

## **Supplementary written evidence from Safe Passage International (CHA0050)**

*Future arrangements for safe, legal routes for family reunion and claiming asylum in the UK, and the effectiveness of current Government initiatives to re-unite families*

### **About Safe Passage International**

1. Safe Passage International is a strategic legal organisation working to ensure people can access safe and legal routes to asylum.
2. Our legal work focuses primarily on reuniting unaccompanied children with family members in the UK via EU Regulation No. 604/2013, commonly known as the Dublin III Regulation.

### **The Home Office Dublin III Regulation guidance**

3. This written evidence sets out the problems identified by Safe Passage International on the Home Office's updated Dublin III Regulation guidance following oral evidence provided by Beth Gardiner-Smith, CEO of Safe Passage International, to the Home Affairs Committee on 16<sup>th</sup> September 2020.<sup>1</sup>
4. The Home Office guidance ("the policy") contains several elements that contradict established domestic and international case law. Parts of the previous policy that were in clear breach of principles established by that body of law have also not been corrected. The guidance given is erroneous and incompatible with Article 8 of the European Convention on Human Rights ("ECHR"), Article 7 of the Charter of Fundamental Rights of the EU ("CFR") and the Convention on the Rights of the Child ("CRC").
5. The policy will have a severe impact on unaccompanied children on the continent. As cases are often unlawfully delayed or refused, children will be left stranded alone and away from family for even longer periods of time, often in extremely dangerous circumstances at heightened risk of trafficking and exploitation. Many will feel that they have no other option but to undertake treacherous journeys and resort to people smuggling in order to reach their loved ones in the UK. Furthermore, many unaccompanied children will be left powerless to challenge unlawful decisions and as a result will be unable to reach their family in the UK.
6. Safe Passage International recommends that the Home Office guidance should be amended so that it is compatible with domestic and international caselaw, Article 8 of the ECHR, Article 7 of the CFR") and the CRC.

### **Our key areas of concern:**

#### **The policy requires Local Authority Assessments to be conducted only after the family link is established**

7. The policy requires Local Authorities in the UK to conduct an assessment only AFTER the family link between the child in Europe and the sponsor in the UK has been

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<sup>1</sup> Home Office (2020), [Dublin III Regulation, Version 4.0, Transferring asylum claimants into and out of the UK where responsibility for examining an asylum claim lies with the UK or with another EU Member State or Associated State.](#)

established. The policy only imposes on caseworkers in the UK a requirement to send an 'initial notification' to the Local Authority of a Take Charge Request (i.e. a request for family reunification) on receipt of the application but not to request an assessment of the Sponsor's ability to care for the child unless the family link is accepted.

8. This is contrary to a series of judgements (set out in the endnotes<sup>1</sup>) which recognise that Local Authority assessments are capable of being relevant to establishing the family link and therefore should be requested in "every" unaccompanied minor's case "as soon as possible" after the Take Charge Request is received to inform whether the request should be accepted or rejected. Not conducting them until after the family link has been established is therefore a clear breach of the SSHD's obligation to take reasonable steps to establish its responsibility.
9. The effect that this has in practice on unaccompanied children is:
  - a. It means that very valuable information and evidence about the family link between the child and the family member in the UK, which could be used to establish the family link is lost and/or not taken into consideration. On top of being unlawful, this leads to cases being refused or delayed. Delays mean leaving a child alone in a foreign, sometimes dangerous country, for longer periods of time. This also increases the risk that they might lose trust in the legal process and attempt to take an irregular and dangerous route. FA (mentioned in the endnotes) is only one example of a case in which local authority assessments were relevant to the assessment of best interests, to the judgment of whether the family link is genuine, and to the ability of relatives to care for the child.
  - b. The policy builds in delay which significantly increases the risk of breaches of the SSHD's obligation to investigate Take Charge Request within 2 months – the Dublin Regulation specifies that in a case of family reunification of an unaccompanied minor with a UK based family member, a decision must be made within 2 months of the request being made. Failure to request a local authority assessment swiftly means that it will be unlikely that the assessment is completed within the 2-month timeframe for deciding a Take Charge Request, prior to taking a decision on it.
  - c. It puts pressure on Local Authorities to complete family assessments in shorter amount of times than they would have had to if the request for assessment was made as soon as a Take Charge Request was received.
  - d. Initial refusals have to be challenged through the re-examination process in Dublin III, and a lot of work is required from professionals both inside and outside of the UK, which would not be necessary if the SSHD observed its own obligations correctly.
  - e. Unlawful refusals continue to be issued leading to significant numbers of Court challenges which cost time and money to an already stretched UK Tribunal system.

