and young people's safety, welfare and well-being are paramount. Our standard for assessing the appropriateness of any system must be the accepted standards set out in the UN Convention on the Rights of the Child.

1.4. The Aim of the Review as expressed in the Terms of Reference is to consider how the detention of children for immigration purposes will be ended. The review will make recommendations based on its findings. The Review will consider seven broad matters set out under headings in the Terms of Reference. We consider each of these headings in turn.

UKBA's current approach to dealing with asylum applications from families, including the contact arrangements with those families and the families' access to legal representation.

2. Reporting

2.1. The potential of 'reporting', as a mechanism for supervising a family in the community appears to be under used. From our discussions with families in detention it is clear that there is room for improved contact arrangements from the start of the asylum process and that detention has sometimes been used because contact has broken down. We do not agree that the breakdown of a reporting arrangement is necessarily good evidence of an intention to abscond as is sometimes assumed. Families may fail to report for a number of reasons – e.g. illness of a family member, lack of money for a fare and so on.

2.2. Reporting mechanisms need to be developed that are more mutually beneficial to both the family and UKBA. One feature of such an arrangement would be flexibility and consideration of the individual needs of the family – including childcare needs and arrangements around school times, proximity of the reporting venue from the family's accommodation and so on. UKBA would benefit from discussing the families particular needs and situation in establishing reporting arrangements. Because of the severe financial constraints on asylum seeking families we suggest UKBA should meet the costs of the reporting arrangements agreed.

2.3. We would also like to see further consideration of the venue and location of where asylum seeking families need to report. Consideration should be given to increasing the number of reporting venues for families, including the use of settings not located in enforcement offices or police stations.

2.4. The quality of the contact that takes place at the reporting venue is also something that needs to be considered. To be of greater use in ensuring compliance, reporting should be used as more than a mechanism for checking a family's whereabouts. It could also be a useful forum to exchange information between UKBA and the family.

3. Access to legal representation

3.1. We are pleased that the Terms of Reference for the review include consideration of access to legal representation. Returns of failed asylum seekers, whether involving detention or not, are more likely to be resisted where the subject has not had the opportunity to fully present their claim to asylum to the authorities. Because of the complexity of asylum, this requires competent, high quality legal representation to be guaranteed at the outset of the claim in order for the applicant to be able to fully put their case.
We believe that evidence from the Solihull pilot points in the direction that those who have been through a fair process – as the scheme to guarantee early representation resulted in applicants being more prepared to return on a voluntary basis. The UNHCR points out that the front-loading design has allowed for decision-making to be based on more evidence and subsequently has lead to better quality decisions.[1]

3.2. We therefore propose that UKBA guarantee that every family is able to access good quality legal advice prior to their asylum interview and decision. The proposal that families are dealt with by specialist asylum teams within UKBA should be complemented by an instruction permitting such teams to operate a more flexible timescale for determining the asylum application to allow representation to be secured and arranged.

3.3. We further propose that the 'merits test' for controlled legal representation at appeal in England and Wales is reviewed – at least in the case where families are concerned. There is precedent for this in as much as the merits standard for unaccompanied children on appeal is currently lower. The same standard could be applied to family cases.

3.4. We believe that these measures would help to address some of the fundamental problems that currently serve to impede a fair and quick process. These barriers include:

a. The postcode lottery in legal representation that means some vulnerable clients such as unaccompanied children are not able to secure legal help in meeting the strict timetable for submitting evidence and attending interviews.

b. In England and Wales, a Legal Aid system that compounds the lack of representation available through a financial incentive to make conservative decisions concerning case management by law firms providing controlled legal representation under an immigration contract.

c. In Scotland there is a considerable variation in the quality of legal representation. The Scottish Legal Aid Board (SLAB) with the support of Scottish Refugee Council is currently conducting research into the access to justice asylum seekers currently have, with specific focus on the timing of legal representatives' interventions and the impact the speed of the process has on access to justice and on availability of funding. We

[1] UNHCR Quality Initiative project, Sixth Report to the Minister, para 2.1.3. http://webarchive.nationalarchives.gov.uk/20100503160445/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/unhcrreports/qualityinitiative/unhcr-report-6?view=Binary, accessed on 30/06/2010

recommend that their findings are taken into consideration when reviewing access to legal representation in Scotland.

