Home Office

To:

1. **Permanent Secretaries**
2. **Minister for Immigration Compliance and Justice**
3. **Home Secretary**

From: Name Redacted
Name Redacted, Head of UASC Policy
SCS: Miv Elimelech/Ailish King-Fisher
Date: 14 July 2021

Unaccompanied asylum seeking children (UASC) in Kent

Issue
Current operational, legal and policy challenges resulting from Kent County Council's (KCC) derogation from their statutory duties under the Children Act 1989 in respect of UASC alongside significant numbers of UASC arriving on small boats. As notified separately, a critical incident has been declared at Kent Intake Unit (KIU).

Timing:

- **Priority/Urgent –** the rate of arrivals of UASC requires an urgent reconsideration of the Government position on mandating the National Transfer Scheme.

Recommendation
That you, Ministers:

- **Note** the immediate operational and challenges and risks at KIU (para 1-3);
- **Note** the alternative accommodation options we are pursuing WP Privilege

Without Prejudice Privilege

- **Note** our intention to procure independent accommodation provision for UASC as an alternative to KIU (8.iii); and
- **Agree** to re-insert a mandatory backstop into the National Transfer Scheme (NTS) to offer the necessary resilience for transfers in the coming weeks and months.

Devolution implications: Yes – see para. 26.

Has the use of analysis/ evidence/ data/ statistical information in this submission been agreed by Home Office Analysis and Insight? N/A

Equality Duty: all decisions made by the Home Office need to be taken with due consideration for the impact on people with protected characteristics, as per the Public Sector Equality Duty.

Has an Equality Impact Assessment been completed? At this stage we do not consider that the recommendation to mandate will result in any unlawful discrimination. We will continue to consider any potential impact on protected characteristics as development progresses.

Has the central Home Office finance team been consulted? Yes

Has relevant legal advice been received? Yes

Do any options considered in this submission involve changes to primary or secondary legislation (including Immigration Rules)? No

Has the deliverability of the proposal been assessed with the Portfolio and Project delivery team, and the Commercial team? Yes

Media interest: Medium

Opportunity for proactive media: No

Annexes

Annex A: **Without Prejudice Privilege**

Annex B: Mandating the National Transfer Scheme proposal – as per previous advice to Ministers on 6 May 2021.

Annex C: Local authority transfer breakdown

Background

1. **Kent County Council's (KCC) derogation from their statutory duties under the Children Act 1989, and a corresponding spike in the intake of unaccompanied asylum seeking children at Kent Intake Unit (KIU), has resulted in an operational situation where, despite concerted effort, children are remaining at KIU for extended periods of time.** Since 14 June 2021 114 UASC have been transferred direct from KIU to alternative local authority care. Following the large number of arrivals on 10 and 11 July, up to 66 UASC currently remain at KIU (and Frontier House), though a small number are awaiting age assessments and if assessed to be clearly adults will be dispersed to adult accommodation – typically 72% of age assessments at KIU are determined as adults. Whilst the majority of children in KIU have been transferred to other local authorities within 48 hours, on 14 July there was one case who had been at KIU 10 nights due to challenges finding a suitable placement.

2. **Once a UASC has been screened they would normally be released to the Refugee Council supervised space which has a maximum of 15 places or, if that is full, to the Atrium, which until today has been an unsupervised space (from today youth workers will be providing supervision in this area).** There have been occasions where both areas have been full and UASC have been held in the short term holding facility for longer than permitted by law. We received legal advice from Lisa Giovannetti QC that Legal Professional Privilege Legal Professional Privilege Therefore, we are now releasing children as soon as they have been processed. They are then either supervised by the Refugee Council if there is space or in KIU's Atrium. The Refugee Council facility is risk assessed to supervise a maximum of 10 young people but we have provided some temporary additional space to accommodate up to 15 children. At the time of submitting, there are 16 children with Refugee Council and 44 in the Atrium. Asylum and Protection have sourced DBS cleared support workers to provide more appropriate supervision of children in the Atrium space, and to provide some resilience should Refugee Council decide to withdraw their services (Refugee Council are seriously concerned regarding the current situation but are willing to remain for the time being – you will receive advice on the contract with Refugee Council shortly).

