

Working with children and young people subject to immigration control Guidelines for best practice

Second edition 2012

Heaven Crawley

ILPA Immigration Law Practitioners' Association

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with

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Sue Shutter, Maryam Tabib, Lisa Woodall and Colin Yeo

funded by the Diana, Princess of Wales Memorial Fund



Immigration Law Practitioners' Association

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Policy and law correct as of March 2012

The Immigration Law Practitioners' Association (ILPA)
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ISBN 1 901833 16 X

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The Immigration Law Practitioners' Association
is a company limited by guarantee.

Registered in England and Wales. Reg. No. 2350422

Design: Pat Kahn Printing: Russell Press

About ILPA

The Immigration Law Practitioners' Association is a professional association, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members.

Established in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion and to promote a just and equitable, non-racist and non-sexist immigration, asylum and nationality law practice.

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Acknowledgments

The first edition

The first edition of these guidelines was produced by ILPA and Dr Heaven Crawley in 2004. The work was funded by the Nuffield Foundation. The drafting group assisting Dr Crawley in 2004 consisted of Gaenor Bruce, Barrister, Jane Coker, solicitor and adjudicator of the then Immigration Appellate Authority, Nadine Finch, barrister, Dr Susan Rowlands, then General Secretary of ILPA, Sue Shutter, ILPA Executive Committee and Alison Stanley, solicitor. The work of the drafting group was supported by a project advisory group comprising Jacqueline Bhabha, lecturer in Public Policy Harvard University, Katherine Henderson, solicitor, Mike Hinchcliffe, then Deputy Legal Director of CAFCASS Legal Services, Dr Matthew Hodes, lecturer in child and Adolescent Psychiatry, Dr Helen Hogan, GP and specialist registrar in public health, Catriona Jarvis, adjudicator of the then Immigration Appellate Authority, Helen Johnson of the Refugee Council Children's Panel, Mike Kaye, then of Anti-Slavery International, Agnes Lai, solicitor, Adrian Matthews, then Director of the Refugee and Asylum-Seekers Project, Children's Legal Centre, University of Essex, John Pullig, then adjudicator of the Immigration Appellate Authority, Jill Rutter, then lecturer at London Metropolitan University, Jane Sufian of the National Leaving Care Advisory Service, Jim Wade of the University of York and Sarah Young, then head of the Legal and Research Unit at the Immigration Appellate Authority.

The second edition

The second edition has been produced by ILPA and Heaven Crawley, Professor of International Migration at the University of Swansea and Director of the Centre for Migration Policy Research. She has undertaken extensive research and written widely on migration and asylum. The drafting group assisting Professor Crawley for the second edition was composed of Syd Bolton of the Refugee Children's Rights Project at Coram Children's Legal Centre, Nadine Finch, barrister and immigration judge, Alison Harvey, General Secretary of ILPA, Baljeet Sandhu of the Refugee Children's Rights Project, based at Islington Law Centre, Sue Shutter, Maryam Tabib, Lisa Woodall and Colin Yeo, barrister.

In addition to representatives of the drafting group, the reference group for the second edition comprised Judith Dennis of the Refugee Council, Catriona Jarvis, senior immigration judge, Kalvir Kaur, solicitor and Denise McDowell of Greater Manchester Immigration Aid Unit. All are members of ILPA's Refugee Children's Project Advisory Board, along with Liz Barratt, solicitor, Kamena Dorling of the Coram Children's Legal Centre, Caroline Little of the Association of Lawyers for Children, Adrian Matthews of the Office of the Children's Commissioner for England and Sheona York from Rights of Women.

The training courses that have taken place as part of this project have informed the production of the guidelines and we should like to thank all the trainers and participants for their feedback. Thanks also to Steve Symonds of ILPA and Daniel Smallwood of the Coram Children's Legal Centre.

Helen Williams, Lisa Woodall and Nirmala Rajasingam of ILPA coordinated production of the publication.

ILPA is grateful to the Diana, Princess of Wales Memorial Fund for funding the second edition.

Acronyms

Every effort has been made to ensure that acronyms have been kept to a minimum.

CAFCASS	Children and Family Court Advisory and Support Service
CRC	Convention on the Rights of the Child
EEA	European Economic Area
ILPA	Immigration Law Practitioners' Association
IRO	Independent Reviewing Officer
NSPCC	National Society for the Prevention of Cruelty to Children
PACE	Police and Criminal Evidence Act
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

Aims of the guidelines

- 1.1 These guidelines on working with children and young people subject to immigration control represent best practice in the context of United Kingdom immigration control based on contemporary knowledge and relevant national, international and regional norms, standards and principles.
- 1.2 These guidelines are aimed principally at immigration practitioners who work with children and young people subject to immigration control and represent their interests. They will also assist legal practitioners in other areas of law and those providing services other than legal services to children including, but not limited to, social workers, carers, youth and support workers, teachers and the police.
- 1.3 The aim of these guidelines is to assist immigration practitioners and other professionals to represent the best interests of children by improving their own practice through adhering to international and domestic standards and ensuring that the UK Border Agency, tribunals and courts also do so.
- 1.4 These guidelines will also be of use to those who play a role in decisions that are taken about a child's immigration status, in particular those working within the UK Border Agency¹ (including interviewing officers, caseworkers, policy officers and presenting officers) and in the Immigration and Asylum Chambers of the First-tier and Upper Tribunals.

¹ Until 29 February 2012, the UK Border Agency was the part of the Home Office responsible for immigration control at air and sea ports throughout the UK. It also considers applications for permission to stay, citizenship and asylum, and deals with removing unsuccessful applicants. On 1 March 2012 the Border Force, with its functions of immigration control at ports, was separated from the UK Border Agency.

2 Working with children and young people subject to immigration control

1.5 In this context the purpose of these guidelines is:

- to ensure the UK abides by its international and domestic obligations
- to enable children and young people to express their views, opinions and beliefs
- to minimise risks to children and young people seeking entry to, and residing in, the UK by safeguarding and promoting their rights and interests
- to provide a framework for best practice for interviewing children and young people
- to provide a framework for interpreting a child or young person's experiences to make an appropriate and sustainable decision
- to ensure that immigration and asylum decision-makers use the most appropriate techniques and procedures to enable children and young people to state their case effectively and exercise their legal rights, and
- to provide a framework for best practice in the tribunals and courts.

International context

- 1.6 Children and young people who are subject to immigration control in the UK are entitled to protection under a broad range of international instruments including the UN Convention on the Rights of the Child 1989, the European Convention on Human Rights 1950 and the 1951 UN Convention relating to the Status of Refugees and its 1967 Protocol ('the Refugee Convention'). A list of relevant international standards is provided in Figure 1. Best practice for working with children and young people subject to immigration control within this international legal framework is discussed in section 3.
- 1.7 Reference should also be made to UNHCR's *Guidelines on Policies and Procedures in dealing with Unaccompanied Children seeking Asylum* (1997).

FIGURE 1 International and regional standards**1**

The Universal Declaration of Human Rights (1948)

The 1926 Slavery Convention and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956

The 1949 Geneva Conventions on the Laws of War and the two Additional Protocols of 1977

The European Convention on Human Rights (1950)

The 1951 Geneva Convention Relating to the Status of Refugees

The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)

The Convention on the Elimination of All Forms of Racial Discrimination (1965)

The International Covenant on Civil and Political Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (1966)

The Convention on the Elimination of All Forms of Discrimination Against Women (1979)

The Hague Convention on the Civil Aspects of International Child Abduction (1980)

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

The UN Convention on the Rights of the Child (CRC) (1989)

The UN Declaration on the Elimination of Violence against Women (1993)

The Hague Convention on the Protection of Children and Co-operation in respect of Inter-country Adoption (1993)

African Charter on the Rights and Welfare of the Child (1999)

The UN Convention against Transnational Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the 'Palermo' Convention and protocol) (2000)

The Charter of Fundamental Rights of the European Union (2000)

Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims

- 1.8 The Convention on the Rights of the Child came into effect in November 1989 and offers the highest standard of protection and assistance for children under any international instrument. It is the most widely accepted human rights instrument² and provides the most comprehensive framework for the responsibilities of States to all children within their jurisdiction. It is an essential interpretive tool which helps to inform all other human rights instruments where there are welfare and protection needs of children at stake. Even though the Convention has not been incorporated into UK domestic law, it is increasingly referred to in judgments made by UK domestic courts concerning children including in the interpretation of obligations toward children imposed by human rights law and domestic law.
- 1.9 The approach of the Convention on the Rights of the Child is holistic, which means that the rights are indivisible and interrelated, and all articles are equally important. All aspects of the Convention are relevant in dealing with children and young people subject to immigration control in the UK. ►See annex 1, Part one of Convention on the Rights of the Child.

Domestic framework

- 1.10 In addition to the international framework for addressing the needs of children and young people who are subject to immigration control, there is a very important domestic context provided by the Children Act 1989, the Children (Scotland) Act 1995, the Rights of Children and Young Persons (Wales) Measure 2011 (2011 nawm 2) the Children (Leaving Care) Act 2000, and section 55 of the Borders, Citizenship and Immigration Act 2009. The Children Act 1989 provides the starting point in this text. The legislation in each part of the UK varies slightly in scope and emphasis and this is noted where appropriate.
- 1.11 The principles in the Children Act 1989 are outlined in Figure 2. Section 1 of the Children Act 1989³ provides that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.

² The Convention on the Rights of the Child is ratified by every country in the world with the exception of the United States of America and Somalia. It has not been extended to the UK overseas territory of Gibraltar.

³ See also section 16 (1) of the Children (Scotland) Act 1995.

FIGURE 2 Important principles in the Children Act 1989**1**

- When a court determines any question with respect to the upbringing of a child, the welfare of the child is the paramount consideration.
- In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.
- In any proceedings in which any question with respect to the upbringing of a child arises, a court should take into account: the ascertainable wishes and feelings of the child concerned (considered in the light of his or her age and understanding); his or her physical, emotional and educational needs; the likely effect on him or her of any change in his or her circumstances; his or her age, sex, background and any characteristics which the court considers relevant; and any harm which he or she has suffered or is at risk of suffering.
- Wherever possible, children should be brought up and cared for within their own families.
- Parents with children in need should be helped to bring up their children themselves. This help should: be provided in partnership with the parents; meet each child's identified needs; be appropriate to the child's race, culture, religion and language; be open to effective independent representations and complaints procedures; and draw upon effective partnership between the local authority and other agencies, including voluntary agencies.
- Children should be safe and be protected by effective intervention if they are in danger.
- A local authority can only arrange for, or assist in arranging for, any child 'in their care' to be removed from the UK with the approval of the court. The court can only consent for a separated child to be removed from the UK if it is satisfied that living outside the UK would be in the child's best interests and that suitable arrangements have been, or will be, made for his or her reception and welfare in the country in which he or she will live.
- It is the duty of every local authority to satisfy itself that the welfare of children who are privately fostered within its area is being satisfactorily safeguarded and promoted and to secure that such advice is given to those caring for them as appears to the authority to be needed.
- Children should be kept informed about what happens to them, and should participate when decisions are made about their future in accordance with their age and understanding.
- Parents will continue to have parental responsibility for their children, even when their children are no longer living with them. They should be kept informed about their children and participate when decisions are made about their children's future.

- 1.12 Ensuring that the child's welfare is the paramount consideration as required under the Children Act 1989 involves not only an assertion to that effect but full and proper training of all the professionals involved in the child's life, proper monitoring and the taking into account of the child's wishes and desires for his or her future.

Existing guidance and good practice

- 1.13 Section 55 of the Borders, Citizenship and Immigration Act 2009 places a duty on the Secretary of State and the UK Border Agency to discharge all immigration functions having regard to the need to safeguard and promote the welfare of children in the United Kingdom. The UK Border Agency publishes guidance and instructions to assist its staff in their decision-making. The following are most relevant to children and young people subject to immigration control:
- *Every Child Matters; change for children: statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children* (2009)
 - UK Border Agency Asylum Process Guidance:
 - Processing an asylum application from a child* (last updated 2011)
 - Assessing age* (last updated 2011)
 - Considering applications for further leave (at age 17½) following grants of Discretionary Leave under the policy on Unaccompanied Asylum Seeking Children* (last updated 2009)
 - Family relationship testing* (2009)
 - Victims of trafficking* (2010)
 - Human trafficking supplementary guidance* (2010)
 - UK Border Agency Enforcement Instructions and Guidance, Chapter 26, *Unaccompanied Children* (undated)
- 1.14 Children and young people in the UK can be involved in many different types of legal proceedings including care proceedings, other proceedings before the family courts, in the criminal justice system and elsewhere. The guidelines draw upon best practice guidance which exists in other areas of policy and practice in the UK. This includes, but is not limited to, guidance produced by the Children and Family Court Advisory and Support Service (CAFCASS),

the Courts and Tribunals Service, the Department of Health, Department for Education (previously Department for Children, Schools and Families and Department for Education and Skills), Ministry of Justice, the NSPCC and the Royal College of Paediatrics and Child Health as well as the specific guidance that has been produced in relation to immigration issues affecting children by the UK Border Agency, the Scottish Government and the Immigration and Asylum Chambers of the Tribunals.

