

By: Paul Carter – Leader, Kent County Council
Andrew Ireland – Corporate Director for Families & Social Care

To: Cabinet - 18 March 2013

Subject: **APPEALS RIGHTS EXHAUSTED (ARE) CASES**

Classification: Unrestricted

Summary

Kent County Council is one of a small number of ‘gateway’ local authorities that incur huge financial costs in supporting over one hundred Unaccompanied Asylum Seeking Young People who are Care Leavers and who, according to the United Kingdom Border Agency (UKBA), are Appeals Rights Exhausted (ARE) and therefore have no right to claim any state financial or housing benefits.

This is further compounded by the confused interface between childcare legislation and immigration legislation which is conflicting and contradictory, especially when it comes to the support and care of young people who have been in the care of a local authority for a significant period of time as Looked After Children, and who are now over the age of 18.

Another challenge for KCC is balancing its obligations to these, young people within the broader financial constraints as UKBA will no longer fund young people who are over 18 years and are ARE but are also Care Leavers. However the UKBA does not accept there is any conflict of legislation, believing that for this group of young people that the immigration law overrides all other.

Despite assertions to the contrary from UKBA, case-law suggests that the local authority retains responsibility for providing accommodation and support to ARE young people over the age of 18. If the local authority decided to remove support in accordance with UKBA advice, it is highly probable that legal challenges would follow in relation to the lawfulness of the council’s actions with the attendant financial and reputational risks.

Recommendations

Kent County Council is concerned that UKBA’s position is unfair and discriminatory towards Kent residents and to be completely lacking in any regard for the welfare and safety of these young people and the communities in which they are living. Similarly, Kent County Council is concerned that UKBA’s interpretation of the relevant legislation unfairly exposes the council to legal risk. As such it is wholly unacceptable to the Council which must therefore respond to protect the interests of the residents of Kent. It is therefore recommended that Cabinet agrees:

(1) The Council continues, along with other similarly affected local authorities, to make vigorous representation to both the Home Office and the Department for Education to bring clarity to the legislation over this issue.

(2) To invoice UKBA monthly for the cost of looking after these young people who are ARE, detailing the numbers and outcomes of the Human Rights Assessments that have been undertaken.

(3) The Cabinet Member for Specialist Children's Services to report to Cabinet 3 times per annum on progress in discussions with central government.

(4) The exploration of all legal remedies available in relation to UKBA's failure to either fund or remove ARE young people.

1. Introduction

This paper:

- Defines the term Appeals Rights Exhausted (ARE).
- Gives an historical context of the development of the service for unaccompanied asylum seeking children.
- Provides an overview of the number of ARE cases in Kent, using figures of such cases from April 2011 to February 2013, to illustrate the cost of supporting these young people.
- Outlines how the cases of young people who are ARE have been managed in the past.
- Gives a summary of how such cases are currently managed.
- Explains the interface between child care law and immigration law and the inconsistent approach taken by UKBA, which has compounded the problems of supporting and funding cases of ARE young people.
- Gives a summary of the risks to the local authority should it cease support to those young people and the work being done to keep those young people occupied and to help them develop skills to enable them gain employment should they return to their home country.

2. Appeals Rights Exhausted (ARE) cases

(1) Definition

For a young person to be classified as ARE, it means that they have exhausted all rights of appeal against the refusal of their asylum application, and thus that they have no legal right to remain in the United Kingdom. Often, on arrival in the UK, many of the young people are given leave to remain until the age of 17 years 6 months, at which point they have a right to make two further appeal applications for their asylum claim. If these are refused, then they have exhausted all their appeals and become ARE. As a result of their status, they are not entitled to benefits or funding from any other source and are often referred to as having "no recourse to public funds". This definition does not take into account the contradictory status and rights that these young people may have under childcare legislation.

(2) Historical context

The operating environment for the delivery of care by Kent's Service for Unaccompanied Asylum Seeking Children (SUASC) is a complex and challenging one. There are numerous and interrelated reasons and drivers for Kent's current position:

- Funding of services for children claiming asylum is from a totally different stream than for that provided for children who are UK nationals, and whilst the Service for UASC is rightly placed within children's services, many of the issues relating to ARE cases are historically managed within the Adult section of the UKBA process.
- Kent is a "gateway authority" and therefore both an arrival and a transit destination for many children, both with their families or unaccompanied. Its location so close to France means the options for travel to the UK makes Kent an easier and cheaper destination for those with no money, or who are using agents.
- Many UASC who arrive in Kent tend to stay for a long time after arrival, forming relationships and making a home in the County. They are very reliant on the local authority, as they are not legally able to work.
- The high level of media and political scrutiny, both local and national, of services for asylum-seeking children, has resulted in rapid and frequent policy changes by central government which, in turn, has impacted on operational service delivery. For almost a decade there have been major annual changes in immigration practices and policy.
- Decision-making about how best to manage this casework has been influenced by this ever-changing political and media-driven climate.
- It is important to understand that many of Kent's ARE young people have been in the local authority's care from a very young age, sometimes since age 11 or 12.

(3) Legal Context

Section 23C of the Children Act 1989 (as amended) provides that the local authority has continuing obligations in relation to supporting former relevant children who are over the age of 18. This is on a sliding scale as those young people get older and is dependent on their assessed needs.

