Web Journal of Current Legal Issues Ltd

Firth, 'Still a migrant first? The Detention of Asylum Seeking Children after the BCIA 2009', [2010] 2 Web JCLI
http://webjcli.ncl.ac.uk/2010/issue2/firth2.html

Still a migrant first? The Detention of Asylum Seeking Children after the BCIA 2009

Georgina Firth

Lecturer in Law, the University of Lancaster
g.firth@lancaster.ac.uk

Copyright © 2010 Georgina Firth
First published in the Web Journal of Current Legal Issues

Summary

In this article, I aim to trace the increasing use of detention as a central plank of asylum policy, its effect on children in asylum seeking families and consider whether the introduction of the 'welfare principle' in section 55 of the Borders, Citizenship and Immigration Act 2009 and the statutory guidance attached to it, will have a positive impact on the children of asylum seeking families. In particular, I would like to challenge the assumption that lies at the heart of many of the arguments put forward in this area, that the detention of children is necessary in the interests of immigration control.

Contents

Introduction

The recent standoff between 'Santa' and the Security Personnel at Yarl's Wood Immigration Removal Centre has returned the issue of the detention of the children of asylum seeking families firmly into the spotlight (Observer, 13 December 2009). Nowhere can the tension between the UK's commitment to children and its desire to maintain a firm immigration policy be seen more clearly than in the issue of the detention of asylum seeking children in families. Whilst in recent years, political parties from both sides of the spectrum have demonstrated a commitment to improving the rights of children in the UK, children in asylum seeking families have remained marginalized and it is notable that there is no definition of 'child' in immigration legislation (Coker, Finch & Stanley 2002, p 4). Every year around 1000 to 2000 children are subject to administrative detention for the purposes of immigration control (Crawley and Lester 2005): a factor that has been very controversial and has attracted widespread criticism from academics, policy makers and interest groups. One issue that was a particular matter of concern until recently, was that UK law did not grant the same rights and protections to a child of an asylum seeker as domestic law gives to UK children. However, given that the UK has now removed its reservation to Article 22 of the UN Convention on the Rights of the Child (UNCRC) in relation to immigration policy and introduced a 'welfare principle' in section 55 of the Borders, Citizenship and Immigration Act (BCIA) 2009, it might be thought that the situation for such children should now be improving. I aim to show in this article that the removal of the reservation and recent legislation alone will not have a positive impact on the children of asylum seeking families without more. In particular, it is noticeable that the UK Borders Agency does not believe that further changes to legislation, guidance or practice are necessary to fully comply with the UNCRC (JCHR 25th Report 2009). This is surprising, given that the asylum system has been consistently criticized on the basis that immigration control takes priority over human rights obligations to asylum seeking children but perhaps this position indicates that the tensions that have existed in the past between children's rights and immigration control have not yet been resolved.

Detention and Government policy

Whilst immigration law has long contained a power of detention, this was little used until 1999. So why did the use of detention increase from this time? Before 1905, Britain was known as a place of refuge because of its relaxed attitude to entrance policies generally and limits on the entrance of 'foreigners' did not really start to appear until the early 20th century (Gibney 2004, p113). Until the Second World War, no distinction was made between immigration and asylum, mainly because there was no draw for workers to come to the UK at the time. However, after the events of World War Two and the corresponding increase in refugee numbers, a distinct asylum policy began to be developed, based on the unpredictable exercise of discretion (Gibney 2004, p127). Interestingly, the UK was one of the first signatories to the 1951 Refugee Convention and

its 1967 protocol but as neither treaty was incorporated into UK law, they did not really affect the treatment of asylum seekers to the UK until the 1980s and refugee status was a matter for the discretion of the Secretary of State as was seen in the case of *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514.

Despite a restrictive use of executive discretion, the numbers of asylum seekers began to increase dramatically in the late 1990s. Applications rose from 27,685 in 1996-7 to 79,125 in 2000 (Bohmer and Schuman 2008, p 23). The crises in Kosovo, Albania, Iraq and Afghanistan contributed to this increase and Britain responded by granting refugee status in a very low percentage of cases, using administrative discretion, special fast track procedures for those from 'safe' countries, by dispersing asylum seekers throughout the UK and by eliminating benefits for applicants in some cases (see Bagilhole 2003; Bohmer and Schuman 2008). All of those measures were designed to prevent people from coming to the UK to seek asylum. The reason for the increase in numbers was that many of the previous barriers to refugee flows diminished in importance. The geographical isolation of the UK was no longer an advantage as a result of the channel tunnel and the organised trafficking of people into the country. Also, the economy had improved and so the UK became a more attractive destination for asylum seekers and economic migrants alike (Gibney 2004, p127).