- 1.15 These guidelines also draw on international good practice guidelines and commentary produced by the UN Committee on the Rights of the Child (specifically *General Comment no. 6: Treatment of unaccompanied and separated children outside their country of origin* (2005)) and by the UNHCR and UNICEF to assist decision-makers in dealing appropriately with children and young people who are subject to immigration control. ►See bibliography.

How to use these guidelines

- 1.16 The guidelines are structured around a number of key themes that arise in working with children and young people who are subject to immigration control. These themes are interrelated but each section is designed to be freestanding. Repetition and cross-referencing is indicated where appropriate.
- 1.17 Because these guidelines represent best practice for those working with children and young people subject to immigration control, they do not necessarily reflect current law, policy or practice. Reference to specific case law, reports or commentary is only included where the case is particularly significant or has prompted the development of specific guidance. Those using these guidelines should ensure that they have an up-to-date understanding of law, policy and practice best to represent the needs and interests of children and young people subject to immigration control. ILPA has published an on-line resource guide which provides a comprehensive list of current legislation, case law, policy and further reading relevant to children and young people subject to immigration control. The resources guide is available at www.ilpa.org.uk/pages/publications.html

8 Working with children and young people subject to immigration control

- 1.18 These guidelines deal with issues relating to the immigration status of children and young people who are subject to immigration control in the UK. They do not provide best practice for welfare or educational provision and support, which are complicated and wide-ranging areas.
- 1.19 The format and style of these guidelines is such that they can be easily adapted to, and developed for, training purposes. Free hard copies of the guidelines are available to all relevant Government departments and organisations working with children and young people who are subject to immigration control. Additional copies can be downloaded free of charge at www.ilpa.org.uk/pages/publications.html

Definitions and roles

Definition of a child or young person

- 2.1 The Convention on the Rights of the Child and the Children Act 1989 define a 'child' as any person under the age of 18.¹
- 2.2 The Immigration Rules provide that: '[A] child means a person who is under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age' (paragraph 349, HC 395 (as amended)).
- 2.3 In some cases the age of an applicant and whether he or she is a child may be disputed. Guidance on best practice in these cases is provided in section 9 of these guidelines.
- 2.4 Although the legal definition of a child is someone under 18, there may be particular problems for these young people if they turn 18 and still have an outstanding or unresolved immigration issue or asylum application. This is discussed in more detail in section 10 of these guidelines which refer to the specific circumstances of this group of young people and elsewhere as appropriate.

¹ The position in Scotland is more complex and differs from this legal definition. Sections 93(2) (a) and (b) of the Children (Scotland) Act 1995 define a child in relation to the powers and duties of the local authority. Different statutory definitions are also found in the Age of Legal Capacity (Scotland) Act 1991. These differing definitions can sometimes lead to a child being considered to be a person under the age of 16. However, in Scotland, the UK Border Agency follows the immigration rules which define a child as a person under the age of 18.

Definition of a separated child

- 2.5 'Separated children' is the term used in most countries to describe those children who are outside their country of origin and separated from their parents or legal or customary primary carer. In some cases they arrive on their own. In other cases they may be accompanied by an adult who is not their parent or legal or customary carer. In each case separated children are, by definition, children who have been deprived of their family environment.

Separated children may include, but are not limited to, those who:

- are entirely on their own in the UK
 - are accompanied by a relative who is not their primary carer and who is unable or unwilling to take responsibility for them and abandons them shortly afterwards
 - are accompanied by a person who is or is not a relative who may be caring for them or may be exploiting them
 - are sent by their parents for safety, education, health or other reasons with or without their consent
 - are separated from their families who are in countries other than their country of origin, or
 - are trafficked.
- 2.6 In the UK, separated children who have applied for asylum are commonly referred to as unaccompanied asylum-seeking children. These guidelines do not use this term because it is limited to those children who are seeking asylum. Instead the term 'separated children' is used throughout these guidelines and includes the experiences of unaccompanied children who are seeking asylum.
- 2.7 It is important that the significance of the separation of children from their parents is recognised because children and young people suffer physically, socially and psychologically as a result of being deprived of the care and protection of their parents or other primary carer(s). Separation is a devastating experience for children and young people and can have serious long-term consequences for their wellbeing.

- 2.8 Although separated 16- and 17-year olds may sometimes come across as being self-reliant and as having the same needs as adults, these children are often vulnerable to harm and in need of reassurance, care and support. This is particularly true during periods of transition such as leaving care, moving to independent living accommodation and receiving decisions on their immigration matters. These guidelines use the term 'young people' to refer to this group of older children.

Children and young people subject to immigration control

- 2.9 There are various circumstances in which children and young people are within the jurisdiction of the UK without a settled immigration status and/or in need of protection.
- 2.10 Some children are subject to immigration control because their parents are seeking leave to remain or challenging a decision by the UK Border Agency to remove them from the UK. Others will be seeking leave to remain or to challenge removal in their own right. Some children may have been born in the UK; some may have been brought into the UK and abandoned. Some may have been trafficked for labour or sexual exploitation. Some may have fled to the UK either at their own instigation or at the wishes of their parents, guardians, or carers for safety and freedom from persecution or for other reasons.
- 2.11 Children and young people arriving, or already resident, in the UK and subject to immigration control include, but are not limited to:
- those applying for entry clearance abroad
 - those seeking leave to enter the UK
 - those who are already living in the UK with unresolved immigration problems or whose status is unclear, and
 - those seeking international protection.
- 2.12 Separated children and young people who are subject to immigration control are some of the children in greatest need in the UK.

Children and young people applying for entry clearance abroad

- 2.13 Families do not always have the means or the opportunity to travel to the UK together and there are often situations when one parent and children are applying to join the other parent in the UK, or children and young people are applying in their own right to join a parent or parents, or other relatives.

Children and young people seeking leave to enter the UK

- 2.14 Children who arrive in the UK and seek leave to enter the UK include, but are not limited to:
- children abandoned at port
 - children who arrive without the correct entry clearance or documentation, with or without their families.

Children and young people already living in the UK

- 2.15 Children may have travelled to the UK alone (often sent by their parents) or with family members to escape conditions of deprivation, for example, lack of education, housing or health care or to seek international protection because they have faced persecution in their countries of origin. Those children who are already living in the UK with unresolved immigration problems, who may or may not have come to the attention of the UK Border Agency, or whose status is unclear, can include, but are not limited to:
- children taken into care by the local authority and whose immigration status may never have been fully considered
 - children accommodated by a local authority because of conflict with families
 - children who are in private fostering arrangements
 - children brought in as visitors who remain in the UK after their period of leave expires
 - children whose immigration status is unclear, including where this is because that of their family is unclear

- children with outstanding asylum or other immigration applications either as part of a family or in their own right
 - children born in the UK who are abandoned by parents unable to care for them
 - children brought into the UK for adoption where the adoption order is refused or the arrangement fails
 - children who are in the UK as international students whose payment system has broken down
 - children who come into contact with the criminal justice system or mental health system, and
 - children who are members of a family split between countries or where the actual family relationships are difficult to determine.
- 2.16 A child may voluntarily come for help and advice on leaving an abusive situation, either from their family or from others, and may need their own separate application to be made to the UK Border Agency. Alternatively another person involved with a child, such as a teacher, may have recognised a problem and seen the need for independent help.
- 2.17 Immigration officers may come across children and young people in different situations where their immigration status will need to be established. For example, there may be a raid on premises in which a child is found, or a child may be interviewed by police as a witness to a crime or accident and his or her identity have to be established, or a child may be with parents or carers whose immigration status is unclear and who come to the attention of the immigration authorities.

Children and young people in need of international protection

- 2.18 Children and young people suffer many of the same human rights abuses as adults, but may also be targeted simply because they are dependent and vulnerable to those abuses. Children may be tortured and mistreated by State officials, arbitrarily or unlawfully detained, or subject to the death penalty. Children and young people are frequently caught up in armed conflict, and are recruited as child soldiers. Because children are 'easy targets', they are sometimes threatened, beaten or raped to punish family members who are

not accessible. Children and young people forced by poverty or abuse to live on the streets are sometimes detained, attacked and even killed in the name of 'social cleansing'. Children and young people may be forced to work in exploitative or hazardous situations, or may be trafficked to work in exploitative situations elsewhere.

2.19 Children and young people who may be in need of international protection can include, but are not limited to:

- children who arrive as members of a family claiming asylum or human rights protection and who may or may not make a separate application
- children who arrive separated from parents or carers who claim asylum or human rights protection
- children who arrive with an agent and are then abandoned, but do not make an asylum or human rights claim and later come to the attention of the authorities
- children who are part of a system of trafficking, and
- children who are subject to forced marriage.²

The role of 'professionals'

2.20 The term 'professionals' is used throughout these guidelines to refer to those persons who, within the context of their work, are in contact with children and young people who are subject to immigration control, and to whom these guidelines are relevant. This includes, but is not limited to: immigration practitioners and other legal practitioners working with children and young people subject to immigration control, social workers, voluntary and non-Governmental organisations working with children, UK Border Agency staff (including those working in removal centres), UK Border Force staff, tribunal judges, consular staff, interpreters, medical and mental health professionals, education professionals, foster carers, youth and support workers, teachers and the police.

² The Forced Marriage Unit, a joint Foreign and Commonwealth Office and Home Office unit, has issued *The Right to Choose: multi-agency statutory guidance for dealing with forced marriage*, statutory guidance under the Forced Marriage (Civil Protection) Act 2007, for multi-agency working in dealing with cases of forced marriage. Information can also be obtained from the non-governmental organisation Southall Black Sisters.

- 2.21 Children and young people who are subject to immigration control in the UK come into contact with a range of professionals from different backgrounds and with different areas of expertise. Their broken narratives, the risks that they may have run in gaining entry to the UK, and the trauma and uncertainty that they may experience can mean that they have complex needs which cannot be met by a single agency and that they are at risk of falling through gaps in provision. Both mainstream and specialist services will need to be aware of the particular issues facing children and young people subject to immigration control to understand their experiences and respond appropriately.
- 2.22 All professionals working with children and young people who are subject to immigration control should be aware of the need to safeguard and promote the welfare of children, and to work together to achieve this purpose. Delivering an effective continuum of care and protection for children and young people requires close co-operation of a variety of government bodies, specialised agencies and professionals. This is widely recognised across government relation to children who are not subject to immigration control.³ Professionals must be aware of the procedures they should follow when they have any child protection concerns about any child or young person with whom they are in contact.

Adults' roles and responsibilities

- 2.23 A wide range of terminology is currently used to describe adults who have a direct role in relation to children and young people who are subject to immigration control. Their roles and responsibilities are not always defined in the same way across different areas of policy and practice.
- 2.24 The terms 'responsible adult', 'appropriate adult', 'suitable adult' and 'guardian' should not be used interchangeably since the legal status and/or role of these adults is different. The definitions and usage of these terms is provided in Figure 3 at the end of this section, and should not be confused.

³ See for example Department of Health (2002), Department of Health (2003), Scottish Executive (2004), Scottish Executive (2007).

The role of a responsible adult

- 2.25 A child or young person who is subject to immigration control and who arrives or remains in the UK alone will usually have no one who has parental responsibility for him or her.⁴ Children who are alone in an unfamiliar country and culture, who often do not speak English and for whom immigration is very often an issue, need an adult with responsibility for them to protect and promote their interests from the moment that they arrive in the UK. In all cases involving separated children and young people, a responsible adult should be appointed to safeguard the best interests of the child and provide a supportive role and link between all those who may provide services to the child.
- 2.26 Although some children *appear* to be accompanied on arrival in the UK, the adults with them are not necessarily able or appropriate persons to assume responsibility for them or be responsible for them in law. That a parent or another adult may be accompanying a child does not necessarily mean that they are the appropriate person to be responsible for the child, for example, if they are abusing or trafficking the child.
- 2.27 The term 'responsible adult' is used in these guidelines to mean a parent, guardian, carer or other adult who takes responsibility for a child or young person.
- 2.28 It is the general duty of each local authority children's social services department to safeguard and promote the welfare of children and young people who are in need and living within its area. Social services will have responsibility for a separated child (when alerted to his or her presence within its area) and a social worker will often take on the role of the 'responsible adult'. Although part or all of the role of a responsible adult may be delegated to others, for example a foster carer or someone else who has been Criminal Records Bureau (CRB) checked,⁵ the overall responsibility for safeguarding the child's welfare lies with the local authority.

⁴ Section 3 of the Children Act 1989 defines parental responsibility as meaning 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'. The Children (Scotland) Act 1995 section 1 goes further in its definition of what these duties are.

