

**Literature review on how the Home Office ensures it acts in the best interests of the child when conducting its immigration, asylum and nationality functions, specifically how it determines, reviews and secures the child's best interests.**

**Prepared for the Independent Chief Inspector of Borders and Immigration**

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## Introduction to the review and synopsis of what is covered

This review will consider how the Home Office ensures it acts in the Best Interests of children when conducting its immigration, asylum and nationality functions. The Independent Chief Inspector of Borders and Immigration (ICIBI) intends to carry out an inspection of the treatment of children across the border and immigration systems (including the exercise of the s.55 duty). It is understood that this review will be used for scoping and initial research for the planned inspection that is primarily concerned with how the Home Office determines, reviews and secures the child's best interests. Each Chapter (with the exception of Chapter 1) finishes with a 'Discussion and Conclusions' section. Within these sections are the author's 'pointers' to what may be usual for ICIBI to inspect however no recommendations are made.

Chapter 1 considers how the concept of 'the best interests of the child' fits into the broader spectrum of children's rights contained in the United Nations Convention on the Rights of the Child (UNCRC). It considers how the concept is realised in international, European and national law and its interpretation by the Committee on the Rights of the Child and by the UK courts. This will provide the context and backdrop for a more detailed review of those business areas in which the Home Office's visas and immigration department (UKVI) operate where decisions are made which directly or indirectly affect children.

Chapter 2 reviews current arrangements for processing children's asylum claims. The chapter begins with a consideration of what unaccompanied children bring with them when they first encounter UK immigration officials. It then looks at the debate about the asylum process and best interests, taking as its starting point the major inquiry into the human rights of migrant unaccompanied and separated children by the Joint Committee on Human Rights in 2013. It then considers other research into the best interests of children in the asylum system undertaken since 2013 and finishes with consideration of how the best interests of children are reflected in the National Transfer Scheme, launched in July 2016, and the current Home Office guidance *Processing Children's Asylum Claims*. It concludes with a discussion and conclusions.

Chapter 3 reviews age assessment within asylum processing. Given the importance of age assessment as the filter process for accessing the benefits afforded to children in the asylum system, it starts with a discussion of the very different perspectives on age assessment from the Home Office on the one hand and its critics on the other. The central instruction in the *Assessing Age* policy is then considered along with a recent Court of Appeal case that throws the lawfulness of the instruction into doubt. The statistics around age disputes are considered followed by a section on the reliance placed by the Home Office on Local Authority assessments and the new arrangements for information sharing between the Home Office and Local Authority partners. The penultimate section considers age assessment in the context of the National Transfer Scheme and finishes with a discussion and conclusions section.

Chapter 4 takes the two complimentary concepts of family tracing and family reunification, starting with how these concepts are considered within a children's rights framework. It

then considers the European law framework through the various Directives and their transposition into domestic law, UK case law on family tracing and research that has considered how the Home Office undertakes its tracing duty. There is brief consideration of the new *Family Tracing* instruction and the chapter finishes with a short discussion and conclusion.

Chapter 5 departs from looking at asylum and considers the family migration rules that concern the entry requirements for non-EEA family members seeking to join their relatives in the UK. In particular, it looks at new family migration rules introduced in 2012 and how children's best interests are considered in applications to enter or remain in the UK on the basis of marriage or civil partnership. It considers ICIBI's 2013 inspection of family applications, the Home Office response and subsequent inquiry by the All Party Parliamentary Group on Migration. It considers in detail the 'exception' within the Rules that is said to account for children's best interests in family migration applications and finishes with the consideration of children's best interest in the family migration context in a recent Supreme Court cases which finds the current rules to be unlawful in respect of how they deal with children's best interests.

Chapter 6 looks at children's access to citizenship considering first the international and domestic legal framework. How the British Nationality Act 1981 considers children's registration by entitlement and by discretion is outlined followed by consideration of the barriers children face in registering their citizenship and how this interacts with their right to have their best interests considered as a 'primary consideration.'

Adrian Matthews  
July 2017

# Chapter 1 - The framework for considering the Best Interests of the child

## Introduction

This review considers how the Home Office ensures it acts in the best interests of the child when conducting its immigration, asylum and nationality functions, specifically how it determines, reviews and secures the child's best interests.

The concept of the 'best interests of the child' is not open to any interpretation and must follow the guidance and interpretation of the principle established in international, regional and domestic law. The legal interpretation and 'content' of the best interest concept is the subject of this opening chapter. It aims to clarify and elucidate the standards against which Home Office actions and decision making in respect of best interests of the child can be assessed. The remaining chapters consider the application of the principle in the Home Office's business areas affecting children.

## The United Nations Convention on the Rights of the Child (UNCRC) and the 'best Interests' principle.

The UNCRC ('The Convention') is the most widely ratified international human rights treaty in the world incorporating comprehensive standards concerning children's fundamental rights including their civil, political, social, economic and cultural rights. The concept of children as rights holders emphasises children's dignity and the importance of ensuring their protection from harm, their wellbeing and their survival and development. The Convention requires that children are to have *"such protection and care as is necessary for their wellbeing"*<sup>1</sup>

Article 3(1) of the Convention outlines the scope and nature and the best interest's duty: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*<sup>2</sup>

The Committee on the Rights of the Child<sup>3</sup> have stressed that the right of the child to have his or her best interests assessed and then taken into account as a primary consideration in all actions concerning them is one of four general principles for interpreting and implementing all of a child's rights and that the concept is 'dynamic' and requires an assessment appropriate to the context.<sup>4</sup> The concept is aimed at *"ensuring both the full and*

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<sup>1</sup> United Nations Convention on the Rights of the Child, Article 3 (2)

<sup>2</sup> Ibid. Article 3(1)

<sup>3</sup> The Committee on the Rights of the Child is a body of independent experts that monitors and reports on implementation of the UNCRC by governments that ratify the Convention.

<sup>4</sup> Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1)* – Para

*effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.”<sup>5</sup>*

### The UK Government and the UNCRC

The UK ratified the UNCRC in April 1990 but until November 2008, maintained a *reservation* in respect of children subject to immigration control. This meant that that Convention rights did not apply to children under immigration control in the UK. Whilst the reservation was lifted in 2008, meaning that the UK became a full signatory to the Convention, the Government has refrained from transposing the Convention in its full form directly into domestic law<sup>6</sup>.

Nevertheless, the best interests principle is a regional norm - for example being incorporated into the Charter on Fundamental Rights of the European Union,<sup>7</sup> and the European Union’s ‘Common European Asylum System’ (CEAS) Directives by which the UK is legally bound. It is also worth noting that in both UK and EU *case law*, the best interests principle has been considered as an integral part of the proportionality assessment under Article 8 of the European Convention on Human Rights (ECHR) which provides a qualified right to respect for private and family life.

### The Section 55 duty

With the lifting of the reservation in 2008, the way was paved for section 55 of the *Border’s Citizenship and Immigration Act 2009* (‘Section 55’). Section 55 creates a mandatory duty on the Secretary of State to make arrangements for ensuring that any function relating to immigration, asylum or nationality and any function conferred by virtue of the Immigration Acts on an immigration officer, must be discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom<sup>8</sup>. Furthermore, “*any person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State*”.<sup>9</sup> The section 55 statutory guidance, *Every Child Matters: Change for Children* has been issued and must be followed.

Section 55 mirrors Section 11 of the *Children Act 2004* which had placed a duty on a wide range of public bodies to carry out their functions (using precisely the same language as in the s.55 duty), ‘*having regard to the need to safeguard and promote the welfare of children.*’

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<sup>5</sup> Ibid – Para 4

<sup>6</sup> The Government has stated to both the *Joint Committee on Human Rights* and in the UK’s *5th Periodic Report to the UNCRC* that domestic law, through the Human Rights Act 1998 and the Children Acts, already ‘enshrine’ the UNCRC principles.

<sup>7</sup> Article 24: 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

<sup>8</sup> Border’s Citizenship and Immigration Act 2009 – s.55 (1) and (2)

<sup>9</sup> Ibid. - S.55 (3)

Both the statutory guidance issued under section 11 of the Children Act 2004 and the statutory guidance issued under s.55 (*Every Child Matters: Change for Children*) define the safeguarding duty as:

- i. Protecting children from maltreatment; preventing impairment of children’s health or development (where health means ‘physical or mental health’ and development means ‘physical, intellectual, emotional, social or behavioural development’);*
- ii. Ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and*
- iii. Undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.*

The UK Courts have clarified that the section 55 duty and the attendant statutory guidance are the vehicles through which UNCRC rights, the safeguarding and promoting of a child’s welfare and the ‘best interests’ principle have become a core feature of immigration and asylum processing and decision making or, as the Supreme Court has expressed it, through Section 55, “*the spirit, if not the precise language*”<sup>10</sup> of the best interests principle has been translated into our national law.

### *Interpretation of the Article 3(1) of the UNCRC by the Committee on the Rights of the Child*

In 2015, the Committee on the Rights of the Child issued a ‘General Comment’<sup>11</sup> on the interpretation of Article 3 (1) of the Convention. The General Comment has been described in *SG & Others, R (on the application of) v Secretary of State for Work and Pensions (SSWP)* by Lord Carnwath as providing “*the most authoritative guidance now available*” on the interpretation and effect of Article 3(1).

The Committee underlines that a child’s best interests are a three-fold concept:

- A substantive right to have best interests assessed and then taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake and the guarantee that the right will be implemented.
- An interpretative legal principle – i.e. where a legal provision is open to interpretation, the one that best serves the child’s best interests should be adopted, the framework for such interpretation being the Convention itself and its optional protocols.

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<sup>10</sup> *ZH (Tanzania) v Secretary of State for the Home Department* – Lady Hale at Para 23

<sup>11</sup> General Comments to the UNCRC are directed to the governments of those countries which have ratified the Convention. Their purpose is to widen and deepen understanding of a particular aspect of the Convention and to reflect the changing conditions under which children grow up.

- A rule of procedure: When a decision will affect a specific child, the decision-making process must include an evaluation of the impact of the decision on the child. The assessment and determination of best interests in any given case requires *procedural guarantees* and the justification for the decision must explicitly demonstrate that the right has been taken into account. How the right has been respected must be explained in the decision including what has been considered to be in the child's best interests, what criteria the decision is based on and the weight apportioned to the best interest of the child against other considerations (such as individual or policy considerations).

The General Comment breaks down Article 3(1) to analyse its constituent parts in detail. Relevant elements of the Committee's analysis include their interpretation of 'actions' in the sentence '*in all **actions** concerning children*'. 'Actions' are deemed to include "*individual decisions, acts, conduct, proposals, services, procedures and other measures as well as omissions and inaction.*"<sup>12</sup>

The Committee considers that the word '*concerning*' in the same sentence refers to decisions and action directly *or indirectly* affecting children. Children may be indirectly affected where they are not the target of a decision or action but it nevertheless affects them – for example in entry clearance decisions on a foreign national parent of a child in the UK.

'*The best interests of the child*' is described as a complex concept which must be determined on a case-by-case basis. The concept is *flexible and adaptable* and should be adjusted and defined according to the specific situation accounting for the child's personal context, situation and needs. The Committee also emphasises that attention must be placed on identifying *possible solutions* which are in the child's best interests.

The phrase '*shall be a primary consideration*' emphasises the *lack of discretion* afforded to decision makers as to whether a child's best interests are assessed and ascribed primary consideration in actions or decisions undertaken. 'Primary consideration' – means they must be given *priority* - justified by the child's 'special situation' of dependency, maturity, legal status, and often voicelessness. The UK courts have endorsed this interpretation.

The Committee recognises the need for flexibility in the application of the concept. Once assessed and determined, the best interests of an individual child must be weighed against other interests – e.g. of other children, parents, the public. Where harmonisation of

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<sup>12</sup> Committee on the Rights of the Child: Op. Cit. - page 7: "*The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures. Inaction or failure to take action and omissions are also "actions", for example, when social welfare authorities fail to take action to protect children from neglect or abuse.*"

different interests is not possible, the rights of all those concerned must be analysed and weighed, bearing in mind the high priority given to the child's best interests and are not just one of several considerations. So, a *greater weight* should be afforded to the child's best interests. Where the impact on the child is undeniable, the weight given to their best interests is increased. (Para 40)

### Assessment and determination of Best Interests

General Comment 14 also provides guidance on *assessing* and *determining* the best interest of the child in order to make a decision on a specific measure or action to be undertaken. The UK Courts (and Home Office guidance) have followed the *staged approach* advocated by the Committee.

*Assessment*, followed by *determination* of the child's best interests, are the two steps required to make a decision. The *assessment* consists of evaluating and balancing all the elements necessary to make the decision in the specific context and is carried out by the decision maker with the participation of the child. The *determination* describes the formal process, with strict procedural safeguards, designed to determine the child's best interests on the basis of the assessment

*Assessing* Best Interests takes place in light of the child's specific circumstances which relate to individual characteristics such as age, sex, level of maturity, experience, belonging to a minority, physical or mental impairment as well as the 'social context' such as presence/absence of parents, whether the child lives with them, quality of the child/parental relationship, safety of the environment, extended family etc.

The Committee has drawn up a *non-exhaustive* and *non-hierarchical* list of element that could be included in the assessment: It cautions that in adding to the list, the decision maker must bear in mind the ultimate purpose of the child's best interest is full and unfettered enjoyment of all UNCRC rights and the holistic development of the child.

The elements the Committee considers need to be taken into account in assessing and determining the best interests of the child include:

- a) The child's views: These are to be given due weight according to age and maturity. There must be the *possibility* for the child's views to influence the determination of best interests.
- b) The child's identity: This includes sex, sexual orientation, national origin, religion and beliefs, cultural identity and personality. The universal needs every child shares are conditioned in their expression by personal, physical, social and cultural aspects including evolving capacity. Access to culture (and language if possible) of their country and family should be considered unless inconsistent with the rights enshrined in the Convention.
- c) Preservation of the family environment and maintaining relations: It is indispensable to carry out the assessment and determination of best interests in the context of potential separation of a child from his parents. Article 16 of the

UNCRC protects the right to family life. Separation from one or both parents should only occur as a measure of last resort (e.g. where there is a danger of harm). Where the family environment is interrupted by migration of any party, preservation of the family unit should be taken into account in assessing best interests in decisions on family reunification.

- d) Care, protection and safety of the child: When assessing and determining best interests the decision maker must ensure such protection and care as is necessary for the child's well-being. 'Well-being' includes basic material, physical, educational and emotional needs and the need for affection and safety. Assessment must also take into account the child's safety and protection from physical or mental violence, injury and abuse as well as protection from all forms of exploitation, labour or armed conflict. Applying the best interests approach to decision making means assessing the safety and integrity of the child at the current time but the precautionary principle also requires assessing the possibility of future risk and harm and consequences for the child's safety.
- e) Situation of vulnerability: This includes disability, minority status, being a refugee or asylum seeker. The Best Interests determination must account for the rights provided for under other human rights norms related to their 'situation of vulnerability' – e.g. the refugee convention.
- f) The child's right to health: The right to health and the health condition of the child are central in assessing the child's best interests. The *possibilities for treatment* may also form part of the assessment and determination of Best Interests with regard to other types of significant decision – for example the grant of a residence permit on humanitarian grounds.
- g) The right to education: All decisions or measures concerning children must respect the best interests of the child with regard to education.

### The UK Courts and the S.55 duty

In the landmark case *ZH (Tanzania) v Secretary of State for the Home Department*, the UK Supreme Court considered the best interests principle in the context of Article 8 ECHR. Lady Hale held that: *"it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of CRC and treat the best interests of a child as a primary consideration"*<sup>13</sup>. She further stressed that best interests *"must be considered first"* before going on to consider what other factors, cumulatively, might act as countervailing considerations, for example the need to maintain firm and fair immigration control.

Lord Kerr in the same case added: *"the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily*

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<sup>13</sup> *ZH (Tanzania) v SSHD* - Para 25. NB: The European Court of Human Rights, which considers State violations of the ECHR (incorporated into domestic law by the *Human Rights Act 1998*), is located in Strasbourg and is referred to by Lady Hale here as 'The Strasbourg Court'.

*dictate the outcome ... and it will require considerations of substantial moment to permit a different result.*"<sup>14</sup>

The Supreme Court case of *Zoumbas*<sup>15</sup> summarized the duty upon decision makers, reiterating that the best interests of a child must be a primary consideration and adding that, although it is not a trump card, other considerations cannot be treated as inherently more significant. Decision makers must ask the right questions in an orderly manner to ensure necessary weight is given to the child's interests, particularly when there are other important considerations, and there is no substitute for a careful examination of all relevant factors.

Following these cases, guidance on the Section 55 duty was provided by the President of the Upper Tribunal of the Asylum and Immigration Chamber in the case of *JO and others (Section 55 duty) Nigeria* [2014] UKUT 517 (IAC). It is worth setting this out in full (emphasis added):

- (1) *The duty imposed by section 55 of the Borders Citizenship and Immigration Act 2009 requires the decision-maker to be properly informed of the position of a child affected by the discharge of an immigration etc. function. Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors.*
- (2) *Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations*
- (3) *The question whether the duties imposed by section 55 have been duly performed in any given case will invariably be an intensely fact sensitive and contextual one. In the real world of litigation, the tools available to the court or tribunal considering this question will frequently be confined to the application or submission made to Secretary of State and the ultimate letter of decision.*

The President also noted that the characteristics of s.55 are formulated "in terms of an unqualified duty" that is, "The Secretary of State must make arrangements for ensuring that..." and that it operates to protect all children in the UK without any qualifying condition such as nationality or residence status.

### Summary and conclusions

The principle of the Best Interests of the Child is embedded in international, European and UK domestic law. The Section 55 duty encapsulates the best interests principle, which must be followed by Home Office decision makers when exercising their immigration, asylum and nationality functions.

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<sup>14</sup> *ZH (Tanzania)* Para 46.

<sup>15</sup> *Zoumbas v SSHD* [2013] UKSC 74 [10] per Lord Hodge.

Guidance on the application of the duty has been given by the UK Courts who have endorsed the guidance given on its application by the Committee on the Rights of the Child in General Comment 14.

## **Asylum and the Best Interests of the Child**

### *Introduction to chapters 2 – 4*

Children may be encountered who are separated from any adult responsible for caring for them and the Home Office describe such children as *unaccompanied*. Where they are also seeking international protection without an adult to look after them they are deemed to be an ‘unaccompanied asylum seeking child’ (‘UASC’).

Children may also be encountered as part of a family group. More often than not they will be dependent on an adult family member’s claim although in some cases a child arriving as part of a family group seeking asylum may be at risk of child specific persecution and /or have a claim in their own right.

Children may also be encountered who have been trafficked for exploitation. Identifying such children can be problematic. They may or may not have been told to claim asylum by their trafficker. A National Referral Mechanism (NRM) exists for children suspected of having been trafficked and a referral under the NRM will often intersect with an application for asylum.

### *The asylum process for unaccompanied asylum seeking children*

To assist UKVI staff in handling asylum application from children there are a suite of asylum policy documents that provide detailed instructions and guidance. Some of these have developed over the years, sometimes changing their titles in response to policy changes and legal judgements while others are new or designed to incorporate significant changes ushered in by the national transfer arrangements for unaccompanied children that became operational in July 2016.

‘*Assessing age*’ sets out the policy and procedures to follow when an asylum applicant claims to be a child but has little or no evidence and their claim to be a child is doubted.<sup>16</sup> This is supplemented by ‘*Age Assessment – Joint Working Guidance*’ published jointly with the Association of Directors of Children’s Services<sup>17</sup>.

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<sup>16</sup> UK Visas & Immigration, *Assessing Age* 15.06.15. This instruction has been updated on a number of occasions since first published in 2011. The version referenced in this review, unless otherwise stated, is the one cited here.

<sup>17</sup> ADCS & Home Office, *Age Assessment – Joint Working Guidance*, June 2015. Note that this replaces the original 2005 protocol.

'Family Tracing' sets out the general policy and procedures for tracing family members of unaccompanied children who have made claims for asylum.<sup>18</sup> There are two additional instructions relating to family tracing in Bangladesh and Albania.<sup>19</sup>

*Processing Children's Asylum Claims* explains how to process claims primarily from unaccompanied children but also covers children in families who are making an asylum claim in their own right.<sup>20</sup> . This has the status of *interim guidance* and was published to coincide with the roll out of the UASC National Transfer Scheme in July 2016. It was due for review over the summer 2016 but no new version is yet available. This guidance is supplemented by the *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children* that deals with the arrangements for transferring children from the 'entry' local authority where the child arrives to a permanent 'receiving' local authority.<sup>21</sup> This arrangement became operational in July 2016 following the enactment of s.69 of Part 5 of the *Immigration Act 2016*.

We will consider UKVI policy and practice in each of these three areas in the next three chapters.

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<sup>18</sup> UK Visas & Immigration, *Family Tracing (v.1)*, 12.07.16

<sup>19</sup> UK Visas & Immigration, *Family tracing assistance from the Foreign and Commonwealth Office in Bangladesh*, 03.02.14 and *Identity checking and family tracing via the Albanian Authorities*, 31.01.14

<sup>20</sup> UK Visas & Immigration, *Processing Children's Asylum Claims (v.1)* 12.07.16

<sup>21</sup> Department for Education; Home Office; Department for Communities & Local Government *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children 2016-17 (Version 0.8)*, 01.07.16

## Chapter 2 - Processing Children's Asylum Claims

### Introduction

The heading of this chapter mirrors the title of the current guidance provided to decision makers at the Home Office when dealing with asylum claims from children. The guidance, and this chapter, has unaccompanied children as its main focus although some of the underlying issues for both unaccompanied and accompanied children are shared. The central question the chapter aims to consider is how and whether children's best interests are being served during the processing of their asylum claims.

### From the child's perspective

We start from the child's point of view. It is important to recognise that a child claiming asylum, particularly if unaccompanied, will encounter a large number of actors<sup>22</sup>, many of whom they have to tell their stories to in order to fulfil assessment requirements, in addition to those directly processing their application. There is a considerable body of evidence to suggest that children find it hard to understand the roles and responsibilities of the different actors they meet, let alone the administrative processes they encounter and this contributes to a sense of matters directly affecting them being out of their hands.<sup>23</sup> Many of the facts they hold about their own lives and experiences which they... *"may regard as unexceptional or irrelevant are accorded particular significance by UK officials ... the young person's ability to remember, narrate, sequence and understand the significance the UK gives to these facts can be critical in determining their futures."*<sup>24</sup>

Children are not well equipped to deal with the processes they face and there is a dissonance between the order and focus of the asylum process and young people's order of

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<sup>22</sup> One study by the Law Centre's Network lists the following officials, professionals and experts a child seeking asylum might have to deal with: Port staff and Home Office screening and interviewing officers and their interpreters, police, foster carers, allocated social workers, child protection officers, assigned key workers/support workers, social workers undertaking age assessments (usually different from the allocated social worker), housing provider support staff, teachers, support staff at NGO's, Refugee Council Children's Panel advisors, Scottish guardians, GP's, counsellors, psychologists, psychiatrists, psychotherapists, other young people in care or co-tenants in supported accommodation, lawyers and their staff, an array of interpreters working with the above professionals.

<sup>23</sup> Law Centres Network, *Put Yourself in Our Shoes: Considering Children's Best Interests in the Asylum System* (November 2015); Matthews, A., *What's Going to Happen Tomorrow? – Unaccompanied Children Refused Asylum*, Office of the Children's Commissioner for England (April 2014); Children's Society, *Into the Unknown: children's journey through the asylum process*, (2011)

<sup>24</sup> Ibid. Law Centres Network, Page 16

priorities and concerns on arrival<sup>25</sup>. Acting in the child's best interests requires that children who are seeking asylum in their own right are helped to understand the processes to which they are subjected, why they are being questioned, the purpose of interviews and the reasons why choices and decisions are made by adults acting on their behalf. It is also important to deal with their anxiety and confusion over fast changing and unfamiliar events.

The experiences children have prior to arrival provide the starting point for their interactions with officials. These will affect their perception of the trustworthiness of those they talk to. A recent study by the Kent UASC Health Project, carried out over a year between March 2016-March 2017 and embedded in a reception centre for child asylum seekers in Kent found very high incidence of disordered sleep patterns, semi-starvation and refeeding symptoms, loss of hope and trauma symptoms in newly arrived unaccompanied children<sup>26</sup>. This is particularly pertinent now where children waiting to get over to the UK from Northern France face violence not only from the people smugglers and traffickers who control their routines and their journeys but also, according to the recent report from the Human Trafficking Foundation (HTF), serious levels of police violence. Of the children HTF surveyed, 96.5% had experienced police violence in Northern France, 79% had experienced tear gas and 75.3% had been arrested or detained. 85.9% of children said they did not feel safe in and around the Calais area.<sup>27</sup> It is hard not to imagine that in these circumstances trust in the adults they encounter is likely to have been damaged.

Reference to such matters in Home Office guidance<sup>28</sup> (in respect of the first encounter) merely states *that Staff must always remember that a child may have travelled extensively before arriving in the UK. They must be offered regular refreshments and comfort breaks during the welfare interview.*<sup>29</sup> There does not appear to be guidance in either *Processing Children's Asylum Claims* or *Assessing Age* on the effects that long term sleep disturbance, trauma, and semi-starvation (for example leading to symptoms such as hair loss) has on the appearance and demeanour of young people on first encounter.

### *The debate about the asylum process and children's best interests*

There has been an ongoing debate about children's best interests and their relationship with the asylum process. In particular, the debate has focused on whether the processes and outcomes provide for *durable solutions* to the children's situation. A durable solution by its nature is designed to last into adulthood. The General Comment No.6 states: "*The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a*

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<sup>25</sup> Kohli, R., *The comfort of strangers: social work practice with unaccompanied asylum-seeking children and young people in the UK* (2006) in *Child & Family Social Work* 11: page 1-10

<sup>26</sup> Draper, A. *New Perspectives on UASC Health and Interventions: Beyond PTSD* (2017) Coram

<sup>27</sup> Human Trafficking Foundation, *An independent inquiry into the situation of separated and unaccompanied minors in parts of Europe* (July 2017) – Page 7

<sup>28</sup> Home Office, *Processing Children's Asylum Claims* (July 2016)

<sup>29</sup> *Ibid.* Page 19

*durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated"*<sup>30</sup>

### Joint Committee on Human Rights

In June 2013, the Joint Committee on Human Rights (JCHR)<sup>31</sup> considered evidence from a wide range of stakeholders, including the Immigration Minister, on whether unaccompanied children's best interests were being properly considered under current arrangements. Most stakeholders concurred that *"the current practice of the UK is only to consider the best interests through an immigration prism, rather than as a process where the decision maker is required to weigh and balance all the relevant factors of a child's case"* arguing that *"the adjudication of best interests in fact required a formal procedure: A Best Interests Determination (BID)."*<sup>32</sup> UNHCR considered that *"a BID, with procedural safeguards and formal representation for children, and involving a wide range of decision-makers, would lead to more sustainable solutions."*<sup>33</sup>

Defending the current arrangements, the Immigration Minister argued that there were no systemic issues negatively affecting consideration of unaccompanied children's best interests proposing that the fact that leave was routinely granted until the cusp of adulthood for those children not granted asylum or humanitarian protection *"demonstrates that we put their best interests first, as that is not what we do with adults."*<sup>34</sup>

The Minister's comments reflect the view often heard from the Home Office that the grant of leave until 'the cusp of adulthood' discharges the best interests obligations to the child. The position was roundly opposed by those giving evidence who countered that the grant of such leave is simply deferred removal, could not be construed as contributing to a durable solution to the young person's situation, presented them with a 'cliff edge' as they attained majority and allowed the Home office to pull the protective rug from underneath the young person when obligations under the UNCRC ended at age 18 allowing the interests of immigration control to reassert their primacy over their best interests at this point. General Comment No.6 notes that *"Many such children are granted only temporary status which ends when they turn 18"* and identifies this as one of the 'protection gaps' in the treatment of unaccompanied children.<sup>35</sup>

The Committee concluded that *"on the balance of evidence we received, we are not persuaded that best interests are being considered adequately at present. Immigration*

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<sup>30</sup> Committee on the Rights of the Child, *General Comment No.6 Treatment of unaccompanied and separated children outside their country of origin* (2005) – Para 79

<sup>31</sup> Joint Committee on Human Rights, *Human Rights of unaccompanied migrant children and young people in the UK - Session 2013-14 HL paper 9/HC 196* (June 2013)

<sup>32</sup> *Ibid.* – Para 24

<sup>33</sup> *Ibid.* – Para 26

<sup>34</sup> *Ibid.* – Para 27

<sup>35</sup> General Comment No 6 (Op. Cit.) Para 3

*concerns are too often being given too much weight, which must change.*<sup>36</sup> However, their central recommendation on best interests was equivocal on whether a formal BID process was the best way forward recommending only that *“that the Government should evaluate the case for the establishment of a formal Best Interests Determination process. This evaluation should analyse the potential benefits of a new and formal process against the alternative of seeking to make improvements to the existing decision-making model”*, adding that *“We would be content with either model, provided that the result is a system that brings the best interests of unaccompanied migrant children to the fore.”*<sup>37</sup>

The other recommendations concerning best interests stressed the need for Home Office guidance to *“reassert the primary need to uphold the welfare and wellbeing of those children throughout their time in the United Kingdom, and to consider properly their best interests during the asylum and immigration process”*<sup>38</sup>. JCHR also recommended establishing an independent advisory group to provide Ministers with advice on how to consider unaccompanied children’s best interest more effectively based on the principles of the UNCRC.