As Bloch and Schuster (2002) note asylum seeking became a key issue for party politics from the late 1980s and successive governments vied to be seen as tough on immigration. This period also saw a growth in media debate around the issue of the UK's responsibilities to asylum seekers. Bloch and Schuster (2002) argue that in the case of asylum policy, politicians from both sides of the political spectrum 'succeeded in manufacturing a moral consensus against asylum seekers through the use of language that removes the notion of legitimacy.' This led to what Cohen (1994) has described as the 'morally untouchable category of political refugee' being deconstructed and replaced, both in political rhetoric and in the popular press, with the undeserving and 'bogus' asylum seeker (Schuster and Welch 2005). The popular media was saturated with articles suggesting that the country was being swamped by bogus asylum seekers and the government response was to opt for ever tougher and more punitive legislation (Bagilhole 2003).

In the 1998 White Paper, *Fairer, Faster, Firmer* (Cm 4018), the Home Office indicated a change of policy, which would focus primarily on deterrence and the control of borders. In order to further these aims, detention was increasingly to be used as a mechanism of immigration control. It was immediately clear from the White Paper that the detention of families was envisaged, as policy targets to remove more failed asylum seekers led to a government focus on groups that were generally perceived as more difficult to remove. As asylum numbers increased and the use of detention became normalized, the implications for children within those families became obvious. According to Crawley and Lester (2005), the government's overall policy of increasing removal numbers meant that families were more likely to be detained, as dependents were included in the removal statistics. There was additional pressure to target these groups because the support cost of families was higher and families were easier to locate due to the need to access services such as local schools for the children. The 2002 White paper, *Secure Borders, Safe Haven* (Cm 5387), further expanded on this policy and indicated that the government intended to detain families for longer than immediately prior to removal (Home Office 2002

4.77). It is therefore immediately clear that children in asylum seeking families became the casualties of policies designed with adult asylum seekers in mind and it is also clear from legislation and policy at that time that little thought was put into the effect of detention on these children as children. Within the asylum policy framework, the distinction between single asylum seekers and families became blurred to the disadvantage of families and in particular, the children within them (Giner 2006, p 16).

When can detention occur?

Schedule 2, paragraph 16 and Schedule 3 of the Immigration Act 1971, as amended by the 1999 and 2002 Acts, contain the powers to detain. Asylum seekers can be detained by the Immigration Authorities whilst a decision is made on whether to grant asylum or following an unsuccessful claim, when their removal from the UK is anticipated. In practice, the detention of children usually occurs at the latter stage and some children experience several episodes of detention before being removed or allowed to stay. The detention powers are subject to the Human Rights Act 1998 and it has become clear from the case of *Saadi v United Kingdom* (Application No 13229/03) [2006] All ER (D) 125 that detention in connection with immigration is a lawful purpose under Article 5(1)(f) of the European Convention on Human Rights, provided that the power is exercised to prevent unauthorized entry into the country or with a view to removal and provided that it is limited to the statutory purpose. Section 66 of the Nationality, Immigration and Asylum Act (NIAA) 2002 indicated clearly that the use of detention was to be a central focus of Government policy in relation to fast tracking claims and enforcement and as can be seen from the White papers that preceded the Act, one of the policy intentions behind the 2002 Act was to normalize the use of detention as a matter of administrative convenience for processing claims quickly (see Macdonald 2008). Chapter 55 of the UK Borders Agency Enforcement Instructions and Guidance indicates that detention is in principle a measure of last resort to be used at the end of the determination process prior to removal and that the broad powers of administrative detention are limited by implied statutory restrictions, Home Office policy, human rights law and are subject to judicial scrutiny.

It is clear from the provisions that the power to detain asylum seekers generally and families in particular, is wide and whilst there are safeguards in place due to the requirement to apply policy and as a result of the incorporation of article 5, experience has shown that they are often inadequate in practice (11 Million, Report of the Children's Commissioner for England 2009). One notable omission from the safeguards is the lack of an automatic provision for bail hearings and thus judicial oversight of detention. The government initially provided for this in sections 44-52 of the Immigration and Asylum Act (IAA) 1999 Act but then repealed the provisions in section 68 of the Nationality, Immigration and Asylum Act (NIAA) 2002. Arguably, this as a lost opportunity to provide greater access to scrutiny of the decision to detain, particularly in relation to the detention of children, where internal monitoring of detention by the Home Office has been consistently criticised by, among others, the Chief Inspector of Prisons (HMCIP 2008) and the Children's Commissioner for England (11 Million: Report of the Children's Commissioner 2009). Further, whilst a statutory presumption in favour of release is a feature of the system, there is no statutory time limit on the period of detention. Evidence has shown that the Immigration Minister has not to date refused any request for extended detention beyond 28 days (The Guardian, 30 August 2009) and a report by the Children's Commissioner for England

in April 2009 indicated that meetings between social services, the UKBA and Yarl's Wood Staff designed to discuss the welfare implications of keeping a child locked up for more than 28 days 'dwelt instead on PR and legal concerns' (The Independent, April 26 2009).