⁵ For further information see www.homeoffice.gov.uk/agencies-public-bodies/crb/

- 2.29 An immigration officer, police officer, officer of the Secretary of State, legal representative or interpreter cannot, and should not, be a responsible adult. The UK Border Agency's *Asylum process instruction: processing an asylum application from a child* is thus unsatisfactory in that it uses the term to include the legal representative, along with the social worker, guardian/relative, foster carer, doctor, priest, vicar, teacher, charity worker or Refugee Council Children's Panel representative.
- 2.30 Where a child is looked after or assisted by a local authority, there is no transfer of parental responsibility to the local authority. It is only where a local authority has taken care proceedings or has been granted an emergency protection order under Section 44 of the Children Act 1989 that there will be any assumption of parental responsibility by it. Unrelated adults may obtain parental responsibility through residence, guardianship or adoption orders.
- 2.31 Anyone caring for a child for whom they do not have parental responsibility as part of a private fostering arrangement which will last more than 28 days must inform social services prior to, or within 48 hours of, the child's arrival.
- 2.32 Under the Children Act 1989, it is the duty of every local authority to satisfy itself that the welfare of children who are privately fostered within its area is being satisfactorily safeguarded and promoted.⁶
- 2.33 A person who does not have parental responsibility for a particular child but has care of the child may, subject to the provisions of the Children Act 1989, do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.⁷

⁶ This is particularly important given the report (Department of Health (2003)) following the Victoria Climbié inquiry which was set up to investigate the circumstances leading to the death of Victoria Climbié and which recommended action to prevent such a tragedy happening again. Victoria Climbié was living with relatives in a private fostering arrangement when she died. The Department of Health has also published guidance on the responsibilities of birth parents, foster carers and local authorities in private fostering arrangements (Department of Health (2001)).

⁷ See Section 3(5) of the Children Act 1989. Practitioners in Scotland should refer to the Children Act (Scotland) 1995

2.34 The role of a responsible adult as defined in these guidelines is:

- to exercise parental responsibility for the child or young person (if they hold or have acquired parental responsibility)
- to ensure that the welfare of the child or young person is the paramount consideration in all decisions
- to consult with and advise the child or young person as appropriate
- to be sensitive to questions of age, gender, race, sexuality, culture, religion and any mental health problems or learning difficulties in working with the child or young person
- to ensure that a separated child or young person has suitable care, accommodation, education, language support and health care
- to ensure that a child or young person has suitable legal representatives to deal with his or her immigration status or asylum application. ►See section 5, and ‘the role of a legal representative’ below.
- to ensure that the child or young person’s legal representative has the necessary instructions and information to act in his or her best interests and to be aware of the progress of the case
- to attend all asylum or immigration interviews with the child or young person to ensure that he or she is not unduly inhibited or alarmed by the interview process and to fulfil the functions set out by the Home Office (as set out in Figure 3 at the end of this section, and in section 5 of these guidelines)
- to provide a link between the child or young person and the various organisations which may provide services to the child
- to advocate where necessary and appropriate on behalf of the child or young person, and
- where appropriate, and taking great care not to increase the risks to the child or young person and/or to his or her family, to explore the possibility of family tracing and reunification.

- 2.35 The UK Border Agency uses the term in a way that is compatible with these guidelines, but describe only a part of the role.⁸ The UK Border Agency defines the role of the responsible adult as follows:
- to be present at interview to ensure that the child is not unduly inhibited or alarmed by the interview process
 - to ensure that the child understands the interview process
 - to give moral support and reassurance as necessary to the child
 - to facilitate communication between the child and the interviewing officer where necessary
 - to ensure that the child's or young person's welfare needs are sufficiently provided for, for example through the provision of adequate breaks, refreshments etc.
 - to offer any additional information to the interviewing officer which may have a bearing on the child's emotional wellbeing and fitness for interview.⁹
- 2.36 According to the definition provided by the UK Border Agency, the responsible adult is not present to answer questions on behalf of the child but may intervene if it is clear to him/her that the child is becoming distressed or tired and a break is required.

The role of a legal representative¹⁰

- 2.37 All children and young people subject to immigration control should be represented throughout any legal proceedings by specialist legal representatives. There should be no charge to the child or young person for legal representation or other expenses arising out of the process. This includes where a child or young person makes an application whilst he or she is under the age of 18 but turns 18 before a decision is made.

⁸ Home Office UK Border Agency (2010d).

⁹ Home Office UK Border Agency (2010d).

¹⁰ Detailed guidance on the role of the legal representative in cases involving children and young people has been produced by, among others, CAF/CASS and The Law Society.

- 2.38 The child's legal representative has no parental responsibility for him or her and is not able to take decisions on the child's behalf.
- 2.39 The representative's role is limited to advising the child on his or her legal options and then acting on his or her instructions, to the extent that a child or young person is capable of giving them.
- 2.40 The role of a legal representative is to ensure that a child or young person is able to present all the information relevant to his or her immigration or asylum application. Acting for a child involves a high degree of commitment, expertise, knowledge and training. To fulfil this role the legal representative will need to:
- assess the child's understanding, maturity and capacity to give instructions, to understand the nature of the proceedings and to have an appreciation of the possible consequences of the application both in the long and short term
 - take a child's social history and a statement about the basis of his or her application unless the immaturity of the child makes it inappropriate to do so
 - obtain the child's permission to pass on information about his or her social history to the responsible adult to reduce the need for this information to be collected repeatedly
 - inform themselves about conditions in the country from which the child or young person has originated
 - inform themselves of the relevant law and policy relating to the child or young person's immigration or asylum matter
 - be sensitive to questions of age, gender, race, sexuality, culture, religion and any mental health problems or learning difficulties both in dealing with the child or young person as client and the issues in any particular case
 - be sensitive to the effects of trauma and to the impact that the child or young person's experiences prior to, and since, arriving in the UK may have on his or her ability to provide information. See also sections 5, 6 and 7 for further information on gathering information from children and young people and on interpreting what is said
 - collect information from third parties, with the consent of the child or young person, including the responsible adult and other individuals or organisations who have been working with the child or young person during his or her stay in the UK

- be professional in all dealings with the child or young person, with the child's parent or carer or other responsible adult, and any other persons or organisations involved in the case
- provide the UK Border Agency with a written statement of the basis of the application
- meet deadlines imposed by the UK Border Agency or, if unable to do so, explain why the deadlines cannot be met and seek extensions of time where appropriate, with supporting information
- ensure that the child or young person's views and voice are heard throughout the process as far as the child or young person is capable of expressing his or her views
- explain the purpose of any immigration interview which the child or young person is expected to attend
- attend all interviews and represent the child's interests by following the best practice guidance set out in section 5 of these guidelines
- recognise the limits of their experience and expertise and seek advice from mentors, experts and specialists as appropriate
- commission expert reports, medical reports and other additional information as necessary to support the application
- keep the child or young person informed about the progress of the application by the means most appropriate to his or her level of understanding, and ensure that an older child who is a client has sufficient information to be able to make informed decisions
- with the child's consent, communicate with the responsible adult about the progress of the application and be aware of any changes in the child or young person's situation that may be relevant
- be aware of local authorities' duties to separated children and young people and refer to other organisations and agencies where appropriate
- advise the child or young person of decisions that are made in relation to the application, including any right of appeal, and ensure that any appeal papers are submitted in time, and
- be alert to the possibility that a child or young person may have been trafficked and respond accordingly. ► See section 12.

FIGURE 3 Definitions and roles of other adults

Appropriate adult

Police

The term appropriate adult is used in relation to the specific definition set out under the Police and Criminal Evidence Act 1984 (PACE).

According to PACE, all people under the age of 17 and those over 17 with mental health problems or learning difficulties *must* have an appropriate adult present when they are being questioned by the police.

An appropriate adult is defined as someone who is either a parent, known to the person being questioned, or experienced in dealing with children, such as a social worker or teacher.

The role of the appropriate adult is stated to be:

- to give support and advice to the detained person
- to facilitate communication between the police and the detained person
- to ensure police interviews are conducted fairly and properly to check welfare matters
- to look at custody records to ensure the person has been treated properly
- to make sure the person understands the interview process.

Home Office (UK Border Agency)

The role of an appropriate adult is not specified but appears to be similar to that outlined for a 'responsible adult' (see above)

Immigration and Asylum Chambers of the Tribunals

It is a requirement that an 'appropriate adult' accompany a child at all hearings. The role of an 'appropriate adult' in this context is not specified.

Adviser or advocate

Home Office (UK Border Agency)

This term is used by the Home Office to describe a representative from the Refugee Council's Children's Panel (see below). According to the Home Office, the role of the Children's Panel adviser is 'to provide independent guidance and support to ensure that the child is aware of his/her rights and the services to which he/she is entitled throughout the asylum process. The Panel does not offer legal advice.'

Refugee Council Children's Panel

The Refugee Council Children's Panel works directly with separated children, as well as giving advice to those involved in their support. The Children's Panel has operated since 1994 and is the only national service of its kind. Many of the panel's fully supported advisers speak the languages of the children with whom they work. The Refugee Council describes the role of the panel as:

- to assist the child in accessing quality legal representation
- to guide the child through the complexities of the asylum procedure
- if necessary, to accompany the child to asylum interviews, tribunal and other hearings, magistrates' and crown court appointments
- to build up a support network for the child involving a range of statutory and non-statutory service providers
- to support the child during appointments with GPs, hospitals, social services or other service providers.

Voice

Voice has trained staff who are able to provide telephone and one-to-one support and advice for children in care and describes their role as:

- to empower children and young people to resolve any problem they may have with their care by giving information, advice and support
- to help children express their own views directly or by speaking on their behalf.

FIGURE 3 *continued*

Children's guardian

Children and Family Court Advisory and Support Service (CAFCASS)

The term 'children's guardian' replaced the term 'guardian ad litem' in April 2001 with the introduction of the combined Children and Family Court Advisory and Support Service.

Children's guardians are qualified and experienced in social work.

They are appointed by the family court to represent the rights and interests of children in cases in England and Wales that involve social services (for example, in care proceedings) or other family court cases.

They are independent of social services, courts, and everyone else involved in the case.

The role of the children's guardian is:

- to appoint a solicitor for the child who specialises in working with children and families
- to advise the court about what work needs to be done before the court makes its decisions
- to write a report for the family court saying what they think is in the best interests of the child. The report must tell the court about the wishes and feelings of the child.

Children and family reporter

When an application is made to a court for a contact, residence, specific issues or prohibited steps order, and the parties are not able to reach agreement, the court in England or Wales will usually ask a Children and Family Reporter from CAFCASS to help families try to agree arrangements for their children. Children and Family Reporters are qualified in social work and are experienced in working with children and families. The Reporter is independent of the courts and social services. Children and Family Reporters were previously called Court Welfare Officers (see below).

The Children and Family Reporter will often visit the family involved in the proceedings and discuss arrangements for the child who is the subject of proceedings. Part of the role of the Reporter is also to talk to the child to find out their wishes and feelings. If no agreement is reached the Children and Family Reporter will write a report for the court. The report explains the enquiries the Children and Family Reporter has made and concludes with their recommendations regarding the matter in dispute.

Child welfare officer

This is often used as a generic term within a wide range of organisations to describe someone who acts as a point of contact in all issues relating to the welfare of children and young people. The term may also be used inaccurately in relation to the post which was previously a Court Welfare Officer but is now a Children and Family Reporter (see above).

Court welfare officer

In family law cases in England and Wales the court sometimes appointed Court Welfare Officers. Court Welfare Officers have now been replaced by Children and Family Reporters (see above) who are part of CAFCASS.

Curator ad litem

Curators ad litem are appointed by the Sheriff court in Scotland to protect the child's best interests for the duration of the court procedure. They are court officers (and tend to be legally qualified) but they do not take instructions from the child. They provide a view of a case from the perspective of the child's best interests. Their role ends when the litigation ends.

Guardian

The term guardian was a legal term that was widely used in the past in various legal contexts but now only relates to testamentary guardians. This term is often still used incorrectly to describe someone who is looking after a child or as an alternative to the word 'sponsor' or 'accompanying adult.'

Scottish Guardianship Service

The Scottish Guardianship Service works with separated children and young people in Scotland who are seeking asylum or who have been trafficked. The Service provides all separated children with a guardian to improve separated children's experience and understanding of immigration and welfare processes and to ensure they receive services appropriate to their needs and entitlements.

FIGURE 3 *continued*

Guardians do not have a statutory role but work closely with social workers and UK Border Agency staff to:

- act as a link between all services and professionals that are involved in the child's or young person's life
- help the child or young person to understand the roles and responsibilities of these professionals
- assist children and young people in understanding the complex immigration and welfare processes and enable them to participate fully in their claims for status and support
- help children and young people to present their case in their claim for asylum and develop tools and techniques to support them and their workers
- advocate on behalf of children and young people and ensure their voices are heard.

Guardian ad litem

The 'guardian ad litem' has now been largely replaced by the 'children's guardian' (see above). A 'guardian ad litem' may have responsibility for a child on the rare occasions that wardship proceedings are taken.