Responding to the Committee’s recommendation the Government said: *“In the light of the Committee’s comments we will consider the case for establishing a Best Interests Determination process in the context of the existing immigration and asylum process. We are aware that the UN High Commissioner for Refugees (UNHCR) is producing guidance in this area, but are mindful that the range and complexity of cases involving unaccompanied children and young people means that any such process must be flexible rather than formal and bureaucratic. In carrying out this consideration we will take into account the views of experts across the statutory and voluntary sector – including those who have submitted evidence to the Committee.”*<sup>39</sup> (Emphasis added). The response indicates that the option of *‘seeking to make improvements to the existing decision-making model’* was preferred to the more fundamental changes demanded by many stakeholders in respect of the development of a formal multi-agency BID process which might imply the loss of sole control over decision making by the immigration authorities.

### UNHCR’s Quality Integration Project and the Best Interests of the Child

From 2004 – 2009 a joint venture between the Home Office and UNHCR known as the ‘Quality Initiative Project’ was undertaken, rooted in the commitment by State Party signatories to the Refugee Convention to cooperate with the Agency.<sup>40</sup> With the ending of the first phase of the project, a second phase known as the *Quality Integration Project*

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<sup>36</sup> Ibid. - Para 28

<sup>37</sup> Ibid – Para 33

<sup>38</sup> Ibid – Para 31

<sup>39</sup> The Government response to the first report from the Joint Committee on Human Rights Session 2013-14 HL paper 9/HC 196 (February 2014) – Page 4 (recommendation 3)

<sup>40</sup> The ‘Quality Initiative’ project and its successor the ‘Quality Integration project’ both have their roots in Article 35 of the 1951 Refugee Convention which stipulates that signatory States will undertake to co-operate with UNHCR to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

commenced in 2010. In 2011, UNHCR was requested by the Home Office to undertake an audit of Refugee Status Determination decisions in *family* cases (that is, accompanied children).

By the time of the JCHR inquiry in June 2013, UNHCR had published their audit of the quality of asylum decision-making in 45 family claims<sup>41</sup> Much of UNHCR's evidence to the JCHR in respect of how the best interests of the child were considered and acted upon by the Home Office was based on what they had learned through this audit process. A further more detailed report was published in December 2013.<sup>42</sup>

Home Office and UNHCR had agreed that the audit would include an assessment of and commentary on the Home Office's methodology for assessing and determining the best interests of any child within an asylum-seeking family. It was agreed that this would encompass not only the assessment and determination of the child's best interests as the family moved through the asylum procedure but also how the determination of the best interests of any child is then factored into any decision resulting from a consideration of the family's asylum claim which would have a direct impact upon the child.<sup>43</sup>

### Findings and Recommendations

UNHCR reviewed the content of the Home Office's training and guidance prior to audit and this highlighted that while training and guidance on the concepts of child welfare and the best interests principle existed, it was primarily aimed at those who handled the claims of unaccompanied children. Not all decision-makers who were required to assess and determine the best interests of children in families had received the full training at the time of the audit.

In considering how Best Interests Assessments were carried out as the family moved through the asylum process, the audit provided clear examples of staff actively identifying issues relevant to the welfare and best interests of children and, as a result of this identification, undertaking actions with those interests in mind - for example, by making relevant referrals to Local Authority Children's Services (even if the subsequent response from the Local Authority was lacking). They also found that in the more routine actions and decisions such as dispersal of asylum-seeking families requesting accommodation and support, there was no clear and systematic primary consideration given to the best interests of the children due largely to the lack of formal collection and recording of relevant information including the absence of any mechanism to obtain the views of the child and give those views weight in line with age and maturity.

The audit considered how Best Interests were determined. There is a requirement for decision makers to set out how they have considered the best interests of the child and

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<sup>41</sup> UNHCR, *Untold Stories: Families in the Asylum Process* (June 2013)

<sup>42</sup> UNHCR, *Considering the Best Interests of a child within an asylum-seeking family* (December 2013)

<sup>43</sup> *Ibid.* Page 5

discharged their s.55 duty in the assessment of the principal applicant's application for international protection. While the audit identified cases in which the best interests of the child *were* determined and given primary consideration in resulting decisions, this was not the case for all children and as a result, decisions that affected them were being taken without these being considered. This was particularly common in cases that recognised that a family member (usually the parent) had international protection needs and was being granted a form of leave to remain. UNHCR point out that while a family member's circumstances will be an important element to give weight to when determining the child's best interests, those interests must still be considered separately.

The *mechanisms for collecting information* necessary to determining the best interests of a child were found to be limited to those that existed as part of the asylum procedure that focused on obtaining evidence relevant to the principal applicant and to the asylum claim. The existing processes curtailed decision makers' ability to know when, where, and from whom they could find relevant information and the sort of information they should seek. This meant that the amount of relevant information gathered was minimal and was typically only available later in the process.

There were also shortcomings in the analysis of information obtained which did not reflect a holistic consideration of the various elements required to determine best interests and was not always specific to the child's individual characteristics or situation. Analysis tended to focus on some elements (e.g. family and close relationships) while ignoring others (e.g. care, protection and safety of the child – a finding noted as being of particular concern). The child's views and those of family members close to the child were rarely considered.

The Committee on the Rights of the Child has made clear that the elements that can be considered in the BID are those linked to the rights set out in the Convention on the Rights of the Child. UNHCR found that decision makers were bringing immigration control directly into the determination of best interests. It was also rare that the elements of best interests were balanced in light of the particular child's individual situation in order to reach the BID.

Decision-makers tended to emphasise those elements that supported a BID that favoured the immigration decision on the principle applicant's asylum claim. While legitimate to the extent that preservation of the child's family environment and maintaining relations is part of the BID, it was often the *only* element considered or was given excessive weight rather than being put 'into the balance'.

Additionally, it was observed that where a BID was undertaken, the same decision-maker that assessed and decided the principle applicant's asylum claim also undertook the BID for the child within the family. This may have led to a conflict of interest, undermining the quality of the BID and placing additional responsibility and workload upon the asylum decision-maker.

Finally, UNHCR considered whether the child's best interests were given *primary consideration* in the immigration decision he/she was affected by, as required, and in particular the bearing that this had on whether leave was granted or refused. They found some evidence of decision-maker acknowledging and demonstrating the need to give the

child's best interests primary consideration when making the immigration leave decision on the principal applicant's asylum claim but also found that decision makers were unclear about where and how the consideration of a child's best interests should fit and be factored into the immigration decision.

Practice was mixed in respect of how decision-makers reasoned their grant of immigration leave on a best interests basis, what immigration status they granted as a result of that reasoning, and to whom. Method of recording this information on CID varied, potentially leading to inaccurate or incomplete data collection. UNHCR were critical of how forms of immigration leave based on family life with a child in the new Immigration Rules at paragraph EX1 of Appendix FM (see chapter 5) were incorporated and considered that they may be negatively impacting upon decision-makers' understanding of what factors should be taken into account when considering both the s.55 duty and the BID in the context of an asylum-seeking family's protection claim.

The findings from the audit led to UNHCR recommending the creation and strengthening of mechanisms for considering and determining a child's best interests in the family context. They suggest in particular that assessments of the child's best interests should be objective, based on the UNCRC rights and undertaken *independently of the asylum process and in coordination with other government bodies responsible for child protection*.

UNHCR also wanted *increased collection of information* relevant to children affected by immigration decisions made on their parents beyond what was collected from the principal applicant's claim. This could be obtained from family members, people close to the child, as well as appropriate experts and professionals. Information gathering should be systematic and initiated from the moment the child is identified as a child for whom the Home Office will need to make decisions relevant to his or her best interests.

A mechanism was also needed through which children in asylum-seeking families could *express their views*, either directly or through a representative, and have those views taken into account and afforded weight in line with their age and maturity. This could be facilitated through provision of child-friendly information in accessible formats explaining the asylum process, the child's right to express his or her views in matters affecting him or her; the option of communicating directly or through a representative; and the impact that his or her views would have on the outcome of the decision-making process.

Addressing the issues highlighted in the report, *guidance and training* should: emphasise the need for any decision affecting a child to be justified and explained in order to demonstrate how the child's best interests have been assessed or determined and taken as a primary consideration when reaching the decision; how the BID should be factored into the written asylum decision reasoning and how it should impact upon the granting or refusing of immigration leave; clarify how and when to record information relevant to best interests on physical files and on CID; increase the understanding and awareness of all the elements necessary to reach a balanced determination of a child's best interests and; explain how the provisions of the immigration rules at Paragraph EX1 of Appendix FM should be put into the context of the wider necessary consideration of a child's best interests.

## Other Research on Best Interests of children in the asylum system

### Greater Manchester Immigration Aid Unit

Research published at the same time as the UNHCR audit (June 2013) of family applications by the Greater Manchester Immigration Aid Unit<sup>44</sup> (GMIAU) focused on Best Interests assessments and determinations in unaccompanied children's cases. They considered 34 cases dealt with by the law centre who had arrived as unaccompanied children and later been refused asylum of Humanitarian Protection (HP).

The approach uses a similar analytic framework to that employed by UNHCR, utilising the UNCRC, the s.55 duty and accompanying guidance and UKBA's then current policy instruction *Processing an Asylum Application from a Child*. The themes that emerge from the study are also remarkably similar to those emerging from UNHCR's analysis of family cases.

### Best Interests Determinations

GMIAU reported that Home Office's own guidance stresses that "*Best Interests is a continuous process from 1<sup>st</sup> encounter until a durable solution is reached*"<sup>45</sup> and that best interests concern not only procedural matters but also the substance of the decision as to whether the child should be returned or not.

GMIAU found that in 24 of 34 cases, there was no evidence of a BID being carried out. In the 10 cases where a BID was undertaken, there was little evidence of anyone other than the decision maker having input. In only 1 case had evidence been sought from the Social worker. The Best Interests Determination in 9 out of the 10 cases was that return was in the child's best interests. Consideration of the factors identified in the guidance as being in a child's best interests was selective with more weight given to factors pointing to return. Children's positive engagement with education was used to suggest that the knowledge gained could be employed on return or, alternatively, that removal would not seriously impact on commitment to their studies.

The conclusions in these cases also demonstrated 'muddled thinking' in that while the BID concluded return was in the child's best interests, DL under the UASC policy was granted instead. This was linked to a failure to undertake any family tracing in 29 of 34 cases despite this being a crucial stage in the determination of the child's best interests.

### Assessment of credibility and the Immigration Rules

Application of the policy instruction *Processing an Asylum Application from a child* was patchy and inconsistent including assessments of credibility that were inconsistent with

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<sup>44</sup> Greater Manchester Immigration Aid Unit, *Children's Best Interests: A Primary Consideration?* (June 2013)

<sup>45</sup> Ibid – Para 2.6

protections in place in the Immigration Rules. For example, ‘lack of detail’ was behind many negative credibility findings leading to refusals of asylum. This was despite the Immigration Rules noting that children do not provide as much detail as adults in recalling abusive experiences, may manifest fears differently and that evidence must be assessed in light of the child’s age, degree of mental development and maturity with allowances made for a different degree of understanding to what one would expect from an adult.

### Case outcomes

GMIAU looked at *case outcomes* and compared these to the approach to determining claims required by the UKBA instruction. The policy instruction required decision makers to take a *staged approach* to determining the outcome of an unaccompanied child’s claim, first considering Asylum, then Humanitarian Protection, then Discretionary Leave (DL) on Article 3 or Art 8 ECHR grounds and finally DL under the UASC policy. However, there was little evidence of this staged approach demonstrated in the Reasons for Refusal Letters.

Of the 34 cases in the sample 19 (54%) were granted DL under the UASC policy, 1 (3%) under the general DL policy (Article 8, private and family life), 13 (38%) were refused outright having reached 17 ½ by the time of the decision and 1 (3%) was refused outright on 3<sup>rd</sup> County grounds. GMIAU make the crucial point that there is a fundamental difference between the two types of DL that might be applied because DL under Article 3 or 8 is a potential route to settlement, while LTR under the UASC policy is not.

### Conclusions and Recommendations

The central conclusion of the study, which appear consistent with the Minister’s comments before the JCHR, was that *“UKBA views the grant of DL to the age of 17.5 as being a complete answer to the issue of a child’s Best Interests”*.<sup>46</sup> Grants of DL under the UASC policy were also *“applied in a blanket manner without case-specific consideration of available reception conditions or any attempt to trace the family of an unaccompanied child.”*<sup>47</sup>

In a similar vein to the UNHCR recommendations, GMIAU recommended that UKBA ensure it complies with its legal duty to treat a child’s Best Interests as a primary consideration in asylum cases; that best interests should be determined in a *holistic manner*, taking into account the views of professionals working with the child and of the child themselves; that once determined, the best interests of the child should *contribute to the outcome* of the case in a meaningful way.

The research for the report had included exploring the impact of the grant of DL under the UASC policy with the children’s social workers. Social Workers thought it harmful to grant this form of leave. Most social workers suggested greater tracing efforts, and early grants or refusals of asylum would be in children’s best interests. They commented on both practical and motivational problems following a grant of Discretionary Leave under the UASC policy –

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<sup>46</sup> Ibid – page 2

<sup>47</sup> Ibid – page 7

for example anxiety about the future, anger interfering with rational choice making and a negative impact on emotional well-being. These considerations also led GMIAU to recommend “UKBA should reconsider whether granting DL till 17.5 serves children’s best interest.”<sup>48</sup>

### Kent Law Clinic and the Children’s Commissioner for England

The reasons why unaccompanied children often fare poorly in the asylum system in comparison to their adult counterparts<sup>49</sup> were explored in two reports in early 2014. Kent Law Clinic (KLC) examined the formal papers of over 25 young people who had arrived as unaccompanied children but had subsequently become ‘appeal rights exhausted’ (‘ARE’) after turning 18. Twenty of the young people were from Afghanistan. KLC considered whether Home Office and other relevant guidance had been followed, what legal arguments had been deployed, what findings of fact had been made, and the legal issues arising at each stage of each case.

As discussed at the start of this chapter, unaccompanied children meet a large number of actors in addition to those directly processing their application. The KLC study looked at the acts of the major relevant institutional actors involved at each stage – the Home Office, Kent Social Services, legal representatives and tribunal judges. They considered the factors that had contributed to the failure of their clients’ asylum claims and ranked these in order of importance as follows:

1. Most had not appealed against the initial refusal of asylum. Then, in all those cases, their application for further leave was refused largely based on the applicant’s alleged implicit acceptance of the allegations in the first refusal.
2. Most refusals and Tribunal dismissals were on grounds of incredibility and implausibility.
3. Most claims refused on credibility grounds had also been age-disputed by Social Services.
4. Some refusals relied on initial ‘illegal entry’ interviews conducted on arrival without appropriate safeguards such as legal representation or the presence of an appropriate adult.
5. Some young people endured long-drawn-out appeal processes, and had turned 18 by the time their case came before a tribunal.
6. The best interests of the child were rarely considered other than by inserting standard text.
7. Family tracing was not carried out in any of the cases. In some cases, the issue of family tracing was relied on by the Home Office or Tribunal judge to discredit the applicant’s claim.

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<sup>48</sup> Ibid - Page 2

<sup>49</sup> Ibid – Page 3 - The table, sourced from Home Office statistics show the following comparisons between the percentage of grants of asylum/Humanitarian protection to adults and unaccompanied children respectively (Adult figures 1<sup>st</sup>) 2006: 10.9% (6.8%); 2007: 16.9% (13.1%); 2008: 21.2% (9.9%); 2009 18.5% (9.2%); 2010: 17.7% (13.9%); 2011: 25.2% (17.6%).

## *Children's Commissioner report*

Children's participation in asylum processes that determine their futures was a key concern for the Children's Commissioner. Her research<sup>50</sup> considered how unaccompanied children navigate the asylum system with the help or otherwise of the key actors surrounding the child. As with the KLC research, her report focused on those who had been unsuccessful - it being the case that in 2012 only around a quarter of unaccompanied children obtained asylum with the remainder being either refused outright if they had reached 17 ½ by the time of the decision or granted UASC leave (formally Discretionary Leave under the UASC policy) if not.

Analysing available Government data on removals and departures of those who had claimed asylum as unaccompanied children, she concluded that the majority remain in the UK as adults with undetermined, precarious or unlawful status.

The report looked in detail at the legal provision to unaccompanied children and interviewed legal aid lawyers who represented their claims. Arrangements must take into account children's need to understand a complex legal regime, build rapport and trust with their lawyer and feel confident about disclosing difficult or traumatic experiences that need to be put before decision makers. The remuneration regime for unaccompanied children cases reflected this to some extent though there was a 'cap' on expenditure after which permission for further funding had to be sought from the Legal Aid Agency. The rules around paying for 'disbursements' (e.g. fees for expert or psychological reports) were inflexible and didn't take account of children's best interests.

While there is a duty under the *Procedures Directive*<sup>51</sup> for States to ensure representation for unaccompanied children, the Commissioner found that *"no single UK agency appears to own the duty to ensure that this happens in a timely manner to fit with Home Office processing targets. Screening staff at the Home Office ask children 'if' they need a lawyer and in the absence of a pro-active approach from their local authority some children rely on peers or other UK contacts to find them one"*.<sup>52</sup>

At the service of the decision to refuse asylum there was almost universal misunderstanding amongst children as to the nature of the limited leave ('UASC leave'/Discretionary Leave under the UASC policy) they had been granted with most believing it to be a 'visa' that could be extended when it was near to running out rather than a refusal of asylum and a deferral of removal. The nature of the leave sometimes only became clear to young people when the

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<sup>50</sup> Matthews, A. *What's Going to Happen Tomorrow? Unaccompanied Children Refused Asylum* (April 2014), Office of the Children's Commissioner for England

<sup>51</sup> COUNCIL DIRECTIVE 2005/85/EC – Article 17 – *"With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 12 and 14, Member States shall: 1 (a) as soon as possible take measures to ensure that a representative represents and/or assists the unaccompanied minor with respect to the examination of the application."*

<sup>52</sup> Matthews, A. (Op Cit.) – Page 11

application to extend it was refused. This impacted on whether the child considered an appeal at this stage that some would have been entitled to then and all would be entitled to now (following changes in the *Immigration Act 2014*)<sup>53</sup>. This point goes to the top ranked concern expressed by Kent Law Clinic (above) that *“most had not appealed against the initial refusal of asylum. Then, in all those cases, their application for further leave was refused largely based on the applicant’s alleged implicit acceptance of the allegations in the first refusal.”*

The right to free representation on appeal against refusal of asylum is subject to a ‘merits test’ administered by the legal representative and where children were declined further representation on merits grounds it was found that they lacked access to information that would entitle them to a review of the merits decision. Government (e.g. The Legal Aid Agency) could provide Child friendly information on this.

Before limited leave expires at age 17 ½, an application can be submitted to *vary* the leave. The waiting period for a further decision was found to be months or years in some cases. While still lawfully present during this period<sup>54</sup>, young people are not provided with any document by the Home Office to prove so. This impacts on their ability to conduct their lives in a dignified manner –e.g. accessing college. Young people experience the waiting as hugely frustrating and debilitating. They cannot make plans for their futures and their motivation is affected.

Without the chance to appeal the decision to refuse further leave, a young person finally becomes Appeal Rights Exhausted. This status ushers in a new regime of having to report regularly at an immigration office. Failure to report will lead to being treated as an absconder. As people are regularly detained when they report to an immigration office, there is significant fear attached to reporting events with some reporting anxiety, sleeplessness and depression. For young people remaining in the care of their local authority, services may now be withdrawn or they may disengage with the service of their own volition in anticipation of being arrested at their accommodation. Few choose voluntary return and most embrace the risk of entering the world of illegal work and reliance on their network of friends and contacts for somewhere to stay.

The Commissioner’s report identified issues for a range of Government agencies and the following practice issues for the Home Office to consider based on the best interests of unaccompanied children: Home Office screening staff should identify whether or not a child has a legal representative and, if not, formally notify the local authority caring for the child; In substantive asylum interviews regular breaks should occur to allow for children’s shorter attention spans; Serving of decisions should not be delayed in order to be able to serve outright refusals rather than a grant of UASC Leave; Where family tracing is undertaken by Home Office officials, children should be informed including of any anticipated delays in serving the decision that may result; That the active review carried out by the Home Office

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<sup>53</sup> The *Nationality, Immigration & Asylum Act 2002* s.83 provided a statutory bar on anyone granted leave (e.g. leave under the UASC policy) for a period of less than 12 months on appealing the decision. This was removed in the *Immigration Act 2014*.

<sup>54</sup> *Immigration Act 1971* s.3 (c)

on applications to vary leave should be time limited. If there are barriers to removal at the time of review, continuing leave should be granted; That the Home Office issue an identity document to a young person while a decision remains outstanding on their variation application.

### 'Safe and Sound'

The arguments made to the JCHR were further articulated by UNICEF UK and UNHCR in a joint briefing paper<sup>55</sup> in 2015, the purpose of which was to consider how to put *Safe and Sound*<sup>56</sup> - a report by the same organisations in respect of separated children in Europe – into practice in the UK. The report and the briefing note return to the theme of best interests and *durable solutions* or how unaccompanied children's long term development can be supported.

Utilising the analytical framework of Article 3(1) of the UNCRC as explained in *General Comment 14*<sup>57</sup>, the briefing discusses how *Best Interest Assessment's* (BIA's) and *Best Interest Determinations* (BID's) are currently undertaken in the UK with respect to unaccompanied children. They example *Best Interest Assessments* (BIA's) with reference to the Home Office initial welfare interview following identification of an unaccompanied child and also the needs assessment carried out by the responsible local authority. Despite such examples, the paper argues that BIA's are not "*routinely undertaken throughout the child's engagement with the immigration and protection systems and that BIA's do not systematically inform decision making (for example in decisions around dispersal or appropriate accommodation)*"<sup>58</sup> as required by the CRC as the method of implementing Art 3(1).

The paper then outlines the features of the Best Interests Determination procedure. BID's are "*a multi-agency process undertaken within a child protection framework*".<sup>59</sup> In-depth information about the child is collected and takes account of the view of those working with the child, including immigration officials, as well of the views of the child itself. The purpose of the BID is to identify the most suitable durable solution for the child, in a timely manner, and to address the issue of being unaccompanied. It is noted that there is currently no BID process undertaken in the UK and no consistent mechanism to ensure the child is safe and supported across all their needs.

The three possible durable solutions are outlined (in accordance with *General Comment No. 6*), return, resettlement and integration into the host country or resettlement to a third

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<sup>55</sup> UNICEF UK/ UNHCR, *What the UK can do to ensure respect for the best interests of unaccompanied and separated children* (2015)

<sup>56</sup> UNHCR/Unicef, *Safe & Sound: What states can do to ensure respect for the best interests of unaccompanied and separated children in Europe* (2014)

<sup>57</sup> Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1)* (2013)

<sup>58</sup> UNHCR/UNICEF UK (2015) Op. Cit. – Page 3

<sup>59</sup> Ibid. – Page 3

country to facilitate family reunion. The durable solution is identified by determining in a formal procedure with safeguards what would be in the child's best interests.

Acknowledging the progress that has been made such as ratification of the UNCRC, the lifting of the immigration reservation on the UNCRC and the enactment of the s.55 duty, the briefing then outlines the scope for improvement and the areas of concern:

- No systematic unifying approach to assessing and determining best interests of unaccompanied children.
- Within the immigration system at least, assessments are not taking place consistently.
- Best Interests of children are '*considered through an immigration prism*' rather than a process where the decision maker is required to weigh and balance all the relevant constituents of a child's case.
- Immigration officials tend to consider Best Interests only as part of a pro-forma exercise rather than a substantive determination. "*Best Interests are often only considered at the return stage* rather than throughout the child's case."
- Review of immigration case files for children in one Local Authority showed that Best Interests were not systematically considered other than through the insertion of standard text in documentation.<sup>60</sup>
- Decision makers are unclear about where and how Best Interests should fit and be factored into decision making.
- A potential conflict of interest arises whereby the official tasked with protecting borders is also making the last decision on the durable solution in the child's Best Interests.
- No guardians were appointed.
- Variation in understanding and implementation of the Best Interests principle across public authorities with a mandate concerning unaccompanied children.
- No formal, systematic collection, recording or sharing of information necessary and relevant to a quality Best Interests consideration, including a mechanism to obtain the views of the child and give those views weight according to age and maturity.
- No BID mechanism for arriving at a durable solution.
- No movement on JCHR's recommendation for an evaluation of the case for an independent BID process in the UK.
- High use of 'UASC leave' - not a durable solution - creating barriers for Local Authorities in undertaking meaningful long term planning.

UNHCR/UNICEF's recommendations<sup>61</sup> fall into four broad areas and are directed, tellingly, at **all** Government departments and agencies at both central and local level that hold statutory duties towards unaccompanied children. This underscores their central point that Best Interests decision making should not be the sole preserve of the Home Office - though immigration officials should contribute to Best Interests Assessments and the BID.

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<sup>60</sup> This refers to the Kent Law Clinic study (Op. Cit.)

<sup>61</sup> . - Page 7

The first recommendation concerns giving a commitment to *“exploring and establishing a BID procedure for children, using Safe and Sound as a framework for development”*. Within this they suggest establishing an independent experts group to advise Government on a BID procedure, involving Local Authorities in the development of the procedure and aligning lead responsibility for the determination of an individual child’s best interests with the agency responsible for the child’s welfare.

The second recommendation concerns *“strengthening procedural safeguards for assessing and determining a child’s best interests”* by introducing independent guardians with sufficient legal authority to hold agencies to account and instruct solicitors, provide child-friendly information, ensure high quality legal advice and representation and training and capacity building for those working with and making decisions for the child.

The third recommendation concerns *“reviewing the content and implementation of Home Office and DfE statutory guidance and operational policies and the functioning of existing mechanism and safeguards to ensure a child’s Best Interests are being proactively assessed by all professionals involved with the child as they move through asylum and immigration procedures”*.

And finally, *“strengthen procedures to ensure that all relevant durable solutions are considered for unaccompanied and separated children”* These include settlement and integration in the UK (with the most appropriate form of leave considered on a case-by-case basis), relocation to a third country (whether via family reunion or resettlement) or return to their country of origin. This would include supporting local authorities to plan with a child for the longer-term regardless of the outcome of the immigration decision in order to make sure the child’s rights are protected.

### *Home Office Guidance – Processing Children’s Asylum Claims and the National Transfer Scheme*

*Processing Children’s Asylum Claims* is the most recent guidance issued to staff and sets out how Home Office staff and caseworkers should deal with UASC and other children making a claim for asylum in their own right as well as a claim made on behalf of a child in a family. It was published in July 2016 to coincide with the roll out of the *National Transfer Scheme*<sup>62</sup>.

#### *The National Transfer Scheme*

Launched on the 1<sup>st</sup> July 2016 by the Home Office and Department for Education the National Transfer Scheme is a *“new voluntary transfer arrangement between local authorities for the care of unaccompanied children who arrive in the UK and claim asylum”*<sup>63</sup>.

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<sup>62</sup> Home Office, Department for Education and Department of Communities and Local Government, *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children 2016-17 v.8* (July 2016)

<sup>63</sup> Ibid – Page 3

Operating through a voluntary interim transfer protocol<sup>64</sup>, the National Transfer Scheme aims to ensure that the responsibility for supporting unaccompanied children does not fall disproportionately on a small number of local authorities situated as entry points into the UK (such as Kent and Hillingdon) and that there is a more even distribution of caring responsibilities across the country.