In line with the new policy to detain more asylum seekers, more detention places were needed. The Immigration and Asylum Act 1999 and the detention rules made under it for the first time regulated immigration detention centres and the powers and duties of custodians and provided a statutory basis in secondary legislation for the giving of written reasons for detention (SI 2001/238 r 9). The statutory footing for increased administrative detention was built upon and expanded in the 2002 Act. The vast majority of those held are now detained in immigration service detention which consists of dedicated immigration facilities run by private security firms who are subject to the Detention Centre rules (DRC). Whilst most of the rules apply to all asylum seekers, there is some recognition of the special position of families. Rule 11 of the DRC sets out conditions for the detention of families and minors and provides that family members are entitled to enjoy family life save to the extent necessary in the interests of security and safety. The accommodation must be suitable to meet the needs of minors and families and everything reasonably necessary for the protections, safety, well being, maintenance and care of babies and children should be provided. As Drew and Nastic (2009, p 2) note, from the time of the change in policy, there have been attempts to challenge the detention of families with some limited success on the issue of conditions, but little on the central issue of whether detention of children in such families is in fact necessary. For example, in *R(S)* [2007] EWHC 1654 (Admin) the court upheld the legality of the Secretary of State's policy with regard to the detention of families with children under the fast track regime and generally, including finding the policy consistent with the UNCRC. However, on the facts, the detention of a mother and her two children after the conclusion of the fast track procedure was unlawful because there were not sufficiently strong grounds to justify detention and the period of detention (2 months) was unreasonable given the age of the children. The prolonged detention of just over 5 months had serious repercussions for the family. The mother became a suicide risk and there was medical evidence of damage to the health and welfare of the youngest child who developed anaemia and rickets whilst detained. These factors led the court to conclude that there had been a breach of the right to respect for physical integrity under article 8. The case clearly highlighted the risks involved in the detention of children, a risk that has been supported by further research showing the children held in UK Immigration centres develop mental and physical health difficulties (The Guardian, 13 October 2009). The case also highlights the lack of suitable child friendly legal principles through which to challenge the detention of asylum seeking children generally. Due to the inability of the courts to give consideration to the UNCRC prior to the 2009 Act, decisions have had to be challenged on an ad hoc, case by case basis using human rights principles from the European Convention of Human Rights, described by Woolf (2003, p 205), due to the lack of specific provisions relating to children, as 'not a child friendly treaty'.

International Standards and the Detention of Children

At the same time as an increasingly restrictive asylum policy unfolded with the increased use of administrative detention for families, a number of international and national developments transformed the child policy framework in the UK for children other than those in asylum seeking families (Giner 2006). The most important development was the 1989 UN Convention

on the Rights of the Child (UNCRC) which enshrined universal rights that children were deemed to have as children (Bentley 2005). In ratifying the UNCRC, state parties agreed to take the best interests of the child into consideration in all actions undertaken, to care for a child whose rights have been violated and to encourage the participation rights of children (Veerman 1992). It might be assumed that the granting rights to children would not be the subject of much controversy. However, Giner (2006, p 9) notes that negotiations during the drafting of the Convention, particularly around the principle of the 'best interests' of the child, indicate the highly political character of recognizing children's rights and the limits of such a commitment. The final decision that the 'best interests' of the child would be a primary consideration rather than paramount indicates that the child's best interests are not to be considered as the single overriding factor but as one factor to be considered in the decision making process thus leaving a margin of discretion for the state parties. Further, nowhere in the Convention is it set out what the 'best interests' of the child are which leaves a wide scope for interpretation and allows competing and inconsistent concepts of 'best interests' to come into play.

As well as general principles, the United Nations Convention on the Rights of the Child 1989 (UNCRC) and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (UNJDL) set out the parameters of what is acceptable in terms of the detention of children and set standards against which signatory governments can be judged. Article 3 of the UNCRC sets out the welfare principle which is aimed at protecting the best interests of the child. Article 22 provides that special protection should be afforded to refugee children but does not expand the definition of refugee beyond that found in the 1951 Refugee Convention. As Giner (2006, p 9) notes, this lack of clear definition was perhaps due to the late 1980s political climate, dissatisfaction with the Refugee Convention definitions and increased asylum restrictions across many western countries. Article 37(b) and the UJDL Rules 2 and 11 require that detention is used only as a measure of last resort, for the shortest appropriate time and only in exceptional cases. In addition, the UJDL require that the length of detention should be determined by a judicial authority, without excluding the possibility of early release and that a state should set an age limit below which it should be deprive a child of her liberty. These latter provisions have no equivalent in UK immigration law at present.

Originally in 1991 when the UK ratified the Convention, it entered a reservation allowing it to opt out of the provisions of the Convention in relation to immigration and asylum matters. Blake and Drew (2001, p.18) noted that the reservation was in extremely broad terms and that as a result, children involved in asylum claims in the UK were not guaranteed the same rights as other children in this country. This position led to increasing pressure from activists and consistent criticism from international and national bodies. In particular, the Committee on the Rights of the Child criticized the UK reservation as incompatible with the spirit and objective of the Convention (UN Committee 2002) and repeatedly urged the UK government to withdraw the reservation. For many years, this pressure was resisted by the UK government on the grounds that the reservation was necessary in the interests of effective immigration control (see, for example, Lord Filkin 2002). The concern of the UK government seemed to be that the UNCRC could provide a basis for children to gain new rights of entry and leave to remain on the basis of age (CRAE 2005).