The obligations placed on the local authority by Section 23C and the provisions around leaving care generally are unaffected by the fact that a young person is ARE.

Section 95 of the Immigration and Asylum Act 1999 gives the Secretary of State the power to provide support for asylum seekers. Section 4 of the 1999 Act also gives the Secretary of State power to provide support for former asylum seekers.

The council is currently unfunded for discharging its obligations pursuant to Section 23C of the Children Act and the provisions around leaving care generally.

The Secretary of State has the power to make payments to the council, but currently chooses not to properly fund this. This seems perverse and irrational as it is the

Secretary of State who determines asylum status and who has the powers, responsibilities and resources in relation to the deportation of failed asylum seekers.

UKBA has asked Kent that once classified as ARE, the council should carry out a “human rights assessment” before determining that the young person be made destitute. In so doing, the UKBA effectively seeks to transfer the legal risk of their failure to deport to the council. However, any decision by the council to make a young person destitute is almost certain to trigger legal proceedings against it.

UKBA dismiss the council’s concerns over the discharge of its obligations under the Children Act 1989. UKBA have failed to properly particularise how the obligations can be ignored and their view appears inconsistent with recent case law and the specific power at Section 4 of the 1999 Act mentioned above. UKBA has asserted that Kent and other local authorities are wrong in their interpretation of their Children Act obligations.

Advice obtained from a QC¹ describes the UKBA’s position as “beguilingly optimistic”.

3. Organisational processes relating to ARE young people

(1) UKBA Processes

When a young person arrives in the country and claims asylum with UKBA, they are usually granted temporary admission into the country. The young person will be called for a substantive interview at which their statement of claim for asylum is examined by UKBA case owners. Following the outcome of the interview the young person could be:

- granted discretionary leave to remain until they are 17years, 6 months
- given refugee status, which entitles them to remain for 5 years
- refused leave to remain outright.

The majority of young people are usually given leave to remain until they are 17years 6 months old. It is incumbent on the young person and their solicitor to make further applications for the case to be heard. This can only be done a further two times; and if the young person is ultimately refused leave to remain, then they become ARE. Once they reach 17 years 6 months, UKBA will notify the young person of the need to report to one of their reporting centres. The reason for this request is to enable UKBA to monitor the movements of these young people.

(2) Kent processes

The cases of all children claiming asylum that are referred to KCC are managed within the LAC process i.e. all the children/young people become Looked After (LAC) under Section 20 of the Children Act 1989. Their care status is changed from LAC to Care Leaving Status once an assessment of need is completed by the social worker and it is identified that the young person has developed sufficient independent skills

¹ Which remains confidential and legally privileged

for their case to be managed under Section 23 and 24 of the Children Act 1989. These are young people who have been Looked After by the department for a significant period of time and are therefore entitled to be supported as care leavers.

A significant number of young people in the care of SUASC become ARE annually. UKBA have been clear in their view that all such young people over the age of 18 years should not be supported by the local authority, as they are not prepared to fund the cost of supporting them. This view is clearly outlined in the (2010) *National Procedures for Care Leavers – Transitions to Adulthood, Volume 3*.

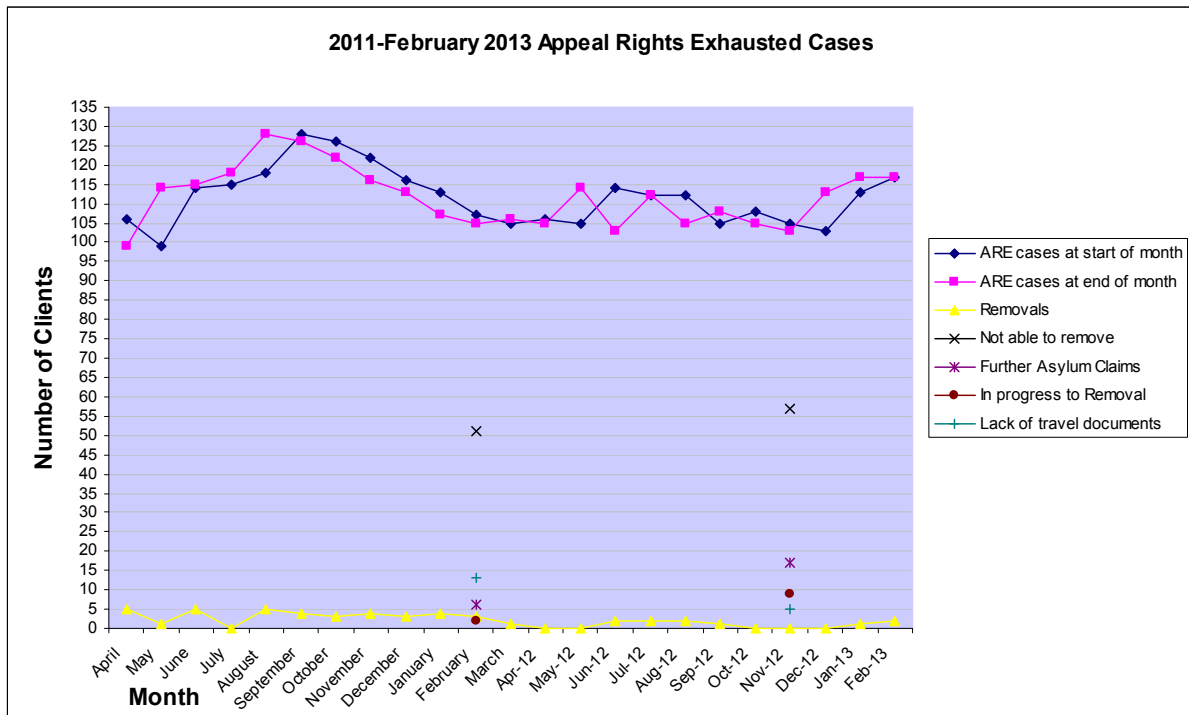
UKBA have argued that a human rights assessment should be completed for all the young people who are ARE and that, if it is found that their rights will not be breached by making them destitute, the council should stop supporting them and refer them to the NASS for support. The UKBA is unclear what support should be provided, and how this should be funded, if the assessments show that their rights will be breached if made destitute.