3. **The operational situation in KIU for UASC is critical**. In recent days there have been children who remained at KIU, without a bed, with minimal entertainment, no structured meal plan, and bathroom facilities in poor condition which are shared with adult migrants in excess of 10 nights. Teams in KIU, including the Refugee Council, Home Office employed social workers, and Asylum & Protection immigration officers are all working to ensure children are supervised and cared for as best they can in these circumstances. Despite this, KIU is not a secure location for children to remain for this length of time. The Refugee Council report they are observing a deterioration in the mental health of the young people in this situation. The children do not have access to the sort of one to one social and health care provision they are entitled to, ordinarily provided by a local authority presenting particular risks for the cases of self-harm, food refusal, and general poor health (several UASC have required hospital treatment over the last few weeks). There is also the risk of young people absconding, as they are not detained and we cannot prevent them from leaving – three young people left the KIU on their own on 14 July.

Discussion

4. **Whilst the NTS voluntary scheme is being 'soft launched' on 26 July and KCC are offering some capacity within their care structures (which we are working hard to agree with them), we believe that a combination of factors, including serious safeguarding concerns, intake levels, and litigation risks, necessitates an urgent reconsideration of the decision not to have a mandatory NTS.**

5. **Despite significant lobbying efforts, it remains challenging to secure sufficient placements, within a reasonable timeframe, for the level of arrivals of UASC into Kent.** Without a sustainable alternative course of action, the risk children remain at the KIU beyond a 'reasonable' length of time continues. **Legal Professional Privilege**

Legal Professional Privilege

6. **Legal action is already currently being taken against the Home Office in three separate challenges involving policies related to KIU**:

   i. Kent County Council Pre-Action Protocol correspondence challenging the legality of the decision not to mandate the NTS;
   ii. Detention Action Pre-Action Protocol correspondence challenging the legality of detention at KIU, and the related issue of functioning of the NTS;
   iii. Instalaw Judicial Review challenging the short age assessment policy in place at KIU (permission granted).

7. **Home Office and DfE officials considered utilising DfE's power to direct KCC to comply with their statutory obligations, but this is no longer considered a viable option.** **Legal Professional Privilege**

Legal Professional Privilege

8. **We are urgently pursuing alternative solutions/opportunities to ensure children are moved out of KIU as quickly as possible, for their safety and wellbeing. You are asked to <u>note</u> the following:**

   I. **<u>We are continuing to seek further immediate placements from other Local Authorities</u>.** Given the challenges converting local authority offers in to concrete placements to meet demand we need more placements to place the numbers of children arriving. **You (Home Secretary) have recently written jointly with DfE Secretary of State to all Council Leaders to seek further urgent support.**

II. Without Prejudice Privilege

III. **In light of this it is vital that in parallel, we explore the direct procurement of accommodation suitable for UASC that would be more appropriate than KIU.** While Immigration legislation provides for accommodating destitute asylum seekers, we have no legislative basis to accommodate unaccompanied children, including through our section 55 duties to act in the best interest of the child. Accommodation of children is governed by the Children Act 1989 which gives duties to LAs. We will provide further advice once we have options, given the speed at which we need to stand this up it is likely to include hotels with appropriate additional wrap around support.