In 2004, the Government introduced a duty to safeguard and promote the welfare of children in section 11 of the Children Act 2004. At the time, the Government chose to exclude immigration from those areas covered by the duty which applied to local authorities, police, probation services and others. Following repeated lobbying and narrowly lost votes on previous Bills, the Government was finally defeated in the Lords in 2008 on the Children and Young Persons Bill. In response, the Government finally removed its reservation to Article 22 of the UNCRC and agreed to legislate for the UK Borders Agency (UKBA) and its private contractors to be made subject to a duty in line with that in section 11 of the Children Act 2004. Section 55 of the Borders, Citizenship and Immigration Act 2009 now introduces that duty, intended to be the equivalent of section 11 as is made clear in the statutory guidance issued under the Act. The only caveat is that the duty only applies to children who are in the UK.

The Current Position

> A child migrant is likely to be the subject of adult decision making by a member of her family or others which not only places her in the complexities of the immigration system but also exposes her to significant harm which in any other context would trigger powerful child protection mechanisms *(*Crawley 2006 p v).

As argued above, the politicization of the category of asylum seeker over the last twenty years has had serious consequences for children in asylum seeking families. Despite a rash of legislation in this area aimed primarily at tightening restrictions and despite continual lobbying by pressure groups, the special vulnerability of children caught up in the system has often been disregarded. In general, there has been a tension between law and policy designed to protect children in the UK and the experience of children subject to immigration control, who have been marginalized from mainstream processes. It can be seen that the policy to increase the use of administrative detention for all asylum seekers has consistently failed to take into account the particular position of children. The consequence of this and of the opt out to the UNCRC has been that asylum seeking children were not seen as children first and foremost but as adjuncts of the adults in the family and as such as part of a group that needs regulating.

The Home Office has stated repeatedly that the removal of those living in the UK illegally must be a central tenet of any coherent immigration policy and that some form of detention or monitoring is necessary in order to facilitate removal after apprehension (UKBA 2009 a and b). As a matter of principle, this has met with little resistance. The justification offered for the need to detain families has centred on the adults in the family and a perceived risk of absconding, despite the fact that no evidence has been produced that families with children systematically disappear. Further, the Home Office has sought to justify the longer terms of detention and periods of re-detention often suffered by families as the fault of the family themselves, in that it is stated that it is often as a result of families exercising their rights to final appeals and/or judicial reviews (Evidence to the Home Affairs Committee 2009). Whilst Home Office figures suggest that the average time that families spend in detention is decreasing (from 16 days in 2008 to 15.58 days in 2009 according to evidence to the Home Affairs Committee 2009), other reports suggest that the average length of time that children and young people are being detained in increasing and that the decision to detain is not being used as a last resort or for the shortest period of time as required by Article 37 UNCRC. The Chief Inspector of Prisons found in 2008

that the average length of stay for children at Yarl's Wood IRC had increased from 8-15 days but that greater numbers of children were being detained for much longer (HMCIP 2008). This finding was echoed in a report from the Children's Commissioner of England (11 Million: Report of the Children's Commissioner 2009). It is difficult to assess the accuracy of the competing claims as the statistics that are available on the detention of children are incomplete and on occasion, inaccurate. Until 2009, the figures simply reflected 'snapshots' of children in detention taken on a particular day and there was no clear picture of the number of children detained annually or how long they had spent in detention. Home Office statistics produced in the latter part of 2009 for the first time gave more comprehensive figures on children held in immigration detention (Control of Immigration: Quarterly Statistical Summary, United Kingdom, April – June 2009). The figures indicated that 29 % of children had been held for over one month. In practice, this means that the Immigration Minister had to sign an authorization for continued detention in each of these cases. An analysis of these figures carried out by the interest groups, Bail for Immigration Detainees and the Children's Society, reveals that 56% of children detained were released back into the community and that children from countries such as Zimbabwe were held at a time when the Home Office not enforcing returns (The Guardian, 30 August 2009; Children's Society 2009). This clearly challenges the Home Office stance that detention is only used as a last resort, for the shortest possible time and only as a preliminary to removal. One notable omission from the recent statistics is that they do not reveal when there have been periods of re-detention of a family and so cumulative periods of detention are not reflected in the figures. Following the release of the figures, the Home Affairs Committee completed a short enquiry into families in detention and concluded that it was not clear why, if detention is the final step in the process and there is no evidence of families disappearing, they were continuing to be detained pending legal appeals (Home Affairs Committee 2009). The Committee appeared to accept that detention of families may be necessary but they recommended that after a fortnight the UKBA should notify the Home Office and Children's Commissioner and be in a position to justify the continued detention. They also recommended the use of alternatives to detention such as tagging, reporting requirements and residence restrictions prior to final legal decisions (Home Affairs Committee 2009). The effect of these recommendations, if any, has yet to be seen and further research will be necessary to monitor developments in this area.