In the light of the findings of the Court of Appeal in the case of R (on the application of SO) v London Borough of Barking and Dagenham [2011] HR 4, it is not as straightforward as UKBA have suggested to make a former looked after child destitute. The Court of Appeal found that when considering whether to provide a former relevant child, who was also a failed asylum seeker, with accommodation under s.23C(4)(c) the respondent authority was not entitled take into account the possibility of the appellant being provided with accommodation by the UK Borders Agency under s.4(2) of the Immigration and Asylum Act 1999.

Historically, the cases of young people who became ARE were supported by the local authority under the Leaving Care legislation, given that they will all involve young people who have been looked after in the past and have become former relevant young people. This is still the case, because the legal status of these young people under childcare legislation has not changed in Kent's legal opinions.

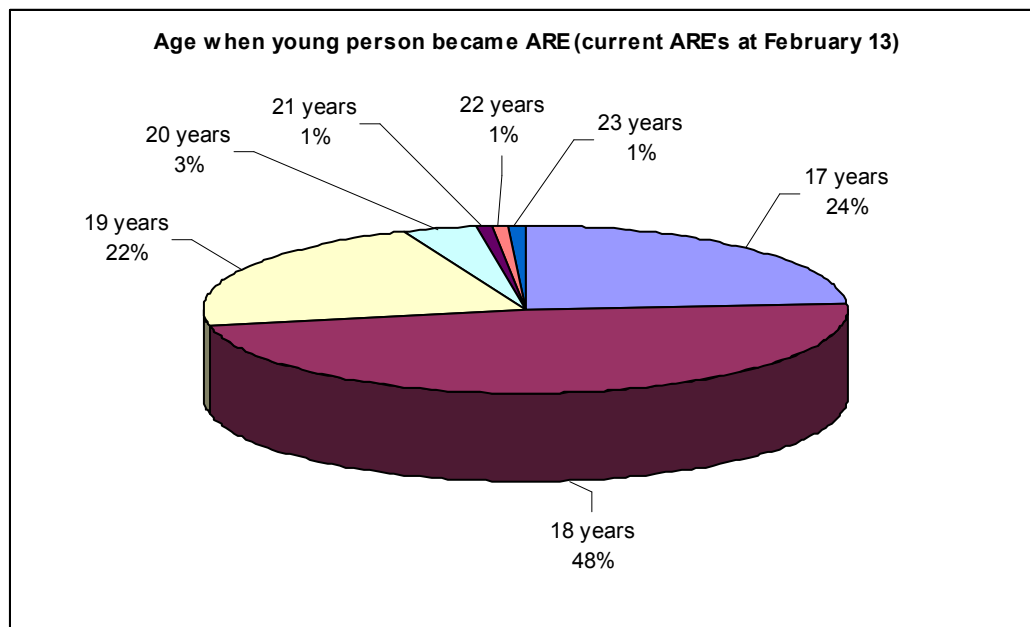
The position to February 2013 of ARE in Kent is set out below.

Figure 1. numbers of ARE cases in Kent February 2011-February 2013



The number of ARE cases is between 100 - 125 at the highest but has not been significantly lower than 100 throughout the year.

Figure 2. age range of cases of young people who are becoming ARE



We can see that the majority of young people who become ARE are 18 years old.