3.5. Difficulty in securing appropriate representation leads to many families having to attend court unrepresented or having to allow the appeal to be determined in their absence and on the papers. Both of these are highly unsatisfactory arrangements and result in a significant number of families making further representations, including judicial review, to prevent removal later on. We therefore suggest that the proposals set out in 3.3 and 3.4 above are considered as part of the solution to this issue.

Quality of initial decision making

3.6. We propose that, in parallel with improved access to legal representation, UKBA consider ways of improving the quality of decision making and the decision-making abilities of case owners in line with UNHCR recommendations made during the Quality Initiative project. We propose that the UKBA consider ways of implementing all recommendations made in all six reports to the Minister within the Quality Initiative Project. Improved initial decision making will strengthen the perception of fairness of the asylum process in asylum-seeking families and a perception of an improved decision-making process is likely to reduce the number of appeals.

Consideration of the differences in the relevant systems in the four countries

3.7. We would ask that any new models are developed in close consultation with devolved governments and civil society organisations, so that new processes are compatible with local structures, legislation and practices.

The current circumstances in which children are detained

3.8. We are pleased that recognition has been given to the wide variety of families who are at risk of detention. More needs to be known about the different circumstances detained families find themselves in. Therefore we encourage the Government to work alongside organisations that support asylum seeking families in the community or in detention to provide a detailed map of those at risk of being detained. This will enable more effective tailored solutions to their particular situation. While the Children's Commissioners are not in a position to provide this detailed analysis our work has highlighted two issues.

3.9. First, the Children's Commissioner for England has regularly encountered overstaying families while visiting Yarl's Wood. In the process of these encounters it has become clear that overstaying families are themselves not a homogenous group having in common only that they are unlikely to have had contact with UKBA prior to coming to notice as overstayers. It is clear that a full understanding of the nature of the overstaying will be important in deciding on the departure of an overstaying family or indeed, considering whether there is a valid application for them to make to remain. Each family will have different circumstances which need considering and the risk of them absconding may vary widely.

3.10. We believe that one way of addressing some of these issues it to secure legal representation for an overstaying family. This may well be a way of giving

them an investment in remaining visible and could give further options to UKBA in the longer term such as self check in or assisted departure.

3.11. Second, we recognise that careful consideration will need to be given to those subject to deportation proceedings who have served criminal sentences and are awaiting deportation. Reuniting the family in immigration detention has been used in the past. Where a parent subject to immigration control has been separated from a child on account of being criminally convicted the separation is not for an 'immigration purpose' and we make no comment on it. It should be possible to deport a parent at the end of their sentence and reunite them with their child at the airport. The child will have been in care prior to this. It is of course important that contact is maintained with the parent during his or her criminal sentence. We see no justification for using immigration detention to extend the length of detention of someone who has been convicted of an offence, let alone have their children join them in detention for apparent administrative convenience.

4. All relevant baseline data and statistics

4.1. We support the collection of comprehensive and robust data, and stress that this is used in an objective way to inform policy. For example, figures that show of the 1,068 children and young people's leaving detention in 2008-9, only 539 were removed while 629 were released back into the community[2] highlights the rationale for the government's current approach and intention to end detention.

4.2. Furthermore we recommend that in addition to the statistical data being collected that greater attention is paid to qualitative evidence from children and young people that can be used to inform practice and assess progress in the quality of experience. We propose that this is done by funding independent research and wide dissemination of its findings.

[2] Hansard HC 17 June 2010: Column 231WH

5. UKBA's initiatives on implementing alternatives to the detention of children, including the Glasgow pilot

5.1. The starting point for any alternative to detention should be consistent with the position we set out in the report of the Children's Commissioner for England *The Arrest and Detention of Children Subject to Immigration Control:*

"UKBA should develop community-based alternatives to detention, which ensure that children's needs are met, and their rights not breached, during the process of removal. We acknowledge that the UKBA needs to take a risk-based approach to immigration. However, we do not believe that this needs to be incompatible with acting in the best interests of the child as required by Article 3 of the UNCRC." [3]

5.2. Serving removal directions in the community is far preferable to serving them at the point of arrest. We would like to see a system where families were supported through the period between service and departure perhaps by a 'case manager' (see below). It will be important to allow sufficient time for the family to realistically 'close' their lives in the UK and this might also point to the advantage of having a case manager involved.

5.3. The risk of a family absconding is something that will have to be considered and, where necessary, ameliorated. Again, we would point to a case management or community supervision model as preferable to technological solutions such as electronic monitoring which inevitably stigmatise asylum seekers.