The Effects of the New Legislation

"What difference will a child tomorrow in Yarl's Wood see as a result of the removal of the reservation?" (The Children's Commissioner quoted in the JCHR 25th Report 2008). Following the withdrawal of the reservation to the UNCRC, the UKBA unveiled a Code of Practice on Children: *Code of Practice for Keeping Children Safe from Harm* on 6 January 2009 which 'requires all UKBA staff to …keep children safe from harm by ensuring that immigration procedures are responsive to the needs of children…' This was followed by the introduction of the 'welfare principle' in section 55 BCIA 2009 and statutory guidance, *Every Child Matters: Change for Children*, issued under that section which came into force in November 2009. Whilst these provisions mark an important step forwards and indicate that the welfare of children in asylum seeking families must now be a primary consideration for the UKBA, refugee groups and practitioners have remained rightly skeptical of the practical impact of these measures (Webber 2009).

(1) The Welfare Principle

As noted earlier, the 'welfare' or 'best interests' principle has not been clearly defined in the UNCRC and there is little guidance in either the Code of Practice or new statutory guidance beyond referring to section 11 of the Children Act 2004. The new Guidance clearly states in Part 1 that the duty does not give the UK Border Agency any new functions, not does it override its existing functions (pg 6). Further, Part 2 which deals with the UKBA's specific role in relation to safeguarding children, starts by setting out its primary duty which is to maintain a secure border. It is clear from 2.19 that the UKBA does not envisage any change in its policies with regards to detention of asylum seeking children in families and this was confirmed by Phil Woolas, the Minister for Immigration in a letter to the JCHR in November 2008 (JCHR 2008 para 111). This raises the question of how the competing aims of maintaining a secure border and respecting the welfare of the child will be played out and which will prevail.

Clements (2006) has argued that some indication of how the 'welfare principle' may be applied in English courts can be gleaned from other cases where there the public interest is also at stake such as cases involving young offenders or the separation of mothers and babies at a particular age in prisons. She appears to support the kind of flexible approach seen in these cases, using on a combination of family life arguments under article 8 of the European Convention of Human Rights and 'best interests' principles to gain the best outcome from the view point of the child. In contrast, Drew and Nastic (2009, p 5) suggest that such an approach is unsystematic and unpredictable. They recommend using guidance from the UNCRC Committee, UNICEF and UNHCR to guide the courts on the intended meaning of 'best interests' and how such questions should be approached.

Whilst both of these approaches have advantages, the lack of a clear definition remains problematic as it leaves scope for differing interpretations of 'best interests' to be mobilized to the detriment of the detained child. As was noted earlier, the weakness of the 'best interests' principle is that it is not a universally recognized concept but inherently subjective (Giner 2006, p 22). As can be seen from the debates during the drafting of the UNCRC and the subsequent immigration opt out by the UK, states fear that families deliberately use their children in the immigration context and this fear can been seen consistently in the negative images of asylum seekers that have been prevalent in political and social discourses since the 1980s. One such image that has raised its head repeatedly is the construct of asylum seekers as irresponsible parents, who deliberately place their children in a position where they have to be detained by either continuing with fruitless appeals to block their return or refusing to return home once their asylum appeals are rejected (UKBA Policy on Detention of Children 2009b). As Giner (2006) has argued, when such arguments are raised, it is clear that children not considered in their own right but as 'passive objects dependent on adult decisions and actors'. Further, the Government has built upon the construct of the irresponsible parent to suggest that it is the state who needs to intervene to protect these children from their parent's decisions and in fact, a deterrent policy for asylum seeking families protects the child's long term welfare, since it is not in the child's best interests to support the family here when they have no long term future in the UK (Hughes in JCHR 2004a: 40; Every Child Matters; Change for Children para 2.21). In relation to the need to detain children, the government then continues to dismiss opposition to detention by arguing that

it is not in the child's best interests to separate them from their family and that in fact by detaining the whole family, they are preserving family life (Hughes in SC Deb (B) 27/01/2004 c416; Every Child Matters; Change for Children para 2.19; UKBA Policy on Detention of Children, 12 August 2009). The clear implication from these arguments is that 'once the Immigration Service has taken control of the dangerous and irresponsible parents, the child sensitive administration will make sure that the needs of the children are met in detention facilities designed for children' (Giner (2006) p 24). As Giner perceptively notes 'the fact that parents may compromise the bests interests of British society at large apparently justifies adapting the best interests of the child to a secured environment' (2006, p 24).