The transfer protocol can be triggered when the number of unaccompanied asylum-seeking and refugee children under the age of 18 in a local authority area (the entry authority) reaches more than 0.07% of the area's child population. Then the local authority can request that a child is transferred to another local authority (the receiving authority) that have not yet reached the 0.07% threshold. This is facilitated through the Home Office's *Central Administration Team* who liaise with the co-ordination lead for the Local Government region, who in turn allocate the child to a local authority within the region according to agreed local arrangements.

The receiving local authority will normally be responsible for covering the costs of transporting the child from the entry local authority. The transfer protocol also introduces new assessment forms for local authorities to complete in relation to children they are caring for. The first (Part A) is to be completed for *all* unaccompanied children, regardless of whether they are being transferred. The Central Administration Team aims to maintain a database of all unaccompanied asylum-seeking children based on the financial receipt information submitted by each local authority and the forms associated with the transfer protocol.

The *Protocol* provides, by way of Annex 1, guidance on how the best interests of the child are to be a primary consideration in the transfer process. Annex 1 highlights factors to be considered when planning a transfer out from an entry authority in line with both domestic legislation and Guidance under the Children Act 1989 and taking account of Article 3(1) of the UNCRC and General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration. These include (in order), the child's views, the child's identity (current needs and capabilities, characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality), the care, protection and safety of the child (material, physical, educational, and emotional needs as well as needs for affection and safety, and the possibility of future risk and harm), situation of vulnerability (physical and emotional need, disability, belonging to a minority group, specific protection needs such as being a victim of trafficking, prior experience of trauma, need for continuity, safety and security), the child's right to health – regarded as central in assessing the child's best interests and the child's right to education

Annex 1 notes that at the beginning of the transfer process, the entry local authority social worker will have to make a decision, based on the child's best interests, whether and when to transfer the child but must do so in the absence of knowing which region or local authority the child will be transferred to and the resources available in that area. Transfers will not take place to authorities that exceed their 0.07% ceiling. The information contained

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<sup>64</sup>Ibid - NB: A revised version of the Transfer protocol is currently under discussion with stakeholders.

in Parts A and B of the assessment forms (completed by the entry authority) will inform the decision of the Central Administration Team on which *region* to transfer to and the regional lead on which *authority* to transfer to. Once transferred to a local authority, a social worker will decide, based on the written information, a suitable placement for the child which is likely to be *temporary* until more is known about their needs and best interests.

### *Commentary on the operation of the National Transfer Scheme*

To date there has been no published information or research on the first year of operation of the transfer scheme.<sup>65</sup> However, the Refugee Children Consortium (RCC) have published a briefing on the website<sup>66</sup> based on information obtained from social workers and Independent Reviewing Officers, FOI requests, staff in entry authorities, Strategic Migration Partnerships and Refugee Children's Consortium NGO affiliate members. The briefing outlines some of the problems in the scheme that have been fed back and which go to the issue of the child's best interests.

The first issue causing concern is the *delays in transfer*. This echoes General Comment No. 6 which states: *"In order to ensure continuity of care and considering the best interests of the child, changes in residence for unaccompanied and separated children should be limited to instances where such change is in the best interests of the child."*<sup>67</sup>

The protocol is vague on transfer timescales but suggests that the entry authority *"will make the transfer decision as soon as practicable and suitable - ideally within 48 hours (two working days) of the child's arrival in to the care of the entry local authority."* Similarly, *"the receiving local authority administration lead will as soon as possible (ideally within 1 working day of receiving [the transfer allocation] acknowledge allocation by email to the receiving regional administration lead [and] confirm transfer acceptance to the entry local authority"*.<sup>68</sup> RCC note that *"there has been universal agreement that moving a child must take account of their best interests and that this will usually include an expeditious transfer"*<sup>69</sup> - to ensure that children's education is not disrupted or withheld and that asylum processing, including legal representation, could be started without undue delay.

RCC report many cases of children not being transferred for weeks or even months and note that this has been 'problematic' with young people being resistant to being moved if they begin to feel settled in the entry authority. In Croydon, no transfers are known to have taken place within a two-week time frame since November 2016. Where young people were transferred, the majority were between 2-3 months or 3-4 months from arrival to transfer.

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<sup>65</sup> Although figures have not been published, it was announced at the East of England UASC regional leads meeting on 19.07.17 that around 480 children had been transferred nationally since the start of the scheme with about 120 of those arriving in the Eastern region.

<sup>66</sup> Refugee Children's Consortium, *Briefing on the National Transfer Scheme*, (July 2017)

<sup>67</sup> General Comment No. 6 (.) – Para 40

<sup>68</sup> Interim National Transfer Protocol (.) P

<sup>69</sup> RCC (.)

A considerable minority of cases took 5-6 months with some cases still awaiting transfer after 6 months.

There have been examples of children self-harming or going missing when required to move – the latter being problematic for the receiving local authority who have by that time assumed legal responsibility for the child under the Protocol’s arrangements. What RCC have not been able to determine is whether delays in transfer are the result of entry authority continuing assessments of a child they intend to transfer, Central Administration Team actions or omissions, regional leads difficulties in allocating to a local authority or the receiving local authority identifying a suitable temporary placement.

The Home Office have a role in ensuring that where children are transferred there are legal aid solicitors able to represent them in their asylum claims within reasonable distance from the local authority area. Historically, because of the concentration of unaccompanied children in London and the South East, specialist legal services have been concentrated there. When the transfer scheme was originally discussed, in March 2015, the Home Office committed to “*looking at access to legal aid as a priority and availability of specialist service*”.<sup>70</sup> Although responsibility for awarding contracts lies with the Legal Aid Agency, part of the Ministry of Justice, tendering for new contracts in transfer regions has not yet begun. This has led to pressure on the few suppliers who are operating in those regions leading to significant increases in waiting times for appointments for children and consequent delays in asylum processing times. Due to these pressures Home Office has agreed to increase the time permitted for the submission of the completed Statement of Evidence Form from 28 days<sup>71</sup> from registration of the claim to 60 days. Even this extension may not be sufficient when one region is reporting waits for children to see a solicitor of 2-3 months. The effect of these delays on children’s claims has not been measured. The risk is that children – particularly those aged 16 or 17 - become ‘aged out’ before the asylum decision leading to an increase in outright refusals rather than grants of UASC leave. There have also been concerns about lack of interpreters and cultural resources in the receiving areas. These issues impact on the costs to Local Authorities and therefore the adequacy of the grant from the Home Office to cover care costs.

The relationship between age-assessment and the National Transfer scheme is discussed in the Chapter on age assessment.

### *The revised guidance - Processing Children’s Asylum Claims*

The new guidance document *Processing Children’s Asylum Claims* replaces the guidance in place when ICIBI conducted their inspection of the handling of claims from unaccompanied children between February and June 2013 and also when the research into children’s best interests in asylum processing, cited above, was conducted.

As with any operational policy there are two issues. The first is whether the policy itself is sufficient to ensure children’s best interests are taken as a primary consideration

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<sup>70</sup> National Asylum Stakeholder Forum - Children’s Sub-Group, 14.12.2016

<sup>71</sup> Home Office, *Processing Children’s Asylum Claims*, (Op. Cit.) - Page 26

throughout the decision-making process. To assess this, the policy can be considered against the framework of the relevant General Comments from the Committee on the Rights of the Child, General Comment No 6 *on the treatment of unaccompanied and separated children outside their country of origin* (2005) and General Comment No.14 *on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1)* (2013). It will be recalled that the latter has been described as ‘authoritative’ in *R (SG) v Secretary of State for Work and Pensions*<sup>72</sup> and also endorsed in *Mathieson* [2015] 1 WLR 3250, [2105] UKSC 47<sup>73</sup>. One of UNHCR and UNICEF’s recommendations in 2015 had been “*reviewing the content and implementation of Home Office .... operational policies and the functioning of existing mechanisms and safeguards to ensure a child’s Best Interests are being proactively assessed.... as they move through asylum and immigration procedures*”.<sup>74</sup>

The second issue, harder to discuss in the absence of up to date evidence, is whether the policies and procedures in the guidance are being properly adhered to. In respect of previous guidance, it will be recalled that one of GMIAU’s concerns was that “*Despite this guidance, the analysis of the research sample showed that there is very little evidence that UK Border Agency is carrying out a proper determination of Best Interests, including a case-specific consideration of all the relevant evidence.*”<sup>75</sup>

The following sections follow the sequence of *Processing Children’s Asylum Claims* and consider the current policy in the light of relevant legal judgements, the framework of the General Comments highlighted above, and the observations of UNCHR arising from their quality initiative work in particular.

### Policy Intention

The policy intentions of the guidance are set out at the start of the document and provide the framework for decision makers when implementing the detail of the instruction. Emphasis is placed on the welfare of the child being *paramount* at all times with references to those charged with caring for the child and keeping them safe. This implies duties for Home office staff in enquiring into the child’s care arrangements, especially on first contact, making appropriate referrals where necessary and being alert to signs of trafficking and ensuring the relevant agencies are informed where this is the case. This is consistent with the s.55 statutory guidance *Every Child Matters: Change for Children* which sets out the contributions that the Home Office makes to safeguarding children and promoting their welfare requiring staff to exercise vigilance when dealing with children with whom staff come into contact who may be at risk of harm and making timely and appropriate referrals to agencies who provide ongoing care and support to children.

The other policy intentions highlighted are that “*the best interests of the child are a primary consideration at all times*”. While this is not elaborated upon, the two further policy intentions could be said to be specific examples of acting in the child’s best interests namely

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<sup>72</sup> *R (SG) v Secretary of State for Work and Pensions*

<sup>73</sup> *Mathieson* [2015] 1 WLR 3250, [2105] UKSC 47

<sup>74</sup> UNHCR/UNICEF (2015). - Page

<sup>75</sup> GMIAU (2013). - Page 10

that “claims from unaccompanied children are prioritised and protection is granted swiftly to those who need it” and that, “information about the asylum claim is collected in an appropriate way with decisions made promptly and communicated to the child in a way that acknowledges their age, maturity and particular vulnerabilities”.<sup>76</sup>

While the literature shows that prompt decision-making is important to children<sup>77</sup>, the policy intention refrains from linking the best interests of the child to the *substance* of the decision that must also give primary consideration to the child’s best interests in the correct interpretation of Article 3(1) of the UNCRC. While this *is* discussed in the final sections of the guidance, it is not highlighted as part of the policy intention and staff might therefore understand the intention of giving primary consideration to a child’s best interests as being discharged merely by *communicating* the decision in an appropriate manner but not through considering those best interests in the decision itself. In addition, while the policy intention accepts that a prompt grant of leave is important for those in need of international protection (implying that the child and its carers can then plan for the future) a prompt *refusal* is also vital to the child for the same reason.

### Immigration Rules

This section of the guidance summarises the Rules relating to unaccompanied children and follows this with a short discussion. The guidance states, “Any decision about immigration status that follows non-recognition of a protection need based on the Refugee Convention must include consideration of the need to safeguard and promote the welfare of the child.”<sup>78</sup> It then reiterates the position that “a grant of humanitarian protection will nearly always take account of this by itself, as will the grant of UASC leave.”<sup>79</sup> (Emphasis added). As highlighted in the literature review, and in the JCHR’s report<sup>80</sup> the grant of UASC leave in itself is considered by many to be used too readily, not to contribute to a durable solution and therefore not be in the child’s best interests. The Committee on the Rights of the Child identified the grant of temporary status that ends when the child turns 18 as one of the ‘protection gaps’ that motivated the issuing of the General Comment.<sup>81</sup>

### Advice, support and welfare for children who claim asylum

This section of the guidance sets out the roles of other actors who support the child through the asylum process and is welcome recognition that decision makers operate in a wider context of support for the child in making their claim. Actors mentioned include private foster carers, the responsible adult, the legal representative and the Refugee Council Children’s panel of Advisors. Neither the Local Authority Social Worker (except in the role of Responsible Adult), the Home Office interpreter, nor the legal representative’s interpreter are mentioned though how they support the child throughout the process may be critical to

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<sup>76</sup> Processing Children’s Asylum Claims (.) - Page 8

<sup>77</sup> See for example: Brighter Futures, *The Cost of Waiting* (2013) Praxis/Brighter Futures and Matthews, A. (2014).

<sup>78</sup> Ibid. – Page 11

<sup>79</sup> Ibid – Page 11

<sup>80</sup> JCHR (.) Para. 106-118 and Para. 190-197

<sup>81</sup> General Comment No. 6. – Para 3

the child having its voice heard and therefore its best interests considered.

a) Responsible Adult

The role of the responsible adult is set out in detail. The role of the responsible adult in substantive interviews was considered in research by the Law Centre's Network<sup>82</sup> who recorded their attendance throughout the substantive interview in 56 out of 58 cases in their sample. In 27 cases children were invited to request who they wanted to fill the role and in only one case was this rejected. In 12 cases children were not given an option contrary to the guidance which states *"The child must be asked prior to the interview to confirm whether they are happy with the person acting as their responsible adult"*<sup>83</sup>

Lawyers recorded useful interventions by the responsible adult in issues relating to the child's health, mental distress, lack of sleep, that the child was fasting, had not eaten or had a lengthy journey as a result of which the interviewer took appropriate action.

The guidance allows interviewing officers to limit the role of the adult in the interview and lawyers observed examples where this was done and the role was reduced to that of observer rather than safeguarder. For example, one lawyer noted a script read out stating that the lawyer and responsible adult could only comment at the end of the interview.

The Law Centres Network research recommends the Home Office be encouraged to see the value of the responsible adult and discourage case worker from reading out scripted presentations setting limits to the role which should only be done if the responsible adult attempts to answer on behalf of the child.<sup>84</sup>

b) Home Office interpreters and Representatives interpreters

In a section on children attending the intake unit at Croydon the guidance states: *"The Home Office will always provide a qualified and professional interpreter for each stage of the asylum process if the claimant is unable to speak English. However, legal representatives may also bring their own interpreters."* Skilled interpretation at asylum interviews is essential to ensure that the child is heard, that they are able to fully participate in the process and are safeguarded. The guidance does not establish the qualifications for Home Office interpreters working with children, what training they receive, standards of behaviour expected and whether they undergo checks on their suitability before interpreting for children. The Law Centres Network research identified a number of problems with some Home Office interpreters and also underscored the need for representatives to have an independent interpreter present<sup>85</sup>. In one case the Home Office interpreter 'lacked professionalism' was 'aloof' and 'looked bored', his manner and engagement being 'poor'. Another was visibly unhappy when corrections were made by the representative's interpreter and objected to the corrections (the interviewing officer accepted the

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<sup>82</sup> Law Centre's Network, Put yourself in Our Shoes – Considering Children's Best Interest's in the Asylum System (November 2015)

<sup>83</sup> Home Office, Op. Cit. - Page 37

<sup>84</sup> Law Centres Network, Op. Cit. Pages 78-79

<sup>85</sup> Law Centre's Network, Ibid. – Pages 79-80

representative's interpreter's corrections). The use of interpreters with different dialects causes particular problems. Native Farsi speakers are used to interpret for Afghan Dari speakers, Pakistani Pashto speakers are used for Afghan Pashto speakers. Children have commented 'they speak different from us' and sometimes blamed them for 'losing their cases'. In some reported examples the Home Office interpreter did not know the County Information and was unable to provide correct spellings for place names. The Committee on the Rights of the Child has emphasised that specialised training is important for all officials working with unaccompanied children, including interpreters, and highlighted that training should cover such matters as the principles and provisions of the Convention, knowledge of the country of origin of separated and unaccompanied children, child development and psychology and cultural sensitivity and inter-cultural communication.

The guidance appears to offer a discretion to Intake Unit staff to exclude a representative's interpreter from an interview with a child: "Croydon AIU staff will try to accommodate requests for interpreters to be in attendance but will also consider whether it is in the child's best interests to allow an additional interpreter into the welfare interview." This appears to be a misuse of the best interest's principle.

There are significant gaps in the knowledge of the standards and checks that the Home Office employs in its use of interpreters in the asylum setting, let alone its use of interpreters for children's cases.

c) Refugee Council Children's Panel Advisors

The role of the Refugee Council Children's Panel Advisor is also set out and clear instructions provided to ensure a referral to the Panel within 24 hours of first contact with the child. Other staff are required to check that the referral has been made. ICIBI had reported previously that in only 39% of cases sampled, and only at Croydon and Heathrow, were referrals made.<sup>86</sup>

d) Legal Representatives

Children making an asylum claim in their own right are eligible for assistance in the form of legal aid and the Legal Aid Agency (LAA) will fund a legal representative's attendance at the substantive interview.

The guidance sets out that children are eligible for assistance under legal aid and that funding is available for the representative's attendance at the substantive interview. It is also mentions that "*there is no requirement for legal representation at first encounter because the child should not be asked questions about issues that relate to the asylum claim*".

When the Home Office was conducting initial screening interviews for children, the Legal Aid Agency would also fund attendance at these<sup>87</sup>. Now that children's screening interviews

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<sup>86</sup> ICIBI. – Para. 7

<sup>87</sup> Legal Services Commission, *Immigration Specification and Immigration Funding Code*, Paragraph 8.53(f), 8.54 8.55.

have been replaced by welfare interviews it is not known whether legal representatives can claim for attendance. The guidance doesn't exclude representatives from attending the welfare interview but, should funding have been withdrawn, it is unlikely that they would. The implications of this are considered below.

### First Encounter and Welfare Form

This section of the guidance marks a significant change in policy by the Home Office from previous guidance. *"Children are no longer required to have the same screening interviews as adults, but must undergo a welfare interview and a series of checks."*<sup>88</sup>. This change was forced on the Home Office by the Court of Appeal in the case of *AN & FA*<sup>89</sup>. The case established that a child should not be interviewed about the substance of their asylum claim without the presence of a responsible adult and also recognised that it was inappropriate for a vulnerable child to be interviewed upon arrival following a long and tiring journey. Any initial detention and interview should only be for the purposes of protecting their welfare.

In respect of questioning that goes to the substance of the asylum claim, Lord Justice Black stated: *"I am not attracted to the idea that the mischief can be corrected by giving the child an opportunity to explain himself on an occasion when he does have the assistance of an independent adult"* (Para 117).

The 'mischief' referred to by LJ Black has not been addressed in the current guidance. While acknowledging that the Immigration Rules prevent information given by the child in the absence of a responsible adult at the welfare interview being *"used to examine the basis of the claim for asylum"*, and that *"therefore a child must not be asked to explain or elaborate on why they are afraid to return to their home country when completing the welfare form"*, taking *"particular care to ensure that questioning does not go beyond inviting a response to the questions on the form"* the 'mischief' remains because: *"It may be that details or information relating to the substance of their asylum claim are nevertheless volunteered by an unaccompanied child on initial encounter or while the welfare form is being completed. Asylum caseworkers must never rely on information obtained from an interview where no responsible adult or legal representative is present unless this information has also been explored and raised with the claimant during the substantive asylum interview in the presence of a responsible adult or legal representative. The child must be given an opportunity to explain any related issues or inconsistencies."* (Emphasis added). This places the responsibility on the child, most likely in the absence of a legal representative or responsible adult, to judge how much to say about the basis of the claim. It could be made clear in the guidance that staff should pro-actively *prevent* children from elaborating beyond an assertion that they wish to seek protection.

How the new welfare form is used to inform the asylum decision has not yet been researched or inspected. It will be important to know whether children's responses to questions establishing that they wish to make a protection claim will continue to be raised for clarification in substantive interviews and referred to in the Reasons for Refusal

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<sup>88</sup> Home Office, (.) – page 19

<sup>89</sup> *R on the application of AN (a child) and FA (a child) v SSHD* [2012] EWCA Civ 1636

following *AN and FA*. The intention of the Judgement is clear: *“It seems to me the appellants are right to say that procedural and substantive safeguards are the most effective means of obtaining the child’s full and reliable account of the reasons why he is here and that those safeguards should include the presence of a responsible adult when asylum is being discussed” (Para 122).*

In addition to completion of the welfare form, other actions to be taken on first encounter are set out which are largely consistent with the policy intention to treat the welfare of the child as *paramount*. These include notifying the Local Authority of the arrival of the child in their area. In the case of accompanied children, staff must verify the identity of any accompanying adult. Staff are required to notify the local authority in which an accompanied child is staying whether or not there are safeguarding or trafficking concerns. It is not entirely clear why a referral is made where there are no concerns or what the local authority is supposed to do with that information. Where there are concerns about the accompanying adult the guidance establishes a procedure for liaising with the local authority. While this is in the child’s best interests, auditing of referrals and local authority responses will provide useful information on whether this measure has assisted with safeguarding the child.

*“All unaccompanied children must be referred to local authority children’s services at the earliest possible opportunity, even if only the most basic details are known.”<sup>90</sup>* . This reflects the *AN & FA* judgement but ‘at the earliest possible opportunity’ still leaves considerable discretion for staff and has always been Home Office policy<sup>91</sup>.

In particular, the guidance appears to permit delays in referrals to the local authority related to Home Office age assessments. The guidance does not go into further detail about age assessment but refers staff to the *Assessing Age* instruction.

The point at which an applicant claims to be a child might be considered ‘the earliest possible opportunity’ for referral but built into the booking in process is an assessment of the appearance and demeanour of someone claiming to be a child to determine whether their age is believed. Referrals may be withheld until Home Office staff are satisfied that the applicant is, or maybe, a child (applying the benefit of the doubt).

Auditing of the time a young person spends between first contact (in the case of clandestine entrants, under detention conditions) and referral to the local authority would be useful in establishing whether the policy is being followed and whether the discretion is being reasonably applied. When the Children’s Commissioner examined 5 children’s files at the Port of Dover, they found that the time between ‘sole immigration detention’ (denoted by service of form IS91 - ‘detention authority’) and referral to the local authority was

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<sup>90</sup> Home Office. Page 21

<sup>91</sup> Hansard, 08.03.11 (col. 935 W): *“Special arrangements are also in place for unaccompanied children who arrive in the UK to claim asylum. The children are referred to the nearest local authority immediately on arrival to ensure that they receive the same standard of care and support as any other child in need.”*

respectively: 6 hrs. 15 mins, 4hrs 55 mins, 4hrs 50 mins, 14 hrs 15 mins and 3 hrs 20 mins.<sup>92</sup>

### UASC Case review events

The purpose of the 'case review event' is to: explain the asylum process; explain the family tracing process; ensure the child has legal representation; check on progress in completing the SEF; explain the current circumstance form, parts 1 and 2, to the social worker and arrange for part 1 to be sent to the social worker with a return date agreed at least one week prior to a substantive interview; issue any further relevant paperwork. A member of the caseworking team issued with the child's file is required to contact the child's social worker, 10 working days after allocation to arrange the case review meeting.

The case review meeting replaces the 'First Reporting Event' – a measure brought in to allow children to meet the casework officer allocated to carry out their asylum interview. The Law Centre's Network research suggests that "*this was not a first event but a 'non-event'*" which rarely took place. They recommended that it should be dispensed with as a scheduled process. Lawyers had commented that it created anxiety and confusion for the child about a further interview.<sup>93</sup> The family tracing element of the event is considered in chapter 4 below.

### Actions to prepare for the substantive interview

Much of this section is predicated on the child having been able to instruct a representative – a matter made more complicated by the National Transfer Scheme (NTS) because it will be for the receiving authority not the entry authority to arrange representation. The NTS interim guidance does not reflect the subsequent change in policy to allow 60 days for the submission of the SEF. However, the principles of the preparation are consistent with best interests principles. The Interview should not go ahead in the absence of the completed SEF but non- return should not be considered a withdrawal of the claim.

The policy on considering whether or not an interview should take place makes reference to the possibility that this may not be in the child's best interests – particularly if they have been through a 'particularly traumatic experience' and sufficient documentary evidence is available. The use of this discretion has not been audited. The policy also emphasises that this is an opportunity for the child's voice to be heard.

### Interviewing children

There is a substantial section on interviewing children including the principles of interviewing, timing and location, conducting the interview, the welfare of the child during the interview, roles of the legal representative and responsible adult. Most recent research into the conduct of Home Office interviews has demonstrated that the policies designed to be beneficial to children and set out in the instruction (and the previous instruction) are

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<sup>92</sup>Matthews, A., *Landing in Dover*, (Jan 2012) Children's Commissioner – Para 7.10

<sup>93</sup> Law Centres Network, Op. Cit. – page 75

broadly being followed. Not only was this the finding of ICIBI<sup>94</sup> but also of GMIAU, Kent Law Clinic and Law Centre's Network (Op. Cit.) In the latter's research, lawyers spoke positively about a specially designed interview room for children and families and how it created a better atmosphere for interviews<sup>95</sup> while also noting that poorly designed rooms inhibited the benefits afforded to the child – for example the child not being in visual contact with the responsible adult because of the room's lay out. The Law Centre's research indicates that postponement requests were generally approved, as were requests for gender and dialect specific interpreters.

One concern raised by the literature is that of delays between registration and substantive interview. The Law Centre's Network research, covering a sample of 60 children who had claimed asylum between December 2013 and December 2014, recorded that in 23 cases the substantive interview took place in between 2 – 4 months from initial registration of claim. However, in some cases there were delays of over a year due in some cases to the child's circumstances but in some cases, due to Home Office errors such as failing to notify parties or issues with interpreters. In a few cases, there were delays of 18 months – 2 years and in one case a delay of 3 years and 5 months<sup>96</sup>. Lengthy delays do not appear to be the norm though this needs careful monitoring following the rise in numbers of UASC since mid 2015 and the commencement of the National Transfer regime. Substantial delays are clearly not in the child's best interests as *"uncertainty over their immigration status causes extreme anxiety and distress for young people."*<sup>97</sup>

#### How to assess claims from children

This section provides guidance on how to assess an asylum claim from a child. It contains sub-sections on decision making principles, the effect of age and maturity, family circumstances, the assessment of credibility, child-specific persecution, assessing awareness of fear and how the Refugee Convention 'reasons' for persecution - religion, political opinion, membership of a particular social group – are to be applied when dealing with children.

It is clear from reading the guidance that much has been taken directly from the UNHCR's 6th Quality Initiative Report to the Minister that contained an audit of the quality of decisions in children's cases<sup>98</sup>. The audit examined *"the extent to which the special circumstances of asylum seeking children are recognised and considered by UKBA in making asylum decisions"*<sup>99</sup>. While UNHCR observed some positive child-sensitive decision making practices they found that not all caseowners were sensitive to child specific issues. In particular, they raised concerns over the assessment of credibility and establishing the facts

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<sup>94</sup> ICIBI, Op Cit. Para's 10-12 and Chapter 7

<sup>95</sup> Law Centre's Network, Op. Cit. – page 76

<sup>96</sup> Ibid – Page 77

<sup>97</sup> Chase. E et al, *The emotional wellbeing of unaccompanied young people seeking asylum in the UK*, (2008), Thomas Coram Research Unit, British Association for Adoption and Fostering - page 5

<sup>98</sup> UNHCR, *Quality Initiative Report – Sixth Report to the Minister* (April 2009) – Part 3 'Audit of Quality of Decisions in Children's Claims'

<sup>99</sup> Ibid. Para 3.4

in children's claims.

In respect of reasons for refusal letters they found *"no explicit consideration of age in the credibility assessment and no attempt to consider age-specific mitigating factors when considering the level of detail and consistency in the applicant's account."*<sup>100</sup> They also noted with concern *"that inappropriate weight is sometimes placed on the child's immigration history including in relation to Section 8 of the 2004 Act.... Adverse credibility findings are sometimes reached without due consideration of the applicant's age and level of control they are able to exercise over their journey to the UK."*<sup>101</sup>.

In addition, they found *"inappropriate use of information obtained in screening interviews or earlier administrative stage"*<sup>102</sup> and no evidence that inconsistencies were later put to the child at the substantive interview. They noted that inability to provide sufficient detail was often used to refuse children asylum and saw this as a misreading of the 'burden of proof'. While the burden falls to the applicant, the duty to ascertain and evaluate relevant facts is a shared duty and would be particularly important in children's cases.

Finally, they complained of the use of 'speculative arguments' on how an applicant or the authorities should or would have behaved in the circumstances.