Personal adviser

Local authority

Social services have a statutory duty under the Children (Leaving Care) Act 2000 to appoint a personal adviser to all relevant and eligible children and young people once they reach the age of 16. The personal adviser will usually be a social worker but may be a Connexions personal adviser (see below) or someone from another organisation who is subcontracted to take on this role (for example, someone from a voluntary or children's organisation).

For separated children and young people who are subject to immigration control, the personal adviser may have an important role to play in ensuring that the local authority and other agencies are fulfilling their roles and obligations in relation to the child or young person.

The personal adviser's role as prescribed by the Children (Leaving Care) Act 2000 is:

- to provide advice (including practical advice) and support;
- where applicable, to participate in the child or young person's assessment and the preparation of his or her Pathway Plan (see glossary)
- to participate in reviews of the Pathway Plan
- to liaise with the responsible authority in the implementation of the Pathway Plan
- to co-ordinate the provision of services and to take reasonable steps to ensure that the child or young person makes use of the available services
- to keep informed about the young person's progress and wellbeing
- to keep a written record of contact with the child

Connexions

Connexions is a government support service for all young people aged 13 to 19 in England. Since September 2011 the service has focused on careers and work advice. Some local authorities continue to fund a wider service, providing integrated advice, guidance and access to opportunities for personal development to help this group make a smooth transition to adulthood and working life.

Young people aged 13–19 may have access to a Connexions personal adviser. The overall aim of providing a personal adviser through Connexions is to make sure that the needs of young people are met so that they are able and motivated to take education, training and work opportunities and to achieve to their full potential.

A Connexions personal adviser's role is to get to know a child or young person and, once they do, to keep in close contact with him or her and to bring together effective support for that child or young person.

The role of the personal adviser varies depending on the way the service is structured by a particular local authority and the needs of a child or young person. For some young people this may be just for careers advice, for others it may involve more in-depth support to help identify barriers to learning and find solutions, brokering access to more specialist support.

FIGURE 3 *continued*

Safeguarder

A safeguarder is an independent person whose role is to prepare a report to assist a hearing to reach a decision on a child's best interests. Safeguarders can be appointed in the Children's Hearing System in Scotland and the Sheriff Court when this is required to safeguard the interests of a child in proceedings. They are, however, commonly used in the Children's Hearing system as the Sheriff Courts tend to use curators ad litem (see above).

The sole remit of a safeguarder is to safeguard the child's interests in the proceedings. They do so by providing support, advice, a written report as well as being in attendance at the hearing. They also convey the views of the child to the hearing.

Sponsor

A sponsor is a friend, relative or other person, whose immigration status is secure, who confirms financial support for an applicant.

The term is often used loosely and incorrectly to describe someone who is meeting a child travelling to the UK and putting himself or herself forward as a 'responsible adult' often as part of a private fostering arrangement (see glossary).

There is no formal role for a sponsor in relation to a child who is subject to immigration control in the UK. The sponsor may assume care for the child through a private fostering arrangement but does not have parental responsibility unless an order of the court is obtained.

SECTION 3

Child first, migrant second: best interests in practice

3

- 3.1 Children and young people experience, and are affected by, immigration control decisions and procedures in ways that are different from adults. They have often had little or no choice in the decisions that have led to their situation. Children and young people are particularly vulnerable to harm and require procedures appropriate to their age, level of maturity and individual needs. They are children first and migrants second. Regardless of a child or young person's immigration status, his or her best interests must always be of primary consideration.

International legal framework and best practice principles

- 3.2 Children and young people who are subject to immigration control in the UK are entitled to international protection under the United Nations Convention on the Rights of the Child, which came into effect in November 1989 and a broad range of international, regional and national instruments. ►See section 1.
- 3.3 When the UK ratified the Convention on the Rights of the Child in December 1991, it entered a reservation to allow it not to apply the Convention to decisions concerning children and young people subject to immigration control. After critical Periodic Reports by the Committee on the Rights of the Child,¹ and much pressure internationally and domestically, the UK removed this and other reservations to the Convention on the Rights of the Child in November 2008. Since that date the UK government has in effect accepted that all children irrespective of their immigration status, whether seeking to enter or remain in the UK, must enjoy all the rights and protections of the Convention without discrimination.

¹ See Committee on the Rights of the Child (2002), Committee on the Rights of the Child (2008) paragraphs 47 and 48(g).

- 3.4 These guidelines proceed on the basis that the law and best practice require children and young people subject to immigration control to be treated as children first and as migrants second. Their immigration status should be treated as secondary to their status as children and their best interests determined and considered as the first requirement.²
- 3.5 These guidelines apply to children who are directly affected by immigration decisions (whether they are separated or accompanied). They also apply to children who are indirectly affected by immigration control decisions about other people. Children who are British citizens or otherwise settled in the UK may be adversely affected by decisions made about their parents, carers and family members such as a decision to remove or deport a parent even though the child cannot in law be required to leave, or decisions on the entry of a family member into the UK to care for, or have contact with, a British or settled child. Such decisions must also consider the rights of the child as set out in the Convention on the Rights of the Child.
- 3.6 Everyone working with, or taking decisions about, children and young people including those subject to immigration control should ensure their own personal and their organisation's adherence to the values and principles enshrined in the Convention on the Rights of the Child irrespective of their professional involvement with a child.
- 3.7 The United Nations High Commissioner for Refugees (UNHCR) has also produced useful guidance on the determination of best interests for refugee and asylum seeking children and young people, extracts from which are provided in Figure 4.

² See *ZH (Tanzania) v SSHD* 2011 UKSC4 which is discussed later on in this section at 3.14ff.

FIGURE 4 Extracts from UNHCR's *Guidelines on Determining the Best Interests of the Child* (2008)³

UNHCR's *Guidelines on Determining the Best Interests of the Child* contain valuable guidance on the range of considerations to be taken into account when identifying the best interests of refugee children and children seeking asylum including:

Safe environment

- exposure or likely exposure to severe harm usually outweighs other factors
- safety in the geographical location/household under consideration
- availability of life-saving medical treatment for sick children
- past harm (frequency, patterns, trends)
- ability to monitor
- whether root causes of past harm still persist

Family and close relationships

- quality and duration of the relationship and degree of attachment of the child to: siblings, other family members, other adults or children in the cultural community, any potential care-giver
- potential effect of separation from family or change in care-givers on the child
- capacity of current and potential future care-givers to care for the child

Development and identity needs

- the child's cultural and community network
- continuity in the child's ethnic, religious, cultural and linguistic background
- specific considerations based on age, sex, ability and other characteristics of the child
- particular physical or emotional needs
- physical and mental health considerations
- educational needs
- prospects for successful transition to adulthood, (employment, marriage, own family)

³ At the time of writing an update was due to be published with specific reference to considerations of best interests in the context of industrialised countries.

Principles in the Convention on the Rights of the Child

- 3.8 The Convention on the Rights of the Child defines a 'child' as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger. The Committee on the Rights of the Child, the monitoring body for the Convention, has encouraged States to review the age of majority if it is set below 18 and to increase the level of protection for all children under 18.
- 3.9 The guiding principles of the Convention include non-discrimination; adherence to the best interests of the child; the right to life, survival and development; and the right to participate. These represent the underlying requirements for any and all rights to be realised.
- 3.10 The Convention on the Rights of the Child emphasises that the family is the natural environment for nurturing the child and recognises that all children should be able to grow up in a happy and loving family environment.
- 3.11 The Convention on the Rights of the Child places a primary obligation on the State to protect children from all forms of abuse, neglect and exploitation, even where these are not carried out directly by State agents. This is intended to ensure that children are protected from abuses committed within the family or the community, including domestic violence and child abuse, bonded child labour or child prostitution.

Non-discrimination

- 3.12 The principle of non-discrimination is set out in Article 2. Every child has the right to be treated fairly and equally regardless of his or her parent's or guardian's, or his or her own, race, ethnicity, colour, gender, language, religion, political or other opinion, social origin, property, disability, birth or other status.
- 3.13 The Convention on the Rights of the Child requires that children and young people who are subject to immigration control are entitled to the same treatment and rights as national or resident children. They must be treated as children first and foremost. All considerations of their immigration status must be secondary to their interests as children.

Best interests

- 3.14 Article 3 is one of the fundamental principles of the Convention on the Rights of the Child, requiring that ‘in all actions concerning children and young people, 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.’ Whilst Article 3 does not require the best interests of the child to be *the* primary consideration, the law now clearly states that where a decision concerns a child’s interests, the assessment of the best interests of that child should be a primary consideration in both the decision-making process and substantive decision as stated by Lady Hale in the leading judgment in *ZH (Tanzania) v SSHD*.⁴
- 3.15 This principle is of broad application. It applies equally to children’s interests when these are only indirectly affected, such as where a decision is made about a parent. It also applies in the formulation and delivery of government and public bodies’ policies and practice.
- 3.16 Determining what is in a child or young person’s best interests must be central to establishing appropriate actions for resolving the situation for any child. This may still mean carefully balancing conflicting rights, between the child and the State or between the child and other individuals. For example, where a parent is facing deportation because of a criminal conviction, or wishing to exercise the right to family reunion, this can give rise to conflict with the child’s own expressed wishes. ► See section 13. The UK Supreme Court has given clear guidance that decision-makers have to ensure that best interests are considered first.⁵

⁴ See the Supreme Court decision in *ZH (Tanzania) v SSHD* 2011 UKSC4, in particular paragraph 33 and *Every Child Matters, Change for Children*, the statutory guidance to section 55 Borders, Citizenship and Immigration Act (2009), paragraph 2.7.

⁵ Although Lady Hale gave the leading judgment in this case (*ZH (Tanzania) v SSHD* 2011 UKSC4), the concurring opinion of Lord Kerr makes this point very clear: ‘It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but 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 dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.’ (para 46).

- 3.17 The principle of best interests is already effectively part of domestic law in the UK, through the Children Act 1989 and the equivalent provisions for Scotland and Northern Ireland, the developing case law of all UK courts and the European Court of Human Rights jurisprudence on Article 8 of the European Convention on Human Rights. The express recognition of the principle of best interests (and the right to be heard) is set out in Article 24 of the Charter of Fundamental Rights of the European Union and is therefore an incorporated and binding provision on member States of the European Union including the UK. In Wales, the Welsh Assembly, under devolved legislation, has passed the UK's first primary legislation making it an explicit duty to have due regard to the Convention on the Rights of the Child.⁶
- 3.18 Separated children and young people who are, by definition, unable to look to their family for support and are directly reliant on the State for their care and welfare are particularly vulnerable to harm. Special protection measures for such children are necessary. A thorough and continuing assessment and understanding of all the needs of the individual child is required to ensure that their best interests are met throughout the process of care and status determination.
- 3.19 The best interests principle means that children and young people who are subject to immigration control need a timely resolution to their case and certainty about the future. The 'no delay' principle has long been integral to UK domestic children and family law. This principle is no less important than in other legal arenas involving children. Children and young people need a durable solution to the problems that affect their lives and their long-term immigration status should not be left undecided until they are approaching or have turned 18.
- 3.20 Turning 18 should not be treated as a watershed in the way a child's case is handled or resolved. ►See sections 10 and 13. Whilst the Convention on the Rights of the Child defines a child as someone who is under the age of 18, the rights established by the Convention are intended to promote the maximum opportunity and best environment for the development of a child into adulthood.

⁶ Rights of Children and Young Persons (Wales) Measure 2011 (2011 nawm 2).

Right to participation

- 3.21 Alongside and integral to the principle and understanding of the child's best interests, it is also important to ensure the child's right to participate in all decisions affecting him or her, directly or indirectly. The principle of best interests should accommodate the fullest opportunity for a child or young person to contribute to an understanding of what those interests are.
- 3.22 Article 12 of the Convention on the Rights of the Child states that every child has the right to express his or her views, opinions or beliefs freely in all matters, in his or her own words, and to contribute to the decisions affecting his or her life, including those taken in any judicial process and to have those views taken into consideration. The views of the child or young person should be given due weight, in accordance with the age and maturity of the child. This principle is recognised in UK law.⁷
- 3.23 The right to participation enshrined in the Convention on the Rights of the Child also requires decision-makers to ensure that procedures are designed in a way that enables the wishes and feelings of children of all ages to be heard in a way to allow them to participate effectively. Reflecting this, children and young people should be kept informed, in a manner appropriate to their age, about the procedures, the decisions made about them, and the possible consequences.

Dignity

- 3.24 The Convention on the Rights of the Child acknowledges that every child is a unique and valuable human being and as such his or her individual dignity, special needs, interests and privacy should be respected and protected. Protecting and promoting the dignity of the child is an essential element of determining what is in their best interests whenever a decision is made.

⁷ See the Supreme Court decision in *ZH (Tanzania) v SSHD* 2011 UKSC4 Lady Hale at paragraph 34.