### **The policy misrepresents the UK's legal obligation to investigate the family link**

10. The policy misrepresents the UK's actual legal obligations to investigate a family link between the child and the family member in the UK. It incorrectly states that the onus is on the unaccompanied child and their family member, sibling or relative to prove family

links and satisfy the SSHD that they are related as claimed.

11. The policy gives a limited discretion to caseworkers to provide family members (though not UAMs) an opportunity to address concerns in limited circumstances before refusing a Take Charge Request. This is contrary to, inter alia, a series of legal precedents set out in the endnotes.<sup>ii</sup>

12. The practical consequences of this are:

- a. Take Charge Requests are refused, often for futile reasons that could easily be addressed by speaking to the Sponsor, the child, or their legal representatives before issuing a negative decision.
- b. Children are being left in limbo for many months, waiting in unsafe and often inhumane conditions for no reason. The policy completely undermines the SSHD's duty regarding the best interests of the child and will leave more children stranded on the continent instead of safe with their family in the UK.
- c. Refusals have to be challenged through the re-examination process in Dublin III, and a lot of work is required from professionals both inside and outside of the UK, which would not be necessary if the SSHD observed its own obligations correctly.
- d. Unlawful refusals of initial decisions and reconsideration requests also lead to significant numbers of Court challenges which cost time and money to an already stretched UK Tribunal system.

**Case study – not investigating the family link:**

Safe Passage has recently worked on a case of a [\*\*\*] street homeless Afghan child in Greece seeking to reunite with his British father in the UK. Birth certificates and passports were submitted to the Home Office with the Take Charge Request. The Request was refused because the Sponsor had not submitted evidence that the child in Greece was not his older late [family member] (who had the same name as the applicant child); or that he had travelled to [third country] when the child was conceived. The latter piece of evidence was already in the possession of the Home Office, which had a copy of the Sponsor's passport with the visa he used to [third country] at the relevant time. Following the refusal, the Sponsor easily obtained a copy of the death certificate of his [deceased family member], which ultimately led to the Request being accepted 7 weeks later. Instead of asking for this evidence, the caseworker unlawfully refused the Take Charge Request and caused unnecessary and unreasonable delays in the case. The child has been living in the streets (occasionally being accommodated by strangers) for almost 10 months now.

**The policy approach to Take Charge Requests that are not investigated within the timeframe**

13. The policy instructs UK caseworkers to reject a Take Charge Request in the case of unaccompanied minors if the SSHD is unable to complete the investigation into whether the UK is responsible for the child's asylum application within 2 months. This includes the exception that a Take Charge Request should not be rejected in order to complete arrangements with the local authority for accommodation.
14. This part of the policy is particularly concerning in the light of the serious deficiencies in the policy's guidance on the investigative steps required on receipt of a Take Charge Request which we have set out above. In addition, this is contrary to, *inter alia*, a legal precedent set out in the endnotes.<sup>iii</sup>
15. The practical consequences of this are:
- a. This policy essentially encourages caseworkers to reject children's applications by default. Summary refusals can cause serious risks to children (including placing them at risk of trafficking) who might see a refusal as final and feel they have no other choice but to find other ways to reach their family members. This is manifestly against their best interests.
  - b. Children remain in precarious situations, away from their family members for longer periods of time.
  - c. Refusals have to be challenged through the re-examination process in Dublin III, and a lot of work is required from professionals both inside and outside of the UK, which would not be necessary if the SSHD observed its own obligations correctly.
  - d. Unlawful refusals of initial decisions and reconsideration requests also lead to significant numbers of Court challenges which cost time and money to an already stretched UK Tribunal system.
  - e. The SSHD is advising its caseworkers to take a step which it has previously told the court is contrary to the best interests of children.