It is clear from the current guidance that much of UNHCR's 2009 critique has been taken on board and found its way into Home Office policy. However, the available research continues to find misapplication or lack of adherence to the principles set out in the guidance. In the Kent Law Clinic research (Op. Cit.), *"most refusals and Tribunal dismissals were on grounds of incredibility and implausibility"*.<sup>103</sup>

For example, a child aged 15 was refused because of *'a lack of detail in his initial application'*. He had stated that he was being abused by family members but had not said in his statement how often he was abused, what he was abused with or why the abuse was happening. No discrepancies or other credibility points were raised. This was contrary to the guidance that requires caseowners to *'be aware that children do not often provide as much detail as adults in recalling abusive experiences'*. In another case the child's evidence was that his father had died when he was 1 or 2 years old. The refusal letter criticises him for being *"unable to provide any information about his father's time with the Taliban and being unable to state precisely how old he was when his father died."*<sup>104</sup>

They also noted the use of speculative argument: *'...It is considered that if [your relative] did not trust the agents with your sister then he also would not take the risk of sending you, a young boy who he cares about, with these men...'*<sup>105</sup> Many further examples of inappropriate credibility assessments that are not in line with stated policy are given.

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<sup>100</sup> Ibid. Para – 3.4.6

<sup>101</sup> Ibid. Para 3.4.8

<sup>102</sup> Ibid. Para 3.4.10

<sup>103</sup> Kent Law Clinic, Op. Cit. Page 11

<sup>104</sup> Ibid. Pages 16

<sup>105</sup> Ibid. Page17

While the guidance provides a positive framework for assessing children’s asylum claims, evidence from refusal reasons letters suggests that decision makers in children’s cases may not be having decisions scrutinised sufficiently by supervisors able to understand and apply the policies correctly. The current guidance says that: *“All refusal decisions and decision letters in children’s cases must be cleared by a senior caseworker or technical specialist”*<sup>106</sup>. What arrangements are in place to ensure this happens is not known.

### Assessing Claim Outcomes

This section of the guidance contains a whole sub-section on ‘Best Interests Consideration’ linking this to the s.55 duty.

The Home Office approach recognises that the s.55 duty is engaged by all asylum decisions made in children’s cases but that *“a decision to grant an application made by a child and supported by those with responsibility for looking after the child can be taken as implicitly safeguarding their welfare and reflecting that, the child’s best interests.”*<sup>107</sup> It is therefore considered that *“it will not be necessary to undertake a detailed best interests assessment in these circumstances.”*<sup>108</sup> However, *“when a decision is being considered that might have an adverse impact on a child, a detailed assessment of the impact on the child in best interest terms is required, because this consideration has the potential to change that decision.”*<sup>109</sup>

A section follows on ‘how to work with local authorities’ in recognition that *“a local authority social worker will usually be in a better position to provide an assessment of the child’s degree of maturity and self-care or living skills.”*<sup>110</sup> - factors relevant to the assessment of best interests, particularly where return is being considered. Once the decision has been made to refuse asylum, case workers are required to send Part 2 of the ‘Current Circumstances Form’ to the child’s social worker for completion and return with 10 working days. Part 1 of this form is sent to the social worker prior to the asylum interview at the time of the case review event and should be returned prior to the asylum interview and used to inform that interview. Forms must be returned before making a further decision.

It appears from the guidance that the exchange of information with the social worker would include the Home Office being sent a copy of the child’s care plan and notes from the most recent Looked After Child (LAC) review meeting. In return the Home Office caseworker is required to send information on reception arrangements in the country or origin. The guidance stresses that up to date information is essential because of the potential for fast moving changes of circumstances in the country of origin. It is assumed that the social worker will be a conduit for information from others who may be able to provide relevant information on the child such as carers, foster carers, schools, colleges and others involved with their welfare. The weight attached to the information received will depend upon the particular circumstances and complexity of the case.

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<sup>106</sup> Home Office, Op. Cit. – Page 50

<sup>107</sup> Ibid. Page 45

<sup>108</sup> Ibid. Page 45

<sup>109</sup> Ibid. Page 45

<sup>110</sup> Ibid. Page 46

The guidance then goes through the hierarchy of possible leave decisions on a child's case before returning to the best interests consideration. Where Refugee Status is granted, "*it will usually be clear that their best interests are served by remaining in the UK.*"<sup>111</sup> Although it is acknowledged that resettlement in a third country where the child's relatives are present might be an alternative outcome and in the child's best interests. Where Asylum is refused, a grant of Humanitarian Protection (HP) will be considered and if granted it will generally be the case that the child's best interests are to remain in the UK.

Where Asylum and HP are refused, consideration should next be given to a grant of leave under the Immigration Rules on the basis of Article 8 ECHR (family and private life). The guidance says that where such a claim is '*made out*', leave would normally be granted on the 10-year route to settlement. It is unclear how a claim under Article 8 could be '*made out*' in light of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which restricts the grounds on which legal aid funding could be provided within the immigration category. Whilst asylum<sup>112</sup> remains within the scope of legal aid funding, the majority of immigration matters (including Article 8 ECHR applications) are now out of scope. This means that the child's lawyer will not receive funding from the LAA to make such an application. The work could be carried out privately but children or their carers may be unable or unwilling to pay.

The guidance is silent on whether case workers are required to consider for themselves the case for Article 8 leave. It is certainly the case that the information returned to them by the local authority and other professionals involved with the child's welfare may assist with such a determination. Where there is sufficient information to establish that the child has established a private or family life, this would need to be weighed against countervailing factors to establish if removal was a disproportionate interference. The child's best interests are considered to be part an integral part of any Article 8 assessment.

Where Article 8 leave under the Rules is ruled out, the caseworker must then consider *Discretionary Leave* outside of the Immigration Rules. This applies to accompanied children "*who do not meet the requirements of UASC leave.*"<sup>113</sup> In the case of unaccompanied children, "*the absence of adequate reception arrangements alone will not usually warrant a grant of DL on exceptional grounds.*"<sup>114</sup> While all grants of DL must be in accordance with the DL policy the guidance sets out some specific areas that need to be considered when assessing whether a child qualifies for DL or not. These include the age of the child (especially for accompanied children), and the circumstances of arrival.

DL might be appropriate for children determined as having been trafficked (a 'conclusive grounds' decision from the competent authority under the National Referral Mechanism for those suspected of having been trafficked) where they have been refused asylum or HP and where there is evidence that family members were complicit in making arrangements for

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<sup>111</sup> Ibid. Page 47

<sup>112</sup> Paragraph 30 of Part 1 of Schedule 1 of LASPO defines an asylum claim as one made under: The Refugee Convention; the EU Qualification Directive; EU Temporary Protection Directive or Article 2 or 3 of ECHR

<sup>113</sup> Op. Cit. Page 47

<sup>114</sup> Ibid. Page 48

the child to come to the UK. DL might also be appropriate where there are barriers to removal, for example serious health issues affecting the child. The guidance suggests relying on information provided by the local authority to determine this.

If the child does not qualify for refugee status, HP, family or private life leave or DL on any other basis, *“the caseworker must consider whether there are safe, adequate and sustainable reception arrangements in the child’s home country.”*<sup>115</sup> For a child under 17 ½ at the point of decision, if such arrangements can be made successfully, the child will be refused leave outright. If not, and the child meets the requirements of Immigration Rules 352ZC-F, they will be granted leave for 30 months or to the age of 17 ½ whichever is shorter (‘UASC Leave’ under the Immigration Rules). Children refused outright because they are 17 ½ at the point of decision but are still under 18 will be liable for removal once they turn 18.

### Best Interests of the Child consideration

The guidance then returns to the issue of ‘how to make a best interest of the child consideration’ - synonymous with a ‘s.55 consideration’. The whole section is poorly structured, badly written and difficult to comprehend. The section *seems* to apply to both accompanied and unaccompanied children but appears marginally more aimed at accompanied children. A careful reading allows for the following points to be ascertained:

- (1) Considering the best interests of the child in a structured way is essentially a matter of asking the right questions. Addressing the questions in an organised way will lead to a good consideration of the child’s best interests.
- (2) The information that goes into this consideration should be that provided by the child or their representative. There is no obligation to enquire or investigate factors that are not obvious or are not being invoked on behalf of the child.
- (3) All best interest enquires must be recorded.
- (4) Consideration of **new**, child specific information at this stage can be used to assess whether the child qualifies for leave in any of the capacities listed (emphasis added).
- (5) It may be apparent that the child’s best interests are served by return – for example where the family has been traced.
- (6) The decision on whether to return will be a matter of making a careful assessment of the child’s best interests and balancing those interests against the wider public interests in preserving good immigration control and use of resources.
- (7) The overall assessment of the child’s best interests are a matter of considering the child’s individual circumstances and experiences in the UK alongside the conditions they would face on return.
- (8) In the case of unaccompanied children, caseworkers must obtain information from the social worker.
- (9) When sufficient information is available to make an overall assessment of the child’s best interests, the assessment should be balanced against the need to provide effective immigration control
- (10) If a decision is made that removal is *not* in the child’s best interests, then a decision must be made on whether those best interests are outweighed by the need to uphold immigration control.

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<sup>115</sup> Ibid. Page 49

- (11) If the decision is that the need to uphold immigration control is greater then speak to a senior manager prior to making a final decision.
- (12) A detailed best interests consideration is an important and necessary stage when a decision is being made that may lead to an adverse impact on a child such as requiring them to leave the UK.

The guidance seems to confirm that no independent BID process involving other professionals involved with the child is yet envisaged. The information gathering mechanisms are at best perfunctory with no mechanism for obtaining the views of the child while reliance is placed upon information provided by the representative who, if working under legal aid, is not funded to make such representations other than on the protection claim itself.

If the intention is that the Home Office will make its own BID's, it would be hoped that the guidance provided here would make reference to the factors to be taken into account when assessing the best interests of a child indicated by the CRC in *General Comment 14* - the child's views, the child's identity, preservation of the family environment and maintaining relations, care, protection and safety of the child, situation of vulnerability, the child's right to health and the child's right to education<sup>116</sup>

Rather, "*the factors that need to be considered when assessing the best interests of a child in the context of an immigration decision*" are identified as a series of question: Is it reasonable to expect the child to live in another country? What is the level of the child's integration into this country? How long has the child been away from the country of the parents? Where and with whom will the child live if compelled to live overseas? What will the arrangements be for the child in that other country? What is the strength of the child's relationship with a parent or other family members that would be severed if the child moves away? These questions are acknowledged as being taken from the *ZH Tanzania* judgment (they can be found at Para. 29). In *ZH Tanzania* these questions refer to the assessment of proportionality under article 8(2) ECHR in the context of an expulsion decision on a child's criminal parent. It is questionable whether this different factual matrix can be applied to a best interests consideration for an unaccompanied child.

The guidance appears to have misunderstood the basic process to be undertaken by decision makers and outlined by the President of the Tribunal in *JO and Others* (see Chapter 1) - that the first stage of the assessment requires the decision maker to be properly informed of the position of the child and then "*Thus equipped, the decision maker must conduct a careful examination of all relevant information and factors... Being adequately informed and conducting a scrupulous analysis are elementary prerequisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations.*" The guidance conflates the stages in the process of first assessing and then determining the child's best interests and then weighing them against other considerations.

This disappointing section appears to confirm parts of the analysis presented by UNHCR and UNICEF in *Safe and Sound* – namely that the best Interests of children are '*considered*

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<sup>116</sup> CRC General Comment No 14 – Para's 52-79

*through an immigration prism’ rather than a process where the decision maker is required to weigh and balance all the relevant constituents of a child’s case and that “Best Interests are often only considered at the return stage rather than throughout the child’s case.”*<sup>117</sup>

### Discussion and Conclusions

The discussion about assessing and determining a child’s best interests, raised over the years, in particular by UNHCR and UNICEF and receiving a good airing in the proceedings before the JCHR in 2013 remain unresolved. There remains a strong case for best interest assessments and determinations to be conducted by a broader range of professionals than Home Office decision makers charged with protecting the borders.

The new guidance and the forms associated with national transfer (the ‘Unique Unaccompanied Child Record’ and the ‘Current Circumstances’ forms issued to Social Workers at various points in the process) provide some opportunities for gathering information relevant to best interest assessments. It will be important to monitor how well these opportunities to obtain baseline information that could contribute to best interests assessments are being used and whether local authorities are assisting the Home Office by supplying care plans etc. However, there is as yet no mechanism in place for obtaining the voice of the child to inform such assessments and guidance to Home Office staff on assessing best interests remains confused and weak. There has as yet been no movement on JCHR’s recommendation for an evaluation of the case for an independent BID process in the UK.

Although revised guidance has been issued to correspond with the launch of the National Transfer scheme, it reproduces some of the same problems identified previously. The guidance gives scant attention or due regard to the circumstances in which unaccompanied children in particular first encounter the immigration authorities and the effect this might have on their willingness and ability to provide reliable or cogent information.

While it is positive that screening interviews for children no longer occur, there remain questions over how information gathered in the new welfare interviews might be used in asylum determination and whether this meets the requirements of the *AN and FA* judgment. Meanwhile, the procedural protection given to children attending screening interviews in the form of the right to be accompanied by a legal representative appear to have been weakened and it is not known whether funding is still available for this from the LAA. It is of concern that the guidance allows an independent interpreter to be excluded from the welfare interview by an immigration officer on the ground of ‘the best interests of the child’.

The National Transfer Scheme has been driven by the needs of the ‘gateway’ Local Authorities and while the best interest of the child are certainly considered in the guidance for the scheme, unless transfers can be effected quickly and efficiently they may not be in the child’s best interests because of delays in the child becoming settled and entering into

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<sup>117</sup> UNHCR & UNICEF *What the United Kingdom can do to ensure respect for the Interests of unaccompanied and separated children* - (2014) Op. Cit. Page 5

education and delays in their full entry into the asylum process with legal representation. While the principal of prioritizing children's claims and resolving them quickly remains, and the Home Office has been accommodating to the delays caused by National Transfer, a slowing down of the asylum process will not benefit children. It will be important to monitor the current length of the asylum process undergone by unaccompanied children in light of the National Transfer and the effect this may be having on decision outcomes. Urgent efforts need to be made to ensure that competent legal representation is available to children in the Transfer regions without lengthy waiting periods.

The actions required in preparation for the substantive interview appear good and research evidence suggests that in recent years, Home Office training and resources have benefited children in that both the physical environment in which interviews are conducted have improved and staff appear better trained and more alert to what makes for a better and more relaxed interview. Concerns remain about the interpreters used in children's cases fuelled by a lack of transparency over interpreter's qualifications and training to work with children as required as a procedural protection by the Committee on the Rights of the Child.

Despite the positive requirements of the Immigration Rules concerning the assessment of children's asylum claims, concerns remain over the extent to which age and maturity are adequately considered in credibility assessments and establishing the facts in children's claims. The new guidance is reasonably strong on this but the issue has always been the extent to which case workers are aware of, understand and follow the guidance in their decision making. Only audits can show this.

## Chapter 3 - Age assessment and asylum processing

### Introduction

The Home Office treats children and adult asylum applicants differently. Children, and particularly unaccompanied children, are entitled to specific procedural and evidentiary safeguards and welfare protections so that fair refugee status determination decisions are reached.<sup>118</sup> These policies are applied with the best interests of the child in mind.

In order to access these safeguards and welfare protections, unaccompanied children in particular are exposed to the filter procedure of age assessment. Paradoxically, many young applicants experience this filter procedure as punishing, confusing and a source of fear, worry and anxiety.<sup>119</sup>

### Two alternative views: 'System abuse' and 'culture of disbelief'

The Government has long held the view that the safeguards and protections afforded to children in the asylum system leave the system open to abuse by adults wishing to take advantage of the more generous treatment provided to children.

The perception that abuse of the system was rife can be traced to shortly before the peaking of claims from applicants claiming to be unaccompanied children in 2008. For example, the 2007 Consultation paper *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children*<sup>120</sup> states: “For immigration purposes the Home Office also needs to make an assessment of age. In respect of asylum seekers this can be very difficult. Relatively few are able to provide documentary evidence of their age and many appear to be considerably older than they claim. There is no doubt that assessing age solely on physical appearance is unsatisfactory. A total of 2425 asylum seekers claimed to be under 18 in 2005, but were initially deemed to be adults by immigration officials. A proportion of these decisions were however changed after more thorough assessments by social workers concluded that the individuals were likely to be under 18. Nonetheless, the number of age dispute cases is illustrative of a serious level of abuse of the system.”<sup>121</sup> (Emphasis added).

Similarly, when the Independent Chief Inspector last reported on age assessment he noted that staff believed that the grant of limited leave to UASC where asylum was refused incentivised false claims to be a child: “Staff at Dover told us that asylum seekers they detected concealed in vehicles were often in mixed-age groups. They believed that the fact

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<sup>118</sup> See for example the *Immigration Rules* - part 11, Rule 350 – 352ZF

<sup>119</sup> See for example The Children’s Society (2011) *Into the Unknown: children’s journey through the asylum process*, p.7; Law Centre’s Network (2015) *Put Yourself in Our Shoes* p.94-98

<sup>120</sup> *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children* – Home Office Immigration & Nationality Department (2007)

<sup>121</sup> *Ibid*, Para 24

*that children’s asylum claims were prioritised, and that they were often granted limited leave if their applications failed, created an incentive for adults to claim to be under 18.”*<sup>122</sup>

However, the perception that the asylum system has seen serious levels of abuse by adults claiming to be children has been challenged by many organisations working in the field<sup>123</sup>. The Immigration Law Practitioners Association encapsulates the alternative view: *“The problem of age disputes is linked to prevailing cultures of cynicism and disbelief among immigration officers and some social workers. There is an over-reliance on physical appearance and credibility as indicators of age.”*<sup>124</sup>

The evidence for either view is anecdotal largely because there is insufficient reliable data to substantiate either position. What is certain is that where a child is incorrectly deemed to be an adult the decision is not in their best interests. Not only do they lose the protections for children built into the asylum determination system, their immediate care and future trajectories are impacted upon sometimes irreversibly. The importance of getting age assessment right for children was summarised by the Joint Committee on Human Rights: *“If assessed incorrectly, children could be accommodated inappropriately, supported insufficiently, and be placed at risk of harm, detention and deportation.”*<sup>125</sup>.

### Current policy - The ‘Assessing Age’ instruction

Many asylum applicants who claim to be children do not have any definitive documentary evidence to support their claimed age. Some of these young people do not know their exact date of birth. As children’s and adult asylum applications are routed differently a decision, or a provisional decision, is made at the start of the asylum application process on what age to treat the applicant as for the purpose of handling their asylum claim. The policy to be applied is set out in the asylum policy guidance document *Assessing Age*<sup>126</sup>.

An initial decision is made by an *assessing officer* (usually an immigration officer) at the point of first contact with the applicant. This is based on their physical appearance and demeanour that the Home Office acknowledges is unsatisfactory.<sup>127</sup>

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<sup>122</sup> Vine J., *An Inspection into the Handling of Asylum Applications Made by Unaccompanied Children – Feb-June 2013*, ICIBI (31.10.13) Para 6.2

<sup>123</sup> See for example *Human Rights of unaccompanied migrant children and young people in the UK*, First Report of Session 2013–14, Joint Committee on Human Rights (May 2013) Page 28 and Footnote 112.

<sup>124</sup> Crawley, H. *‘When is a child not a child?’ – ILPA Research Report*, May 2007

<sup>125</sup> *Human Rights of unaccompanied migrant children and young people in the UK*. Para 79

<sup>126</sup> The version of *Assessing Age* on the Government website states that it was updated on 15.06.15. However, the ‘version control’ at the back of the same document gives a date for the last changes as 17.06.11. Whichever is correct, the version available is outdated in significant respects. Of particular concern is Section 7, which has not been updated since new *Joint Working Guidance* between Home Office and ADCS was published in April 2015. *Assessing Age* ‘embeds’ the 2005 Protocol, now superseded by the 2015 guidance.

<sup>127</sup> *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children –* Para 24

Where an applicant is claiming to be a child (under 18) but their appearance and/or demeanour *'very strongly suggests that they are significantly over 18 years of age'*<sup>128</sup> the application will be dealt with under adult processes. Such cases are not referred to a Local Authority children's service for assessment or care.

The safeguard in place for such cases is that before a decision is taken to assess as *significantly over 18* the assessing officer's countersigning officer (who must be at least a Chief Immigration Officer (CIO)/Higher Executive Officer (HEO) grade) must be consulted to act as a second pair of eyes and must make their own assessment of the applicant's age. If they also agree that they are significantly over 18 the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. They will be served with Form IS.97M confirming that their age has been disputed.<sup>129</sup>

All other applicants are afforded the benefit of the doubt and treated as children in accordance with the *'Processing an asylum application from a child'* asylum instruction<sup>130</sup> until a further assessment of their age has been completed. This policy is said to be designed to safeguard the welfare of children. The provisional decision to treat an applicant as a child does not indicate final acceptance of their claimed age which is assessed in the round when all relevant evidence has been considered and, in particular, the view of the local authority to whom the applicant will be referred for support and accommodation. The asylum process is not normally delayed whilst a final decision on an applicant's age remains outstanding and they are treated as a child until the decision in respect of the age has been made.<sup>131</sup>

The policy of treating those whose *appearance and/or demeanour very strongly suggests that they are significantly over 18 years of age* as adult was recently the subject of judicial review proceedings which reached the Court of Appeal in March 2017.<sup>132</sup>

The Court of Appeal dismissed an appeal by the Secretary of State against a High Court decision of 11 May 2016, which had found the detention of a Sudanese unaccompanied minor mistakenly considered as an adult by the immigration authorities to be unlawful. The High Court had ruled that to justify detention it did not suffice to "genuinely believe" or suspect at the time of the detention that the individual was an adult.

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<sup>128</sup> *'Assessing Age'* Op. Cit. section 2.1

<sup>129</sup> *Ibid*, section 2.1. NB: Applicants who are believed to be a child but not of the claimed age and those believed to be adult but given the 'benefit of the doubt' for the time being because they do not reach the threshold of 'significantly' over 18 are *also* issued with Form IS97M. This common process may have contributed to the incorrect 'flagging' of age disputed cases highlighted by the ICIBI in its 2013 report.

<sup>130</sup> *Assessing Age* refers to this previous policy instruction that was superseded by *'Processing Children's Asylum claims'* in July 2016.

<sup>131</sup> *Ibid*, section 2.1

<sup>132</sup> *Ali, R (on the application of) v The Secretary of State for the Home Department & Another [EWCA Civ 138]*

The Secretary of State had argued that the word “child” should be construed subjectively, meaning that whether or not the detainee is a child is dependent upon the reasonable belief of the immigration officer at the time of the decision to detain. This was rejected by the High Court. The Court of Appeal concurred with the High Court that the word “child” should be interpreted literally and objectively.<sup>133</sup>

The Home Office have not appealed this very significant decision. Given the legal ruling, it is expected that the Home Office will now review the policy of detaining applicants assessed to be adult on the basis of their appearance and demeanour and revise the *Assessing Age* instruction accordingly. As the financial consequences for the Home Office in respect of compensation for unlawful detention are significant, we would expect this to be dealt with expeditiously.

### Numbers of asylum applicants subject to an age dispute

To get a better understanding of whether the asylum system is being abused by adults claiming to be children or whether children are having their rights negated through being incorrectly assessed as adults, robust data is required. This underscores the importance of statistics on age disputed cases. Asylum statistics, including age dispute statistics, are published by the Home Office on a quarterly and an annual basis. The British Refugee Council regularly collate and publish Home Office asylum statistics, including the numbers of age disputed applicants, on their website.

*Table 1: Age Disputed applications (excluding dependents)<sup>134</sup>*

	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
<b>Applications</b>	337	323	318	789	918
<b>% change to previous year</b>	-9%	-4%	-2%	+148%	+16%

The increased number of age disputes raised by the Home Office in 2015 and 2016 (Table 1) reflect a significant rise in the numbers of applicants claiming to be unaccompanied children over the same period (in line with a rise in all asylum applications). However, it also appears that that as a *percentage* of all applications from those claiming to be unaccompanied children (Table 2), age disputed cases, after a steady percentage decline between 2012-2014, reached their highest level for 5 years in 2016.

*Table 2: Asylum Applications received from Unaccompanied Children (excluding dependents)<sup>135</sup> and % that were age disputed.*

<sup>133</sup> This follows judgement in the Supreme Court in *R (on the application of A) (FC) v London Borough of Croydon* [2009] UKSC 8 where the Court Found that: ‘The question is whether the person is, or is not, under the age of eighteen. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court’. – Para 51

<sup>134</sup> Refugee Council, *Children in the Asylum System*, May 2017

	2012	2013	2014	2015	2016
<b>Applications</b>	1,225	1,265	1,945	3,253	3,175
<b>% of disputed applications</b> <sup>136</sup>	27.5%	25.5%	16.3%	24.3%	28.9%

Home Office statistics on the number of age disputes raised *only* reflect those applicants who are afforded the benefit of the doubt and are temporarily treated as children while further investigation, including a local authority ‘Merton compliant’ age assessment, is completed. The statistics do *not* include those cases *where physical appearance and demeanour very strongly suggest that the applicant is over 18*. This is important because it means that the true number of age disputes raised by the Home Office remains unknown. Also, the statistics do not reflect age disputes raised by a local authority where the Home Office has initially accepted the child’s stated age.

The Joint Committee on Human Rights highlighted age dispute statistics in its 2013 report.<sup>137</sup> Having taken evidence from a wide range of stakeholders they reported the widespread view that the data available was insufficient. The Committee agreed that effective, disaggregated data was required, including *outcome data*. They concluded that: *“The case for providing comprehensive, robust and transparent data is absolutely clear. It is only by doing so that policy and practice can be properly examined, and issues identified. We therefore endorse the call for full, disaggregated statistics to be provided for all age dispute cases, to enable cases to be tracked through the system”*.<sup>138</sup> The Committee recommend that the Government should record and publish statistics of all those who claim to be children whose age is disputed including:

- *“The number of asylum applicants who claim to be children but who are treated as adults by the immigration authorities on the ground that their appearance or demeanour very strongly suggest that they are significantly over 18;*
- *The number of cases where an individual claiming to be a child is placed in immigration detention, and any subsequent action in relation to those cases;*
- *The number of cases in which age is assessed by local authorities, and, in such cases, how many children are determined to be adults and how many are determined to be children;*
- *The number of cases that are challenged by judicial review, and the number of such challenges that are successful.*

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<sup>135</sup> Ibid

<sup>136</sup> This line has been added to the Refugee Council table by the author to show the % of all applications from unaccompanied children that were age disputed in each year.

<sup>137</sup> Joint Committee on Human Rights, *Human Rights of unaccompanied migrant children and young people in the UK*, First Report of Session 2013–14, 12 June 2013, London, HM Stationary Office – Para's 83-89

<sup>138</sup> Ibid. Para 87

*These statistics should be disaggregated to allow scrutiny of the gender and nationality of all cases”.*<sup>139</sup>

The Home Office responded by ‘partially accepting’ the recommendation on publishing statistics on those claiming to be children but treated as adult: *“We are currently running a pilot, in the Home Office Asylum Screening Unit in Croydon, to record cases on our case information database, in which the Home Office considers that an individual who has claimed to be a child is significantly over the age of 18 and is therefore treated as an adult. If the pilot is successful, we will look to roll out the recording arrangements to the rest of the asylum process. We will then consider whether the data should be formally published.”*<sup>140</sup> It is unclear what criteria were used to establish whether or not the pilot was successful and results from the pilot were not published or made available and have not been rolled out.

The Committees recommendation on publishing statistics for those claiming to be children placed in immigration detention were turned down: *“Our policy is not to detain children. We monitor, on a quarterly basis, cases of those who have been detained on the basis that they are adults but who have at some stage claimed to be children, and we discuss findings with corporate partners to try to resolve issues that emerge. We have no plans at present to formally publish this data”*<sup>141</sup>.

In addition to ‘findings discussed with corporate partners’ (Home Office management information) - for an example of this see the ICIBI 2013 report at Para. 6.37-, partial information on the number of age disputed cases ending up in detention are produced annually by the British Refugee Council who run a specific project for age disputed applicants and who compile and report on their findings on an annual basis.