SECTION 4

Initial contact with children

- 4.1 This section outlines basic principles for dealing with children and young people to ensure that their best interests are met when they first come into contact with the immigration authorities or other professionals.
- 4.2 Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a duty on the UK Border Agency and other statutory agencies to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children. This duty extends to all UK Border Agency staff, and those acting on their behalf, when conducting immigration functions in relation to children and young people. It applies both to children and young people who have just arrived in the UK and to those who come to the attention of the immigration authorities when they are already living in the UK.
- 4.3 At the point of first contact with immigration authorities, children and young people should only be asked a limited number of questions to establish their identity, age and whether or not there is someone caring for them in the UK. No additional questioning should take place. If it is considered necessary to ask additional questions, for example at a substantive interview, the best practice on interviewing children and young people provided in section 5 of these guidelines should be followed.

Understanding the child

- 4.4 Children and young people subject to immigration control may be frightened or unsure of what is going to happen to them. It is important that the first professional they meet ensures that they feel safe and supported and that they continue to do so. Some children, particularly older teenagers, may not admit to being scared or upset whereas younger children may worry about getting into trouble and saying or doing the wrong thing.
- 4.5 To allay the fears and anxieties of children and young people about the immigration process and what will happen to them, immigration officers and other professionals should put the child at ease by using appropriate body language and friendly facial expressions, maintaining eye contact and appropriate tone of voice and being as informal as possible. All UK Border Agency staff must act professionally, impartially and courteously at all times. They must be open and honest in their dealings with applicants and their representatives.
- 4.6 Children and young people should not be required to wait before a meeting with a professional starts. If for any reason a child has to wait, they should be asked regularly whether they would like a drink, something to eat, whether they are comfortable or if they need to go to the lavatory. These questions should also be asked at the start of any meeting and repeated depending on the length of the meeting. It is also usually appropriate to check the child is comfortable with all parties to the meeting being present before it begins.
- 4.7 If the child appears unwell or distressed or the immigration officer or other professional has any concerns at all about the child's welfare then immediate medical or other appropriate assistance should be sought. If this is unavailable it may be necessary to involve social services or to get in touch with the emergency services.
- 4.8 If it is suspected that a child has been abused, including where it is suspected the child has been trafficked, or is at risk of abuse, professionals should follow the appropriate procedures within the organisation or department in which they are based. Procedures in cases where trafficking is suspected are outlined in section 12 of these guidelines.

- 4.9 Most children and young people who come into contact with the UK Border Agency will not speak English as their first language. However, they may say that they do not want or need an interpreter because they are wary of coming into contact with people from their own country. If there are any doubts whatsoever about the ability of the child to communicate fluently in English then an interpreter who is professional and neutral should be used. Children and young people should be informed of this neutrality and advised that an interpreter is essential for them to disclose their claim fully. Further information on the use and role of interpreters is provided in section 5 of these guidelines.

Establishing basic details

- 4.10 Whether or not a child or young person is separated should be established as soon as possible after coming into contact with immigration or other authorities. While an immigration officer is questioning a separated child for the first time or during a screening interview, the UK Border Agency has a duty of care to that child.
- 4.11 If a child's first contact with professionals is at the port of entry, the immigration officer should get in touch with the person meeting the child if there is one, and ask him or her to come to meet the child, if he or she has not already done so.¹ In all cases the person meeting the child or young person should be told to produce photographic proof of identity e.g. a passport, a photo ID driving licence, an Application Registration Card, a UK Border Agency biometric identity document or a national identity card. These details should be copied, recorded and kept on the child's file.
- 4.12 Immigration officers play a key role in ensuring that a separated child is collected by an adult who is known to them and who is able to take responsibility for their welfare. If the child or young person is not being met by a parent, sibling, close relative or carer with parental responsibility, and the application for leave to enter

¹ The term 'sponsor' is often used loosely and incorrectly to describe someone who is meeting a child travelling to the UK and putting himself or herself forward as a 'responsible adult.' ► See figure 3 at the end of section 3 for further information and definitions.

is for more than 28 days, the UK Border Agency should inform social services in the area where the child is staying because this constitutes a private fostering arrangement.

- 4.13 Traffickers sometimes present themselves as adults with responsibility for the child. Section 12 of these guidelines outlines best practice for identifying and working with children who may have been trafficked. Social services should be informed in any case where there is concern about the child's safety or relationship to the adult(s) meeting the child or about any private fostering arrangement. In cases of suspected trafficking, the police should also be informed.
- 4.14 Unless there are concerns about the child's safety and welfare, a child or young person should not be separated from an adult, particularly a parent, during this investigation. After questioning the adults of the party and conducting database checks, the immigration officer can usually be satisfied of the situation. Where an officer is not satisfied, or there are safety and welfare concerns from the start, the officer may wish to question the child or young person separately. This must only be done in the presence of a responsible adult, as set out in Figure 3.
- 4.15 If the immigration officer is not satisfied as to the relationship with the accompanying adult, or has other concerns regarding the child's welfare, if there is a private fostering arrangement in place, or he or she is satisfied that the child is separated, then social services should be advised of the child's presence.
- 4.16 There may be circumstances in which the immigration officer is unwilling to release the child into the care of a person meeting him or her but social services have declined to intervene. Consideration should be given to getting in touch with child protection officers within the police service² who have further legal powers concerning children and young people who may be at risk.

² Child protection officers located with the police service are specially trained to deal with any situation where children or young people are being treated badly or are potentially at risk. Child protection officers work closely with people outside the police, such as social services, health and education services.

- 4.17 Wherever a child under the age of 16 is photographed or fingerprinted, a responsible adult is legally required to be present. It is best practice that a young person aged 16 or 17 should also be accompanied by a responsible adult during this process.³ Every separated child should be photographed by social services for identification purposes.⁴

Entry clearance

- 4.18 Applications for entry clearance from children in any capacity should be prioritised. Applications for citizenship and passports from children and young people based abroad should similarly be prioritised.
- 4.19 When a child or young person applies for entry clearance with someone who is not the parent or guardian, decision-makers should be aware that a child may be being trafficked and evidence of the relationship to the person travelling with the child to the UK should be established.⁵ Further information on working with children and young people who have, or may have been, trafficked is provided in section 12 of these guidelines.

³ Immigration and Asylum Act 1999, section 141.

⁴ This is important so that if the child goes missing he or she can be identified.
► See section 12 for further information on trafficking.

⁵ In the case of child visitors, see the Immigration Rules, paragraph 46A which require the consent of a parent or guardian in the country of origin or habitual residence and suitable arrangements for the child's travel to, and reception and care, in UK.

Access to the territory and/or to protection

- 4.20 Children and young people should not be subjected to 'fast track' or accelerated procedures. Where the age of an individual is disputed, he or she should not be subjected to any fast track or 'safe third country' procedures. Further information on best practice guidance in cases where the age of the applicant is disputed is provided in section 9 of these guidelines.
- 4.21 Whether or not a child or young person can produce documentation to confirm his or her identity will be dependent on the child's circumstances and on how he or she arrived in the UK. A child or young person should not be prosecuted for the inability to produce documents or for other immigration offences.⁶

⁶ Although the power to prosecute children exists, for those over 10 years of age in England, Wales and Northern Ireland and those over 12 in Scotland, to do so is not in children's best interests and fails to reflect their particular experiences. Children often have no control over the circumstances that have led to them to come to the UK. They may not be able to produce identity documents because these are not available to them in the country or origin. ► See section 6 for further information on identity documents.

SECTION 5

Interviewing children and young people

- 5.1 Children and young people may be interviewed about immigration matters in a variety of different contexts and locations including at overseas posts, at ports on their arrival, by the police, by caseworkers and decision-makers in the UK Border Agency, by legal representatives, representatives of social services, local authority staff and other professionals. Additional guidance on best practice when initial contact is made with a child or young person who is subject to immigration control is provided in section 4 of these guidelines.
- 5.2 In relation to children and young people who are not subject to immigration control, but who come into contact with professionals such as the police, the courts, legal representatives and social services, it is widely recognised that it is important to minimise the number of interviews and assessments to which they are subjected. This is acknowledged to be in the best interests of the child. Public bodies, including the UK Border Agency and social service departments, have a duty to safeguard and protect a child's best interests so the same principle applies to children and young people who are subject to immigration control. ► See section 3 for further guidance on the best interests of children and young people subject to immigration control.

The decision to interview

- 5.3 In deciding whether or not to interview a child or young person who is subject to immigration control in connection with his or her application, it is necessary first to determine whether this is in the best interests of the child. Interviews by a figure of authority, for example, an immigration officer, can be distressing for a child or young person.

- 5.4 Although the majority of children claiming asylum will be interviewed in respect of their claim if they are over 12 years of age, there will be instances when either the child or young person is unfit to be interviewed or it is not appropriate to do so. A child or young person should not be compelled to be interviewed by the UK Border Agency about immigration matters if it is possible to obtain sufficient information from other sources to resolve the immigration issue. It is accepted childcare practice in other areas to draw from other sources of information as much as possible to avoid interviews with children.
- 5.5 To obtain additional information the UK Border Agency should consider alternative sources of evidence. These may include, for example, a written statement from the child prepared by the child's legal representative, information from family members or a responsible adult rather than the child, information on the situation of children in the country of origin, expert evidence from a physician, a child psychologist or a social worker. Further guidance on expert evidence and supporting information is provided in section 6 of these guidelines.
- 5.6 Where an interview by an immigration officer is considered essential, a child or young person should be treated in a manner that respects the principle of best interests (discussed in section 3). The UK Border Agency and other statutory agencies have a duty to safeguard and promote the best interests of children and this includes taking into account a child's personal situation and immediate needs, age, gender, level of maturity and any disability and fully respecting his or her physical, mental and moral integrity.
- 5.7 An invitation to be interviewed by the UK Border Agency should be issued at least 28 days in advance of the scheduled date. If a child or young person fails to attend an interview, the application should not be refused on non-compliance grounds because of the particular vulnerabilities of children and young people, and because they may not understand the procedures fully. A further interview date should be sent.

- 5.8 The number of interviews undertaken overall and by different professionals should be kept to an absolute minimum. If interviews or assessments have been undertaken by professionals working with the child or young person, that information should be disclosed to the legal representative to minimise the number of times the child or young person has to repeat his or her account. With the child's consent, the legal representative should disclose information obtained from the child to other professionals to reduce the need to re-interview. If follow-up interviews are to be undertaken, the same person should carry them out.

Issues in interviewing children

- 5.9 Interviewing children and young people is difficult. Most children, especially younger children, do not have a clear idea of the purpose of the interview, nor do they have the ability to recognise the relative importance of facts known to them. In addition, an interviewer is faced with the limited cognitive skills of children, such as short attention spans, limited vocabulary and linguistic abilities, limited concepts of space and time, and limits on ability to relate events in chronological order.
- 5.10 Some children may have mental health problems or learning difficulties and/or have suffered trauma which can impact on their ability to give information in chronological order, or at all.
- 5.11 Many children and young people have a desire to please adults by saying things which they feel are expected of them. Where children or young people are interviewed in the context of a family's immigration status or asylum application, undue emphasis should not be placed on inconsistencies in the child's account in assessing credibility.
▶ See section 6 for further guidance on assessing credibility.
- 5.12 Although these issues make interviewing children complex, the right of children to be heard is a fundamental principle in international law. The Convention on the Rights of the Child provides that a child who is capable of forming their own views has the right to express those views clearly in all matters affecting them (discussed in section 3 of these guidelines). This means that during interviews conducted as part of the process of immigration control, a child or young person must have an opportunity to present the reasons giving rise to their immigration matter.

- 5.13 All professionals who come into contact with a child or young person including legal representatives, UK Border Agency staff, social workers, the courts, and foster parents amongst others, should ensure that appropriate steps are taken to ensure the voice of the child is heard and given due weight during the process.

Role of the responsible adult

- 5.14 Ensuring that best practice is followed when working with children and young people who are subject to immigration control means that they should not be interviewed without a responsible adult present. The role of the responsible adult more generally is set out in section 2 of these guidelines. Any interview in relation to a child's immigration status should not take place until at least 14 days after a responsible adult has been appointed.
- 5.15 The main roles of the responsible adult at an immigration interview are:
- to ensure that the child or young person understands the interview process and the purpose of each interview
 - to be present at interview to ensure that the child or young person is not unduly inhibited or alarmed by the interview process
 - to give moral support and reassurance as necessary
 - to facilitate communication between the child or young person and the interviewer where necessary
 - to ensure that the child's or young person's welfare needs are sufficiently provided for, for example through the provision of adequate breaks, refreshments etc.
 - to offer any additional information to the interviewer which may have a bearing on the child or young person's application, emotional wellbeing, mental health and fitness for interview, and
 - to ensure that the interviewer is made aware if the child or young person is becoming distressed or tired and a break is required or the interview should be curtailed.