5.4. As a result we welcome the Minister's recent statement that:

"The UK Border Agency would therefore set removal directions while the family is in the community , giving the family time to submit further representations and to apply for a judicial review if they wish to do so as well as giving them time to make plans for their return. The arrangements would place greater emphasis on self check in or escorting to the airport."[4]

5.5. The review made specific reference to the A2D project in Ashford, Kent and current pilot in Glasgow. The Office of the Children's Commissioner for England has visited both projects, and Scotland's Commissioner for Children and Young People has visited the Glasgow pilot – we will comment briefly on both below (5.6 and 5.7). The comments on the Kent pilot are the views of the Children's Commissioner for England alone and the Commissioners are aware that the full formal evaluation of the Glasgow pilot is yet to be published.

5.6. In relation to the Kent pilot, the Office of the Children's Commissioner for England agrees with the current Minister for Immigration that the project was not allowed to run for long enough, was not well resourced and could not provide an answer to the questions around developing a sustainable alternative.[5]

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[3] 11 MILLION, op cit. , Recommendation 1.3
[4] MP's debate – Alternatives to Child Detention, 17 June 2010
[5] Hansard, HC Borders Citizenship and Immigration Bill , Second Reading , 2 June 2009; Column 217

5.7. The Glasgow Pilot has been better resourced and planned but has yet to be properly evaluated. One early positive result from the project has been that awareness of Assisted Voluntary Return has spread and there has been greater take up of this outside of the project itself. In addition the Minister was able to report some initial data to Parliament on 17th June.

5.8. Despite disappointing figures for those directly involved in the project we await the full evaluation. In undertaking this evaluation we believe that there is a need to address a number of factors:

a. The motives of those placed in the pilot scheme need to be assessed (our hope is that the pilot has reinforced the benefits of voluntary return and addresses any unresolved concerns about a family's safety upon their return).

b. The impact of requiring families to leave the accommodation they have occupied in the community and live in dedicated accommodation. The feedback we have received suggests that by being asked to move to a different accommodation families focus on the practicalities of that move and are unable to start thinking about returning to their country of origin.

c. The effectiveness of entry into the schemes only being at the point that the family is 'appeal rights exhausted'.

d. The dependency of AVR schemes on the wider asylum process to which families may or may not have had access compared to systems that focus exclusively on removal and return.

5.9. The Commissioners will be very pleased to support projects that can demonstrate evidence of effectiveness across these criteria.

6. Models of good practice from other jurisdictions and relevant current research

6.1. Ambitious reform to asylum and detention processes have taken place in other countries such as Australia, Sweden and, most recently Belgium. Worthwhile 'alternatives' have also been experimented with in Canada and the USA at various times. The UK can learn from the experience of other jurisdictions but because of significant differences in matters such as how families are accommodated and cared for elsewhere, it is not possible simply to import a model. Rather, we suggest that *approaches* are considered for adaption to a British model.

6.2. A common feature in many of the experiments with alternatives to detention is community based case management. A recurring feature of such models is the allocation of a case manager who is independent from the decision maker and whose function is to guide the migrant through the asylum or immigration process. The case manager makes sure that the applicant understands the process they are going through, has access to the necessary legal advice and representation and can direct the individual to where their welfare needs can be met.

6.3. Case management involvement from the start of the migrant's application process would seem to be important. By assisting with the practical difficulties that face the migrant, it would seem possible to open up a dialogue which encourages consideration of all immigration outcomes. Part of this would be access to information and support about assisted voluntary return in the event of the failure of a protection claim.

6.4. In Sweden such a model has been in existence since 1997. Asylum seekers live in the community and meet on a regular basis with an assigned caseworker. The caseworker's role extends through ensuring that they understand their rights and obligations, ensuring they have legal representation and carrying out welfare and risk assessments which are communicated to decision makers. Many of the workers come from a social work background.

6.5. Australia introduced a similar model to Sweden more recently. Migrants who are identified as vulnerable are provided with a case manager who remains allocated to them until their case is resolved. The case manager provides an ongoing assessment - including of the person's welfare needs and barriers to immigration outcomes, practical support and recommendations to decision makers but has no direct decision making role themselves.