Its 2014 report noted that: *“Advisers have supported 55 children in various complex circumstances. We were able to secure the release from detention of 25 of the children we supported. Of these, 17 have now been accepted as children and are under full care of the local authority whilst eight have assessments pending. We have, and continue to support, 26 children who were not detained but whose age was still in dispute; of these nine have already been accepted as children and we continue to assist in the struggle of those with on-going cases. Already in 2015, we have secured the release of 10 children from detention.”*<sup>142</sup>

The 2013 ICIBI inspection of the handling of children’s asylum claims raised a concern that confusion over the *Assessing Age* instruction amongst staff could lead to inaccurate data: *“From the sampled files we conclude that some level of mistaken flagging is likely to exist right across age dispute files. This is of concern as we understand that the flags inform Home Office data gathering. There is therefore a risk that inaccurate information on the issue*

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<sup>139</sup> Ibid. Para 88-89

<sup>140</sup> *The Government response to the first report from the Joint Committee on Human Rights Session 2013-14 HL Paper 9 /HC196: Human Rights of unaccompanied migrant children and young people in the UK.* Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, February 2014, page 9

<sup>141</sup> Ibid, page 9.

<sup>142</sup> Refugee Council, *Age Dispute Project – End of Year Report 2014*, p.9

could be provided to Ministers and Parliament due to flaws in the way age disputes are recorded on CID".<sup>143</sup> ICIBI recommended that the Home Office "develop validated statistics for all cases where asylum applicants claim to be unaccompanied children."<sup>144</sup> The Home Office accepted this recommendation stressing that it was "working hard to improve the quality of the data it holds and records on asylum".<sup>145</sup>

Concern about the reliability and completeness of data on age assessment persists. In 2016, the UN Committee on the Rights of the Child expressed its concern that "Reliable data on asylum-seeking children, including those whose age is disputed, remain unavailable"<sup>146</sup>. It recommended that the State Party "Systematically collect and publish disaggregated data on the number of children seeking asylum, including those whose age is disputed".<sup>147</sup>

### The status of Local Authority age assessments in Home Office policy

Local Authorities are required to provide services, including accommodation, to children who have no one with parental responsibility to look after them. S.20 of the Children Act 1989 that confers this duty is blind to a child's immigration status. However, the duty does not extend to those who are no longer children when they first present themselves and therefore, just as the Home Office needs to record the age of an asylum applicant in order to apply the relevant policy and procedures, so a local authority may have to assign an age to a young person who is requesting services from them both to ensure that they are eligible for such services and to enable the right services to be provided. If determining the age of a young person seeking services from them is necessary, the Local Authority is required to conduct a lawful assessment following the guidance from the courts.<sup>148</sup>

The Home Office *Assessing Age* guidance requires case owners to give 'considerable weight' to the local authorities' age assessments in deference to the particular expertise they have in working with children and will normally regard their assessment as determinative in the absence of any other evidence on the young person's age.<sup>149</sup> Nevertheless, case-owners are required to 'carefully consider' the local authorities' findings to ensure they are clear,

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<sup>143</sup> *An Inspection into the Handling of Asylum Applications Made by Unaccompanied Children*. Para 6.28

<sup>144</sup> *Ibid*, Para 6.42

<sup>145</sup> *The Home Office response to the Independent Chief Inspector's report 'An inspection into the handling of asylum applications made by unaccompanied children'* Home Office (October 2013) – Para 7.2

<sup>146</sup> Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 3 June 2016, Para 75

<sup>147</sup> *Ibid*. Para 76

<sup>148</sup> A synopsis of the applicable law and the principles to be applied by a local authority in conducting an age assessment is contained in the annex to *Age Assessment Guidance - Guidance to assist social workers and their managers in undertaking age assessments in England*, Association of Directors of Children's Services (October 2015) pages 58-61

<sup>149</sup> *Assessing Age*, Para 5.2

supported by the evidence, compliant with case-law and, where necessary, apply the benefit of the doubt correctly.<sup>150</sup>

The ICIBI's 2013 report (Op. Cit.) judged the guidance in *Assessing Age* on obtaining the local authority age assessment to be "clear and specific" but that "overall improvement was required so that adequate Merton-compliant age assessment information was obtained in compliance with guidance".<sup>151</sup> ICIBI also reported the development by Association of Directors of Children's Services (ADCS) of a Model Information sharing Pro-forma with the Home Office for which it was hoped "that wide adoption will bring greater consistency to age assessment information sharing between local authorities and the Home Office."<sup>152</sup>

### New information sharing arrangements between Home Office and Local Authorities

Revised *Joint Working Guidance* (JWG) was issued by ADCS and the Home Office in 2015<sup>153</sup> replacing the original protocol issued in 2005. "... The 2005 iteration had been superseded in many ways as result of experience, litigation and developing practice".<sup>154</sup>

The revised Guidance aims at establishing clear process and communication between Local Authorities and the Home Office thus reducing the likelihood of disagreement, dispute and litigation. It sets out the agreed arrangements between the Home Office and Local Authorities (LAs) in England where *either* body disputes the age of a person claiming to be a child. Part 3 of the Guidance sets out detailed *information sharing requirements* in respect of Home Office and Local Authority responsibilities. Referral from the Home Office can initially be made by telephone but must be promptly followed up in writing. Referrals must explain, 'in as much detail as possible' concerns the Home Office has about the claimed age. Home Office must provide the LA with the information it has in relation to the individual's age including what the young person has said about their age (e.g. was this an approximate or an exact date of birth, has the claimed age been consistently maintained and any information the individual has provided in support of their claimed age).

The referrer (Home Office or the LA) must establish that the individual has been told that the information they provide could be shared with other government organisations to enable it to carry out its functions. The Home Office can disclose information to LAs on the basis that the LA will only use it for the purposes of providing appropriate services including

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<sup>150</sup> Ibid

<sup>151</sup> Op. Cit. Para 6.49

<sup>152</sup> Ibid Para 6.50

<sup>153</sup> *Age Assessment Joint Working Guidance*, ADCS & Home Office (April 2015)

<sup>154</sup> *Introductory note to JWG - Age Assessment – consolidating processes and practices in conducting lawful age assessments in England*. ADCS (April 2015). NB – *Assessing Age* still refers to, and embeds in the instruction the 2005 Protocol. Outdated guidance is then given to staff.

for care planning/support, safeguarding/child protection, where trafficking is suspected, and conducting an age assessment.<sup>155</sup> The LA can disclose information to the Home Office to assist it discharge its immigration and safeguarding responsibilities.

The 2012 *Information Sharing Proforma* (referenced in the ICIBI's 2013 report) used to communicate the outcome of an age assessment to the Home Office by the local authority was further amended to reflect changes set out in the JWG. The revised *Information Sharing Proforma* remains a key part of the updated arrangements<sup>156</sup>.

The *Information Sharing Proforma* introduces an abridged or summary version of the substantive age assessment report and is set out more like a witness statement. The pro-forma replaces the single sheet back page used to notify the Home Office of the outcome of an age assessment until 2012 and now considered insufficient for Home Office decision makers to be assured that the LA age assessment has been carried out in a thorough and lawful way.

The revised pro-forma should enable the requirements of the Home Office to be met by Local Authorities sharing sufficient information without including aspects which may touch on credibility<sup>157</sup> or raise other issues of data protection which have concerned Local Authorities in the past. The pro-forma is accompanied by an *Information Sharing Consent Form* reflecting the requirements of case law to ensure that persons undergoing age assessments have the process explained to them and, as far as possible, develops an understanding of its purpose and significance.

ADCS, as part of the suite of guidance issued in 2015, also published new *practice guidance* aimed at improving how social workers conduct assessments in this sensitive area of work.<sup>158</sup>

### *Reliability of Local Authority age-assessments*

Although a case law compliant age assessment conducted by a local authority goes beyond the determination of age simply on appearance and demeanour, the quality and reliability of assessments, as well as the damage they inflict on their subjects, continue to cause

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<sup>155</sup> These reasons for sharing information are not currently reflected in the *Assessing Age* instruction.

<sup>156</sup> *Age Assessment - Joint Working Guidance*, page 5

<sup>157</sup> *Assessing Age* still allows the use of information obtained from a Local Authority age assessment to be used for asylum determination purposes although with some safeguards built in to using the information – see section 5.2.1 'Asylum credibility issues raised in the age assessment report'.

<sup>158</sup> ADCS, *Age Assessment Guidance - Guidance to assist social workers and their managers in undertaking age assessments in England* (October 2015)

concern for children’s advocates.<sup>159</sup>

From the Home Office perspective, there are significant reasons why age assessment determinations from a local authority, on which they principally rely, need to be robust. The reasons go beyond wanting to ensure that children’s best interests are served.

The 2013 ICIBI inspection considered *“indicative figures on asylum detention and release related to claimed under 18 status”*.<sup>160</sup> The inspection found that *“for three of the groups Home Office age dispute was not a factor in their detention. The largest (Type 1a) were detained on local authority age assessments”*.<sup>161</sup> Where the Home Office detains a person who under 18, either following their own assessment or in reliance on a local authority assessment, they expose themselves to litigation and potential compensation for unlawful detention.<sup>162</sup>

Problems with local authority assessments may be rooted in lack of experience and training by social work assessors or from pressure on local authority resources. Coram Children’s Legal Centre documented both problems in 2013.<sup>163</sup> Their report highlights *“a clear difference between the role of a social worker in the context of welfare concerns and child protection and their role in seeking to elicit information in order to make a decision on a child’s age”*.<sup>164</sup> Many age assessments require *“specific knowledge of different countries of origin, their cultures and religions. Practitioners have identified a need for further information about festivals, local calendars, cultural expectations of children’s roles and responsibilities and child development.”*

A more systemic concern is over the potential conflict of interest in social work assessment due their dual role as gatekeepers to overstretched and underfunded children’s services. Local authorities regularly complain that the funding available from the Home Office Asylum Support budget to reimburse them for the care of unaccompanied children does not cover the actual costs or take into account leaving care duties that extend to age 25. A recent ADCS report on unaccompanied asylum seeking children had asked local authority respondents *“if funding is sufficient to meet costs, and if not, how authorities are meeting the shortfall? The result was overwhelming, 43 of the 44 local authorities that answered this question felt that national funding was not sufficient, despite examples of robust action being taken to manage and reduce costs. Just one local authority felt that funding would be sufficient if the child received an in-house foster placement, but not other placement types. 38 authorities described the gap as being of concern, but six added that the gap for care*

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<sup>159</sup> Coram Children’s Legal Centre, *Happy Birthday? – Disputing the Age of Children in the Immigration System* (May 2013) – section 2.3 ‘Social work age-assessments’

<sup>160</sup> Figure 1.1 at Para 6.37

<sup>161</sup> Ibid. Para 6.38

<sup>162</sup> Dennis, J. *Not a minor offence: unaccompanied children locked up as part of the asylum system*, Refugee Council (May 2012); Taylor, D. *£2m paid out over child asylum seekers illegally detained as adults*, The Guardian, 17.02.12

<sup>163</sup> *Happy Birthday? – Disputing the age of children in the Immigration system*, Op. Cit.

<sup>164</sup> Ibid. Page 14

*leavers who were UASC was an even greater concern.”*<sup>165</sup>

The Coram CLC report states that *“it has become apparent that in some cases social workers may feel under pressure from their managers either to find a child to be an adult, or to decide that they over 16.”*<sup>166</sup> Where a local authority age assessment concludes that the applicant is over 18 the financial burden of supporting them falls back on the Home Office. If accepted as under 18 the costs fall on the local authority albeit with grant-in-aid partially compensating for this.

The Joint Committee on Human Rights noted concerns over potential conflict of interest and resulting bias in local authority age assessments in their 2013 report.<sup>167</sup> They recommended that: *“As part of developing age assessment guidance, the Government should evaluate how to incorporate a greater range of expert input into the process. In particular, the Government should commission the Royal College of Paediatric and Child Health to develop guidelines for a stronger contribution from paediatric consultants in assessing age.”*<sup>168</sup> Although the Home Office considered funding a research proposal from the RCPCH that would have led to age assessment guidelines for paediatricians *“in order to develop an enhanced multi-disciplinary approach to age assessment”*<sup>169</sup> the guidance was never commissioned.<sup>170</sup>

### *Age Assessment and the National Transfer Scheme for Unaccompanied Children*

The *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children*<sup>171</sup> has been operational since 1<sup>st</sup> July 2016 and enables ‘entry’ local authorities with larger numbers of unaccompanied children arriving in their area (for example Kent), to transfer unaccompanied children to a ‘receiving’ authority where existing numbers of unaccompanied children are below the agreed threshold. The transfer is affected through a

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<sup>165</sup> *Safeguarding Pressures Phase 5 – Special Thematic Report on Unaccompanied Asylum seeking and Refugee Children*, ADCS, November 2016

<sup>166</sup>. Page 14

<sup>167</sup> *The Human Rights of unaccompanied migrant children and young people in the UK*, Para 92

<sup>168</sup> *Ibid*, Para 104

<sup>169</sup> *The Government response to the first report from the Joint Committee on Human Rights Session 2013-14*, Op. Cit. – page 11

<sup>170</sup> Given that all children entering care, including unaccompanied children, are required under legislation and guidance to have a ‘looked after medical’ (generally conducted by a paediatrician), there is a clear existing framework under which paediatricians could contribute to local authority age assessments. Paediatricians however will not be persuaded to engage in this work in the absence of professional guidance from the College.

<sup>171</sup> *Interim National Transfer Protocol for Unaccompanied Asylum Seeking Children 2016-17 Version 0.8*, Department for Education, Home Office, Department for Communities & Local Government, (July 2016)

Central Administration Team at the Home Office.

Not everyone claiming to be an unaccompanied child is eligible for transfer under the scheme: *“Anyone claiming to be a child but whose physical appearance and demeanour very strongly suggests that they are significantly over 18 will be treated by the Home Office from that point onwards as an adult, though the decision will be reviewed if relevant new evidence is received. The entry local authority will liaise with the Home Office as appropriate, and if requested, provide its observations regarding the age of anyone claiming to be a child, to help inform the Home Office initial decision on whether they are significantly over 18.”<sup>172</sup>* (Emphasis added)

Leaving aside the current legal status of the significantly over -18 policy, the question arises why the Home Office would refer such cases to the local authority *at all* given the assessment that the person is deemed ‘very significantly’ over 18.

If they do refer to the local authority it must be that they are applying the benefit of the doubt and, even if they believe the applicant to be an adult, their appearance and demeanour will not have met the threshold to determine them as significantly over 18.

Any such referral presents a problem for the entry local authority. Under the Protocol, if they wish to transfer the applicant out of the region, the ‘receiving’ local authority, not them, will be responsible for conducting a case-law compliant age assessment. If the entry authority is merely providing observations to assist the Home Office determine whether they meet the significantly over 18 threshold, then this will not meet the criteria of a lawful assessment and reliance on such observations are also likely to be unlawful and would breach current policy under the *Assessing Age* instruction which require evidence that any age assessment from a local authority is case-law compliant.

The mechanism for a local authority to provide its observation of the young person’s age appears to be the *Unique Unaccompanied Child Record (UUCR)* that is annexed to the Protocol. Described as ‘reception information’, the entry authority is required to complete and submit the UCCR *“in respect of each unaccompanied child who begins to be looked after, and submitted promptly by the local authority to (central admin team email address)”<sup>173</sup>.*

The UUCR is submitted in all cases whether or not the entry local authority wishes to transfer the young person elsewhere or retain responsibility for them. Regarding the applicant’s age the UUCR asks: *“Does the young person have any documents to support their stated age and nationality? Does this young person require an age assessment? If so, what is your observation of his/her likely age?”* (Emphasis added). This is not requesting a formal age assessment and it is unclear how the Central Administration Team uses the information in respect of transfer or decisions on treating the applicant as significantly over 18.

Outside of the significantly over 18 category of applicant claiming to be a child,

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<sup>172</sup>Ibid. Page 7

<sup>173</sup> Ibid -

responsibility for assessing the age of the young person *where necessary*<sup>174</sup> will depend on whether the entry local authority requests a transfer out or not: *“Where the age of a child is disputed (but accepted as being under 18 years of age) a Merton compliant age assessment will be conducted by the entry local authority if the unaccompanied child is not transferred or the receiving local authority if they are transferred.”*<sup>175</sup>

Due to the newness of the transfer scheme, there is, as yet no published research into its operation. However, the Refugee Children’s Consortium has now produced a briefing on the first year of operation of the scheme based on reports and feedback from NGO practitioner affiliates. They note: *“A problem appears to arise when the entry local authority perceives that the child might be over 18. In one case, the entry authority thought the child was over 18 but wouldn’t assess because they were hoping to transfer, but it was too far for the receiving authority to send two social workers to conduct an assessment, so the young person was left in limbo. Similarly, one local authority and SMP in the same area said that they would not accept a transfer request where there was a doubt about age.”*<sup>176</sup>

## Discussion and Conclusion

The current *Assessing Age* policy is in urgent need of updating to bring it into line with recent case law developments, the *Joint Working Guidance* (and associated forms) issued with the Association of Directors of Children’s Services and with the National Transfer Scheme.

The extent to which the age of those claiming to be children is disputed remains opaque due to both the deliberate omission of the significantly over 18 category, possible flagging errors by case workers and the possible omission of age dispute data where the Local Authority is the instigator of the dispute rather than the Home Office. If the level of age disputes can be regarded as lying somewhere along a continuum between ‘abuse of the system’ on the one hand and ‘a culture of disbelief’ on the other, answers are unlikely to be found in the absence of reliable data.

Principle reliance by the Home Office on Local Authority age assessments, particularly in the absence of their inclusion of significant input from other key professionals, remains fraught with danger for the Home Office both in ensuring that they are complying with their duty to ensure children’s best interests are being served and in exposing them to financial, litigation and reputational risks. This is due both to the lack of experience and specialised training of those conducting the assessments (which will be exacerbated under the National Transfer Scheme where ‘receiving’ LA’s with little experience of unaccompanied children are expected to conduct age assessments) and because of funding and resource pressures on

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<sup>174</sup> The interim protocol repeats the wording of DfE Statutory Guidance on the care of Unaccompanied and Trafficked children: *“Age assessments should only be carried out where there is significant reason to doubt that the claimant is a child. Age assessments should not be a routine part of a local authority’s assessment of unaccompanied or trafficked children.”*

<sup>175</sup>. Page 10

<sup>176</sup> Refugee Children’s Consortium, *Briefing on the National Transfer Scheme* (July 2017)

local authorities that potentially compromise the objectivity of assessments.

The 2015 *Joint Working Guidance*, along with the ADCS *Age assessment guidance for social workers and their managers* are positive developments and their use should be monitored and reported upon. In respect of the former, the extent to which Home Office staff are now sharing information with local authorities and the quality of this information are issues that could usefully be inspected as could the use of the *Information Sharing pro-forma* by local authorities in providing information to the Home Office.

Further research is needed on how age assessments are being dealt with under the National Transfer Scheme. Ensuring that transfers are affected quickly, and before a child has settled in the entry authority, have been widely regarded as a marker of whether the child's best interests are being served under the new arrangements<sup>177</sup> and of course has knock on effects for the speed of asylum processing. It will be important to establish in particular how social worker observations on age contained in the compulsory *Unique Unaccompanied Child Record* are used by the Home Office Central Administration Team in relation to effecting timely transfers in the child's best interests and for the Home Office's own age determination purposes.

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<sup>177</sup> For example, the Interim National Transfer protocol notes that: "*The entry local authority will make the transfer decision as soon as practicable and suitable - ideally within 48 hours (two working days) of the child's arrival in to the care of the entry local authority.*"

## Chapter 4 - Family tracing and family reunification for unaccompanied children

### Child Rights Framework

*“The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child’s view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated.”<sup>178</sup>*

This starting point of this chapter is the UN Convention on the Rights of Child (UNCRC). The Committee on the Rights of the Child (the Committee) has identified article 3, paragraph 1, (the best interests principle) as one of the four general principles of the Convention for interpreting and implementing all the rights of the child.<sup>179</sup> This includes the rights of a child to be brought up by his or her family (Article 9) and to be reunited if separated (Article 10).

General Comment No 6 on the *Treatment of unaccompanied and separated children outside their country of origin*<sup>180</sup>, takes as its starting point the proposition that reunification of the unaccompanied child with his or her family will be in his or her best interests ‘*wherever possible*’.

The qualification ‘wherever possible’ recalls Article 9 of the Convention which requires that *“a child shall not be separated from his or her parents against their will **except** when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”<sup>181</sup>*

Family tracing takes place within the context of the search for a durable solution to the unaccompanied child’s situation with family reunification as the first option that must be considered. UNCRC Article 22 (2) requires State Parties to co-operate with the United Nations or non-governmental organisations *“to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.”<sup>182</sup>*

In respect of the *timing* of family tracing efforts, General Comment No. 6 emphasises that efforts to find a durable solution for the unaccompanied child should begin ‘*without undue delay*’ and preferably ‘*immediately on assessment of the child being unaccompanied or*

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<sup>178</sup> Committee on the Rights of the Child, *General Comment No.6 - Treatment of unaccompanied and separated children outside their country of origin* (2005) – Para 79

<sup>179</sup> Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1)* (2013)- Para 1

<sup>180</sup> General Comment No. 6 – Op. Cit.

<sup>181</sup> UNCRC, Article 9 (1)

<sup>182</sup> Ibid. Art 22(2)

separated'. The search for a durable solution starts with analysing the possibility of family reunification *'following a rights based approach.'*<sup>183</sup>

The purpose of family tracing is as *"an essential component of any search for a durable solution and should be prioritised except where the act of tracing, or the way in which tracing is conducted, would be contrary to the best interests of the child or jeopardise fundamental rights of those being traced.... Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child."*<sup>184</sup>

Where family tracing is unsuccessful, either through inability to find the child's family or because it would endanger the child or the family to do so, other durable solutions must be considered: *"In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention."*<sup>185</sup>

The approach adopted in the UN Convention on the Rights of the Child outlined above, is also reflected in the UN High Commission for Refugee's *Guidelines on Determining the Best Interests of the Child.*<sup>186</sup>

In turn these principles have influenced the relevant sections of the Common European Asylum System (CEAS) – *"a project still in the making"*<sup>187</sup> – that aims to gradually harmonise asylum law and policy in the EU Member States.

### European and Domestic asylum law framework

Article 63 of the Treaty Establishing the European Community (TEC), (as inserted by the Treat of Amsterdam) provided for the adoption of measures on asylum in accordance with the 1951 Geneva Convention relating to the Status of Refugees<sup>188</sup>. The measures were to comprise *minimum standards* on the reception of asylum seekers (The 'Reception Conditions Directive'), on qualification for refugee status or subsidiary protection (The 'Qualification Directive'), on asylum procedures (The 'Asylum Procedures Directive') and on temporary protection in the context of a mass influx (The 'Temporary Protection Directive'). In addition, because of single Member State processing, a mechanism was envisaged for determining Member State responsibilities for processing an asylum claim (The 'Dublin

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<sup>183</sup> GC No. 6. Para 79

<sup>184</sup> GC No.6, Para 80 and 82

<sup>185</sup> UNCRC, Article 22 (2)

<sup>186</sup> UNHCR *Guidelines on Determining the Best Interests of the Child*, (May 2008)

<sup>187</sup> Smyth, C. *European Asylum Law and the Rights of the Child*, (2014) Routledge - page 9

<sup>188</sup> *Ibid* – page 10

Regulations’).<sup>189</sup> All of these instruments make specific provision for children as minors including unaccompanied children.

While the UK *“has an option to participate in this policy area, and chose to opt in to the first phase of EU asylum measures adopted between 1999 and 2004”*<sup>190</sup>, in 2013 *“the coalition government confirmed that it has ‘no plans for future participation’ in the second phase, judging it not to be in ‘Britain’s best interests’.”*<sup>191</sup>

Across the EU, the second phase of legislation making up the CEAS has now been agreed with the current versions of these instruments being the recast Directives, mostly adopted in June 2013.<sup>192</sup> UK law still applies the first phase measures before they were recast in 2011 and 2013. The exception to this is the recast Dublin Regulation known as ‘Dublin 111’ that the UK has opted into.

The Migration Observatory reports that: *“A common observation is that “Britain has tended to participate in coercive measures that curtail the ability of migrants to enter the EU while opting out of protective measures [such as] on family reunion and the rights of long-term residents that to some extent give rights to migrants and third-country nationals.”*<sup>193</sup>

### The EU Directives and Dublin Regulation - family reunification and tracing.

#### 1. The Reception Conditions Directive

The *Receptions Conditions Directive* aims to harmonise to a minimum standard how Member States host asylum seekers and their accompanying family members for the duration of the asylum process. Article 19 deals with reception conditions for unaccompanied minors and Article 19 (c) with minimum requirements for family tracing.

*“Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety”*<sup>194</sup>.

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<sup>189</sup> Ibid – page 10

<sup>190</sup> Migration Observatory, *The UK, the Common European Asylum System and EU Immigration Law* (May 2014) – Section 1 (Introduction)

<sup>191</sup> Ibid.

<sup>192</sup> Directive 2013/33/EU (the recast ‘Reception Directive’); Regulation (EU) No 604/2013 (The recast ‘Dublin Regulation’); Directive 2013/32/EU (The recast ‘Procedures’ Directive). Note Directive 2011/95/EU– the recast ‘Qualification Directive’ was adopted 2 years earlier than the other instruments.

<sup>193</sup> Migration Observatory, – Section 6 *‘Does the UK’s selective participation allow it ‘the best of both worlds?’* citing

<sup>194</sup> COUNCIL DIRECTIVE 2003/9/EC *laying down minimum standards for the reception of asylum seekers* (27 January 2003) - Art 19

Article 19 must be read in light of Article 18 which requires that: *“The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.”*<sup>195</sup>

The *Reception Conditions Directive* was recast in 2013 *“raising the standards of reception conditions generally”*<sup>196</sup>. Article 24 (3) deals with the family tracing obligations on Member States for those identified as unaccompanied minors. The family tracing obligation is *“more robust”*<sup>197</sup> than the original 2003 iteration:

*“Member States shall start tracing the members of the unaccompanied minor’s family, where necessary with the assistance of international or other relevant organisations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.”*<sup>198</sup>

The recast *Reception Conditions Directive* places a requirement on State Parties in relation to minors and their best interests that is absent from the 2003 iteration: *“In assessing the best interests of the child, Member States shall in particular take due account of the following factors: (a) family reunification possibilities”*<sup>199</sup>. The UK has not opted into the recast Directive and thus is not obliged to take account of family reunification possibilities in assessing the best interests of the child.

## 2. The Qualification Directive

The *Qualification Directive*<sup>200</sup> is designed to provide guidance on the assessment of facts and circumstances in a protection claim; give legal clarity to certain elements of the refugee definition; subsidiary protection and the rights that attach to refugee status and subsidiary protection. It is relevant to the issue of family tracing for unaccompanied children only in as much as it extends the obligation on State Parties to commence or continue family tracing efforts once the unaccompanied child has received ‘refugee or subsidiary protection’.

Article 30 (5), dealing with the obligations on State Parties, uses almost identical language to that used in the *Reception Conditions Directive*. The only difference is the addition at the end of the Article of the words *‘...so as to avoid jeopardising their safety’*. The tracing obligation in the recast *Qualification Directive* uses similar language to the recast *Reception*

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<sup>195</sup> Ibid. Article 18 (1)

<sup>196</sup> Smyth, C. Op. Cit. Page 21

<sup>197</sup> Ibid. Page 21

<sup>198</sup> Directive 2013/33/EU, Op. Cit. – Article 24 (3)

<sup>199</sup> Ibid – Article 23 (2) (a)

<sup>200</sup> Council Directive 2004/83/EC -the original ‘Qualification Directive’ not the ‘recast’ version.

*Conditions Directive*. However, it does not mention ‘best interests’ or the possibility of family reunification. The UK has not opted into the recast Qualification Directive.

### 3. The Dublin Regulation

The *Dublin Regulation* (DR) and recast (Dublin 111<sup>201</sup>) is a specialised form of the safe third country concept. *“Based on the premise that all EU Member States are safe owing to the minimum standards established in the CEAS, the DR establishes that one, and only one, EU Member State is responsible for processing any given asylum application.”*<sup>202</sup> The DR establishes a *hierarchy of criteria* to determine Member State responsibility for examining the claim. When an application is lodged in any Member State, the criteria are applied until a match is found *“whereupon the asylum seeker can be sent to the responsible State to have his/her claim processed there.”*<sup>203</sup>

Chapter 111 of the Regulation set out the hierarchy of criteria, the first principle being of family unity/reunification – the idea that an applicant should have his or her claim processed in the Member State in which he or she has family members. The Regulation also provides rules for the transfer of applicants between Member States including rules regarding the processing of requests, time limits for making and responding to requests and a default mechanism.