Where Parliament has not legislated in a particular area Ministers can rely on prerogative powers. Legal Professional Privilege

Legal Professional Privilege

Legal Professional Privilege

Legal Professional Privilege

9. Without Prejudice Privilege

WP Privilege In theory, the new voluntary rota scheme for the NTS has been designed so that a region is identified immediately by the rota and the transfer is complete within ten days but this will depend on intake volumes and other factors may also impede transfer such as age dispute, meeting complex needs and domestic intake. Without Prejudice Privilege

Without Prejudice Privilege

10. **We remain concerned that in the current context the voluntary NTS rota will not deliver the full capacity required for the level of intake.** Officials are doing all they can to get regions ready and setting the clear expectation that the rota operates as intended. We are working at pace to 'soft launch' the new NTS national voluntary rota on 26 July and holding a national event with Directors of Children's Services on 15 July. We will continue our engagement with regions and devolved governments to facilitate the first rota cycle. However, the ability of the rota to meet the demands of current high intake will be tested very quickly. At best, we will have enough support to deliver the first 50 placements, which at current intake levels could take us up to the first week of August. Whilst there is a degree of positivity regarding the new rota and the wider package that goes with it, there is significant reluctance by local authorities to commit to the new scheme at the scale that we need in order to make it a success. Derby have written to say they will not be participating, and London local authorities are threatening to do the same (in part because they do not agree with the way in which we are seeking to gradually reduce their contribution over time rather than acknowledging their current contribution and reducing their allocation from the start).

11. **We therefore remain of the view that it is essential to have an emergency mandatory backstop element within the NTS model.** In May, you (Ministers) decided against a mandatory backstop, instead preferring to incentivise the voluntary scheme. Despite the package of incentives being introduced alongside the new voluntary rota, the current rate of intake and Kent's derogation of its duties has created a situation where it may not be possible for the voluntary rota to keep up with demand and pace. Mandating the NTS is not an immediate solution in terms of implementation (the legislation requires us to give 14 day notice to local authorities of our intention to mandate), and some local authorities may continue to resist mandatory transfers, but should the rota fail in early August we need a solution in place that protects against a repetition of the current potential breeches to individuals' human rights. Also, if we are able to demonstrate a willingness to move to mandating transfers if required, we anticipate KCC would step in more immediately to assist with the cases currently at KIU. **Reintroducing a mandatory backstop is therefore a necessary course of action in the current circumstances to quickly safeguard the children currently at, and immediately due to arrive, into Kent, even with the other mitigations being pursued.**

12. **Whilst you have previously rejected the idea of including a mandatory backstop in the NTS model, in light of the situation in KIU are you, Ministers, willing to reconsider your position on mandating the NTS? If so please see previous proposal as set out in May 2021 at Annex D.**

13. **Given the need for a write-around if you (Ministers) are willing to reconsider an urgent conversation would be needed with DfE SoS who, we understand, remains opposed to the idea.**

Financial implications

14. **Without Prejudice Privilege**

Without Prejudice Privilege The Asylum Support budget is under severe strain with a reserve claim due to be submitted to Treasury imminently for an additional £270m to cover exceptional forecast expenditure over and above the current available budget. Any additional costs incurred would add to this pressure.

Deliverability implications

15. We will provide further advice in due course on the alternative accommodation options, including deliverability and costs.

Analysis and insight

16. Not applicable.

Legal considerations

Legal Professional Privilege

Legal Professional Privilege

Media handling advice and correspondence lines

21. **There is continued media interest in the situation facing UASCs who arrive across the Channel, with KCC's recent announcement that they could accommodate no more receiving widespread coverage.** Prominently featured in such reporting are criticisms from charities and stakeholder groups that the Government is breaching its statutory duty and 'detaining' children at the KIU. There was also fairly widespread coverage of the changes to the National Transfer Scheme with media including the BBC questioning why the decision was made to keep this voluntary. Should it come to light that children are being

accommodated for several nights, often unsupervised, which seems likely given the interest in this space, this would result in significant, highly critical reporting.

22. **Should you agree to introduce a mandatory backstop, we will prepare reactive lines justifying this development.** It is highly likely that a decision to mandate will quickly enter the public domain via local authorities – both those aggrieved and those supportive of such a move. Any lines would position this is as further evidence of the urgent need for reform of the system that the Nationality and Borders Bill will deliver, while acknowledging the exceptional circumstances that require mandating the NTS. Lines will be sent for clearance in the usual way. If possible we will seek to work with policy to explore supportive voices for the decision in order to justify the move.