6.6. Both the Australian and Swedish experiences have resulted in reduced reliance on detention. In both countries the model is used on all migrants (subject to a risk assessment) and not simply for families. Sweden consequently makes little use of detention. It is reported that 76% of asylum seekers refused in Sweden return voluntarily – the highest levels of voluntary return in Europe.[6] Australia has closed the majority of its mainland detention centres. According to Australian Government statistics 94% of people on community based case management programmes complied with their

[6] International Detention Coalition, *Detention Reform and Alternatives in Australia* (2009)

reporting requirements and did not abscond. 99% of families did not abscond and 67% of those not granted a visa to remain departed voluntarily.[7]

6.7. Belgium ended the detention of children in families in October 2009. Families are placed instead in open housing units allowing them to lead a more normal life. They receive advice and assistance from a 'returns coach' who assists them consider the option of voluntary return. Initial government statistics indicates 79% of families remained in contact with their coach throughout their stay. Unlike in similar UK experiments in Ashford and Glasgow, the coaches have the ability to discuss options for stay with the families and in practice have recommended that families are routed out of the programme. However their overall results are less impressive than those in Australia and Sweden.[8]

6.8. The Belgium experience more closely resembles the model attempted in the A2D experiment in Ashford, Kent and in the Glasgow pilot in as much as families are transferred to a special housing unit after refusal. This is thought to be traumatic for the family and inhibits their ability to engage with the process. Flemish Refugee Council reports that insufficient structure and support for the 'coaches' to ensure the welfare of children in the housing units.

6.9. It is interesting to note that the more successful approaches adopted in Australia and Sweden have engaged with migrants in an end to end process rather than simply after a refusal of the claim. These approaches seem to allow a relationship of trust to be built up between migrant and case worker which seem to have contributed to the eventual higher levels of voluntary returns.

[7] International Detention Coalition, ibid
[8] Flemish Refugee Council, *An Alternative to Detention of Families with Children* (December 2009)

7. How the current voluntary return process may be improved to increase the take up from families who have no legal right to remain in the UK

7.1. In the Parliamentary debate from June noted above the Minister stated: *"The need for better contact management and more active discussion of a families options if their claim is rejected and their right to appeal a decision has been exhausted. Discussions with a family member might need to be backed up by improved support from NGO's partners and other workers."*[9]

7.2. Information about returning voluntarily to the country of origin can and should be included in the context of a more co-operative relationship between the family and UKBA predicated upon better contact management. We would welcome and support such moves that must learn from previous attempts that have been both unsuccessful and distressing.

7.3. We would also welcome the commissioning and publication of research into the outcomes for families who have been returned to their countries of origin. The availability of independent analysis of this sensitive issue will make it easier for such information to be communicated to families by UKBA case owners, IOM, legal representatives and organisations working to support asylum seeking families. The two possible outcomes of the asylum claim and their consequences, including return options, should be carefully communicated from the very beginning, without prejudice to the outcome of the asylum claim or any appeals.

7.4. This is consistent with our position on this matter, set out in *The Arrest and Detention of Children Subject to Immigration Control,* where the Children's Commissioner for England stated that:

"Information to support voluntary departure should be delivered when families appeal rights are exhausted, recognising that they are unlikely to be open to return whilst their claim is outstanding. Ongoing face to face opportunities to identify and address barriers to departure and appropriate support should be provided for families unable to remain."

7.5. We reiterate this as a practical suggestion that could be integrated into contact management with the family. If this proposal is accepted then the family's legal representative must be informed beforehand of the purpose of the appointment with the family. This would assist the discussion between the family and UKBA since the representative may be able to explain the options prior to the discussion. Prior information to the representative may also reduce the risk of distrust or distress that may be caused if information is sprung on a family unexpectedly.

7.6. We acknowledge that timing of discussions about voluntary return is important but have challenged the appropriateness and effectiveness of the current arrangements where we understand that information is provided 'throughout the process'.[10]

7.7. Information is best provided in a fitting fashion at an appropriate time. For example, while it may seem appropriate for some discussion or provision of

[9] *Hansard,* HC 17 June 2010; Column 213WH
[10] UKBA response to 11 MILLION, 12 August 2009

information about voluntary return to be shared prior to decision, this might be interpreted as bias towards a negative outcome if the source of the information was also the decision maker. Similarly it would, in our view, be inappropriate to seek discussions before the family has had the opportunity to consider and exercise any appeal right.

7.8. Therefore, an appropriate solution is for a post appeal interview with the UKBA case owner to become a standard part of contact management with the applicant.

7.9. Finally, we would like consideration to be given to how IOM and its partners deliver information about VARPP and any practical issues that arise for families in attending IOM offices such as travel costs.

8. How a new family removals model can be established which protects the welfare of children and ensures the return of those who have no right to be in the UK, outlining the key process changes, rule or legislative changes that would be required to implement the new model

8.1 We support the development of a system that safeguards and guarantees a fair asylum process for every child and young person with such safeguards as guaranteed competent representation.