The first criterion in the hierarchy of criteria is directed towards unaccompanied minors. *“It provides that the State in which the unaccompanied minor’s family is legally present is the one responsible for processing his/her asylum claim, provided that this is in the minor’s best interests.”*<sup>204</sup> Where the minor has no family members in a Member State, they are processed in the State where the claim was lodged.

Chapter 11 of the recast Dublin Regulation (Dublin 111) adds a new article entitled ‘Guarantees for Minors’. The Article provides that the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in the regulation<sup>205</sup> and gives an illustrative list of factors to be taken into account in assessing the best interests of the child including *‘family reunification possibilities’*. It further establishes an obligation to undertake family tracing within the EU for the unaccompanied minor with a view to applying the criterion in the hierarchy relating to unaccompanied minors: *“For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to*

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<sup>201</sup> European Union Regulation 604/2013 (Dublin 111) - References to the Dublin Regulation in this section refer to the recast Dublin 111 regulation that the UK has opted into.

<sup>202</sup> Smyth, C., Op. Cit., Page 17

<sup>203</sup> Ibid. Page 17

<sup>204</sup> Ibid. Page 18

<sup>205</sup> Op. Cit. – Article 6 (1)

*identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.*"<sup>206</sup>

The criterion is also expanded in scope, applying now to 'siblings and relatives' as well as family members.

#### 4. Family Reunification Directive<sup>207</sup>

The UK has not opted into the Family Reunification Directive. In respect of unaccompanied minors granted Refugee Status, Article 10.3 of the Directive states: "*If the refugee is an unaccompanied minor, the Member States: (a) shall authorise the entry and residence for the purposes of family reunification of his/her first-degree relatives in the direct ascending line without applying the conditions laid down in Article 4(2)(a);*"<sup>208</sup>

The Immigration Rules do not permit unaccompanied children granted Refugee Status to apply for their immediate family ('first degree relatives') to join them in the UK, mirroring the opt out from the *Family Reunification Directive*.

Home Office policy has nevertheless maintained that "*family reunification should generally be regarded as being in the best interests of the child*"<sup>209</sup> in the context of the decision on whether or not to grant Discretionary Leave under the (old) UASC policy. This approach continues to be reflected in the current Immigration Rules in the requirements to be met in order for UASC leave to be granted requiring there to be "*no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted*".<sup>210</sup>

Home Office policy on family reunification for unaccompanied children appears to employ best interests criteria when family reunification is to take place outside of the UK but not otherwise.

#### Domestic Law and family tracing

The obligation to trace the family of an unaccompanied minor was transposed into Domestic Law by the *Asylum Seekers (Reception Conditions) Regulations 2005* ('The 2005 Regulations'). While the Home Office issued guidance to staff to accompany this, when the ICIBI carried out their inspection of the handling of asylum applications from unaccompanied minors in 2013 they reported that: "*The main Home Office guidance on*

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<sup>206</sup> Ibid. Article 6 (4)

<sup>207</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

<sup>208</sup> Ibid. Art 10 (3)

<sup>209</sup> Greater Manchester Immigration Aid Unit, *Children's Best Interests – A primary consideration?* (June 2013) – page 7 (quoting the 'Discretionary Leave' policy at the time)

<sup>210</sup> Immigration Rules – Rule 352ZF (c)

children's asylum claims, which we looked at, was last updated substantively in 2010. It explained family tracing, but said little about how to do it."<sup>211</sup>

### The 2005 Regulations and the Reception Directive

Regulation 6 of the 2005 Regulations reads: "(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum. (2) In cases where there may be a threat to the life or integrity of the minor or the minor's close family, the Secretary of State shall take care to ensure that the collection, processing and circulation of information concerning the minor or his close family is undertaken on a confidential basis so as not to jeopardise his or their safety."<sup>212</sup> (Emphasis added)

Regulation 6 changes the wording of Art 19 (3) (c) of the 2003 Directive (The family tracing obligation) by adding: "so as to protect an unaccompanied minors best interests...". In contrast to language of the Directive that it purports to transpose, the wording of the Regulation appears to conflate commencement of family tracing with securing the child's best interests. Although the Regulation qualifies the 'endeavour to trace' where there may be a 'threat to the life or integrity of the minor or the minor's close family' by stating that 'care' should be taken not to jeopardise safety, it omits the wording of the 2003 Directive which qualifies the obligation further by using the words '*particularly if they have remained in the country of origin*'. This is significant because it is largely where an unaccompanied child has family remaining in the country of origin that the Home Office appears to focus its tracing efforts. For example, see the specific family tracing instructions relating to Albania and Bangladesh.

### UK case law on family tracing

A line of jurisprudence in the UK Court of Appeal relating to family tracing found that the Home Office had systematically breached its tracing duty by failing to endeavour to undertake tracing. This was reported on in some detail by the ICIBI in their 2013 inspection report. The matter was finally considered by the Supreme Court in 2015<sup>213</sup> and several important principles emerged from the case in respect of the duty and its relation to an asylum claim from an unaccompanied minor – in particular regarding what had become known as 'corrective relief' for the failure of the State to undertake its tracing obligation.

The Supreme Court affirmed the established rule that asylum appeals should be determined by reference to the situation at the time of the appellate decision rather than by reference to the situation at the time of the original decision. The exception to this rule - established in the case of *Rashid* – that an abuse of power by the State enables the court to intervene to give appropriate relief to compensate for a past breach of duty even if the asylum applicant is presently no longer in need of protection - lacked a satisfactory principle and should no

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<sup>211</sup> ICIBI (2013) Op. Cit. Para 8.43

<sup>212</sup> *Asylum Seekers (Reception Conditions) Regulations 2005*, Regulation 6

<sup>213</sup> *TN and MA (Afghanistan) v SSHD & AA (Afghanistan) v SSHD* [2015] UKSC

longer be followed. The ruling cuts the link between the tracing duty and the asylum decision making process.

The Court also held that in deciding whether to accept an applicant's account, the tribunal must act on the evidence before it with no presumption of credibility. The fact that the Secretary of State fails to discharge her tracing obligation does not affect this. Given that the Upper Tribunal disbelieved the accounts of the appellants, their appeals should not have been allowed just because of the Respondent's breach of her tracing obligation.

The Court reaffirmed that officials who discharge the Secretary of State's functions in relation to immigration and asylum must take into account the best interests of a child as a primary consideration when making decisions which affect them (the S.55 duty and the statutory guidance in *Every Child Matters*). They held that the child's best interests provide the rationale for the tracing obligation. However, *"before any tracing process is embarked upon the child must be properly consulted about his or her wishes. This is a necessary part of considering the child's best interests. There may be all sorts of reasons why the child may not want any such process to be carried out, or may be concerned about the way in which it is carried out, because of potential consequences for the child, members of their family or others."*<sup>214</sup>

### Research into the application of the tracing obligation

ICIBI undertook a file sampling exercise in relation to family tracing for their 2013 inspection (Op. Cit.). While recognising that *"decision-makers would have regarded the requirements of tracing as being in a state of flux during our sampling period"*<sup>215</sup> following a ruling in the Court of Appeal, they concluded that: *"It is not always clear whether in an individual case the Home Office can be said to have met the tracing duty."*<sup>216</sup> ICIBI considered separately evidence of tracing in cases where the child had been granted asylum (reflecting the duty in the *Qualification Directive*) finding that in only 1 out of 22 cases did decision makers consider whether to undertake tracing.<sup>217</sup>

Of the 93 cases where asylum was refused ICIBI concluded that *"In 60% of the refusal cases we sampled, tracing either was not done, was insufficient or was considered but then not carried through on a ground that was clearly unreasonable. In the remaining cases, we are either confident that the family tracing duty was discharged or... a case can be made that it was."* They also found that: *"In four cases, the Home Office used the information supplied to attempt to locate the child's family, and in two cases they were located".*<sup>218</sup>

The ICIBI's findings are not dissimilar to other 'file sampling' research undertaken. The Greater Manchester Immigration Aid Unit analysed 34 cases of unaccompanied children to

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<sup>214</sup> Ibid – paragraph 69.

<sup>215</sup> ICIBI (2013). Para 8.49

<sup>216</sup> Ibid. Para 8.51

<sup>217</sup> Ibid. Para 8.54

<sup>218</sup> Ibid. Para 8.56 – 8.57

examine “to what extent the UK Border Agency treats the best interests of children as a primary consideration in unaccompanied children’s asylum cases.”<sup>219</sup>

The premise of their analysis was that: “UK Border Agency policy is to grant Discretionary Leave to Remain until the age of 17 ½ where they are not satisfied that adequate and safe reception arrangements exist in the country of origin” and that therefore, “consideration of reception condition should take place on a case by case basis.”<sup>220</sup>

They found that in only 2 out of the 34 cases had any case specific consideration been given to reception conditions. In all of the other case the Reasons for Refusal letter merely contained a standard paragraph stating that the Secretary of State was not satisfied that there were adequate reception available “despite the fact that some of the children in the sample were in regular contact with their families and had been found not to be in need of international protection.”<sup>221</sup>. In only 1 out of 34 cases had the Home Office made an attempt to trace the child’s family by making enquiries to the British Embassy and the police in the country of origin. In 29 of the 34 cases the Home Office had also failed to inform the child of the services of the Red Cross.

They conclude that: “this suggests the grant of discretionary leave to remain under the UASC policy is applied in a blanket manner, without a case specific consideration of the reception conditions that are available, or any attempt to trace the family of the unaccompanied child.”<sup>222</sup>

The Law Centres Network undertook a further study in 2014. This study analysed data on 60 cases of unaccompanied children from 11 participating Law Centres whose substantive interviews had taken place between 1<sup>st</sup> December 2013 and 31<sup>st</sup> December 2014. This detailed study asked the participating Law Centres caseworkers to complete answers to 600 questions.<sup>223</sup>

Of the 60 cases sampled, 25 were recorded as being in contact with their families or friends during some point in their journey to the UK and during the asylum process. 11 of the children had lost contact with their families during the journey or on or after arrival in the UK. 3 children were recorded as having made a first contact or retained an existing contact following arrival.<sup>224</sup>

20 of the respondent lawyers reported that their child clients had been asked for information relevant to family tracing, most at the screening interview. Of 24 lawyers who gave a clear answer to the question as to whether the Home Office had made any efforts to trace the child’s family only 5 recorded that some effort had been made. The reasons for

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<sup>219</sup> GMIAU (2013). – Page 2

<sup>220</sup> Ibid. Page 7

<sup>221</sup> Ibid. Page 7

<sup>222</sup> Ibid. - Page 7

<sup>223</sup> Law Centre’s Network, *Put Yourself in Our Shoes: Considering Children’s Best Interests in the Asylum System*, (November 2015) – page 10

<sup>224</sup> Ibid. – Page 101

not tracing were noted as the family's whereabouts being known to the child (4 cases), risks in tracing due to family complicity in exploiting the child (5 cases), turning 18 (1 case) and that the Local Authority was undertaking the role (1 case). Local authorities were found to be more active in tracing (7 cases) and 5 children had accessed the Red Cross to help find their families. In 10 cases professionals and experts were noted to have commented on the impact of family separation and loss on the child and their distress at the lack of information concerning the family's whereabouts and welfare.<sup>225</sup>

While none of the above studies are conclusive, they suggest little evidence of the Home Office assisting children with help in contacting or tracing their families.

### Home Office 'Family Tracing' Instruction<sup>226</sup>

A long-awaited asylum policy instruction, '*Family Tracing*', was issued in July 2016 replacing previous interim guidance. It is a comprehensive document of 40 pages setting out the principles and stages of family tracing, consideration of whether family tracing needs to be undertaken, the European and domestic law framework for tracing, how information should be collected from the child and from those responsible for the child's care, recording of the steps taken, what to do if the family is or is not traced, and the relevance of family tracing to the determination of the asylum claim. No research has yet taken place on the impact of the *Family Tracing* instruction on Home Office practice in complying with the tracing duty.

Against the background of the materials considered in this chapter and in light of the new instruction, the following pointers are highlighted should ICIBI wish to undertake further inspection of the Home Office's duty to trace taking into account the best interests of the child as a primary consideration.

### Discussion and conclusions – Family tracing

'Decision makers at every stage of the process ...have a responsibility to endeavour to trace the child's family'<sup>227</sup>. This makes the point that endeavours to trace are not for the purpose of determining the asylum claim (although information collected may be relevant to that determination as the Supreme Court in *TN & MA* found). This is highly relevant to the requirements of the *Qualification Directive* for those children found to be refugees and an area of practice that the ICIBI inspection and the other studies have highlighted as inadequately considered by decision makers.

'Taking account of the views and feelings of the child'<sup>228</sup>. The Supreme Court emphasised in *TN and MA (Afghanistan) v SSHD & AA (Afghanistan) v SSHD* (Op. Cit.) the importance of taking the child's wishes into account in respect of family tracing as "a necessary part of considering the child's best interests". The instruction emphasises "gaining the trust and co-

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<sup>225</sup> Ibid. Page 101-102

<sup>226</sup> Home Office, *Family Tracing, version 1* (12.07.16)

<sup>227</sup> Ibid. Page 2

<sup>228</sup> Ibid. Page 15

*operation of the child*<sup>229</sup> and urges decision makers to “*be proactive in eliciting what is concerning the child and... respond to any questions or misconceptions expressed by the child regarding the family tracing process.*”<sup>230</sup> An issue here may be the limited contexts in which decision makers and other Home Office staff interacting with the child are *able* to establish trust and confidence. The instruction notes that: “*The child’s opinion on family tracing is requested within the written SEF and, if required, their views can also be requested at the asylum interview.*”<sup>231</sup> Paradoxically, screening interviews, where detailed information on the child’s family used to be collected, have now been replaced by a much shorter welfare interview where a more limited set of questions are asked. The welfare interview would nevertheless provide an opportunity for the interviewer and child to discuss, in general terms, the family tracing information required in the SEF and provide a chance to address any concerns the child may have. No reference is made to the welfare interview in the instruction.

The SEF is normally completed with the help of the child’s legal representative and is issued to the child at the conclusion of the welfare interview at the registration of the claim. A key to successfully obtaining the information via the SEF must be through cooperation with the child’s legal representative. Although the legal representative is mentioned in passing in the section ‘*obtaining information from individual’s responsible for the child’s care*’<sup>232</sup> the emphasis is on the social worker’s completion of the ‘current circumstances’ form. While completed SEF’s are routinely returned in advance of the substantive interview their usefulness in providing sufficient information to enable a decision to be made on whether to commence tracing and has yet to be investigated and established. This is also the case for the ‘Current circumstances’ form.

The *Family Tracing* guidance does not appear to apply where an unaccompanied child’s fingerprints are found to match those on the EURODAC database (‘Dublin’ cases). While there is good quality information on the Home Office website for *applicants*, including children, subject to the Dublin procedures<sup>233</sup>, there does not appear to be a publicly available instruction for staff in the Third County Unit (TCU) on how to apply the Dublin Regulation. Given that the Regulation now includes guarantees for minors providing that their best interests shall be a primary consideration with respect to all procedures, we would expect TCU guidance to include such matters as the information to be sought from children subject to the procedure regarding relatives in UK or other Dublin Countries, how and when such information should be sought, how best interests are to be considered where family members in Dublin countries are identified, procedures for dealing with children who have a EURODAC fingerprint ‘hit’ but also claim to have a relative in the UK, and how the tracing obligation impacts on Dublin procedures.

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<sup>229</sup> Ibid. Page 15

<sup>230</sup> Ibid. Page 16

<sup>231</sup> Ibid. Page 15

<sup>232</sup> Ibid. Page 17

<sup>233</sup> Migrationsverket, *Children asking for International protection - Information for unaccompanied children who are applying for international protection pursuant to article 4 of Regulation (EU) No 604/2013* (21.02.14) NB This appears to be an EU publication in English

The section on ‘*Delaying asylum decisions while family tracing endeavours are concluded*’ notes: “*In cases where it appears that the family tracing endeavours are likely to be protracted, decision makers should therefore not defer making an initial decision pending the outcome of a tracing request. A positive decision in favour of granting asylum to a child should not normally be withheld just because family tracing has not reached a conclusion.*”<sup>234</sup> However, no guidance is given on what decision makers should do where a negative decision is reached. This goes to the substance of the GMIAU concern that the grant of Discretionary/UASC leave is “*applied in a blanket manner without a case specific consideration of the reception conditions that are available, or any attempt to trace the family of the unaccompanied child*” and also to the ICIBI’s similar concern that failure to discharge the duty might “*lead to incorrect decisions, such as a grant of leave based on no adequate reception arrangements when tracing might have located family members.*”<sup>235</sup>

### Discussion and conclusions – Family Reunification for Unaccompanied children

Failure to opt into both the recast *Reception Conditions Directive* and, particularly, the *Family Reunification Directive* means that the UK has been able to maintain some of the most restrictive policies on family reunion within the EU. *The Family Reunification Directive* provides for direct ascending family reunion for unaccompanied children. A recent House of Lords Report on Unaccompanied Children in the UK<sup>236</sup> recommended that the Government reconsider its position on family reunion for unaccompanied children and found no evidence that allowing children to reunite with ascending relatives and siblings created a perverse incentive to send unaccompanied minors to the UK.

The Refugee Children’s Consortium has argued that the failure to include provision for family reunion for unaccompanied children in the Immigration Rules may provide incentive for “*siblings and parents making their way independently to the EU through dangerous routes to benefit from the provisions of Dublin III.*”<sup>237</sup> If that argument is correct, the failure to provide for unaccompanied children to be reunited with their adult family members under the Rules may be short-sighted.

The current status quo in respect of family reunification for unaccompanied children cannot be said to give primary consideration to their best interests or in any way contribute to a durable solution that includes reunification with parents and family members.

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<sup>234</sup> *Family Tracing*, Op. Cit. – page 35

<sup>235</sup> ICIBI (2013). Para 8.60

<sup>236</sup> House of Lords European Union Committee, *Children in Crisis: unaccompanied migrant children in the EU - 2<sup>nd</sup> report of the Session 2016-17* (26 July 2016)

<sup>237</sup> Refugee Children’s Consortium, *Refugee Family Reunion – Briefing for the Westminster Hall debate*, (29.11.16)

## Chapter 5 - Family Migration and Children's Best Interests

*“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,*

*Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...”<sup>238</sup>*

### Introduction

The Universal Declaration of Human Rights states that ‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family’ and that: ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.<sup>239</sup>

However, while ‘Everyone has the right to respect for his private and family life’<sup>240</sup> the right is a qualified one. The ECHR requires that: ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others’.  
(Emphasis added)

There is a clear tension between the right to respect for family life contained in international and regional human rights instruments and domestic law (through the Human Rights Act) and the rights of States to control their borders. A refusal to admit foreign spouses of British citizens and persons settled here is not, in itself, a breach of the right to respect family life, the European Court of Human Rights holding that there is no general obligation to respect a couple’s choice of country to live in<sup>241</sup>.

Globalisation has brought these tensions sharply into focus. As the Children’s Commissioner has written: “Globalisation has made a profound difference to our lifestyles. We travel more, we work abroad more, and we holiday outside of our own countries and more people from other countries of the world travel to our country, as visitors, students and workers. When we carry out these ordinary modern-day activities, extraordinary things sometimes happen –

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<sup>238</sup> Preamble to the *United Nations Convention on the Rights of the Child*

<sup>239</sup> Universal Declaration of Human Rights, Article 16

<sup>240</sup> European Convention on Human Rights, Article 8

<sup>241</sup> See for example *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) EHRR 471

*we fall in love with the person we want to share our lives with. And sharing a life will mean for most people having children together and raising them in the family”.*<sup>242</sup>

This starting point for this chapter are the arrangements that the UK Government has put in place to control family migration from outside of the European Economic Area (EEA)<sup>243</sup>. These arrangements are of course obliged to comply with the various international, regional and domestic legal obligations that have been set out previously.

Given the wide consensus that a child should not be forced to be separated from its parents unless it is in their best interests<sup>244</sup>, the question as far as children are concerned is whether the arrangements for family migration can be said to comply with legal obligations designed to give ‘primary consideration’ to their best interests. Any arrangements for family migration must be compliant with the best interests principle in both design and execution.

### *The Family Migration Rules*

In July 2012, a new *Appendix FM* was inserted into the Immigration Rules dealing with the entry requirements for non-EEA family members to join their relatives in the UK. A large part of *Appendix FM* (section E- ECP) is designed for spouses or partners from outside the EU who are seeking to enter or remain in the UK on the basis of their family life with a person who is either a British Citizen, settled in the UK, or is in the UK with limited leave as a refugee or person granted humanitarian protection.<sup>245</sup>

*Appendix FM* sets out a series of requirements to be met by the applicant and describes how, under Article 8 of the ECHR, the balance is intended to be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety, economic well-being of the UK, the prevention of disorder and crime, the protection of health or morals and the protection of the rights and freedoms of others.

The requirements for a successful application under Appendix FM include a ‘minimum income requirement’ to be met by the applicant’s sponsor as well as an English language requirement, relationship requirements, suitability criteria and, for ‘in-country’ applications,

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<sup>242</sup> The Children’s Commissioner’s Foreword to *Family Friendly? – The impact on children of the Family Migration Rules: A review of the financial requirements*, Middlesex University and the Joint Council for the Welfare of Immigrants (2015), *Children’s Commissioner for England*, Page 7

<sup>243</sup> Migrants from within the EEA are currently able to exercise their right to free movement and move to the UK and found a family here without being subject to immigration control.

<sup>244</sup> UNCRC, Article 10(1) ‘States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.’

<sup>245</sup> The new Rules were further amended by CM 8423 which inserted a new Appendix FM-SE dealing with procedural and evidential requirements and came into force on 20 July 2012.

immigration status requirements. The Appendix also states that it *'takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009'*.<sup>246</sup>

*Consideration of Children's Best Interests in applications to enter or remain in the UK on the basis of marriage or civil partnership.*

In October 2013, just over a year after the introduction of the new Family Migration Rules the Chief Inspector of Borders and Immigration published *'An inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnership'*<sup>247</sup>. The inspection examined how the UK Border Agency dealt with all such applications focusing on assessing the consistency of decision-making across different locations and work-streams. The fieldwork for the inspection was carried out between April and October 2012 – traversing the period where both the old and new family migration rules were in operation.

As part of the inspection, consideration was given to UKBA's duty under s.55 to ensure that applications were being considered having regard to the need to safeguard children and promotes their welfare as well as the wider requirement to account for children's best interests as part of any ECHR Article 8 consideration by decision makers. The inspection therefore looked specifically at applications where children were involved. Entry clearance applications from abroad were considered separately from 'in-country' applications for further leave or settlement.

File sampling of 92 'in-country' applications for further leave or settlement found 39 cases involving at least 1 child. UKBA staff interviewed told the inspection that where a refusal under the Immigration Rules was likely to have an adverse impact on a child, Discretionary Leave (DL), outside of the Rules, would be granted. This was only partly borne out by the findings.

Leave under the Immigration Rules was granted in 18 of the 39 cases involving children. Of the 21 refusals involving children, UKBA subsequently granted DL in 10 (48%) cases and a further 1 had extant leave in another capacity. All the grants of DL followed a refusal of settlement, rather than further leave under the Rules.

Given the s.55 obligations, the inspection considered why DL outside of the Rules had not been granted in the remaining 10 cases. In only one of these had explicit consideration been given to the child's best interests. There was no 'substance of attention' given to the overall well-being of the child in the remaining 9 cases.

Commenting on these findings, the inspection noted the expectation that *explicit consideration* should have been given to any impact refusing to grant further leave to the

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<sup>246</sup> Immigration Rules, Appendix FM (family members), GEN 1.1.

<sup>247</sup> *An inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnership*, Vine, J., Independent Chief Inspector of Borders and Immigration, London, (2013)

applicant was likely to have on the child. *“The lack of specific reference to the best interests of the child in the paper files or the Agency’s electronic case-working system meant that we were unable to determine whether the Section 55 duty had been considered. Given the potential impact of the Agency’s decisions on children, we would expect the Agency’s notes to be explicit in setting out a consideration of the best interests of the child.”*<sup>248</sup>

The inspection then considered overseas decision making in 157 entry clearance cases, 57 of which involved a child. Of those 57 cases, leave had been granted in 20 and refused in 37. While acknowledging that the s.55 duty did not apply to children outside of the UK, the Chief Inspector notes that the s.55 statutory guidance makes clear that: *“UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention”*.<sup>249 250</sup> Furthermore, a decision to refuse entry to a parent with a child in the UK could breach Article 8 ECHR right to a family life and therefore a consideration of the child’s best interests as part of the Article 8 balancing exercise would be necessary in cases involving such children.

Reviewing the 37 cases involving children in the UK where entry of the foreign national parent on the basis of marriage was refused under the Rules, the inspection found that the best interests of the child had not been referred to in any of the case files. *“In the absence of any reference to the best interests of the child, in either paper or electronic files or notes, we were unable to determine whether Entry Clearance Officers had considered the Agency’s guidance on acting in the spirit of the legislation or not.”*<sup>251</sup>

As a result of the findings in both in-county and overseas cases involving children the following recommendation was made to UKBA: *Ensures that the best interests of the child are considered in all relevant cases and that these are expressly referred to in both notes and decisions to refuse applications.*<sup>252</sup>

### UKBA response to the Chief Inspector’s recommendation

In accepting the Chief Inspector’s recommendation UKBA relied on the changes that had taken place to the Family Migration Rules since the 2012 inspection. *“This inspection by the Independent Chief Inspector, conducted in 2012, reviewed applications and data prior to the*

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<sup>248</sup> Ibid, Para 7.11

<sup>249</sup> *Every Child Matters: Change for Children - Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*. Home Office UK Border Agency & Department for Children, Schools and Families, November 2009. Para 2.34

<sup>250</sup> It should be noted that where an applicant for entry clearance applying from outside the UK has a child already in the UK, the Section 55 duty *would be* engaged whether or not that child is subject to immigration control. This point was perhaps missed.

<sup>251</sup> Op. Cit. Para 7.16

<sup>252</sup> Op. Cit. Para 7.18

*introduction of the new family Immigration Rules in July 2012.*<sup>253</sup> . UKBA asserted that their approach to the statutory duty under section 55 had been reinforced by the July 2012 changes *“by bringing consideration of the welfare – or best interests – of children into the Immigration Rules”*<sup>254</sup>.

The new Family Migration Rules, it was said, *“set out a clear framework for weighing the best interests of the child against the wider public interest in removal and deportation cases. The rules create a route for applications for leave based on a child’s best interests. This means that a child’s best interests are always considered in the relevant cases and according to best interests criteria that are now expressly mentioned in the rules”*.<sup>255</sup>

### *Bringing consideration of a child’s best interests into the Immigration Rules on family migration.*

Where an applicant meets all the requirements of the 2012 Rules, leave will be granted and no consideration is therefore given to a child’s best interests. ‘Taking into account’ the need to safeguard children and promote their welfare only takes place where the applicant is *unable* to meet one or more of the requirements of Appendix FM and thus would otherwise be refused entry or stay. This happens in the first place by applying the ‘exception’ - ‘EX.1’ - included in the Rules at the end of Appendix FM.

In respect of children, EX.1. applies *“if the applicant has a genuine and subsisting parental relationship with a child who- (a) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied; (b) is in the UK; (c) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and it would not be reasonable to expect the child to leave the UK”*<sup>256</sup>

Analysis of the Home Office approach reveals that not all children affected by a decision on entry or stay of a parent are covered by EX.1.<sup>257</sup> In particular:

- It only applies where children already in the UK are *either* citizens *or* have lived in the UK continuously for seven years. A non- EU parent of non- British citizen children under 7 years old (or children who are older but who do not meet the 7-year residence requirement) does not benefit from the exception.
- It does not apply when applicants apply for entry clearance from abroad, as required under the Rules, even if their children are British Citizens (or children who have been lived continuously in the UK for more than 7 years).

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<sup>253</sup> *The UK Border Agency Response to the Independent Chief Inspector’s Report: An inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnership*, Home Office UK Border Agency, (2013) Page 1

<sup>254</sup> *Ibid*, page 4

<sup>255</sup> *Ibid*, page 4

<sup>256</sup> Immigration Rules, Appendix FM, EX.1.

<sup>257</sup> Middlesex University and the Joint Council for the Welfare of Immigrants (2015) Op. Cit.