Role of the legal representative

- 5.16 The legal representative should be present at all immigration interviews, should be skilled in advising and representing children and young people and, in asylum cases, should be aware of child-specific forms of persecution. Legal representatives should have child-specific interviewing skills as the information that is or is not obtained by them will have implications for the child's immigration or asylum case. Legal representatives working with children and young people should be vigilant in detecting where a child or young person, whether separated or with an adult, may have been trafficked or otherwise abused. ► See section 12 for further information on identifying and working with children and young people at risk of or who have been, trafficked.
- 5.17 A legal representative who accompanies a separated child or young person should not also take on the role of the responsible adult as defined by the UK Border Agency. The role of the responsible adult is outlined in section 2 of these guidelines. The responsible adult accompanying the child or young person to the interview must be able to attend the interview alongside the legal representative.
- 5.18 The role of the legal representative in relation to the immigration interview is:
- together with the responsible adult, to ensure that the child or young person understands the interview process, the purpose of the interview and what will happen after the interview
 - to attend the interview and ensure that the child is able to give a full account of his or her experiences as relevant to the application
 - to facilitate communication between the child or young person and the interviewing officer where necessary
 - with the responsible adult, to provide support and reassurance to the child or young person as appropriate
 - with the responsible adult, to ensure that any welfare needs of the child or young person are sufficiently provided for e.g. adequate breaks, refreshments etc

- to provide an independent interpreter at the interview who is able to confirm that the child and the official interpreter understand one another and to check that the interviewing officer ensures the interpreter fulfils his or her role in relation to the official interpreter properly. The representative should be aware of any changes in the interpreter's tone of voice, be alert to his or her body language and whether or not the interpreter is speaking for noticeably longer or shorter periods than the child for whom he or she has been asked to interpret
- to keep an independent record of the proceedings as a whole, including times, breaks, interventions, demeanour of the child or young person and manner and demeanour of the interviewing officer
- to assist the child in presenting all the information relevant to his or her application
- to intervene where there has been unresolved confusion or misunderstanding which cannot wait until the end of the interview
- to intervene if the interview is being conducted in an inappropriate manner
- to bring to the attention of the interviewing officer any areas of the application or issues which need to be investigated
- at the conclusion of the interviewing officer's questions, to make any appropriate observations or representations regarding either the conduct of the interview or any further questions or clarifications which need to be put
- to make any necessary post-interview representations, including submitting additional evidence as appropriate, and
- to keep the child updated as to the progress of their case and as to whether any further information is required from them or a further interview is required.

Use of interpreters

- 5.19 Interviews should take place in a language and dialect that the child or young person uses and understands. If there are any doubts about the ability of the child to communicate fluently in English then an interpreter should always be used even where a child or young person says that he or she is able to speak good English. Some children and young people may say that they do not want an interpreter because they are wary of coming into contact with people from their own country. Others may become anxious during the interview and may find it difficult to communicate their experiences fully in English.
- 5.20 A professional interpreter should always be used. It is not appropriate to use friends or family to interpret as this can lead to mistakes or may cause the child or young person to withhold information due to embarrassment or fear of loss of ties with their community.
- 5.21 The role of the interpreter should be explained fully to the child, namely that the interpreter is there to provide an impartial and confidential direct translation of everything that is said during the interview. The child or young person should be reassured that if he or she is uncomfortable with the selected interpreter the interview can be stopped and another interpreter used, even if this means rescheduling the interview.
- 5.22 The role of the interpreter is to interpret truly, accurately, fully, distinctly and audibly using appropriate language and emphasis. Although it can be distressing, embarrassing or difficult, it is vital that all of the information provided by a child or young person is relayed to the interviewing officer. The interpreter should be impartial and his or her role is to bridge the linguistic gap between the child and the interviewing officer, no more. It is the duty of the interviewing officer to ensure that the interpreter properly fulfils his or her role in a professional and neutral manner. The legal representative and responsible adult should also be alert to this. An interpreter cannot fulfil the role of a responsible adult.
- 5.23 Because the unique aspects of language, both verbal and nonverbal, vary from culture to culture and from country to country, it is important that the interpreter has cultural as well as linguistic expertise and is able to convert the meaning of all information provided by the child without unnecessary additions, deletions or changes in meaning and without including their own opinions.

- 5.24 Interviewers should be aware that linguistic limitations may mean that certain concepts and experiences can only be expressed in one language, and that a child or young person may not be aware of this.
- 5.25 Insofar as possible, interpreters should be skilled and trained in interpreting for children. Children and young people should be asked whether they want a male or a female interpreter.

Purpose of the interview

5

- 5.26 There are many different kinds of interview, each of which has a different purpose and objective. For example, a child may be interviewed about the basis of his or her asylum claim, or in relation to mental health or welfare issues, or about joining a parent or other family member in the UK. A child or young person will need to understand the purpose of the interview for it to be effective and for his or her best interests to be taken into account. The purpose of the interview must be identified and explained to the child.
- 5.27 The purpose of a substantive immigration or asylum interview is to enable the basis of a child or young person's application to be made or clarified to UK Border Agency so that an appropriate, permanent and sustainable decision is made. Interviews should be conducted objectively and impartially and the purpose is to obtain facts relevant to the application. The interview is essentially a fact-finding exercise, an opportunity for the child or young person to elaborate on the background to his or her application and introduce any additional information. The interviewer may ask questions to assess the credibility of the account if required.
- 5.28 Whilst the interview is essentially a fact-finding exercise, the child or young person should be made aware that an interviewing officer may probe any answers given and investigate unsupported statements.

Before the immigration interview

- 5.29 It is important that appropriate preparations are made before any interview with a child or young person subject to immigration control, including consideration of using a same-sex interviewer. Tape recording provides a full record of an interview which can be consulted if questions arise later. Consideration should be given to requesting that the interview be tape-recorded and advance notice given to the UK Border Agency.
- 5.30 Children and young people should not be required to wait before an interview starts. If a child or young person has to wait for any reason, he or she should regularly be asked whether they would like a drink or something to eat, whether they are comfortable or if they need to go to the lavatory.
- 5.31 The interview should take place in a non-threatening environment. The interview room should be a comfortable temperature and refreshments should be easily at hand. Pens and paper should be available but toys should be avoided as these can be distracting. Seating should be appropriate to the size of the child or young person and the interviewer should sit at the same level as the child to avoid being viewed as an authority figure.
- 5.32 Specially trained staff should carry out all interviews with children and young people. The interviewer should be well-prepared and have as much background information about the child or young person and his or her case as possible before the interview. The interviewer should:
- be familiar with relevant sources of information concerning children and young people including guidelines on best practice for interviewing children and young people subject to immigration control
 - be familiar with information about the child's migration history and current application
 - have appropriate knowledge of the psychological, emotional and physical development and behaviour of children generally, and of the specific child or young person who is to be interviewed
 - be aware that it can be difficult to listen to the experiences of children and young people who have been abused, neglected or subjected to violence, and

- have objective and current information on the legal and cultural situation of children and young people in the country of origin, on the incidence of exploitation, victimisation, and other human rights violations against children and young people, and on the adequacy of State protection afforded to them.

Role of the interviewer

- 5.33 Before the interview begins, the interviewer should explain the process to the child or young person, making the purpose and ground rules of the interview clear. The interviewer should explain how long the interview will take and of what it will consist. In order to ensure that the child or young person feels comfortable and able to discuss his or her experiences, the interviewer should:
- introduce him or herself and others present at the interview by name
 - explain that the purpose of the interview is to find out information about the basis of the application and that any answers given may be probed
 - advise the child or young person that the interview should take no longer than 30 minutes (for younger children) or an hour and a half (for older children), and that if the interview takes longer than this, he or she will be offered a break whenever appropriate and at least every 30 minutes
 - explain to the child or young person that the interviewer will be asking questions, and that it is acceptable for the child to say 'I don't know' if he or she does not know the answer, and that it is acceptable to say 'I don't remember' if he or she does not
 - explain that if the child or young person does not understand the question, he or she should say so and the interviewer will repeat it, or ask it in a different way to help the child to understand
 - emphasise that although there is no 'right' or 'wrong' answer to the questions being asked, it is important to give truthful information and to be as accurate as possible
 - ensure that the interview starts promptly and that any necessary delay is explained

- inform the child or young person that the information he or she provides will be kept confidential, with limitations
- confirm that the child or young person is fit and well enough to be interviewed. If the child or young person is feeling unwell, the interview may be postponed
- tell the child or young person that he or she can ask for a break at any time during the interview
- explain that the child or young person can ask to speak to their legal representative and/or responsible adult in private at any time
- confirm that, if an interpreter has been requested in advance of the interview, one is present who is fluent in the language and dialect specified, and that the child and the interpreter understand one another, and
- reassure the child that if they are uncomfortable with, or cannot understand the interpreter, the interview can be stopped.

Confidentiality

- 5.34 Legal representatives and other professionals should be aware that information given to the UK Border Agency is not treated as confidential because the UK Border Agency reserves the right to disclose information to other government departments or agencies, local authorities, international organisations and other bodies to enable them to carry out their functions. However, the information is not disclosed to the government in the country of origin.
- 5.35 Children and young people need to know that the information that they provide in their application may be shared with others. Interviewers and decision-makers should be aware that any indication that a child's application may not be treated as confidential is likely seriously to hinder his or her willingness to provide full details of his or her experiences.
- 5.36 The welfare of a child or young person has to be taken into account when dealing with information that is disclosed. In certain circumstances it may be appropriate to breach confidentiality, for example, if the child discloses that a crime involving serious harm has been committed or is about to be committed or there are child protection issues.

During the interview

- 5.37 In interviews involving children and young people, the duty to ensure full adherence to procedural safeguards rests upon all of the parties involved in the process, including the interviewing officer, the responsible adult, the interpreter and the legal representative. All parties have a responsibility to ensure that the best interests of the child or young person are considered at all times and that the manner in which the interview is conducted does not cause any additional trauma.
- 5.38 There must be sufficient time available for the interview and there should be no disturbances. Interviewers and decision-makers should be aware of, and take into account, for example, distances to be travelled, issues of privacy, the need to provide refreshments and breaks, and the potentially traumatic effects of interviews.
- 5.39 It is the responsibility of the interviewing officer to ensure that the child's wellbeing and comfort are maintained during the interview. Children and young people might not take the initiative to request a break when they need one. Interviewers must look for signs of tiredness or distress and should offer regular breaks during the interview or curtail it if necessary.
- 5.40 The duration of interviews with children and young people should be as short as possible. A suggested time for young children is no longer than 30 minutes and for older children, no longer than one and a half hours. Should a child or young person need to be interviewed for longer than these suggested times, he or she should be provided with a break whenever appropriate and at least every 30 minutes.

Gathering information from children and young people

- 5.41 Children and young people are likely to express themselves best if given freedom to do so in their own way, in their own time. A child or young person should not be criticised if his or her evidence goes beyond the confines of the question to which he or she is responding.
- 5.42 Professionals should not treat any child or young person as typical of a given age. Children and young people in some cultures are taught to listen to adults but not to speak in their presence at all. Other children may have spent time in school or other environments where providing answers to questions is expected and saying 'I don't know' is discouraged.
- 5.43 The ability of a child or young person to provide information during an interview will be dependent upon a number of factors. These include, but are not limited to:
- the age, emotional and psychological development of the child or young person, both at the time of the interview and at the time of the events about which he or she might have information
 - the capacity of the child or young person to recall and understand past events and the time that has elapsed since. This capacity will be affected by the child's age, gender, culture, education and any mental health problems or learning difficulties as well as what they have experienced, including any trauma
 - the extent to which a child or young person has been protected by his or her parents or family and/or may not know all the relevant details
 - the ability of the child or young person to understand that it is now safe to talk about issues and events that he or she could not previously talk about, and
 - the capacity of the child or young person to communicate his or her experiences.

- 5.44 Many children and young people face particular difficulties in discussing their experiences, because of their age and their lack of understanding, especially when they have had experiences that are difficult and/or painful to describe. There are many barriers that may prevent children and young people from talking openly or at all. These include, but are not limited to:
- anxiety about being overwhelmed by emotion in the presence of strangers
 - the effects of trauma
 - shame and guilt at what has happened
 - fear of punishment or retribution for themselves or their families
 - fear of giving the wrong answer
 - thoughts that the interviewer may not believe or understand what has happened to them
 - general issues of trust and mistrust
 - wanting to protect others, particularly family members, and
 - having been told by those who arranged their journey to tell a certain story.
- 5.45 Interviewers should be aware of age differences in communication, particularly non-verbal communication. Interviewers will have to build a rapport with the child or young person to enable him or her to talk about his or her experiences. The interview should be non-confrontational and exploratory. It may be necessary to use a variety of techniques to obtain information from children and young people. These will need to be adapted according to the maturity and understanding of the child. For example, interviewers should:
- spend time establishing a rapport with the child or young person
 - take care to adopt a relaxed, non-threatening posture and tone of voice and to be aware of cultural implications of body language and facial expressions that could indicate displeasure, disbelief, frustration or impatience
 - use simple, non-colloquial language and sentence construction because children and young people do not have the same understanding and vocabulary as adults

- use different types of questioning style to gather information on different issues. Some issues are best addressed by simple, clear, closed questions, others are best addressed by open questions which are indirect
 - evaluate the child's words from a child's point of view to ensure that the questions and the child's answers are clearly understood, for example, a child or young person may describe something as happening 'in the middle of the night' when it may not be very late in the evening
 - be aware that what seems trivial or irrelevant may actually be very important or significant for a child or young person
 - be aware of non-verbal cues, such as a puzzled looks, knitted eyebrows, downcast eyes and long pauses which may signal that the child or young person is confused or distressed
 - rephrase questions if no appropriate response is forthcoming, and
 - avoid making suggestions.
- 5.46 A child or young person may not be able to provide information that is expected of an adult in the same circumstances. For example, a child or young person may be aware of some of the activities of his or her parents but may not be able to describe these in detail or understand their significance or relevance to his or her own status. Children and young people may also have limited knowledge of general conditions in their country of origin. The implications of this for assessing the credibility of the application are outlined in section 6.
- 5.47 Boys and girls are socialised into different roles in different cultures. Interviewers and decision-makers should be aware of the effect of gender in response to being interviewed.
- 5.48 Trauma and stress can be suffered by any individual subject to immigration control, regardless of age, and may have a significant impact on the ability to present information about their application. Some children and young people may appear numb or show emotional passivity when recounting past events of mistreatment.