8.2 Even with such safeguards, albeit that they are not in place currently, we would anticipate that there will be a small number of families who would not avail themselves of the assistance available for returning and may resist removal.

8.2 This raises the question of how UKBA can remove those who no longer have a right to be here without recourse, in the case of families, to detaining them.

8.3 We note the observations of the Home Affairs Select Committee enquiry into children's detention which understood the need for UKBA to have recourse to detention in order to effect removal while insisting that its use was minimised. We concur with the Committee that without a power to 'detain' – in the sense of *any* deprivation of liberty, UKBA may find it impossible to carry out any kind of enforcement activity. It should be borne in mind that arresting a person and placing them in the back of a van while transporting them to an airport is, in law, 'detention'.

8.4 We think that as the final stage in a graduated process deprivation of a child's liberty may continue to be necessary in order to effect the removal of some families. Where this happens, we would want to ensure that, in line with Article 37 (b) of the UNCRC, the arrest and detention of the child is used only as 'a measure of last resort' and 'for the shortest appropriate period of time.

8.5 It may be worth discussing what we would consider to be 'the shortest appropriate period of time' in this context. An arrest may take place in a city some way from the airport from which the family will be departing. During transportation, the child will be detained. If the family is not released at the airport to continue the journey unassisted by an escort then detention can be said to continue. For it to be the shortest *appropriate* period the flight arrangements will have been carefully planned to ensure that detention of the child is kept to a minimum.

8.6 In the light of the above considerations, and in a context where the existing detention centres for families are decommissioned, it is likely that short-term holding facilities could become used for holding more families. The current rules in short-term holding facilities make them very unsuitable for families with children. This has been noted in the reports of the HMIP and we propose an urgent review of those rules.

8.7 More or less the 'shortest appropriate period of time' in this context equates to removal on the same day as arrest to avoid overnight detention. It will be recalled that 'same day removals' were abandoned by the immigration service after the tragic death of Joy Gardiner who jumped from a window to her death to avoid her imminent removal. That case highlighted the dangers of same day removals and acts as a reminder as to the other 'limb' of Article 37 (b) - that any child's arrest and detention must be as a 'measure of last resort'.

8.8 We would want this interpreted as the family having had notice of the removal and time to challenge it if necessary and to prepare for their departure. This accords with the Minister's declared intention to set removal directions while families are in the community.

8.9 There will be debate over what is an appropriate 'notice' period to a family between the issuing of removal directions and the actual date of departure. This needs to be tailored to the individual family and the country and the particular circumstances they face as well as issues such as how long they have been in the UK for. The time given has to be adequate erring on the side of generous and will need to take account of the child's best interests and in particular proximity to examinations and the need to arrange for travel vaccines and prophylaxis and for adequate time for medication to become effective. There must also be time for the family to close down its affairs in the UK in an orderly manner, pack and arrange for belongings to be transported, discuss the assisted returns package with IOM , make contact with family or friends in the country of origin. We understand that in Belgium families are given around six week's notice of removal.

8.10 We would also seek guidance from the Convention on the issue of whether it can be appropriate to separate children from their parents to effect compliance with removal. Article 9.1 requires that *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.*

8.11 It would be hard to comply with Article 9.1 in taking a parent into detention while leaving a child in another's care pending removal of the whole family. We would therefore want to exclude removal options that relied on separating children from their parents.

9. Conclusion

9.1 We appreciate that welfare of children in the asylum and immigration systems presents significant challenges and is a difficult area of public policy. We appreciate the recognition that a number of organisations will need to work together to develop solutions that are durable in the long term.

9.2 Discussion of 'family removals' can not take place in isolation from the broader discussion about a fair, transparent asylum determination system. This paper has addressed only some of the issues that this area of policy and practice raises. However, we do set out a positive approach and set of principles that we believe should underpin the changes the government decides to implement.

9.3 We urge that there is an ongoing dialogue between the government, through UKBA, and stakeholders with a concern for this area of policy beyond the formal end of the review. The UK Children's Commissioners would welcome such an opportunity in order that the views, interests and well-being of children are at the forefront of new policy, practice and procedure.

9.3 If there are no 'quick fixes' to the problems that have led to the current debate then there is also a pressing need to end the detention of children to avoid the continuing damage we know that it causes. We urge the government to do so swiftly while the new arrangements are being put in place.