Figure 3. Age of current appeal rights exhausted at the end of February 13

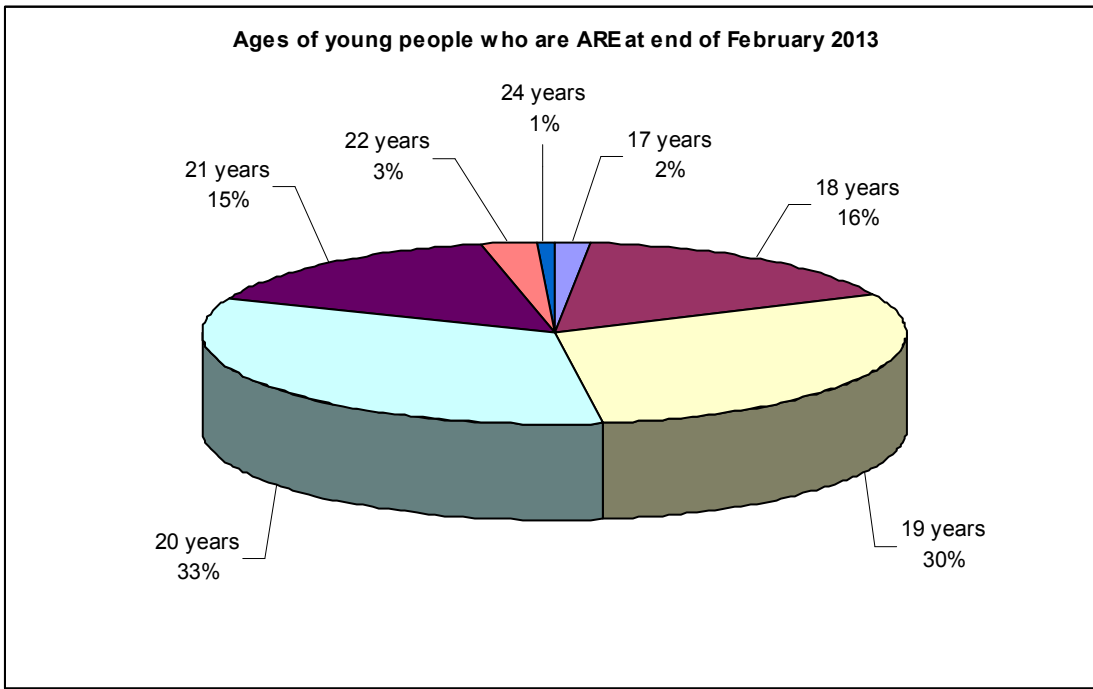


Figure 3 demonstrates that majority remain ARE between 18 months and 2 years.

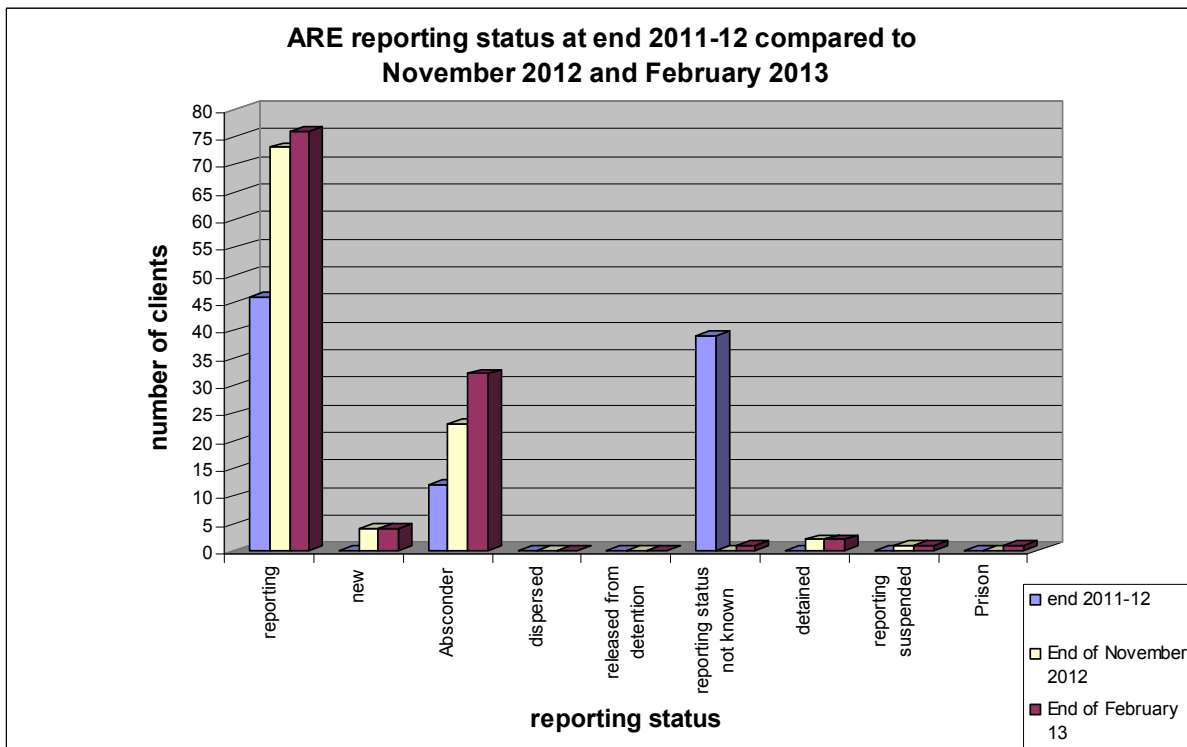


Figure 4. Cases of young people who are on the reporting register.