Public Sector Equality Duty

23. **You are asked to note the Public Sector Equality Duty**.

> ***'Public Sector Equality Duty***
>
> *You are obliged to have due regard to the need to—*
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*
> *(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;*
> *(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

24. **We do not consider the options provided in this submission give rise to any particular discrimination issues**. However, you should consider that the current situation in KIU could result in unlawful discrimination on grounds relating to protected characteristics (primarily, but not limited to, race age and sex). Therefore you should have due regard to the factors in the PSED when making a decision about next steps.

25. We will keep the situation under review and provide further detail on your public sector equality duty in due course.

Parliamentary considerations

26. **There are no Parliamentary handling considerations arising from this advice at this stage.** We will provide further advice on Parliamentary handling alongside once the new NTS package is finalised with DfE.

Devolution / Union issues

27. **Children's social care is a devolved matter and therefore DfE can comment only on the implications for England.** We are working with representatives of Local Government and the Devolved Administrations in Scotland, Wales and Northern Ireland to build support for the new NTS the four nations of the UK. In particular we recognise the different legislative, financial and political circumstances in the devolved nations and are working to agree ambitious and realistic allocations of transfers under the voluntary rota for each. The plans we were developing for potential mandatory transfers also reflect the need for caution in application to devolved nations given that consultation responses from

local authorities in devolved nations were strongly against a mandatory approach.

Copy list: Home Secretary, Ministers, Permanent Secretary, Second Permanent Secretary, Special Advisers, Minister's Private Secretary, Press Office Immigration Desk, Home Office Legal Advisers - Immigration and Asylum Team, Parliamentary Team, Glyn Williams, Emma Haddad, Graham Campbell Name Redacted Jackie Power, Dan Hobbs, Sean Palmer, Miv Elimelech, Neil Forshaw, David Draper, Name Redacted Asim Hafeez, Name Redacted Name Redacted

Annex B

Proposed mandatory backstop process

Emergency mandatory backstop

1. **Following Name Redacted advice of 21 January, you (Ministers) agreed for officials to continue to develop proposals for a mandatory backstop policy, and that the guiding principle behind the backstop should be to pre-empt a crisis situation where an LA suspends their statutory duties before it emerges. In response to a further submission on 6 May which contained the information below Ministers indicated they no longer wished to pursue a mandatory backstop element to the NTS. If you agree to reconsider your position, the below sets out the approach we would propose to take.**

2. This annex provides further detail on our proposed mandatory backstop process. In line with our statutory duty under Section 55 of the Borders, Citizenship and Immigration Act, you (Ministers) agreed the best interests of the child must underpin the decision to mandate and its operation, and that it is essential we protect the capacity of local authorities to deliver their statutory duties to the children in their care.

Proposed four-step process

3. **Our proposed four-step process for considering, invoking and implementing the mandatory backstop seeks to balance a range of factors: the need to ensure it is exercised only as a last resort, to maintain broad support for the new NTS package among local authorities and from DfE Ministers, and to ensure it can be deployed in good time to pre-empt a crisis situation.** As you (Ministers) agreed following our earlier advice, the final decision to mandate rests with Ministers. Our four proposed steps are:
    1) Initial advice to Home Office and DfE Ministers triggered by problems identified based on key indicators of NTS performance.
    2) Solutions sought within framework of the voluntary system via NTS governance framework. If problems persist, Ministers advised on whether to trigger the backstop.
    3) If Ministers decide to trigger the backstop, the Home Office writes to local authorities giving them 14 days' notice of intent to mandate transfers.
    4) Backstop implemented, with transfers mandated by the Home Office, according to agreed allocation model.

    This process and our recommended approach to allocating transfers under the backstop is set out in more detail below.