- It does not apply to parents who are in the UK on a visit visa although applicants who are in the UK unlawfully (for example having overstayed a visit visa) *are* able to benefit.
- Applicants granted leave under EX.1. are placed on a 10-year route to settlement rather than the 5-year route for those able to meet the requirements without relying on the exception. This prolongs uncertainty and increases the cost of the application process.<sup>258</sup>

It is clear then that the Rules, including EX.1. are not, on their own, designed to cover all the situations in which an applicant may have a valid claim to enter or remain as a result of their Article 8 rights or because the s.55 duty requires admission.

Where an applicant cannot meet the requirements of Appendix FM *or* the EX.1 criteria (for example because they are applying for entry clearance from outside the UK or are in the UK on a visit visa), the application will be considered as *an exceptional case outside of the Immigration Rules* in order to comply with Article 8 ECHR and the best interests principle. Cases decided outside of the Rules are determined in accordance with the Immigration Directorate Instructions (IDI's)<sup>259</sup>. As the Home Office argue in their response to the Independent Chief Inspector's 2013 report:

*"Section 55 does not apply to entry clearance cases, even where the applicant (who will be outside the UK by the nature of the application) has a child who is in the UK<sup>260</sup>. The new family rules are compliant with Article 8, but where an applicant for entry clearance has a child in the UK and fails to meet the requirements of the rules, they can raise any exceptional circumstances which would mean that a refusal under the rules would result in an unjustifiably harsh outcome – i.e. one that is incompatible with Article 8 – for the applicant or their child... The UK Border Agency's assessment of these exceptional circumstances will involve a consideration of the best interests of the child and could result in a grant of leave outside the rules where appropriate."<sup>261</sup>*

Section 14 of the IDI's '5-year route' guidance (see Footnote 22), requires Entry Clearance Officers, *"where an application does not meet the requirements of the Rules, to consider whether there are exceptional circumstances which make refusal a breach of Article 8 rights or whether there are compelling compassionate reasons which might justify a grant of entry clearance because refusal would result in unjustifiably harsh consequences for the applicant*

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<sup>258</sup> Ibid, Pages 19-20.

<sup>259</sup> *Immigration Directorate Instructions: Family Migration: Appendix FM 1.0a: Family Life (as a partner or Parent) and Private Life: 5-year routes and Appendix FM 1.0b: Family Life (as a partner or Parent) and Private Life: 10-year routes*, (August 2015) is the most recent IDI guidance in relation to family migration on Article 8 grounds.

<sup>260</sup> This analysis of the duty by the Home Office is concerning. The statute places no such limitation on the application of the duty. It reads: (1) The Secretary of State must make arrangements for ensuring that— 1. (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom (emphasis added)

<sup>261</sup>. page 4

or their family”. However, Entry Clearance Officers are not allowed to grant entry clearance outside of the Rules, so an officer who thinks that the case might meet “*this high threshold must refer the case to the Referred Casework Unit (“RCU”) in London.*”<sup>262</sup>

The Supreme Court in *MM (Lebanon)* received evidence on the numbers of cases referred to the Referred Casework Unit for consideration of leave outside of the Rules. Between 2012 – 2014 only 52 cases were referred of which 26 succeeded. In the same period, some 30,000 applications were refused.<sup>263</sup>

Similar guidance exists on in-county applications for leave to remain outside of the Rules but as Lady Hale points out in *MM (Lebanon)* “...the initial assumption that the Rules cover the ground, so that refusals will only be disproportionate in exceptional circumstances likely to be rare and the definition of exceptional circumstances are the same.”<sup>264</sup>

### *APPG on Migration inquiry into the new Family Migration Rules*

The All Party Parliamentary Group on Migration undertook first scrutiny of the new Family Migration Rules introduced in July 2012<sup>265</sup>. The inquiry was launched on 20<sup>th</sup> November 2012 and looked, in particular, at the new minimum income requirement of £18,600 for British nationals and permanent residents (‘UK sponsors’) seeking to sponsor a non-EEA spouse or partner (rising to £22,400 to sponsor a child in addition and a further £2,400 for each further child included in the application). The inquiry also considered the new rules on sponsorship of non-EEA adult dependents applying to come to the UK<sup>266</sup>.

The inquiry found that some British citizens and permanent residents in the UK, including people in full-time employment, had been separated from a non-EEA partner and in some cases their children as a result of the minimum income requirement in force from July 2012. A number of putative UK sponsors in full-time employment earning at or above the National Minimum Wage (then £6.19 per hour, or £12,855 per annum) reported that they were unable to meet the income requirement reflecting wider evidence suggesting that 47% of the UK working population in 2012 would fail to meet the income level in order to sponsor a non-EEA partner. Because of variations in earnings between regions, the income requirement had a particular impact on UK sponsors based outside of London and the South East. Lower-earning sections of the UK working population including women, young adults, elderly people, and some ethnic minority groups also reported difficulties. The inquiry also heard evidence that the income requirement had generated some unforeseen costs to the public purse, including an increased uptake of welfare benefits among some UK sponsors,

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<sup>262</sup> Quoted from *R & MM (Lebanon) v SSHD*, [2017] UKSC 10, Para 22

<sup>263</sup> *Ibid*, Para 25

<sup>264</sup> *Ibid*, Para 26

<sup>265</sup> *Report of the Inquiry into the New Family Migration Rules*, All Party Parliamentary Group on Migration, June 2013

<sup>266</sup> Over 280 submissions were received, including over 175 submissions from families who had been affected by the new Rules. Written evidence was also received from charities, lawyers, local authorities, businesses and MPs from across the UK.

greater pressure on UK sponsors and the State with regard to caring responsibilities, and a loss of potential tax revenue from future non-EEA partner earnings in the UK.

Some British citizens and permanent residents had been prevented from returning to the UK with their non-EEA partner and any children as a result of the income requirement. Over 60 families seeking to return to the UK as a family unit had been delayed or prevented from doing so because of the level of the income requirement and the limited sources permitted under the new Rules in order to meet the requirement. In some cases, the non-EEA partner was the main earner with a medium or high salary that the new Rules prevented from being counted towards the income requirement.

Some children, including British citizen children, had been indefinitely separated from a non-EEA parent as a result of the income requirement. 45 of the families who submitted evidence reported that their inability to meet the income requirement had led to the separation of children, including British children, from a non-EEA parent or wider family members. Some submissions referred to children, including babies, who had been separated indefinitely from a non-EEA parent who could not enter the UK, which the inquiry noted could have *“potentially significant implications for their development and wellbeing”* while in other cases, *“children were living overseas with both parents as the non-EEA parent could not enter the UK, and were separated from grandparents and wider family networks as a result”*.<sup>267</sup>

Whilst the inquiry did not seek specific evidence on how far the best interests of children had been considered by decision-makers in EEA partner applications since July 2012, it noted the findings of the Chief Inspector’s 2012 report in relation to the best interests of children in addition to the evidence received by the inquiry from affected families and others and recommended that: *“The family migration rules should ensure that children are supported to live with their parents in the UK where their best interests require this. Decision-makers should ensure that duties to consider the best interests of children are fully discharged when deciding non-EEA partner applications. Consideration should be given to enabling decision-makers to grant entry clearance where the best interests of children require it”*.<sup>268</sup>

### *Further research into the impact of the Family Migration Rules on children*

The APPG enquiry and subsequent anecdotal evidence of the impact of the Minimum Income Requirement from family members led to further research on the impact on children being commissioned by the Children’s Commissioner for England. The results were published in a comprehensive report in August 2015.<sup>269</sup>

The researchers undertook in depth research with families and their children through

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<sup>267</sup> Ibid, page 7

<sup>268</sup> Ibid, page 8

<sup>269</sup> *Family Friendly? – The impact on children of the Family Migration Rules: A review of the financial requirements*, Children’s Commissioner (2015).

questionnaires and semi-structured interviews with parents and children separated through the Rules, a literature review relating to the financial requirements which included the Government's consultation and impact assessment documents and the Migration Advisory Committee (MAC) reports, an analysis of 11 decision letters refusing a grant of leave to enter or remain to ascertain whether decision making reflected the UK's legal obligations towards children and a detailed consideration of those obligations. In addition, an annex to the report reviewed the literature on attachment and disruption in children of separated parents.

The report aimed to provide *"a detailed assessment of the impact of the financial requirements on children, young people and families and in particular on the enjoyment by children of their rights under the United Nations Convention on the Rights of the Child (UNCRC).... The overarching aim is to contribute to achieving a situation where children's best interests are given primary consideration in the family migration system."*<sup>270</sup>

Amongst the report's key findings were that:

- *"... at least 15,000 children have been affected by changes to the financial requirements of the Immigration Rules implemented in 2012"*
- *"Children, most of whom are British Citizens (79% in the survey carried out for this report) are suffering distress and anxiety as a result of separation from a parent."*
- *"The Immigration Rules and accompanying guidance do not comply with the duty to safeguard and protect the best interests of children in the UK. Several categories of children in the UK are not protected and the Rules as drafted breach national and international law."*
- *"Decision-making routinely fails to adequately consider the best interest of children and decision letters are often legally and factually incorrect."<sup>271</sup>*

The researchers were critical of the Government's position, reflected in the UKBA response to the Chief Inspector's report outlined above, that the financial requirements in Appendix FM (the new Family Migration Rules) *"set out a clear framework for weighing the best interests of the child against the wider public interest in removal and deportation cases"*.

### Consideration of Appendix FM by the UK courts

The legality of new minimum income requirement (MIR) has been challenged in a number of cases that reached the Supreme Court in February 2016. The basis of the challenge had been that the MIR was not rationally connected to its legitimate aims and ought to be struck down in its entirety. This claim was rejected in the Court of Appeal.

By the time of the Supreme Court hearing, one case, 'MM (Lebanon)', involved the separation of a child from his uncle where it was contended that the appellant's difficulties in achieving family unity was not only in breach of his ECHR Article 8 rights but also of the Secretary of State's duty under section 55 of the 2009 Act. Although the case did not concern MM's biological child the Court assessed that MM's case provided *'the opportunity*

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<sup>270</sup> Ibid, page 17

<sup>271</sup> Ibid, page 15

for us to deal with the position of children under the rules as a matter of general principle.<sup>272</sup>

The judgement rehearses at some length how “the internationally accepted principle requiring primary attention to be given to the best interests of affected children is given clear effect in domestic law and policy” and that “the same principle is restated as part of the considerations relevant to the article 8 assessment in *Jeunesse*”<sup>273</sup>... requiring national decision-makers to: “...advert to and assess evidence in respect of the practicality, feasibility and proportionality [of any such removal of a non-national parent] in order to give effective protection and sufficient weight to the best interests of the children directly affected by it.” (Para 119).<sup>274</sup>

Against this background, the Supreme Court considered the assertion at GEN.1.1 of Appendix FM that the new route for those seeking to enter or remain in the UK on the basis of their family life “also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State’s duty under section 55 of the *Borders, Citizenship and Immigration Act 2009*”.<sup>275</sup>

While the Court accepted as ‘axiomatic’ that it would be for entry clearance officers to ensure appropriate consideration was given to the interests of any children when considering the admission of someone whose presence or absence impacts on a child, they found that the instructions to staff<sup>276</sup> “do not adequately fill the gap left by the rules”.<sup>277</sup>

“Rather than treating the best interests of children as a primary consideration, taking account of the factors summarised in *Jeunesse*, they lay down a highly prescriptive criterion requiring factors...that can **only** be alleviated by the presence of the applicant in the UK, such as support during a major medical procedure, or ‘prevention of abandonment where there is no other family member...’ (Emphasis in the original).

They conclude that the guidance (see Footnote 276) is ‘defective in this respect and needs to be amended in line with principles stated by the Strasbourg court’<sup>278</sup> (in *Jeunesse* – see footnote 273).

Furthermore, the Court rejected the statement at the end of GEN 1.1. of Appendix FM that the appendix “also takes into account the need to safeguard and promote the welfare of children in the UK, in line with the Secretary of State’s duty under section 55 of the *Borders, Citizenship and Immigration Act 2009*” describing this as “wrong in law”.<sup>279</sup> GEN 1.10 – 11,

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<sup>272</sup> R & MM (Lebanon) v SSHD, [2017] UKSC 10, Para 88

<sup>273</sup> *Jeunesse v The Netherlands* (2015) 60 EHRR 789

<sup>274</sup> Op. Cit. *MM (Lebanon)*. Para 89

<sup>275</sup>. Appendix FM, GEN.1.1

<sup>276</sup> *Immigration Directorate Instructions: Family Migration: Appendix FM Section 1.0a: Family Life (as a Partner or a Parent); 5-Year Routes and Appendix FM Section 1.0b: Family Life (as a Partner or Parent) 10- Year Routes* (August 2015)

<sup>277</sup> Op. Cit. *MM (Lebanon)*. Para 91

<sup>278</sup> *Ibid.* Para 92

<sup>279</sup> *Ibid.* Para 92

which refer to the separate consideration under article 8 is no remedy since it fails to mention the s.55 duty in the 2009 Act which “stands on its own feet as a statutory requirement apart from the Human Rights Act or the European Convention on Human Rights” applying to “any of the Secretary of State’s functions including the making of rules”. This was not simply a “defect of form, nor a gap which can be adequately filled by the instructions”. While the detailed guidance could be given by instructions, “it should be clear from the Rules themselves that the statutory duty has been properly taken into account”.<sup>280</sup> They conclude by ruling that: “We would declare that the rules fail unlawfully to give effect to the duty of the Secretary of State in respect of the welfare of children under section 55 of the 2009 Act.”<sup>281</sup> At the current time, it is understood that the SSHD has yet to indicate how she intends to rectify the defects in the instructions<sup>282</sup>.

It should be noted that the Supreme Court judgement in *MM (Lebanon)* upheld the decision from the Court of Appeal that the MIR was “rationally connected to its legitimate aim”, upholding both the principle and the level at which it had been set. At the same time, they invited the Secretary of State to reconsider “alternative sources of funding” that could be taken into account in deciding applications.

### Discussion and Conclusion

The Supreme Court in *MM (Lebanon)* has required the Home Office to reconsider how a child’s best interests will be given primary consideration. In respect of the Article 8 ECHR consideration, the instructions (see footnote 276) must now be brought into conformity with the principles set out in *Jeunesse* – requiring a ‘fair balance’ which must follow an individual assessment of what the child’s best interests entail on the particular facts of the case.

The quality of the information available to decision makers on what those best interests are, “must include respect for the child’s right to express his or her views freely and due weight given to said views in all matters affecting the child”<sup>283</sup>.

As the Children’s Commissioner’s research highlighted in a section of their report entitled ‘Amendment to forms and guidance to enable decision-makers to identify and assess a child’s best interests in order to make them a primary consideration in decision making’, “... The defects are both procedural (children’s best interests are not effectively identified through the decision-making process) and substantive (they are not treated as a primary consideration).”<sup>284</sup>

In respect of the procedural defects, the researchers conclude that the application forms

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<sup>280</sup> All quotations in this paragraph from *MM (Lebanon)* Ibid. Para 92.

<sup>281</sup> *MM (Lebanon)* Ibid. Para 109

<sup>282</sup> Knights. S. *UK Supreme Court blog: Case comment R (MM (Lebanon) v SSHD [2017] UKSC 10 Part 2*, 21 June 2017

<sup>283</sup> *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, Para. 1)*, UN Committee on the Rights of the Child (2013) Para 43

<sup>284</sup> Op.Cit. ‘Family Friendly’, Page 110, para. 7.3.3

used for entry clearance (VAF4A) and for Leave to Remain applications (Form FLR (M)) provide insufficient opportunity for applicants to record issues relating to the welfare and best interests of children who will be affected by the decision and highlight that “ *a more specific enquiry is needed to ensure decision makers are cognizant of all relevant issues*”.<sup>285</sup> They recommend amending the application forms to enable decision makers to identify and assess a child’s best interests and where still unclear to invite applicants to submit further information and evidence.

In respect of the substantive defects (corresponding to the defects identified by the Supreme Court in *MM (Lebanon)*), the researchers conclude that, where the requirements of the MIR are not met, a proper evaluation is carried out to determine whether the best interests of the child require leave to be granted and recommend a substantial writing of the guidance, now found to be unlawful, be undertaken to:

- Ensure that the starting point for entry clearance guidance, as with ‘in country’ guidance is that the best interests of the child is to be with both parents and that the instruction to consider other means of meeting the child’s best interests (than by allowing the foreign spouse entry) is removed.
- Ensure that entry clearance officers apply the s.55 duty to children in the UK and to embrace the spirit of the duty in respect of children outside the UK (as per the statutory guidance).
- Ensure guidance for all decision makers requires them to carry out a full evaluation of the circumstances of each child and what their best interest require before refusing an application.
- Describe in the guidance how such an evaluation is to be structured and carried out.
- Remove the test of ‘unjustifiably harsh consequences’ from the guidance and make clear that the test is that the child’s best interests are a primary consideration.
- Remove the limited and extreme examples of when the best interest principle applies and other inferences that subordinate a child’s best interests to other considerations.
- Where an application is still refused, describe in the decision letter how the decision was reached setting out the factors that were taken into account in determining the child’s best interests, what those best interests were identified to be and the countervailing factors that, in this instance, outweigh the child’s best interests.

The Supreme Court did not indicate how the defects in the Rules and the instructions should be corrected. “ *It is preferable to adjourn the question of remedies to allow time for the Secretary of State to consider her position, and to indicate to the appellants and to the court how she proposes to amend the instructions or other guidance to accord with the law as indicated in this judgement. The court will receive written submissions on such proposals, and consider whether a further hearing is necessary.*” <sup>286</sup>

It is to be hoped that the Supreme Court will use its continuing supervisory function in this case to ensure any new approach is sufficiently robust.

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<sup>285</sup> *ibid.* page 111, para 7.3.3

<sup>286</sup> *Op.Cit. MM Lebanon* page 39, para. 110

The Independent Chief Inspector might wish to consider building on the work conducted in the 2012 inspection once the new instructions and guidance have been issued. Alternatively, should there be excessive delay in issuing new instructions, a further 'stock take' of how best interests are accounted for under current arrangements would provide a continuing reminder that the Courts have required changes to be made.

## Chapter 6 - Children's Access to Citizenship

### International Legal Framework

There are a number of international legal instruments to which the UK is signatory that have a bearing on children's right to a nationality and access to citizenship.

Article 15 of the Universal Declaration of Human Rights states that (1) *"Everyone has the right to a nationality"* and (2) *"No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."*

Article 24 of the International Covenant on Civil and Political Rights states that *"Every child has the right to acquire a nationality."*

### The 1961 Convention on the Reduction of Statelessness

The 1961 *Convention on the reduction of Statelessness*<sup>287</sup> along with the 1954 *Convention Relating to the Status of Stateless Persons* together found the international legal framework to address statelessness which continues to adversely affect millions of people, particularly children, worldwide.

The 1961 Convention is the leading international instrument that sets rules for the conferral and non-withdrawal of Citizenship to prevent cases of Statelessness from arising. By setting out the rules to limit the occurrence of Statelessness, the Convention gives effect to Art 15 of the Universal Declaration of Human Rights which recognises that *"Everyone has the right to a nationality"*.

Underlying the 1961 Convention is the notion that while States maintain the right to elaborate the content of their nationality laws, *"they must do so in compliance with international norms relating to nationality including the principle that Statelessness should be avoided."*<sup>288</sup> The UK's principal domestic legislation on nationality, the *British Nationality Act 1981* was written to be compliant with the provisions of the 1961 Convention.<sup>289</sup>

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<sup>287</sup> The 1961 Convention entered into force on 13<sup>th</sup> December 1975. The UK had already ratified the Convention on 29<sup>th</sup> March 1966.

<sup>288</sup> United Nations, *Convention on the Reduction of Statelessness* (1961), Introductory Note by the United Nations High Commissioner for Refugees, Page 3

<sup>289</sup> However, when the UK ratified the Convention it entered the following declaration: *"The Government of the United Kingdom declares that in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that inconsistently with his duty of loyalty to Her Britannic Majesty the person (i) Has, in disregard of an express prohibition of Her Britannic Majesty rendered or continued to render,*

The 1961 Convention protects against Statelessness in several different contexts relevant to children:

- "Stateless birth" on a contracting State's territory attracts the grant of their nationality (article 1).
- Otherwise stateless persons may take the nationality of the place of their birth or of the place where they were found (in the case of a foundling), otherwise they may take the nationality of one of their parents (in each case possibly subject to a qualifying period of residence in that State) (article 2).
- A stateless person has some time beyond attaining adulthood to seek to claim the benefit of the Convention. That time is always at least three years from the age of eighteen (article 1(5)).
- Persons otherwise stateless shall be able to take the nationality of one of their parents (possibly subject to a period of prior residence not more than three years) (article 4).
- Absent circumstances of fraudulent application or disloyalty toward the contracting state, deprivations and renunciations of citizenship shall only take effect where a person has or subsequently obtains another nationality in replacement (article 8).
- Disloyal or certain criminal conduct may limit an individual's ability to avail the benefit of the Convention (article 8).
- The benefit of the Convention may be claimed by guardians on behalf of children (article 1(1)).
- States may impose a period of residence qualification for granting nationality to persons who may be otherwise stateless. That period is a maximum five years immediately prior to application and maximum of ten years overall (article 1(2)).

### UN Convention on the Rights of the Child

Article 7 of the UN Convention on the rights of the child states that (1) *"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents"* (emphasis added) and (2) *"States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."*

It will be recalled that Article 3(1) of the UNCRC requires that *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."* The Committee on the Rights of the Child in *General Comment No.14* (on the right of the child to have his or her best interests taken as a primary consideration) *"emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the*

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*or received or continued to receive, emoluments from another State or (ii) has conducted himself in a manner seriously prejudicial to the Vital Interests of Her Britannic Majesty."*

*environment, living conditions, protection, asylum, immigration, access to nationality, among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.*<sup>290</sup> (emphasis added)

The Open Society Foundations has commented that: “*Although the Committee on the Rights of the Child has not clarified precisely what the right to acquire a nationality means in practical terms, it has stressed that states have an obligation to take every appropriate measure to ensure that no children are left stateless. The committee has also stressed that states parties to the CRC must implement children’s right to a nationality in such a way that the best interests of the child are observed. At the very least, the right to acquire a nationality under the CRC should be understood to mean that children have a right to nationality in their country of birth if they do not acquire another nationality from birth—in other words, if they would otherwise be stateless.*”<sup>291</sup>

## **UK Domestic Legislation – children and citizenship**

The principle legislation governing nationality and citizenship is the *British Nationality Act 1981* (BNA '81) which came into force on 1 January 1983. Prior to the Act, any child born in the UK was automatically entitled to British citizenship. Following enactment, citizenship was to be based upon a person enjoying a “*close personal connection with the United Kingdom*”.<sup>292</sup> The Act has been amended several times and where quoted below reflects all amendments now incorporated.

Currently, a child will acquire British citizenship at birth if they are born in the United Kingdom (or a ‘qualifying territory’) and at the time of the birth, the child’s father or mother is a British citizen or settled in the United Kingdom (or qualifying territory).<sup>293</sup> There is also automatic acquisition of citizenship for those born in the UK or qualifying territory where at the time of birth the mother or father is serving in the armed forces<sup>294</sup> or is “found abandoned”<sup>295</sup>. Any child born in any of these circumstances will not need to register as a British Citizen.

### **Registration**

BNA '81 sets out the various bases on which a child ‘*shall be*’ or ‘*may become*’ a British citizen. Where a person *shall be* a British Citizen this is described in law and, for example, in

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<sup>290</sup> Op. Cit. Para. 30

<sup>291</sup> Open Society Foundations, Open Society Justice Initiative Fact Sheet - “*Children’s Right to a Nationality*”

<sup>6</sup> White Paper - *British Nationality Law: Outline of Proposed Legislation*, (Cmnd 7987), presented July 1980 at para 18, Page 3.

<sup>293</sup> BNA '81 s. 1 (1) (a) and (b)

<sup>294</sup> BNA '81 s 1 (1A)

<sup>295</sup> BNA'81 s. 1 (2).

the most recent Home Office guidance *Registration as British Citizen: Children*<sup>296</sup> as 'registration by entitlement'. Where a child may become a British Citizen, the term used is 'registration by discretion'.

Children's registration 'by entitlement' is covered by a range of provisions in BNA '81 including section 1 (3) - for UK born children whose parent has become a British citizen, settled here or in the armed forces and section 1 (4) - for UK born children with residence in the UK from birth to age 10. In addition, there is provision for registration by entitlement for children born to British citizens outside of the UK (s.3(2)), children born to British Citizens outside the UK where the family have lived in the UK for three years (s. 3(5)), children born to parents who have certain prescribed forms of British nationality (s.4 (2) and 4B), children born outside the UK to a parent serving in the armed forces (s.4D), children born before 1 July 2006 and would have an entitlement to registration had the child's mother been married to their natural father (s.4 F), children born between 1 January 1983 and 30 June 2006 who would have become a British citizen automatically had the child's mother been married to their natural father (s.4G). There is also provision for UK nationals for European Union treaty purposes (s.5) and for stateless children (Schedule 2, paragraphs 3,4 and 5).

Children may also register and be granted citizenship 'by discretion' under s.3(1) of BNA'81. Section 3(1) reads: "If while a person is a minor an application is made for his registration as a British citizen, the Secretary of State may, if he thinks fit, cause him to be registered as such a citizen.". The only statutory requirements for registration under s.3(1) are that the applicant is under 18 at the time of application, if aged 10 or over on the date of application is 'of good character' and that the Secretary of State 'thinks fit' to register them. This amounts to a wide measure of discretion which should be exercised in the child's favour if it is their best interests to do so.

### **Commentary on the arrangements for citizenship applications for children**

Most commentary on citizenship applications for children have come from practitioners directly involved with child clients. The Migrant Children's Legal Unit (MiCLU) undertook casework between 2012 – 2016<sup>297</sup> involving 54 'undocumented'<sup>298</sup> youth citing a major

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<sup>296</sup> Home Office *Registration as British Citizen: Children (formerly Chapters 8,9 & 10)*, Version 1.0 (14.07.17) – page 6

<sup>297</sup> Migrant Children's Legal Unit, *Precarious Citizenship - Unseen, Settled and Alone- The Legal and Protection Needs of 'Undocumented' Children and Young People in England and Wales* (March 2017)

<sup>298</sup> Ibid. Page 6. MiCLU define 'undocumented' as meaning "A child or young person (CYP) is unable to show any documents to prove that they are British or otherwise allowed to lawfully remain or live in the UK (e.g. if they or their parents were not born here). They may not have, or have ever seen, documents to prove their identity (i.e. a passport or birth certificate). They may not have a Residence Permit, visa or Immigration Status document that confirms their right to remain in the UK. Alternatively, the documents they do have may

motivation for the project as being to “counter the perception that undocumented CYP in the UK are voluntary migrants who have come to the UK for educational or economic betterment”.

Based on their experience, understanding of the law and application process for both immigration and citizenship applications, MiCLU report that citizenship applications involve ‘financial and procedural difficulties’<sup>299</sup> Fees for applications are very high - currently £936 for a child and £1236 for an adult - which are non-refundable if the application is unsuccessful and also, unlike immigration applications, do not attract a fee waiver.