48 young people who are ARE were reporting at the end of April 2012., by the end November 2012 this number had increased to 73 and by the end of February 2013 85 young people were actively reporting at the end of February 13. There 27 young people are absconders, 3 are not reporting and 2 are in detention

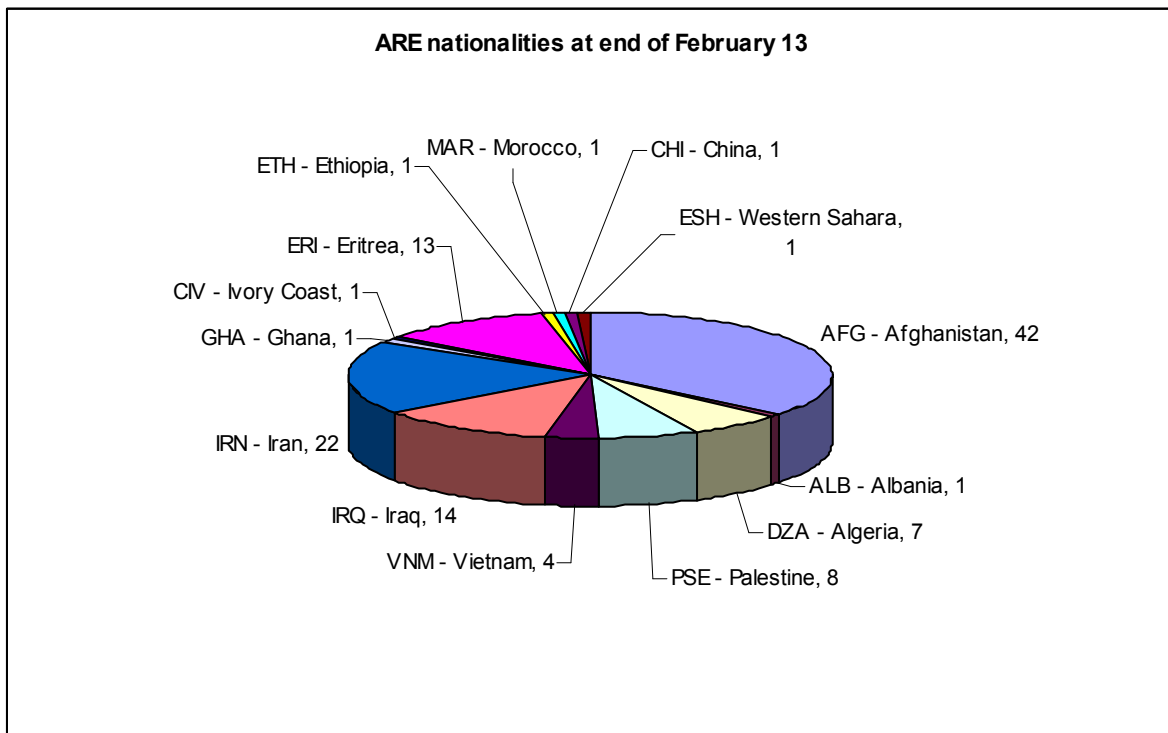


Figure 5. Nationality of cases who are ARE.

4. Why is there a need to change this historical practice?

The costs of care provided by the local authority to young people who are ARE is high. It is not funded by UKBA, the agency who are responsible for the safe removal of these young people back to their country of origin, should it be determined that they have no leave to remain in the UK.

Until March 2011, there were no processes in place between UKBA and the local authority for managing these cases. A new and structured process of managing the cases of ARE young people in Kent aged 18 years and over was therefore instituted in March 2011 and came into effect in May 2011. There were 90 cases of ARE young people, of different nationalities, at the time. The local authority and UKBA worked closely together to set up a reporting process. However, it soon became clear that, in order to manage the process effectively, we needed to target a smaller group. A pilot reporting process was therefore instituted, targeting 71 young people from Afghanistan, of whom 28 were already reporting. UKBA targeted this group because they were deemed to be 'removable'. The pilot began in April 2011 and became fully operational in May that year. All the young people were issued letters containing clear directions as to which UKBA reporting centre they should report to.

This reporting process is now being used to monitor and track the movements of all ARE young people in Kent. The numbers of such cases supported by the service fluctuate but is typically above 100 (see Figure 1) and as at 28 Feb 2013 there were 117 such young people. All these young people have been previously Looked After by the county for more than thirteen weeks and therefore qualify to be supported as Care Leavers. They all, therefore, have allocated support workers who support them in the community, visit them regularly and review their pathway plans every six months. The department also provides accommodation and subsistence allowance.

As of May 2011, when the reporting process commenced to date, UKBA have removed 45 young people; (see Figure 6). It is accepted that this number is low. The graph shows that up to five cases of ARE young people are removed each month with the exception of July 2011, April and May 2012, September 2012, October 2012, November 2012 and December 2012 when there were no removals of young people.

At the end of 2012, the UKBA had 57 cases of young people they had not been able to return to their country of origin due to restriction on documentation and removal. These cases are usually referred to as 'general legal barrier' cases (GLB). There were 17 cases where the young people had made further submissions, appeals and judicial review applications. 9 cases were waiting for documentation and a further 5 were being processed to removal. The UKBA have been asked to provide updated figures for the ARE cases they are not actively seeking to return but, as at this report's publishing deadline, have not yet done so.