A child or young person's way of coping with frustration or emotion may be to shut down during the interview, to fall into silence or into a series of 'I don't know' and 'I don't remember' responses. Other children and young people may give matter-of-fact recitations of serious instances of mistreatment. Inappropriate behaviour, for example, laughter, can be a sign of trauma, embarrassment or discomfort.

- 5.49 If there are indications that the child or young person is feeling uncomfortable or embarrassed, the interviewer should offer verbal reassurances. The interviewer may also shift the focus of the questioning to a non-threatening subject until the child or young person regains his or her confidence. Reassurance, empathetic support, carefully framed questions, encouragement, and shifting the topic are important techniques in these situations.

Demeanour

- 5.50 The difficulties associated with interviewing children and young people have implications for the way in which children and young people will behave in the context of an interview. ► See section 6 for discussion of credibility.
- 5.51 Demeanour refers to how a person handles himself or herself physically, for example, maintaining eye contact, shifting in posture, and hesitating in speech. Cross-cultural sensitivity is required of all interviewers and decision-makers irrespective of whether the applicant is a child or an adult. Demeanour should not be used to assess the credibility of the account provided by a child or young person.
- 5.52 Some children can appear uncooperative for reasons having nothing to do with the credibility of their testimony. The credibility of children and young people should not be assessed on the basis of Western cultural values such as the ability to maintain eye contact. In many cultures it is considered highly inappropriate for children to maintain eye contact with adults, particularly those who are in positions of authority. In addition some children and young people may have had experiences that give them good reason to distrust persons in authority.

Ending the interview

- 5.53 At the end of the interview, the interviewer should confirm that the child or young person has understood all the questions and should give the responsible adult and legal representative an opportunity to add any comment relating to the substance of the application and the conduct of the interview. Whether or not the interview has been tape-recorded, a copy of the written instructions should be requested. The child or young person, their responsible adult and legal representative should read the interview record in full and check that there are no inaccuracies resulting, for example, from poor or inaccurate translation or the interviewer's misunderstanding what was said. Any inaccuracies or misunderstandings should be reported to the UK Border Agency.
- 5.54 A decision on the application should be deferred until all the information relevant to the application, for example, medical reports or additional representations, has been submitted.
- 5.55 Children and young people should be informed in an age-appropriate way about the next steps in the procedure. This includes advising them of where they stand in the process and what decisions have been taken. As uncertainty can lead to unnecessary anxiety and worry, keeping a child or young person accurately informed is important to assist him or her to understand the consequences of the process and form realistic expectations.
- 5.56 The information obtained during an immigration interview should be accurately recorded. When information is requested, received, forwarded and stored, care should be exercised to ensure that it is not disclosed to any unauthorised parties. This is important in order to protect both the child or young person and members of his or her family.

SECTION 6

Evidence and supporting information

6

- 6.1 Evidence and supporting information regarding the experiences of children and young people subject to immigration control is often different from and/or less available than that which is available for adults. These differences should be taken into account when assessing the credibility of a child or young person's application.

Credibility

- 6.2 When making a decision about the credibility of a child or young person's case, a range of factors should be taken into account. These include, but are not limited to:
- the age, maturity and stage of development of a child or young person
 - the gender, educational and social background of a child or young person
 - the possibility that children and young people may manifest their fears differently from adults
 - the likelihood that children and young people will have limited knowledge of social, political and economic conditions in the country of origin, or of its geography
 - the possibility that children and young people may not have birth certificates or other documents, celebrate their birthdays or know their exact age
 - child-specific forms of human rights violations, such as recruitment of children and young people into armies, trafficking for prostitution and forced labour, forced marriage and female genital cutting, and
 - the situation of the child's family in the country of origin and, where known, the wishes of parents who have sent a child or young person out of the country.

- 6.3 Although the burden of proof is on the applicant, 'benefit of the doubt' should be given where there are doubts regarding the credibility of the child's story.¹
- 6.4 In asylum cases and human rights cases, it is neither possible nor necessary to 'prove' every aspect of a claim.² A child or young person, like an adult, is not required to provide corroborating evidence in all cases, and may rely solely on testimony. Testimonial evidence should be assessed in the context of the child and of a child or young person's understanding of what has happened.
- 6.5 The level of detail and internal consistency expected of a child or young person should be appropriate to his or her age, maturity, gender, education and knowledge, and any mental health problems or learning difficulties. Children and young people in many societies do not have specific information about the activities of family or community members.
- 6.6 Trauma may have implications for the ability of a child or young person to provide information or a chronological account of what has happened. A lack of coherence is consistent with having experienced traumatic events. Gaps or inconsistencies in a child or young person's knowledge should not necessarily undermine the credibility of his or her account.

Identity documents

- 6.7 Some children and young people have identity documents to prove who they are, others do not. There are different reasons for the lack of documentation: births are not registered in many countries and when they are, contemporaneous birth certificates may not be issued; birth certificates may not be issued unless both parents are present to register the birth; a parent's signature may be required to obtain a passport; and passports may not be issued unless the child or young person is over a certain age or travelling with his or her family. This issue is discussed further in section 9 of these guidelines.

¹ This is consistent with paragraph 219 UNHCR (1992) which states that '... the examiner, in co-operation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt.'

² Paragraph 203 UNHCR (1992).

- 6.8 Some children and young people travelling to the UK will not have documents because the situation from which they have come makes it impossible to obtain documents or retain them if they were in possession of them in the first place. Separated children and young people frequently travel with agents who instruct them to destroy documents on or before arrival in the UK or to hand the documents back to them. The production of identity documents that are fake or do not belong to the child or young person should not necessarily prejudice credibility as these are likely to have been given to the child or young person by the person arranging their journey to the UK. Children and young people should not be prosecuted for failing to produce identity documents. ► See also section 4.
- 6.9 When children and young people are able to provide identity documents, social services departments and legal representatives must ensure that these are copied and, where necessary, a certified translation produced, before being sent to any authorities. Full records should be kept including the date the document was sent, to whom it was sent and proof of postage and delivery.

Evidence provided by children and young people

- 6.10 Interviewing children and young people poses a variety of problems and raises concerns which are discussed in detail in section 5 of these guidelines. Vagueness and inconsistencies are likely to occur when a child or young person is interviewed. Decision-makers should bear in mind the possible developmental, health, educational or cultural reasons for this, and not assume that it is an indicator of unreliability. Further enquiries should not be excluded if it is thought that the child or young person has given a fabricated, embellished or exaggerated account.
- 6.11 There are a number of reasons why children and young people may not tell the truth or may give confused information. Some children and young people may have been coached by adults to give a particular account at the interview, which the child repeats in order not to anger, or to protect the adult. Children and young people may have been told what to say on arrival by family members for a variety of reasons. Parents or carers sometimes tell their children that they are being sent away to get a better education or to visit

a family member to allay their children's fears and protect them from the real, often very disturbing, reasons. Parents or carers may also do this to try to prevent children worrying about what is happening to those who are left behind. Children may have been told by an agent what to say and do when they arrive. The agent may threaten them, or their family back home, if they divulge the details of their journey or other information.

- 6.12 Children and young people are often scared and confused about what will happen to them. They may be frightened of people in uniform and positions of authority and not know whether or not to trust them. Children and young people may also seek to please adults, especially those in authority, and, out of fear of 'getting it wrong,' may tell the interviewer what they think the interviewer wants to hear.
- 6.13 Children and young people may be less aware than adults of the circumstances and decisions that led to their current situation. Some children and young people will have only the vaguest idea of why they have been sent to the UK. A child's knowledge of issues that may be relevant to his or her case may be limited due to age, gender, cultural background, or other circumstances. For example, a child or young person may have experienced persecution or threats of persecution because of the activities of other family members without knowing the details.
- 6.14 It may be particularly difficult to obtain information from separated children about the events that caused them to leave. Due to the trauma caused by separation from family members, a child or young person may create a narrative of what happened that is easier for him or her to live with than the reality. In addition a child or young person who has no contact with family members may not have any documentary evidence about the circumstances of his or her departure.

Expert evidence

- 6.15 Because of the difficulties in obtaining information directly from a child or young person through interview, decision-makers will need to consider other evidence where available. This can relate specifically to the experiences and background of the child or young person and may include, but is not limited to:
- evidence provided by the child or young person through a written statement obtained by a legal representative or other professional
 - evidence from family members or the child's guardian or another responsible adult
 - evidence from members of the child's community
 - evidence from medical personnel, teachers, social workers, community workers, child and educational psychologists, and others who have dealt with the child or young person, and
 - evidence from country information experts.
- 6.16 The child or young person's legal representative should assist the decision-maker by providing expert evidence about the experiences and background of the child or young person where appropriate. An assessment of whether or not expert evidence is required should be made, taking into account the child's background and the circumstances of his or her application and whether the application is for permanent or temporary residence. For example, if the application is for the child to remain in the UK for educational purposes, evidence may be required concerning the child's schooling and achievements to comply with the Immigration Rules.
- 6.17 If the application is to remain on the grounds of Article 8 of the European Convention on Human Rights, then evidence should be provided about the relationship between the child or young person and his or her family members or carers or other ties in the UK. This information should be provided at the earliest opportunity. ► See section 9 for further guidance on best practice regarding medical evidence in age dispute cases.

- 6.18 In cases involving children and young people, including where they are with their families, it may be necessary during the course of the application to obtain expert evidence as to the consequences for the children of their own return or that of a parent or carer. When a final decision has been received, any expert evidence should be reviewed and consideration given to obtaining updated reports particularly regarding the consequences of return to the child or young person. This is discussed further in section 13.
- 6.19 If an interviewer or decision-maker receives medical, psychological, professional or other related expert evidence at any stage, it should be considered with care and assessed impartially.
- 6.20 There is frequently no physical evidence in cases involving rape or sexual violence. In addition, interviewers and decision-makers should be aware that torturers and abusers often choose methods precisely because they do not leave physical marks.
- 6.21 DNA evidence is not necessary to prove that a child is a 'child of the family', which is not necessarily a biological relationship. If DNA evidence is sought to establish a relationship, extreme care should be taken if it reveals that the child or young person is not related as claimed as that revelation may have very serious consequences for both the child or young person and his or her parent. The child or the parent may not know that they are not related. The evidence may also cause the UK Border Agency to doubt credibility. In such circumstances, it is important to take instructions and address the evidence.

Country of origin information

- 6.22 Decision-makers will need to consider evidence specifically about the circumstances for children and young people in the country of origin. Information relevant to the experiences of children and young people may relate to different issues from those associated with adults.
- 6.23 Detailed research on conditions in the country from which the child or young person has originated, and the legal, social, political and cultural issues affecting children and young people, should be undertaken at the outset of the decision-making process and before an interview is conducted. Country of origin information should also include information about education, health and social services in the countries from which children and young people originate.
- 6.24 Most children and young people assume that the adults with whom they come into contact have an understanding of their country and culture and they may therefore not consider it necessary to explain the conditions or circumstances in the country from which they originate. In most cases, however, a child will not be able to provide an adequate assessment of the educational, health and social services facilities in their country and how they would access these on return. Decision-makers should therefore not rely upon a child or young person for this information.

SECTION 7

Interpreting the child's experiences

- 7.1 A child or young person may have grounds for seeking entry to or wanting to stay in the UK or for protection in his or her own right and is entitled to an individual determination of his or her application. This is not only true for separated children and young people, but also for those children who, although with their families, may wish to make an application in their own right.
- 7.2 A proper interpretation of the experiences of a child or young person subject to immigration control is central to ensuring that his or her best interests are met. This interpretation must take into account the full range of circumstances affecting the child or young person and the full range of legal instruments that are available including the immigration laws, the Immigration Rules and policies, the European Convention on Human Rights, the UN Convention on the Rights of the Child and the Refugee Convention.¹
- 7.3 Article 12 of the Convention on the Rights of the Child provides for the fundamental principle of the right of the child to have their voice heard in relation to decisions that affect them. ►See also section 3. Children and young people in the UK who have been separated from their parents or carers are at particular risk and have to be given the opportunity to express their views at all stages of the immigration and asylum process. Meetings and interviews between professionals and children should be conducted in a way that allows a child or young person to speak freely and express his or her views. Sections 5 and 6 provide further guidance on making contact with and interviewing children and young people.