Step 1: Problems identified

4. **Where NTS reporting or other information channels (e.g. information from DfE or direct communication from local authorities) show problems emerging in key indicators of NTS performance, this will trigger advice to Ministers.** We propose four indicators of NTS performance to inform the triggering of advice and consideration on invoking the backstop in steps 1-3. These are:
    1) **Time taken for transfers** – where there is a concerning rise in the average time from entry into care until transfer;

2) **UASC numbers in one or more LA** – where the numbers of UASC in care in one or more local authority significantly increases;
3) **Unacceptable risks posed to children** – where circumstances arise in one or more LA where children are put at unacceptable risk;
4) **Health of wider children's services** – where HO is made aware - from an LA, DfE, or other source - of a significant increase in pressure on wider children's services in one or more LA.

We believe these indicators will provide Ministers with appropriate flexibility in deciding when to invoke the backstop, in contrast to tight numerical thresholds which may bind Ministers' hands. This will help guard against local authorities attempting to game the system. It also allows us to better account for unpredictable external factors, for example the impact of COVID on local authority capacity.

5. **We also propose Ministers reserve the power to mandate in individual cases where there may be exceptional needs, such as serious medical issues, and where a voluntary offer for an appropriate permanent placement is not forthcoming**. We expect this to be a highly unusual situation.

Step 2: Options discussed

6. **To demonstrate our commitment to the voluntary NTS, in the intervening period between our initial advice to Ministers and our final advice on whether to invoke the backstop, we propose discussing available ways forward with the NTS governance framework.** We also propose commissioning the advice of independent and/or expert bodies, including the Children's Commissioner, the Chief Social Worker and Ofsted, where appropriate. **Legal Professional Privilege** **Legal Professional Privilege** We will need to consider how this would work in further detail, and how it should be framed, including potential handling issues.

7. **If the problems identified in step 1 persist in spite of the solutions sought and pursued via the voluntary framework, Ministers will be advised on whether to invoke the backstop.** As agreed following our earlier advice, the final decision to mandate rests with Ministers. While the 2016 Act legislation is clear the powers sit with the Home Secretary, Cabinet Office advise this should be agreed collectively, and subject to further discussions you (Ministers) may wish to consider DfE Ministers taking a more active and formal role in the decision-making process to secure their support.

Step 3: Backstop invoked

8. **If Ministers decide to invoke the backstop, under section 72 of the Immigration Act 2016 we must give local authorities 14 days' notice in advance of a mandated transfer, during which period authorities may make written representations to the Home Office about the proposed transfer.** Therefore, before making any "direction" to a local authority to receive a transfer we will need to write to every local authority we intend to mandate transfers to, setting out the projected number of transfers we expect to mandate to them, and the expected timeframe for doing so.

Step 4: Allocating transfers

9. **Our proposed model for allocating transfers under the mandatory backstop is to operate the regional rota (as we will have established for voluntary**

transfers), with an intra-regional rota to assign transfers to specific local authorities. We will seek to mirror the voluntary rota as far as possible, to maintain the equitable distribution between regions it provides. Local authorities broadly welcomed the principle of the rota system in the consultation, and we have agreed enhanced modelling with the UASC Governance Board. The proposed model includes 5 factors, to reflect the population size of a region as well as pressures on children's services and pressures relating to the supported asylum population. Our preference is for Strategic Migration Partnership (SMP) UASC coordinators to coordinate intra-regional allocation systems for their regions, as in the voluntary system. In the event this is not possible in some regions, the Home Office would need to *prescribe* an intra-regional rota for those regions as a fallback. Annex B sets out the indicative numbers of transfers which local authorities in each region might receive under two options: a taxi rank model, and a local authority-level rota weighted by total child population relative to other local authorities in its region. We recommend the latter following feedback from the Children's Minister.

10. **The allocation system must also have the necessary flexibility to take account of the best interests of the child, issues around certain local authorities' children's services, and representations made during the 14-day notice period.** We are considering a combination of approaches to allow for this, and will work these up into more detailed, formal advice.