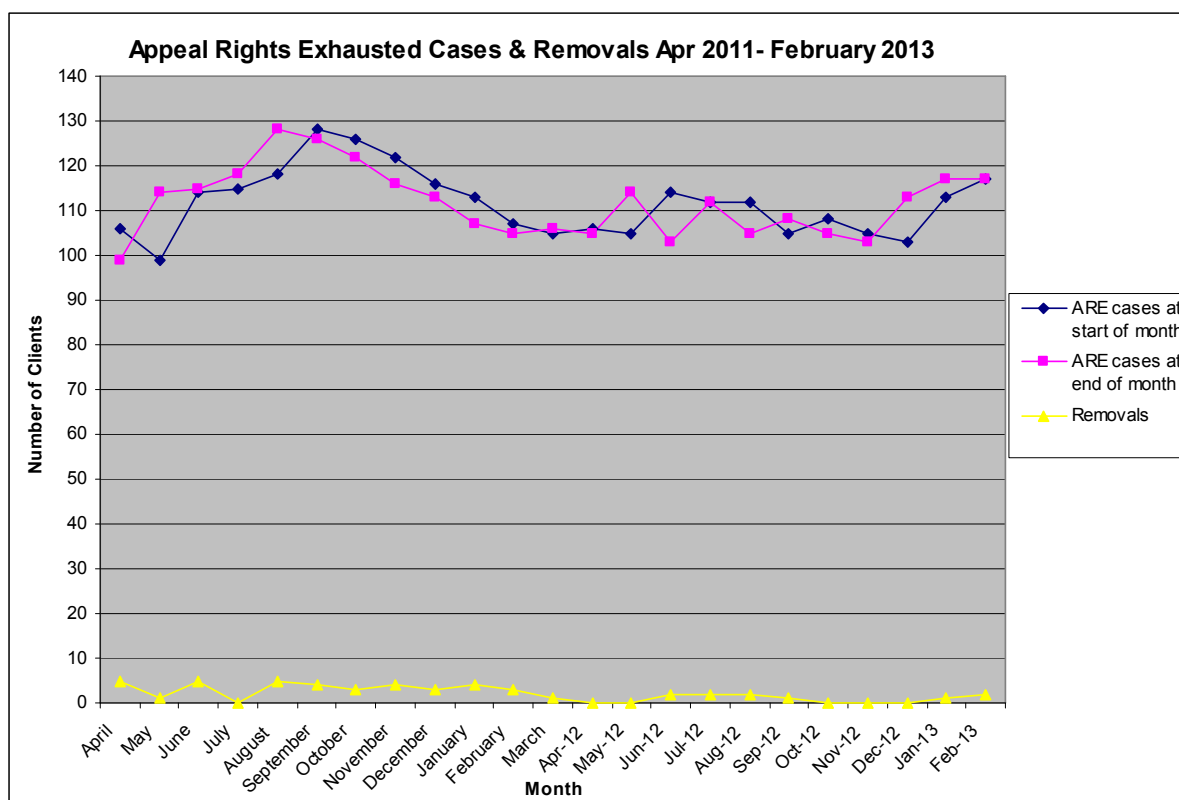


Figure 6 – Removals

5. Policy

UKBA has issued a directive that all local authorities should cease supporting young people who become ARE after their 18th birthday. It is suggested that UKBA will fund the cost of maintaining these young people for three months after their 18th birthday and that local authorities should complete Human Rights Assessments and refer the cases to NASS. *Planning Transitions to Adulthood for Care Leavers, Volume 3* (2010), advises that local authorities can consider discharging their duty of care to UASC who reach 18 years old and are ARE.

6. Financial matters

In 2011/12 the cost to KCC of meeting the statutory needs of UASC and former UASC was £3.33m above the level of funding received from the Home Office. Of this £1.4m was the unfunded cost of supporting former UASC who were ARE.

As at Quarter 3 of 12/13, the forecast cost to KCC meeting these statutory needs this year is expected to be £3.36m above the level of funding to be received from the Home Office. Of this £943k is the forecast unfunded cost, under current grant rules, of supporting former UASC who are ARE.

The remaining £2.41m of unfunded forecast cost is due to the cost of meeting the statutory needs of UASC and former UASC being greater than the amount allocated in the known grant rules. Confirmation has now been received from the UKBA that the level of Gateway Grant funding for 12/13 is as that received in 11/12 which is what is anticipated in the above forecast position.

7. Risks to the local authority

As at 28 Feb 2013, the County has 117 young people who are ARE and have no recourse to public funds. These young people are currently supported by Children's Services under Sections 23 and 24 of the Leaving Care Act 2000, as they are Care Leavers who are deemed to have the right to be supported as such; UKBA do not fund their costs. The risks to the local authority can be divided in four categories: (1) financial and legal risks; (2) risks to the young people; (3) risks to the communities; (4) risks to the professional credibility of the local authority and to individual social workers and (5) legal considerations.

(1) Financial risks

It is likely that the council will face claims for judicial review brought by young people who oppose any local authority plans to stop support. The cost of the litigation could exceed £50,000 per case. In addition, it is evident that legal action (or even the threat of it) would inevitably slow down the process of actions to complete assessments and removal of young people. It is worth noting that even if there were no claims, not every young person would be able to be made destitute, so the savings on support after the human rights assessments would probably not apply to the whole cohort.

(2) Risks to young people

It is anticipated that ARE young people are likely to disappear to work in unregulated workplaces, where they could be exploited to work in dangerous places for long hours, exposing them to great harm. Of real concern is that, as young people are made destitute, it is also likely that they would take out their anger and frustrations out on the department and cause damage to the properties they live in.