Citing the Government’s rationale for high fee levels for citizenship applications as being that ‘citizenship is a privilege not a right’ they disagree as: “this fails to take into account the situation of CYP born in the UK and with periods of long residence who may not be able to access citizenship rights of any other country thereby leaving them effectively without any citizenship of a country. Due to birth and length of stay in the UK they lack documentary evidence of their connections with the country of nationality of their parents/family. This is particularly the case with CYP who are separated from their family members and cannot therefore access any evidence of their original nationality. It also fails to engage with CYP’s self-identity as British youth.”<sup>300</sup>

MiCLU contrast the legal entitlement that some of their child clients have to citizenship with prohibitive fee levels and lack of waiver rendering the theoretical entitlement to register citizenship ‘illusory’. High fees are compounded by ‘procedural difficulties’ including the lack of legal aid for citizenship applications and the complexity of British nationality law which mean that without specialist legal assistance children may not be able to prove their entitlement. “In the case of one of our cohort, his entitlement to British citizenship (which was closely intertwined with his mother’s presence in the UK as an EEA national) was so unclear that even a specialist European Law advice charity was unable to make a correct diagnosis. Our client’s British citizenship has now been formally recognised.”<sup>301</sup>

Perhaps the most incisive commentary on the arrangements for children to make citizenship applications has come from a specialist NGO established precisely for the purpose of assisting children and young people (CYP) with such applications. The Project for the Registration of Children as British Citizens (PRCBC), then housed at Ealing Law Centre published a major legal research report in 2014 entitled ‘Systematic Obstacles to Children’s Registration as British Citizens’.<sup>302</sup>

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*not have been endorsed with any form of visa or permission to stay in the UK by the government or these documents may have expired.”*

<sup>299</sup> Ibid. – Page 120

<sup>300</sup> Ibid. Page 120

<sup>301</sup> Ibid Page 121

<sup>302</sup> Ealing Law Centre/Project for the Registration of Children as British Citizens, *Systematic Obstacles to Children’s Registration as British Citizens* (November 2014)

The policy context of the report is explained in the introduction. Since 1<sup>st</sup> April 2013,<sup>303</sup> legal aid cuts have meant there is no longer legal aid available for children to receive advice and assistance in their registration applications making it harder for children without means to access the help needed to assist with registration by entitlement or discretion. Furthermore, changes to the Immigration Rules have meant fewer children qualify for settled immigration status or it takes longer for them to qualify<sup>304</sup>. Fees for applications that need to be made several times before eligibility for ILR ensues have risen significantly<sup>305</sup> and delays in grants of leave and refusals of leave without a removal decision (which would trigger an appeal to the First-Tier Tribunal) have all contributed a rise in the numbers of children with an unsettled immigration status.<sup>306</sup> These changes have had a knock-on effect for children qualifying for registration for citizenship at the Secretary of State's discretion (under BNA' 81 –s.3(1)) as under then current (and most recent) policy guidance,<sup>307</sup> it is expected that a child 'would have ILR' before registering him/herself as British.<sup>308</sup>

The report in particular researches three issues acting as obstacles to registration. The first is the mandatory registration application fee (which has risen since the report was written in November 2014 from £669 to £936) - including the absence of a fee waiver for children unable to afford the fee. The second and third issues both relate to the Secretary of State's discretionary powers under s.3(1) of BNA'81 - the policy guidance itself (updated since the report's publication) and the lack of adequate reasons given where applications under s 3(1) are refused.

## Fees

The issues identified in relation to fees in the 2014 report (Op. Cit.) have all been elaborated in more recent published materials from lawyers working with PRCBC and Amnesty International<sup>309</sup>.

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<sup>303</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

<sup>304</sup> ILR policy DP5/96 to grant children who have completed 7 years in the UK was withdrawn on 9 December 2008

<sup>305</sup> Immigration and nationality Fees regulations 2014 (SI/2014/922), ILR applications set at £1,093 and LTR at £601. Although some very limited fee waivers have been introduced

<sup>306</sup> Op. Cit. PRCBC, Page 5

<sup>307</sup> Home Office, *Registration as British citizen: children (Formerly Chapters 8, 9 and 10) V. 2.0* (17.08.17) is the current guidance.

<sup>308</sup> Ibid Page 30: "As a general principle, the expectation is that there should be a staged approach to permanent residence and citizenship. This means that the child will first achieve one of the following before being considered for British citizenship: indefinite leave (IL); permanent residence under the European Economic Area (EEA) regulations."

<sup>309</sup> Valdez, S. & Symonds, S. "Children are being priced out of their rights", Legal Voice (13.10.16); Prabha D. Hambly, J. & Valdez, S., Policy Bristol, Policy Report 4/2016 "Children's British Citizenship: Exposing the barriers to registration" (2016) University of Bristol; PRCBC & Amnesty International UK, *Briefing on Fees for the Registration of Children as British Citizens* (28 September 2016 -revised on 1 January 2017)

In a briefing for the *Immigration Bill 2016* they affirm that over recent years the charging of fees has become one of the chief impediments preventing children exercising their entitlement to register for citizenship. They argue that the escalation of fees for children's citizenship applications has proceeded "*without consideration of substantial distinctions, in particular those between nationality and immigration law and policy, adults and children and registration by entitlement and registration by discretion.*" <sup>310</sup>

Citing the *Impact Assessment for the Immigration and Nationality (Fees) Order 2016*, they report that the current registration charge for children of £936 is made up of £272 said to constitute the cost of administration and £664 "*profit to the Home Office*".<sup>311</sup> The fee rises "*inappropriately mirrored the escalation in fees for adult naturalisation and for settlement applications*" undermining Parliament's intention in the passage of BNA '81 to preserve "*the entitlement to British citizenship of certain groups of children born in the UK and the means whereby other children whose future clearly lies in the UK may become British citizens even though not born here*" <sup>312</sup>.

Section 68 of the *Immigration Act 2014* empowers the Home Secretary to set fees for immigration and nationality applications and provides various grounds on which she may charge above the cost of processing applications. It also empowers the Home Secretary to provide for fee exemptions and waivers but these powers have not been exercised in the case of children's citizenship registration.

Although the fee-making powers in Section 68 apply to both immigration and nationality, PRCBC argue that the two are fundamentally different. The *Immigration Act 1971* empowers the Home Secretary to determine the criteria under which someone is to be granted permission to enter or remain in the UK (primarily through the Immigration Rules) while under BNA '81 the criteria by which someone is entitled to British citizenship is fixed by statute. BNA '81 determines both who is a British Citizen at birth and who is entitled to become a British citizen through registration. It is argued that the role of the Home Office in citizenship applications is simply to administer what has been provided for by BNA '81. In the case of children, the Act gives *discretion* to the Home Secretary for registration *only* under section 3(1) – other applications and mandatory bar the 'good character' test for those aged 10 or over.

PRCBC, amongst others, claim that the level of fees currently charged for citizenship applications from children are incompatible with domestic and international duties to give primary consideration to children's best interests

### *The application of discretion and lack of adequate reasons given in refusal decisions of applications under section 3(1) of BNA'81*

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<sup>310</sup> Ibid. *Briefing on Fees for Registration of Children as British Citizens*

<sup>311</sup> Ibid.

<sup>312</sup> Ibid

PRCBC's 2014 report (Op. Cit.) also researched the exercise of discretion under s.3(1) of BNA'81 and analysed the reasons given for refusing such applications.

They point firstly to the guidance on the exercise of discretion under s.3(1) which, at the time of the report, could be found in Chapter 9 of the Nationality Instructions. (NB: Updated guidance containing a substantial section on the exercise of discretion under s. 3(1) was issued in July 2017<sup>313</sup> ).

PRCBC highlight the following from the Chapter 9 guidance:

- That the guidance does not amount to 'hard and fast rules'. It will allow the majority of cases to be dealt with but the law gives 'complete discretion' and each case must be considered on its merits. All relevant factors, including representations should be taken into account otherwise criticism could be levelled that discretion is not being exercised in a reasonable way.<sup>314</sup>
- Section 9.17 deals with discretionary applications and sets out '*broadly in order of importance*', criteria which minors falling to have their applications considered under s.3(1) outside of specified circumstances are normally expected to meet: Future intentions - the child's future should clearly be seen to lie in the UK; Citizenship and immigration status of the parents. Normally expected that one parent is British and the other at least has settled status/ILR or leave to remain; Child's conditions of stay in the UK; Length of residence in the UK (at least two years of residence; Consent of the parent(s); Child's best interests; Exceptional circumstances; Good character.<sup>315</sup>
- 'Future Intentions' is the most important criterion: '*The child's future should clearly be seen to lie in the UK*' – a reliable indicator being the applicant's and/or the family's past behaviour. Where this suggests an established way of life and there is no reason to think it will not continue, '*we should accept at face value that the child intends to live here*'<sup>316</sup>

PRCBC then analyse their case files in light of the Chapter 9 guidance. They found that Refusal letters were often just a few standard lines with one small paragraph providing a 'standard' reason for refusal. The standard paragraph states that the Secretary of State "*...has carefully considered to see whether there were sufficient grounds for treating it exceptionally. However, sufficient grounds could not be found to exercise her discretion in this case. The application is therefore refused*".<sup>317</sup> . This paragraph fails to explain or address the *reasoning* for failing to exercise discretion.

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<sup>313</sup> Op.Cit. Home Office: *Registration of British Citizen: Children (formerly Chapters 8,9 & 10)* Version 1.0 (14 July 2017)

<sup>314</sup> Very similar language is used in the July 2017 Guidance (Ibid.) – see Page 16

<sup>315</sup> The July 2017 guidance's equivalent set of criteria can be found at Page 27 onwards – 'future intentions' remains the leading guiding principle.

<sup>316</sup> The July 2017 guidance mirrors this at Page 27 under the sub-section 'Child's future intentions'

<sup>317</sup> Op.Cit. PRCBC (2014). - Page 37

The initial remedy to a decision to refuse a registration application is an ‘internal review’ by the Secretary of State. A form is completed and sent with a fee (at the time of PRCBC’s report, the fee was £80). PRCBC state that *“the lack of proper reasons for refusing to register a child makes it extremely difficult for our clients to exercise the right to review effectively, particularly when they have no idea where they have gone wrong in the application, or how they can address any issues of concern raised by the Secretary of State.”*

<sup>318</sup>

Requests were made within the legal community for copies of Refusal letters used when refusing to register a child under s.3 (1) and PRCBC received a number of samples which confirmed the repetitive pattern of the format and wording of the letters. The standard quotation cited above was contained in nearly all the examples.

Because of the difficulties PRCBC faced in being able to establish whether the Secretary of State was following her own guidance and properly considering the exercise of discretion, ‘subject access requests’ were made in relation to refused applications made by PRCBC’s child clients under s.3(1). 10 children were initially selected but because of strict conditions relating to obtaining formal authority and proof of identity and address for obtaining subject access, only 5 complete sets of files were obtained. 3 of the 5 cases went through Judicial Review proceedings after which the children were successfully registered as British. The information in the subject access files *“confirmed the lack of proper reasoning by the Secretary of State in discretion applications under s.3(1) .... This is what we expected and they are in line with the brief reasons given in the Secretary of State’s Refusal letters ...”*<sup>319</sup>

### Statistics on grants and refusals of citizenship applications from children

A further part of PRCBC’s research entailed making Freedom of Information Requests (FOI’s) including to establish statistics on grants and refusals of applications. Information was requested on the number of applications for registration by minors made under sections 1(3), 1(4) and 3(1) of BNA ’81. Each request was for the period from 1 January 2002 – 30 June 2014. The FOI’s asked for the figures to be disaggregated into application from children under 10, between 10-14, between 14-16 and between 16 -17.

Under the ‘mandatory’ sections (for children) of the BNA ’81 – s.1(3) and s.1(4) – where children ‘shall be’ granted citizenship if they meet the criteria, the following overall figure were provided<sup>320</sup> Under s 1(3) over the whole period there were 198,910 grants and 9,130 refusals. Under s. 1(4) over the whole period there were 3,980 grants and 280 refusals. Given the mandatory nature of applications under s.1(3) and s.1(4), the reasons for refusing registration must be either that the applicant failed the ‘good character’ test or that the child was unable to *evidence* meeting the criteria (or that the application was fraudulent – in which case prosecution would surely follow<sup>321</sup>),

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<sup>318</sup> Ibid. Page 37

<sup>319</sup> Ibid. Page 41

<sup>320</sup> PRCBC reproduce the full disaggregated statistics in the report at pages 46 -54

<sup>321</sup> BNA’81 s.46 **Offences and proceedings.** (1) Any person who for the purpose of procuring anything to be done or not to be done under this Act— (a)makes any statement which he

Under the 'discretionary' section (for children) of BNA'81 over the whole period there were 246,335 grants and 25,795 refusals. PRCBC speculate that the high level of grants shown by the statistics may be misleading. In many cases parent's may apply to naturalise as citizens at the same time as applying for their children – this would show intension that the child's future would lie in the UK, resulting in a grant. PRCBC asked a further FOI looking at statistics on children whose parents are neither British nor becoming British. Even these figures would not reflect the 'pool' of children with a good claim to discretionary registration as many will simply not apply because of the high fees and lack of legal aid to make such an application.

### Evidential requirements

It is normal and generally appropriate to require evidence in support of legal claims. Citizenship registration is no different. However, care needs to be taken, particularly in considering children's claims, to ensure the requirements are not so excessive or inflexible as to deprive children of their right to be registered.

Current guidance makes clear that Home Office expects to see evidence of identity over and above that required to establish an entitlement to registration. The guidance makes clear that *'a birth certificate is not evidence of identity but evidence of an event.'*<sup>322</sup>

The evidential requirements differ for the different sections under which children can register. The simplest evidential requirements are for applications made under s.1 (3) where the child's full birth certificate (showing birth in the UK, parents details and registration in the 12-month period following birth) along with evidence of parent's British citizenship or parent's settled status since the applicant's birth (and marriage certificate if after the child's birth) is all that is required.

Even with these apparently straightforward evidential requirements under s 1(3) there can be problems that require a flexible approach tailored to the circumstances and taking the child's best interest as a primary consideration. PRCBC report on the case of a 5-year-old born in the UK at a time when neither parent was settled or British. The father subsequently obtained settlement but by that time the couple had separated due to the father's violence. The mother with whom the boy lived did not have settled status but was applying to regularise her status. While the boy was entitled to register under s 1(3) by virtue of his father's settled status, his father would not supply evidence of his indefinite leave to remain. Someone did approach the boy's father at his mother's request but he refused to cooperate. The mother had to provide evidence of the domestic violence she had suffered before the Home Office could be persuaded to check their own records of the grant of ILR to

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*knows to be false in a material particular; or (b)recklessly makes any statement which is false in a material particular, shall be liable on summary conviction in the United Kingdom to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the standard scale, or both.*

<sup>322</sup> Home Office: *Registration of British Citizen: Children* (Op.Cit.) – Page 7

the father. This appears inflexible in light of the guidance which states: “*We should take into account any evidence already on the file.*”<sup>323</sup>

For applications under s 1(4) (based on birth in the UK and 10 years of continuous residence) matters become much more complex because proof needs to be shown that they have lived in the UK for the first 10 years of their life and that they have not been outside of the UK for more than 90 days in each of the first 10 years of their life. The applicant must supply in particular “*evidence of residence to cover the first 10 years of the applicant’s life*” which **must** include passport or travel documents. That every child may not have a travel document or passport – especially as a requirement of applying under s 1(4) is ‘birth in the UK’ – is not mentioned in the guidance. Children entitled to register under 1(4) could be refused on this ground alone.

In addition to passport or travel document, medical records, vaccination records, doctors’ letters, personal child health record (red book) and letters from child’s nursery need to be supplied from age 0-5. For children age 5-10 letters are needed from the child’s school confirming attendance and “*passport or travel document for the full ten-year period to confirm absences during the period*”.

PRCBC give an example of the difficulties of an inflexible approach to this kind of evidence: “*Elaine is now a young adult. She was born in the UK and has lived here all her life. She became entitled to British citizenship on her 10th birthday, by virtue of section 1(4) of the British Nationality Act 1981. At that time, she was in the care of social services, and had already been in their care for nearly five years... In purely technical terms, Elaine’s case is as straightforward as can be imagined...however, things are far from straightforward. Elaine must prove her residence throughout those first 10 years. Limited periods of absence are permitted – and these may be surpassed if there are ‘special circumstances’ to satisfy section 1(7) of the Act – but this ought to be irrelevant in Elaine’s case. She has never left the UK. Had social services understood and taken the necessary steps to register her when she was 10, things might have been easier. But after so much time, it is extremely difficult to track down evidence of Elaine’s residence in the UK before she was taken into care. This affects many children – both those in care and those not. Over time, baby books, medical and school records, which earlier would have been readily available, become lost or untraceable. Sometimes schools and healthcare practices close down*”<sup>324</sup>

According to PRCBC, evidential requirements for a child to register by discretion under section 3(1) of the Act can be especially onerous. Here the child needs to sufficiently establish her or his connection to the UK, demonstrate that his or her future clearly lies in the UK and any other matters, such as the child’s best interests, to support the favourable exercise of the Secretary of State’s discretion. “*This often requires extensive documentation of the child’s life in the UK – its duration, continuity and quality. Statements from family, friends and neighbours, baby books, reports and letters from schools and colleges, medical*

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<sup>323</sup> Ibid. – Page 7

<sup>324</sup> Valdez, s. & Symonds, S. *British born children entitled to citizenship but caught in an evidence trap*, Legal Voice (18.11.16)

*reports and photographs of and throughout their lives in the UK are among the evidence that may be needed.”*<sup>325</sup>

PRCBC have also highlighted the situation of children not required to register at all because they are British at birth who have been deprived of their right to a passport and recognition of their citizenship because of refusal to check records to establish the citizenship or settled status of a parent when the child was born.

PRCBC also report difficulties raised over whether the child and parent are indeed related. They claim that *“the Home Office regularly insists on receiving DNA evidence – for which it will not pay – to establish the relationship, particularly over paternity. This can be prohibitive if either the father will not cooperate or the child’s parent or parents cannot afford the DNA test.”*<sup>326</sup> PRCBC have come across cases where the insistence on DNA testing has put mother and child at risk, such as where the father has a history of violence. In one case, where the Home Office had evidence of domestic violence, a birth certificate naming the father and a sworn statement from the mother about the paternity, in seeking the father’s cooperation, the mother suffered an assault by him.

The Home Office is not *required* to insist on evidence a child cannot supply. Its duties under section 55 of the Borders, Citizenship and Immigration Act 2009 and the 1989 UN Convention on the Rights of the Child ought to provide the framework for it to be flexible so as to promote the child’s welfare and best interests. In the absence of legal aid for citizenship applications these duties become even more important. In particular, there would appear to be room for the Home Office to check its own records where they hold evidence that could assist a child in establishing their claim to citizenship.

### *The ‘Good character’ Test*

Registration a child as a British citizen under s 1(3), s.1(4) and s 3(1) is subject to the child, if over the age of ten, being considered by the Home Office to be of ‘good character’. The latest guidance on applications from children<sup>327</sup> states: *“In considering applications you must take into account the standards of character required for the grant of citizenship to an adult at the Secretary of State’s discretion”*<sup>328</sup> (commonly known as ‘naturalisation’ applications).

Significant tightening of the ‘good character’ requirements for adult and child applicants for citizenship were brought in on 11 December 2014. According to reports, *“A number of undesirable behaviours have been added to the list of disqualifying behaviour, including illegal entry, assisting illegal migration and evasion of immigration control ...Unfortunately, these changes will prevent almost all refugees from qualifying for British citizenship for at*

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<sup>325</sup> Ibid.

<sup>326</sup> Ibid.

<sup>327</sup> Op. Cit. – Page 32. While this relates to applications under s. 3(1) the same criteria apply to applications under s.1(3) and s. 1(4)

<sup>328</sup> Ibid. Page 32

*least 10 years from their date of entry, as opposed to six years at present. This is arguably contrary to Article 31 of the Refugee Convention Refugee and certainly contrary to Article 34.*<sup>329 330</sup>

The changes also affected a considerable number of people who may have committed minor or major infractions of immigration law, from short periods of overstaying or some limited working without permission to significant deception, and who would not previously have encountered any issues with applying for naturalisation once their position was regularised. This appears perverse in relation to children found to have breached immigration legislation (for example by overstaying) who will have done so following their parents on whom they were dependent. Such breaches of immigration law for which children cannot be held responsible can now lead to a refusal of that child's application.

These changes were a direct result of an inspection report from ICIBI published in December 2014<sup>331</sup> These additions continue to be reflected in the most recent guidance published in July 2017.<sup>332</sup> The good character requirement applies *"to anybody over the age of ten who applies for naturalisation or registration as a British citizen unless an application is made under the statelessness provisions in Schedule 2 of the BNA 1981, or section 4B of the Act from an eligible applicant."*<sup>333</sup>

According to PRCBC, the good character test has become increasingly significant in applications from children. Children become more at risk of falling foul of the good character requirements as they progress through adolescence, particularly if they come from fractured or difficult home circumstances. *"If children go on to become involved in the criminal justice system when they are older, registration at a young age can be an important protection for them enabling future rehabilitation and development. As the recent review chaired by Lord Laming has found, those subjected to poor parenting or without parents and in care are disproportionately affected."*<sup>334</sup>

BNA '81 does not define 'good character', but neither does it leave the meaning of good character to the Home Secretary's general discretion. The High Court has made clear that in

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<sup>329</sup> Free Movement, *Good Character Citizenship criteria quietly tightened up* (08 Jan 2015)

<sup>330</sup> Article 31 of the Refugee Convention reads: *"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."* Article 34 reads: *"The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings"*

<sup>331</sup> Vine, J. *An Inspection of Nationality Casework – April –May 2014*, ICIBI (December 2014)

<sup>332</sup> Home Office, *Annex D to Chapter 18* (27 July 2017)

<sup>333</sup> *Ibid.* – Page 4

<sup>334</sup> Valdez, S. & Symons, S., *British Citizenship for Young Migrants and 'bad character provisions'* Legal Voice (24.06.16)

applying the good character test, the Home Secretary must consider *all* aspects of the applicant's character<sup>335</sup>. It is not enough for her to focus on one aspect of the person's character, and the presence or absence of a criminal conviction is not in itself determinative of character. As the court held: "*There has to be a comprehensive assessment of each applicant's character, as an individual, which involves an exercise of judgment, not just ticking boxes on a form.*"<sup>336</sup> While this case applied to an adult seeking to naturalise, the same approach was followed by the High Court in *R (SA) v SSHD* [2015] EWHC 1611 (Admin) in the case of a child's registration by discretion under section 3(1) of the Act.

PRCBC note that "*Both judgments demonstrate a profound inadequacy in the way the Home Secretary approaches good character on citizenship applications. Yet her decisions continue to be driven by a mechanistic approach, applying the various thresholds discussed in the Nationality Instructions, Chapter 18, Annex D in tick box-style. This has been made much worse since the introduction in December 2012 of section 56A of the Borders Act 2007. From that time, convictions which for other purposes would be treated as spent under the Rehabilitation of Offenders Act 1974 remain to be considered by the Home Secretary when making certain immigration and nationality decisions.*"<sup>337</sup>

PRCBC conclude that while Annex D is expressly intended for 'naturalisation' applications - which *only* an adult can make, the Home Secretary has instructed her decision-makers to apply it to registration applications by both adults and children. They describe applying good character guidance with no distinction between adults and children as constituting a significant failure to recognise or give effect to what it means to '*fully and individually consider the applicant's character*' as required by the two High Court judgements.

In *SA* (Op. Cit.) the court drew attention to the State's obligation under Article 40 of the 1989 UNCRC to take steps to facilitate a child offender's rehabilitation and reintegration<sup>338</sup>. Given the developing nature of childhood, as recognised in the UK and other legal systems, it ought to be clear that making an assessment of whether someone *is* of good character will require a particular and different approach when that person is a child.

Certainly, the guidance at Annex D of Chapter 18 takes no account of the developing nature of character during childhood nor of the requirement of Article 40 of the UNCRC. PRCBC claim that "*these considerations are systemically ignored. Hundreds of children have been refused citizenship on grounds of good character – including children like Olly and Mahmood. Olly was born in the UK and is now 13 years old, but his registration has been*

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<sup>335</sup> *R (Hiri) v SSHD* [2014] EWHC 254 (Admin)

<sup>336</sup> *Ibid* - Paragraph 36

<sup>337</sup> Valdez and Symonds, *British Citizenship for Young Migrants and 'bad character provisions'* (Op. Cit.)

<sup>338</sup> UNCRC Article 40: "*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*"

*refused on the basis of a conviction for assault following a fight at school. Mahmood came to the UK as a refugee when aged 10. He is now 17 years old, but a police caution has led to his application being refused.*<sup>339</sup>

### *The new guidance<sup>340</sup> and the Section 55 Duty*

The new guidance issued in July 2017 has a short section entitled ‘*Section 55 and Article 8 considerations*’. The section provides guidance to decision makers on how to take account of the s.55 duty when considering citizenship applications from children. The section on the s.55 contains three brief paragraphs. The brevity of the section, along with the content considered below, indicates a tokenistic approach to considering a child’s best interests in respect of citizenship decision making.

The section opens by establishing that the s.55 places an obligation on the Secretary of State that, ‘in practice’ requires a consideration to be made of the best interests of a child in casework decisions that have an impact on that child. *“All decisions must demonstrate that the child’s best interests have been considered as a primary, but not necessarily the only consideration.”*<sup>341</sup> This is at best ambiguous as to whether refusal letter should contain the reasoning as to how the child’s best interests have been determined and what they are considered to be and then how then they have been accounted for against other interests. (In contrast for example to the section on determining best interests in ‘Processing Children’s Asylum Claims’ (Op. Cit.)). There is no mention of *ZH Tanzania* or any guidance of substance to nationality caseworkers on how they might determine a child’s best interests. Rather, the assumption appears to be that being granted citizenship is in the child’s best interests but this can be overridden by *“wider requirements to ensure a fair, consistent and coherent immigration and citizenship policy. Including the requirements for the vast majority of migrants to complete a qualifying period of limited leave before being eligible for settlement and have settlement before applying for citizenship”*<sup>342</sup>

The second paragraph bizarrely discusses that it may become clear that the child does not want to become a British Citizen (but doesn’t mention why they would then have applied) and that, in this circumstance, their views should be taken into account and consideration given to whether it would be right to refuse the application - the judgement call on the part of the caseworker being to assess whether the child has sufficient intelligence and understanding to make an informed decision. It is significant that the *only* mention that ‘the child’s views’ receives in the guidance is in the context of a decision that would be favourable to excluding the child from citizenship. The child’s views on whether they wish to become citizens, and why, should of course also form part of the ‘best interest assessment’ and go very much to the issue of the child’s ‘future intentions’ - crucial on the application evidence under discretionary registration under s.3(1)

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<sup>339</sup> Valdez & Symonds, Op. Cit.

<sup>340</sup> Op.Cit. Home Office, *Registration of British Citizen: Children*

<sup>341</sup> Ibid. – Page 31

<sup>342</sup> Ibid – page 31

The final paragraph in this section reminds caseworkers that *“Section 55 does not have to be taken into account once a child has turned 18. This means that where the applicant turns 18 on or before the date of decision you do not need to consider section 55. This may be particularly relevant where an application is made shortly before the 18th birthday.”*<sup>343</sup> On any reading this appears to be giving decision makers a broad hint that delaying the decision in order to circumvent the onerous business of having to account for the children’s best interests is acceptable practice. Given that a large fee will have been paid to apply, this guidance appears immoral.

### Discussion and Conclusion

Children’s access to a nationality is a matter that has been identified by the Committee on the Rights of the Child as within the scope of best interests’ decision making. While the recent Home Office instruction does make reference to the section 55 duty, it does so in a perfunctory way. There is little evidence from the wider policy context or from individual decision making in children’s citizenship claims that their best interests are a primary consideration in this business area.

This chapter has raised a number of issues that may be of interest to ICIBI in considering whether children’s best interests are being properly taken into account in citizenship decision making. It is recognised that some of the issue raised, such as the lack of legal aid to pursue citizenship applications, changes to length of the route to gaining ILR and the level of fees charged to children, fall more into ‘policy’ considerations and are therefore less ‘inspectable’. Nevertheless, they have been raised because they are all central to securing the child’s best interests in this area and the Home Office has considerable influence on the shape of these policy decisions.

On the basis of the material considered in this chapter, the following suggestions are made in respect of matters that may be open to direct inspection either in their own right or as part of a broader inspection of nationality functions (or more general review functions across Home Office work streams).

Evidence has been presented that refusal letters in citizenship claims from children are frequently formulaic and devoid of substantial reasoning - particularly in respect of discretionary applications under s.3(1). They fail to contain reference to how the child’s best interests have been determined, including the views of the child which go very much to the issue of ‘future intentions’. This makes submitting evidence for a ‘nationality review’ challenging and places the child at considerable disadvantage since the reasons for refusal are not clearly set out to enable challenge. The content and quality of refusal letters are matters that deserve further scrutiny.

It would also be useful to look into the how the ‘good character’ requirements are applied in children’s cases (both in entitlement and discretionary registration applications) and the extent to which they inform decision making and decision outcomes.

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<sup>343</sup> Ibid. – Page 32

While it is reasonable that evidence is required in citizenship applications, the child's best interests require that there is a flexible approach to the evidential requirements, particularly where the child is no longer living with one or both parents. It may be useful, in particular and if possible, to consider applications from children in the care system and/or who are no longer living with parents who are likely to encounter evidential barriers but whose best interest would be clearly served by a grant of citizenship. There is a section on applications from children looked after by local authority in the most recent guidance.

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