(2) The Code of Practice and Statutory Guidance

The limitations of the 'welfare principle' in isolation are also reflected in the provisions of both the Code of Practice and in the statutory guidance that has superseded it. It is clear from both documents that no immigration procedures affecting children have been changed and there is no intention of changing these procedures in the near future. Whilst the Code seeks to limit and monitor the detention of children, there is still no statutory ban on detention or time limit on their detention. The Guidance continues to envisage detention lasting more than 28 days, despite recommending a 2-3 day limit, which suggests that children will continue to be detained inappropriately and for excessive periods. Decisions to detain and all subsequent automatic reviews of that decision are to continue to be made within the Home Office and are not subject to automatic judicial oversight. As BID notes, this leaves the onus on the family to know what bail is, how to apply for it and what evidence needs to be gathered for a successful application (BID briefing paper Feb 2009). It is suggested that without such measures or any clear recognition of the potentially harmful impact of detention on children, the safeguards that are proposed to keep children safe from harm in detention are not meaningful and continue to place the UK in breach of its international obligations under the UNCRC and UNJDL.

The recommendation of Home Affairs Committee that local authorities play a greater role in detention, that they should be notified of any period of detention and then undertake statutory responsibilities in relation to the child's welfare does not appear to have been followed (Home Affairs Committee 2009). Instead, the guidance makes clear that the primary responsibility for monitoring children in detention will remain within the Home Office save in very limited and extreme circumstances. What this implies is that although the appointment of a senior member of staff as a Children's Champion (para 2.9) staff training (para 2.14) and inter agency co-operation (para 2.29), for example with the local safeguarding children's boards (LSCBs) where appropriate, are envisaged in the near future, the UKBA does not appear to see the need to move to a different approach in order to incorporate children's rights into the asylum system. Further, it is clearly stated the documents provide guidance only and there is provision throughout the documents to depart from the guidance if there are clear reasons for doing so (para 6, pg 5). This does not seem to be proposing an asylum system modeled on the highest standards applied to children, in which their best interests are taken as a primary consideration. In particular, the guidance makes clear that both section 55 and the guidelines create no new or overriding duty which will interfere with the UKBA's primary function to uphold the integrity of the immigration control system (pg 5, para 8). On the contrary, the emphasis throughout the documents is to try to make children understand and adapt to immigration processes rather than

modifying them to meet children's needs. Nowhere does the Code address, for example, the procedures, practices and rights of the child during the appeals process, an area that has long been criticised for poor decision making based on a 'culture of disbelief' for adults and children alike (New Statesman, 4 September 2008; Asylum Aid 1999; Amnesty International 2004).

(3) Other changes and the assumption that detention is necessary

In the debates surrounding the introduction of the new legislation and guidance, the government has been at pains to demonstrate that it is responding to negative reports about detention centres such as Yarl's Wood and that significant improvements have been made (UKBA policy on detention of children, 12 August 2009). The reports from both the Chief Inspector of Prisons in 2008 and the Children's Commissioner for England in 2009 expressed significant and continuing concerns about the lack of activity for children and detention of children at Yarl's Wood. The Inspections found children with disabilities who ought not to be detained at all, children detained for over 4 weeks and ineffective and inaccurate monitoring as well as inadequate education and after school activities (HMCIP Report August 2008; 11 Million 2009). In placing considerable emphasis on its efforts in this area, it is clear that the government remains convinced that detention of children is necessary and the question is how to manage it, but is this really the case? The Home Affairs Committee, reporting in November 2009, found that there had been improvements at Yarl's Wood but they described these improvements as 'tackling the symptoms of the problem rather than the cause' (Home Affairs Committee 2009). As has been argued by a number of groups supporting asylum seekers, sustained improvements in the treatment of children in the immigration system can only come about as a result of reform of the overall asylum system (ILPA and the Children' Society in JCHR 25th Report, 2008). Focusing on an improvement at Yarl's Wood does not address the wider issues and in the light of figures showing that 23% of decisions are overturned on appeal, there remains a need for a more streamlined asylum process with higher standard of decision making at the earlier stages (Figures from Oct 2008 cited in Home Affairs Committee 2009). ILPA and Children's Society suggest that withdrawal of the reservation demands a 'root and branch review of the way that the asylum system treats children…to ensure that the decision making throughout the asylum process fully evaluates and acts upon their best interests'. (JCHR 25th Report 2009, p37)

Interestingly, despite the legislative changes, the Joint Committee on Human Rights remains concerned that the government has not made a case for detaining families and on the available evidence, this would seem to be correct. Following on from their earlier report on the *Treatment of Asylum Seekers* (JCHR 10th Report 2007), they found that there was 'still no evidence of a systematic risk of absconding and that detention is costly and incompatible with the welfare of the child'. In place of detention and in common with the Children's Commissioner for England, they recommend a system of incentivized compliance, such as that implemented in the US, Sweden and Australia (Crawley and Lester 2005). One such project, the Millbank Project in Kent, has recently been trialled by the Home Office and ended in summer 2008. This was a pilot project aiming to set up an alternative removal process, which encouraged closer case work activity with families in supported accommodation. Families awaiting deportation were housed in a residential centre rather than a detention facility. It was hoped that families would voluntarily return but by the end of the pilot only one family did so. BID and Children's Society believe was a missed opportunity. They state that families were not told why they were being

sent to the Project, were given little time to prepare, that the referral criteria poor and some families referred who could not be returned home due the current Home Office policies on the risk in their home countries (Evidence to JCHR 25th Report 2008). Whilst the UKBA appear discouraged by the results of the pilot, the arguments that it was not properly set up would suggest that any conclusions that can be drawn as to its effectiveness should be challenged. One way in which such a programme could be improved would be through a model which consists of much earlier engagement with families to enable a building of trust between the families and the UKBA earlier in the process as suggested by the Children's Commissioner (Evidence to JCHR 25th Report 2008). It is to be hoped that a more recent Project, which is currently being piloted in Glasgow, takes the shortcomings of the earlier pilot into account and meets with more success. However, in the end, the success of such Projects will depend very much upon further significant change in the asylum process, the assumptions underlying it and a real shift towards recognizing the children in asylum seeking families are children first and migrants second.