(3) Risks posed to communities

Young people who have lived in communities for a long time will probably gravitate to the community they know. Without a home and with no means of feeding themselves, they are likely to resort to begging, stealing, prostitution and possibly to

other criminal activities such as trafficking, gang crime and, in extreme cases, terrorism. This would undoubtedly create community disharmony and tension.

(4) Risks to the professional credibility of the local authority and individual social workers

KCC is one of the largest local authorities, to consistently champion work with unaccompanied asylum seeking children. The work of SUASC has gained a good reputation nationally, and to some extent internationally. KCC has an excellent record in resisting applications for judicial review and mitigating risk in relation to other areas of SUASC's practice due to close working between Legal Services and the service's staff and senior management. The defence of these applications draws heavily on the council's resources and the proposed human rights assessments would carry a similar impact. Furthermore, the human rights assessments would be outside the core competencies of most social workers and therefore give rise to greater risk and impact on the service. Judicial reviews undoubtedly draw attention and increase scrutiny to the work of an organisation. Furthermore, the work of the social workers who complete the assessments could be called into question by the young people and their legal support. This could undermine their credibility and lead to an increased risk of related litigation such as age assessments.

(5) Legal Consideration

There is a clear dispute between a number of councils and UKBA in relation to the interpretation of obligations under the Children Act and the extent to which they are affected by immigration legislation. The Court of Appeal decision in the Barking and Dagenham case was not appealed to the Supreme Court and there remains disagreement and confusion in relation to the extent to the obligations owed to ARE young people. The judgment in the Barking and Dagenham case relates to a case with specific facts and the response of that local authority to that case – it does not necessarily provide a full and final answer but has been described by one barrister as “a clear statement by the courts that Parliament has intended that local authorities provide a fully funded safety net for children leaving the care system”²

8. Chronology of actions taken

(1) Communication between KCC and UKBA

There is an identified lead officer who works closely with KCC staff to help resolve issues that arise with the young people and other wider issues of both agencies.

(2) System of young people reporting to UKBA

A very structured system has been put in place to ensure that young people who are ARE report regularly to UKBA. This commenced in March 2011 and means that eth UKBA is now fully aware of the movements of these young people.

(3) Work to engage the young people

² David Bedingfield, 4 Paper Buildings – Local Authorities Duties to Children Leaving Care (Article in Family Law Week – 2010)

The local authority has worked very closely with the South East Migration Partnership Group to begin to explore ideas about how best to keep young people who are ARE occupied while they are waiting to be removed from the country. A meeting took place with the UKBA and some voluntary agencies and it was agreed to set up a pilot group of 20 young people, all from Afghanistan and between the ages of 19 – 21 who are ARE. A further meeting will take place with the young people to start to map out the skills that will help them find employment when they return home.

(4) Human Rights Assessments

KCC commissioned the No Recourse to Public Funds Network in July 2012 to deliver training on Human Rights Assessments, at a cost of £120 per person. A pilot comprising 20 Human Rights Assessment cases has been completed, 5 from social workers in the team and 15 by an independent assessor from another local authority with no previous links with Kent County Council.

It took approximately 3 working days, i.e. 21 hours, to complete an assessment. Each assessment cost £710.00. This cost is not reimbursed by UKBA

The assessment took into account the following Articles of the Convention of Human Rights as recommended by No recourse to public funds network. (NRPF)

- Article 3 : Article 3 specifies an absolute right and specifies that torture and inhumane or degrading treatment or punishment are prohibited, .
- Article 8. : Article 8 is a qualifying right and grants a right to Family and Private Life.

The recommendations from the assessments are that, if services are withdrawn, the young people will not have food, shelter and clothing, with no family members in the country or extended networks they will be left destitute. This seems likely to constitute a breach of their human rights and it is anticipated would result in likely judicial review proceedings being issued against KCC.

A meeting with Simon Bentley of UKBA took place on 22nd February 2013. Simon, on behalf of UKBA does not accept the recommendations arising from the assessments. He does not believe that the young people will be destitute should the local authority withdraw support and that it will not constitute a breach of their human rights. He was of the firm view that the young people in thirteen of the fifteen assessments he had read should be made destitute. The two he felt could not be made destitute were cases where the young people had made fresh applications for their asylum claims.

KCC will stand by the recommendations from the assessments. The LGA paper written in June 2012 and cited by Simon Bentley concludes that it has not set hard and fast rules on how Local Authorities should set about reviewing the support entitlement of the young people who are ARE.

9. Conclusions

Kent County Council has continued to meet its duties and responsibilities to all the young people under the Children Act 1989 and the Leaving Care Act 2000, despite the severe financial pressure this has entailed. However, the authority is confronted with a stark choice between two options. These are:

(1) Continued support of the young people who are ARE

The local authority could choose to continue to support the young people who are ARE, as it is currently doing. The advantage of this is, first and foremost, that it will ensure the continued safety of the young people. Furthermore, the local authority will be thus fulfilling its duty under the Children Act 1989.