### **The policy's approach to re-consideration requests**

16. Under Dublin III, after a Take Charge Request has been refused, a Member State may request a reconsideration which should be made within 3 weeks and responded to within 2 weeks.
17. The policy states: "Upon receipt of a reconsideration request, reasonable endeavours should be made to respond within 2 weeks. If it is not possible to respond within two weeks despite reasonable endeavours, then responsibility for considering the asylum claim reverts to the requesting state."
18. The policy provides that a rejected request "can only trigger one re-examination procedure" and that reconsideration requests made outside of the 3-week timeframe or repeat reconsideration requests are not permitted.
19. This is a significant departure from the SSHD's longstanding practise on reconsideration requests. Previously in unaccompanied minors' cases the SSHD would routinely consider reconsideration requests made outside of the 3-week timeframe, and would

also take the decisions on reconsideration requests substantively - even if unable to do so within the 2-week timescale for a decision. It would also consider multiple re-examination requests sent by Member States.

20. Such an unprecedented and blanket policy clearly does not allow for full consideration of the best interests of the child and the right to family life.

21. This is contrary to, inter alia, the following legal precedents set out in the endnotes.<sup>iv</sup>

22. The effects of this in practice are:

- a. The child and the Sponsor are not given the opportunity to submit further evidence that would prove the family link (e.g. a DNA test)
- b. Children remain in precarious situations, away from their family members for longer periods of time
- c. Refusals have to be challenged through the re-examination process in Dublin III, and a lot of work is required from professionals both inside and outside of the UK, which would not be necessary if the SSHD observed its own obligations correctly.
- d. Unlawful refusals of initial decisions and reconsideration requests also lead to significant numbers of Court challenges which cost time and money to an already stretched UK Tribunal system.

## **Conclusion**

**23.** It is clear from the Home Office's statistics that a significant proportion of Take Charge Requests are refused. In SPI's experience these refusal decisions are invariably unlawful for the reasons explained above and chief among these the Home Office's routine and universal breach of their investigative duty. In our experience, when these decisions are challenged by judicial review, the Take Charge Request is ultimately accepted. **This is clearly a cause for significant concern for two main reasons:**

- 1. Children are left stranded and on their own for longer periods of time often in unsafe circumstances and are at heightened risk of undertaking dangerous journeys to reach the UK; and**
- 2. It increases the numbers of court challenges which expend a significant amount of public funds, in the context of an already stretched UK Tribunal system.**

24. It is important to note that only a small proportion of children who are subject to unlawful decisions will be able to access the legal advice needed to challenge them, with the result that they may be prevented from accessing a safe and legal route to join their family in the UK purely on account of poor quality, unlawful Home Office decision making and policy.

September 2020

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<sup>i</sup> Legal precedents:

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- i. R (BAA) v SSHD (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 ("BAA")
  - ii. FA & Others v SSHD JR/5523/2018; JR/5405/2018; JR/5406/2018 ("FA")
  - iii. FWF v SSHD JR/1626/2019 ("FWF")
  - iv. KF v SSHD, JR/1642/2019 ("KF")
  - v. HN & MN v SSHD JR/4719/2019 ("HN & MN")
  - vi. R (MS) v SSHD (Dublin III; duty to investigate) [2019] UKUT 00009 ("MS")
  - vii. R (MK, IK, and HK) v SSHD [2016]
  - viii. Article 12 of the Implementing Regulation 1560/2003, as amended by Implementing Regulation 118/2014, which refers to the role of authorities responsible for the protection of children having full knowledge of the facts to consider the ability of the adult or adults concerned to take charge of the child in a way which serves their best interests.

ii Legal precedents:

- i. FWF v SSHD JR/1626/2019 ("FWF")
- ii. KF v SSHD, JR/1642/2019 ("KF")
- iii. R (MS) v SSHD (Dublin III; duty to investigate) [2019] UKUT 00009 ("MS")
- iv. R (MK, IK and HK) v SSHD [2016]

iii Legal precedent: ECJ judgment in X & X v Staatssecretaris van Veiligheid [2019] 2 CMLR 4 at §67, which stated that formal refusals to avoid default acceptance where the required checks have not been completed within 2 months are not permitted under Dublin III.

iv Legal precedents:

- i. Article 12 of the Implementing Regulation 1560/2003, as amended by Implementing Regulation 118/2014 (see i, viii)
- ii. Article 6 Dublin III – requirements to make the best interests of the child a primary consideration in all procedures under Dublin III