Conclusions

As can be seen from the previous discussion, the negotiation of the relationship between asylum policy and the best interests of the asylum-seeking child has been particularly challenging in recent years. Recent legislation and the debates that have surrounded it show that the tension between the UK's commitment to children and the desire to maintain a firm immigration control has not yet been resolved and that recent legislative change, whilst welcome, will not end the policy of detaining children in asylum seeking families or even improve their position substantially without further substantial change within a broader reform agenda encompassing legislative norms, policy and public perception. It cannot be doubted that the Government does understand that it has a commitment to all children and it is clear is that the controversy over asylum seeking children does not result from a 'divergent understanding of childhood between the state and its opponents per se but rather from the consideration given to adult asylum seekers and the standards set for the entire asylum process' (Giner 2006, p4). In the light of this, what are now needed are urgent efforts to redress the negative way in which all asylum seekers are depicted in order to persuade a government, which remains in favour of applying a system based on deterrence with detention as a central measure, to replace this with a child centred asylum system, which would allow an individual approach taking into account each person's relevant material, physical and psychological condition. It is only if such changes in practice, policy and rhetoric take place that the detention of families in the UK for the purposes of immigration control will end.

Bibliography

Amnesty International (2004) *Get It Right: How Home Office Decision Making fails Refugees*, February 2004
http://www.amnesty.org.uk/uploads/documents/doc_15239.pdf (accessed 2 January 2010)
Asylum Aid (1999) *Still No Reason At All: Home Office Decisions on Asylum* Claims, May 1999
http://www.asylumaid.org.uk/data/files/publications/46/Still_No_Reason_At_All.pdf (accessed 2 January 2010)
Aynsley-Green, A (2008) 'No Place for Children' *New Statesman*, September 4.

Bagilhole, B (2003) 'Soft Haven? A Critical Analysis of the Treatment of Asylum Seekers in the UK', Paper delivered at ECPR conference, Marburg, 18-21 September.
www.essex.acv.uk/ecpr/events/generalconference/marburg/papers/10/10/Bagilhole.pdf
(accessed November 26 2009)
Bail for Immigration Detainees, (2009) Briefing paper on Children and Immigration detention – February 2009
http://www.biduk.org/library/BID_briefing_on_children_and_immigration_detention.pdf
(accessed November 13 2009)
Bentley, KA, (2005) 'Can there be any universal Children's Rights?' *International Journal of Human Rights*, 9(1): 107-123
Blake, N & Drew, S (2001) *Legal Opinion of Nicholas Blake QC, Matrix Chambers and Sandhya Drew, 'In the Matter of the United Kingdom reservation to the UN Convention on the Rights of the Child.'* Available from:
http://www.segregation.org.uk/legal opinion.pdf (accessed 12 December 2009)
Bloch, A & Schuster, L (2002) 'Asylum and Welfare: Contemporary Debates', *Critical Social Policy*, 22(3): 393-414
Bohmer, C & Schuman, A. (2008) *Rejecting Refugees: Political Asylum in the 21st Century*, Routledge, London
Children's Commissioner (2009) '11 Million: The Arrest and Detention of Children subject to Immigration Control: A report following the Children's Commissioner for England's visit to Yarl's Wood Immigration Removal Centre, 24 April
http://www.11million.org.uk/immigration_control_full_report.pdf (accessed 2 November 2009)
Children's Society (2009) 'Home Office statistics reveal scandalous extent of detention of children', Press Office, 31 August 2009
http://www.childrenssociety.org.uk (accessed 2 November 2009)
Children's Rights Alliance for England (2005) 'Memorandum, Written Evidence for the Joint Committee on Human Rights.'
http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/99we04.htm (accessed 26 November 2009)
Clements, LM (2006) 'The Treatment of Children under the UK Asylum system – Children First and Foremost?' 5 Web JCLI
Cohen, R (1994) '*Frontiers of identity: The British and the Others'*, London, Longman
Coker, J, Finch, N. & Stanley, A. (2002) '*Putting Children First: A guide for immigration practitioners'*, LAG, London
Crawley, H (2006) '*Child First, Migrant Second: Ensuring that Every Child Matters'* ILPA Policy Paper
Crawley, H & Lester, T (2005) *No Place for a Child: Children in UK Immigration Detention: Impacts, Alternatives and Safeguards*, London, Save the Children.
Drew, S & Nastic, D (2009) 'The immigration reservation to the Convention on the Rights of the Child: an insuperable difficulty no more', *J.I.A.N.L* 119
Doward, J (2009) 'Anglican 'Santa' barred from giving gifts to children at detainee centre' *The Observer*, December 13
Dugan, E (2009) 'Inside Yarl's Wood: Britain's shame over child detainees', *The Independent*, April 26
Gibney, M. J. (2004) *The Ethics and Politics of Asylum*, CUP, Cambridge