However, this will cost the local authority significant amount of money. The unit cost for the care of a young person who is ARE is: £160.92 per week, making a total cost of £700.00 per month

(2) Ceasing support

The local authority could take the directive from UKBA and cease its support of the young people three months after they become ARE. This, however, has serious implications, as follows:

- i. *The threat of destitution.* A young person might accept being made destitute, but would naturally turn to other means of ensuring survival, such as stealing or begging. This could potentially lead to arrest and a possible prison sentence. Again, this leaves the local authority open to much criticism because it will be seen to have failed in its duty to adequately care for young people who they have been responsible for as Looked After Children in the first instance and now, as care leavers.
- ii. *The threat of exploitation.* Young people ejected into a life of destitution become particularly vulnerable to exploitation by the unscrupulous, or by criminals. They may be forced into prostitution, into organised crime, or to work in unsafe conditions in order to survive. In addition to the risk to these young people, the investigation of any such cases by the media would invite hostile criticism of KCC.
- iii. *The threat of serious harm.* In the most extreme cases, young people who are homeless and without any means of purchasing food or living in a reasonably safe house could become seriously ill, or even die. Again, there is a very substantial risk to these young people as well as undoubtedly leaving the local authority vulnerable to serious criticism about its care of young people.
- iv. *The threat to local communities.* Given the extremely poor record of the UKBA in achieving successful repatriation and the ongoing numbers they are unable to repatriate, making these significant number of young people destitute will have a negative impact on the communities where they live, and in some cases have done so for a number of years.
- v. *The threat of judicial review.* The young people could choose to press for a judicial review, resulting in a huge cost to KCC of about £50,000 per case. There would also be a great deal of unwanted media attention.

All of these points strongly support the position that the Council has adopted, which is to continue to offer support under the Leaving Care Act for these care leavers who are ARE, while cooperating as fully as possible with UKBA over areas such as Human Rights Assessments and the reporting process pilot detailed in section 4 of

this report. However to do so is incurring significant expenditure for the Council, expenditure which should be met by central government as again this is a national issue and, equally again, one for which Kent is picking up a significant amount of national cost, currently running at an annually reoccurring cost of £3 million.

Kent County Council has made repeated attempts over a number of years to achieve a resolution to this issue with UKBA but there has been very little evidence of real progress, and in fact, the most recent communication from the Home Office offers very little indication of movement on this matter.

10. Legal Options

UKBA's position requires the council to absorb all of the legal risk for UKBA's failure to remove ARE young people from the UK. Its position encourages the type of outcomes that the Children Act and Leaving care legislation specifically seek to avoid. However, the UKBA has continued to fail to make a decision in relation to the funding of KCC for meeting its statutory obligations in relation to the cohort of ARE that UKBA has failed to remove.

One option to reduce the immediate risk to the council is to lobby government for a change to the law. The obligations on the council under the Children Act could be limited or excluded for that cohort of former relevant children who are ARE. It is, however, recognised that this presents related reputational risks and a failure in our corporate parenting obligations. There is nevertheless a relevant precedent for this which is referred to in one of the recent cases.

In *R v Hammersmith and Fulham LBC ex parte M* [1997] the Court of Appeal decided that a local authority had an obligation under section 21 of the National Assistance Act 1948 to provide accommodation to healthy but destitute asylum seekers. This would have imposed a disproportionate burden on local authorities in whose area asylum seekers tend to congregate. In consequence, Parliament introduced amendments to section 21 of the Immigration and Asylum Act 1999 which had the effect of removing from a local authority the obligation to provide accommodation to asylum seekers whose need for care and attention arose solely from destitution or from the physical effects or anticipated physical effects of destitution.

Another potential option would be for the council to explore litigated options in relation to the way in which the Secretary of State is currently exercising her powers. The council could apply to the court for a declaration on the interpretation of the council's legal obligations and respective primacy of legislation. The council could also consider judicial review on specific cases or decisions and seek remedies including prohibiting orders (preventing the Secretary of State from doing something), mandatory orders (making the Secretary of State do something) and/or financial damages.

A third option would be for the council to involve the Secretary of State in any subsequent claims against Kent for carrying out Human Rights Assessments.

Legal Services are arranging further and detailed consideration of the council's legal options through seeking the opinion of a QC.

11. Recommendations

Kent County Council finds the UKBA's position to be both unfair and discriminatory towards Kent residents and completely lacking in any regard for the welfare and safety of these young people and the communities in which they are living.

As such it is wholly unacceptable to the Council which must respond to protect the interests of the residents of Kent. It is therefore recommended that Cabinet agrees:

(1) The Council should continue, along with other similarly affected local authorities, to make vigorous representation to both the Home Office and the Department for Education to bring clarity to the legislation over this issue.

(2) To work with other affected authorities to seek an urgent meeting with UKBA lawyers to find a solution to the present situation and failing that, the exploration of all legal remedies available in relation to UKBA's failure to either fund or deport ARE young people.

(3) To invoice UKBA monthly for the cost of looking after these young people who are ARE, detailing the numbers and outcomes of the Human Rights Assessments that have been undertaken..

(4) The Cabinet Member for Specialist Children's Services to report to Cabinet 3 times per annum on progress in discussions with central government

Lead Officer/Contact:

Teresa Gallagher – County Manager, SUASC, 7000 5265

Michelle Goldsmith – Finance Manager, BSS, 7000 1770

Background Documents: None