Enforcement

11. **Where a local authority refuses to comply with a direction, options for enforcing mandatory transfers are limited.** Legal Professional Privilege

Legal Professional Privilege

Funding for mandated transfers

12. **Mandating transfers to local authorities will impose a "new burden" on them and so must be subject to a New Burdens Assessment (NBA) and any identified costs met.** The NBA process for mandated transfers has begun with MHCLG. LGA support for the proposed funding uplift for UASC and care leavers will be key to gaining approval from MHCLG. While the costs for supporting UASC and care leavers varies across local authorities, we anticipate that the uplifted rate for care leavers of £270 per week and the higher rate of £143 per night for UASC will satisfy the LGA for the purposes of the NBA.

Devolved nations

13. **Given the varying political, legislative and funding contexts in the devolved nations we will need to be cautious in allocating transfers under either voluntary or mandatory aspects.** In addition, consultation responses from local authorities in Wales and Scotland were strongly opposed to any mandatory approach to transfers. We are engaging with the Strategic Migration Partnerships for the devolved nations and with representatives from the Devolved Administrations to discuss their particular circumstances and to agree

a realistic contribution to transferring UASC under voluntary rota arrangements. The provisions in the Immigration Act 2016 that would underpin any mandatory transfers have territorial extent to the Devolved Administrations. We have therefore begun to discuss with devolved partners how the backstop might apply in devolved nations. These initial conversations have been positive on the basis that the expected contribution would reflect the number of transfers agreed for the voluntary rota.

Indicative transfers to each local authority under both a 'taxi rank' and weighted rota under an emergency mandatory backstop

Our preference is for regions to arrange their own intra-regional allocation model under the mandatory backstop. If a region cannot provide this, we have modelled two options, using the preferred regional rota weightings agreed at the UASC Working Group:

- a 'taxi rank' system
- weighted distribution based on current total child population

The table below gives an indicative number of transfers a local authority in each region might receive in one cycle, under each of these options.

Current proportion of UASC population is used as a placeholder for Devolved Nations weighting.

Region/Nation	Indicative rota weight	Placements per cycle of 504 referrals (estimated annual total)	Current proportion of UK UASC population (at end-October 2020)	Preferred method to allocate to LAs	Transfers per LA under taxi rank system	Transfers to LA with highest and lowest total child pop. within region, weighted by total child pop. (highest, lowest)
East Midlands	8.6%	43	4.6%	**Each region to determine their own allocation to LAs**	4.8	7.3 (Northamps) 0.4 (Rutland)
East of England	14.4%	73	12.6%		6.1	18.3 (Essex) 2.2 (West Suffolk)
London	9.1%	46	31.7%		2.0	2.8 (Barnet) 1.4 (Kingston)
North East	7.3%	37	0.9%		3.1	7.0 (County Durham) 1.5 (Hartlepool)
North West	7.7%	39	7.7%		1.9	7.4 (Lancashire) 0.8 (Halton)
Northern Ireland	0.6%	3	0.6%		0.6	TBD
Scotland	3.8%	19	3.8%		0.6	TBD
South East	17.6%	89	20.4%		5.6	16.9 (Hampshire) 1.8 (Isle of Wight)
South West	14.8%	75	4.7%		4.7	9.8 (Devon) 1.5 (Torbay)
Wales	1.3%	7	1.3%		0.3	TBD
West Midlands	7.3%	37	7.3%		2.8	8.5 (Birmingham) 1.1 (Herefordshire)
Yorkshire and Humber	7.5%	38	4.4%		2.5	5.3 (Leeds) 1.1 (NE Lincolnshire)

*Based on UASC population summary from 8 February 2021. **Management information only and subject to change – not for external dissemination.**

Weightings applied:	
Child population	25%
Supported. asylum population	33%

*Based on UASC population summary from 8 February 2021. **Management information only and subject to change – not for external dissemination.**

LAC per 10k	22%
UASC per 10k	10%
Former UASC care leavers per 10k	10%