Giner, C (2006) 'Asylum and Childhood in the UK; A Highly Political Relationship', *Refugee Studies Centre, Working Paper Series No. 34*
http://rsc.ox.ac.uk/PDFs/WP34_Asylum_and_Childhood_CG.pdf
(accessed 4 November 2009)
HMCIP (2008) *Report on an Announced Inspection of Yarl's Wood Immigration Removal Centre (4-8 February)*, London, Her Majesty's Inspector of Prisons
Home Affairs Committee (2009) '*The Detention of Children in the Immigration System*, First Report of Session 2009-10, HC 73, 29 November 2009
Home Office (1998) *Fairer, Faster and Firmer: A Modern Approach to Immigration and Asylum*, London, Stationery Office
---------- (2002) *Secure Borders, Safe Haven*, London, Stationery Office
---------- (2009) *Control of Immigration: Quarterly Statistical Summary, United Kingdom, April –June 2009*
http://www.homeoffice.gov.uk/rds/pdfs09/immiq209.pdf (accessed 23 November 2009)
Hughes, B (2003) 'Supplementary Memorandum submitted by Beverley Hughes, Minister of State, to Home Affairs Committee' Evidence, 44-5 in Home Affairs Select Committee, *Asylum and Immigration (Treatment of Claimants etc.) Bill, First Report of Session 2003-4*
---------- (2004) Letter from Beverley Hughes MP, Minister of State, in Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants etc.) Bill, Fifth Report of Session 2003-4*
Joint Committee on Human Rights (2004) *Asylum and Immigration (Treatment of Claimants etc.) Bill: Fifth Report of Session 2003-4*, HL Paper 35, HC 304
http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/161/161.pdf (accessed 26 November 2009)
---------- (2007) *The Treatment of Asylum Seekers: Tenth Report of Session 2006-7*, HL Paper 81 -I, HC 60-I
www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf (accessed 3 January 2010)

---------- (2009) *Children's Rights, Twenty Fifth Report of Session 2008-2009*, HL Paper 157, HC 318
http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/157/157.pdf
(accessed 3 December 2009)
Lord Filkin (2001) Letter to the Committee from the Parliamentary Under Secretary of State for the Home Office re the Nationality, Immigration and Asylum Bill in Twenty first Report, Session 2001b02, Scrutiny of Bills: Further Progress Report, HL Paper 159/HC 1141, Ev 2, London, Stationery Office.
Macdonald, I & Toal, R (2008) *Macdonald's Immigration Law & Practice'* (7th Ed.), Butterworths, LexisNexis, London
McVeigh, K, (2009a) "Ministers under fire for locking up immigrant children", *The Guardian*, August 30
---------- (2009b) 'Immigration and Detention – codes of practice', *The Guardian*, August 30
---------- (2009c) 'Children made 'sick with fear' in UK immigration detention centres', *The Guardian*, October 13

Schuster, L & Welch, M (2005) 'Detention of Asylum Seekers in the UK and US: Deciphering Noisy and Quiet Constructions', *Punishment and Society* 7(4): 397- 418
UK Borders Agency (2009a) '*Code of Practice for Keeping Children Safe from Harm'*, Code of Practice issued under Section 21 of the UK Borders Act 2007 http://www.ukba.homeoffice.gov.uk/sitedocuments/aboutsus/consulations/keepingchildrensafe/codeofpracticechildren?view=Binary (accessed 26 November 2009)
UK Borders Agency (2009b) '*UK Policy on Detention of Children*'. UKBA Response to 11 Million, 12 August http://www.eera.gov.uk/GetAsset.aspx (accessed 20 December 2009)
UK Borders Agency (2009c) '*Every Child Matters: Change for Children'*, Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, November 2009. http://www.ukba.homeoffice.gov.uk/sitedocuments/aboutus/policyandlaw/legislation/bci-act1/change-for-children.pdf (accessed 22 December 2009)
UN Committee of the Rights of the Child (2002) *Consideration of Reports submitted by states parties under article 44 of the Convention – Concluding observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/15/Add.188
Veerman, P.E, (1992) *The Rights of the Child and the Changing Image of Childhood*, London, Martinus Nijhoff.
Webber, F (2009) 'New Immigration code does not fully protect children', IRR news http://www.irr.org.uk/2009/january/bw000006.html (accessed 2 December 2009)
Woolf, M, 2003, "Coming of Age? – The Principle of "The Best Interests of the Child", *E.H.R.L.R. 205*