¹ ►See section 1 and figure 1 for the range of human rights instruments that should be considered when interpreting the experiences of children and young people. As the European Convention on Human Rights and the Refugee Convention have direct effect in courts in the UK, they will be the starting point in most cases.

- 7.4 Decision-makers and other professionals dealing with children and young people should keep in mind section 55 of the Borders, Citizenship and Immigration Act 2009 which places a statutory duty on the Secretary of State and other public bodies to make arrangements to ensure that their duties are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. Further guidance on, and definitions of, the best interests of children are provided in section 3 of these guidelines.
- 7.5 Without keeping these principles in mind and ensuring the views, wishes and voice of the child or young person are heard fully, it will not be possible to properly interpret the child's experiences.
- 7.6 It is in the best interests of children and young people that a decision is made regarding their immigration status as soon as is possible. Keeping children in limbo regarding their status, and hence their security and their future, is not in their best interests.
- 7.7 Although these principles apply to all children and young people subject to immigration control and to those making applications under the Immigration Rules, this section deals largely with best practice in working with children and young people seeking asylum. This is because the interpretation of children's experiences under the Refugee Convention is an area of considerable uncertainty where there is considerable scope to interpret children's experiences in ways that do not take into account children's best interests. The guidance provided in this section analyses asylum claims made by children and young people in relation to the essential elements of the refugee definition in Article 1(A) of the Refugee Convention.²

² According to Article 1(A) of the 1951 UN Convention Relating to the Status of Refugees, the term 'refugee' shall apply to any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his [or her] country of origin and is unable, or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country; or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.'

Framework for refugee status determination

- 7.8 To be recognised as a refugee, a child or young person must establish that he or she is a refugee within the meaning of the Refugee Convention. It must be established that the child or young person has a well-founded fear of persecution or serious harm, will not or cannot be protected by the authorities of the country from which he or she originates and is at risk for a Convention reason.
- 7.9 Within the framework for refugee status determination, persecution takes the form of acts sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or an accumulation of various measures including violations of human rights which is sufficiently severe as to affect people in the same way.³
- 7.10 The concept of persecution within the Refugee Convention raises two questions:
- *Is there a violation of human rights that amounts to 'serious harm'?*
 - *Is the State unable or unwilling to offer effective protection?*
- 7.11 In examining the factual elements of the claim made by a child or young person, particular attention should always be given to the ways in which the child or young person's age and status have affected his or her experiences of persecution.
- 7.12 The 'best interests of the child' principle does not replace or change the refugee definition in determining substantive eligibility but should be taken into account when deciding if a child or young person meets the definition of a refugee. ► See section 3 for further guidance on the best interests principle.
- 7.13 Particular procedural and evidential issues may also arise in the asylum claims of children and young people.

³ Paraphrasing Article 9 of Directive 2004/83/EC, the Qualification Directive.

Well-founded fear of persecution

- 7.14 A person of any age may qualify for recognition as a refugee under the Refugee Convention. An asylum application made by a child or young person should not be refused solely because the child or young person is too young to understand his or her situation or to be able to articulate a well-founded fear of persecution.
- 7.15 A child or young person's fear of persecution may not be the same as that of an adult. The child's maturity should be taken into account when considering that fear. For example, a child or young person may not realise the extent to which he or she is at risk because he or she is not sufficiently aware of the overall situation in the country of origin or the circumstances affecting family or community members.
- 7.16 Where the child or young person has not reached a sufficient degree of maturity to make it possible to establish a subjective fear in the same way as for an adult, it is necessary to examine in more detail objective factors, such as the characteristics of the group to which the child belongs, the situation prevailing in the country of origin, and the circumstances of family members, inside or outside the country.
- 7.17 Country of origin information does not generally address in detail the situation of children and young people, making additional research and/or expert evidence necessary to establish whether the fear is well-founded. ► See section 6 for additional guidance on evidence and supporting information.

'Serious harm'

- 7.18 It is important to consider child-specific forms of human rights violations when interpreting the experiences of children and young people.⁴ For example, there is considerable evidence of even very young children being recruited into the armed forces and militia, of girls experiencing female genital cutting, and of children being forced into prostitution or child labour. These violations of human rights amount to 'serious harm.'

⁴ Directive 2004/83/EC, the Qualification directive sets out in Article 9(2)(f) that persecution can take the form of acts of a child-specific nature.

- 7.19 The gender of the child or young person may also have particular consequences. For example, in some countries young girls may be expected to undergo female genital cutting or forced marriage, whilst in others young boys may be more likely to be forcibly conscripted.
- 7.20 Policies and practices which constitute violations of the specific rights of the child may lead to situations that fall within the scope of the Refugee Convention. In addition, violations of human rights may be subjectively worse when experienced by children and young people than when experienced by adults. For example, the forced conscription of children into military service is very likely to constitute serious harm in circumstances where it may not for an adult. Similarly, the treatment experienced by a child or young person could constitute a violation of Article 3 (prohibition on torture, inhuman or degrading treatment) of the European Convention on Human Rights where it would not for an adult.
- 7.21 ‘Serious harm’ may be inflicted in the mistaken belief that a child or young person is helped, for example, by female genital cutting, exorcism or the use of psychiatric treatments to ‘treat’ homosexuality.
- 7.22 Children and young people who have escaped from their traffickers may be at risk of being re-trafficked if returned to their country of origin or of being subject to other punishments from their traffickers. The harm that they may consequently suffer may amount to persecution if there is not sufficient State protection and they may qualify for recognition as a refugee or other forms of long-term protection in the UK. ► See section 12 for further discussion of this issue.

Failure of State protection

- 7.23 In addition to establishing a well-founded fear of ‘serious harm’, a child or young person must also show that the State has failed to protect him or her to be recognised as a Convention refugee.

‘Persecution’ = serious harm + the failure of State protection

- 7.24 A failure of State protection exists in the following situations:
- if 'serious harm' is or will be inflicted by the authorities or by associated organisations or groups
or
 - if 'serious harm' is or will be inflicted by others and the authorities are *unwilling* to give effective protection
or
 - if 'serious harm' is or will be committed by others, and the authorities are *unable* to give effective protection.
- 7.25 Although international law recognises the importance of the family in a child's development and upbringing, it also places a primary obligation on the State to protect children from all forms of abuse, neglect and exploitation, even where these are not carried out directly by State agents. This is intended to ensure that children and young people are protected from abuses committed within the family or the community, including domestic violence and child abuse.
- 7.26 The asylum claims of children and young people often involve forms of harm that have not traditionally been associated with government actors. Bonded child labour or child prostitution, for instance, are usually perpetrated by non-State agents, and governments fail in their responsibility to protect children and young people from such abuses.
- 7.27 Where a child alleges that he or she has been persecuted by a non-State agent, it will be necessary to demonstrate that the State concerned is unwilling or unable to provide effective protection through its legal and judicial system. The effectiveness of the system of protection can be judged by its ability to deter or prevent the persecution feared.
- 7.28 State protection must be meaningful, accessible, effective and available to a child or young person regardless of his or her race, ethnicity, gender, sexual orientation, disability, religion, class, age, occupation or any other aspect of his or her identity. In some cases there may be protection in theory, but actual practice must be examined. Corroborative evidence will not always be available.

- 7.29 That a child or young person did not specifically seek protection in his or her country of habitual residence does not necessarily undermine his or her case, but instead the decision-maker must explore what, if any, means the child or young person had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that the decision-maker will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to government efforts to address criminal activities relating to children and young people.
- 7.30 When assessing whether internal relocation is reasonable, decision-makers must consider the best interests of the child or young person. What is considered reasonable for an adult may not be so for a child or young person.
- 7.31 A claim should not be rejected simply because a child or young person comes from a situation where the State is unable, as opposed to unwilling, to provide protection.

Convention grounds

- 7.32 To decide whether a child or young person is in need of protection under the Refugee Convention, it will be necessary to determine whether the persecution or fear of persecution is 'for reason of' one of the enumerated grounds.
- 7.33 Although age is not specifically enumerated as one of the grounds for establishing status within the Refugee Convention, decision-makers should allow age to inform their assessment. Age is an immutable characteristic that the individual cannot change. Where country information shows there is persecution of, or discrimination against children and young people, then age can be the basis for the identification of a particular social group. In addition decision-makers should allow age to inform their assessment under race, religion, nationality, and political opinion.

- 7.34 Establishing the actual or exact reason for persecution or feared persecution may be impossible in many cases. Establishing the reasons for the persecution feared by a child or young person may be particularly difficult because he or she may express fear or have experienced harm without understanding the persecutor's intent. It is not necessary for any individual to identify the precise reason for his or her persecution. He or she may not know or understand the reason. The relationship between the persecution feared and the Convention ground can be established from objective evidence and/or the testimony of adults. ►See section 6 for further guidance on this.
- 7.35 Decision-makers do not have to explore the purpose or intentions of those who have committed or may commit acts of persecution.
- 7.36 The level of children and young persons' political activity varies widely. A child or young person's claim of persecution based on political opinion should not be rejected on the basis of age alone. It should not be assumed that age alone prevents a child or young person from holding political opinions for which he or she may be persecuted. Equally some of the actions or activities of children and young people may not appear political but may be inherently so in the context from which a child or young person originates.
- 7.37 It may be possible for a child or young person's claim to be based on imputed political opinion. The decision-maker should carefully review the family, political and other history of the child or young person to determine whether he or she may face persecution based on the beliefs of family members or some other group with which he or she is identified: targeting of a parent through his or her children is widespread. Where a political opinion is imputed, children and young people should not be expected to demonstrate a knowledge or understanding of that opinion to qualify for recognition as refugees.
- 7.38 Children and young people may face persecution as members of particular social groups who are vulnerable, for example, to trafficking for prostitution or domestic slavery, female genital cutting or recruitment as child soldiers. In these circumstances the form of the persecution is not part of the definition of the particular social group. The persecution arises from the socially constructed situation in which a child is placed, i.e. the social group, within a particular country or society.

- 7.39 The circumstances of a child or young person's family or community may be central to understanding the experiences of a child or young person who has claimed asylum. A child or young person may fear, or have been affected by, discriminatory or persecutory measures affecting the entire family or community.
- 7.40 The final decision should be based on a case-by-case examination of the unique combination of factors presented by each child or young person, including the child's personal, family and cultural background. It is important that all those involved in the asylum determination process have an understanding of the history, culture and background of the child or young person.
- 7.41 When a decision has been made about a claim for recognition as a refugee, the child or young person should be notified of the decision, along with his or her legal representative and the responsible adult.
- 7.42 Where a child or young person makes an asylum or human rights application or an application outside the rules, and a decision to grant leave is made, legal representatives should make the case for this to be leave for an indefinite period.
- 7.43 Significant unfairness can result when a child becomes an adult during the asylum determination process, particularly where this occurs as a result of delays. Steps should be taken to eliminate unnecessary delays which result in a child becoming more mature during the process. Where a young person becomes an adult during the decision-making process, he or she should continue to be treated in accordance with these guidelines. ► See section 10 for further discussion of best practice where the young person turns 18.

Humanitarian protection

- 7.44 Rule 339C of the Immigration Rules provides for the grant of humanitarian protection which is assessed by reference to various kinds of serious harm, including those which correspond directly to violations of particular rights under the European Convention on Human Rights. Humanitarian protection is granted where:
- substantial grounds have been shown for considering that a person, if returned to the country of origin, would face a real risk of suffering serious harm
 - the person is unable, or, owing to such risk, unwilling to avail him or herself of the protection of that country
 - the person is not excluded from a grant of humanitarian protection.
- 7.45 Serious harm is described as encompassing the death penalty or execution; unlawful killing; torture or inhuman or degrading treatment or punishment of a person in the country of return; or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.⁵
- 7.46 Claims for humanitarian protection are determined in the same process as asylum claims, but attention should be given first to whether the child or young person should be recognised as a refugee.

⁵ Humanitarian protection is the UK's expression of what is known as 'subsidiary protection' in *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*.

Other applications under the rules

- 7.47 There are a number of paragraphs of the Immigration Rules under which children, or some older children, can make applications in their own right, such as the categories of child visitor⁶ or child student⁷ or applications to join a parent present and settled in the UK. Children may also be the dependants of adults making applications.

Applications outside the immigration rules on human rights and compassionate grounds

- 7.48 A child or young person who is not recognised as a refugee, granted humanitarian protection or given leave under the immigration rules, may be allowed to remain in the UK for a number of reasons. He or she may be given discretionary leave to remain because it is not safe to return to the country of origin due, for example, to risks of grave breaches of human rights other than those protected by grants of humanitarian protection, to armed conflict, or because no suitable carer can be identified, or because he or she is still a child and arrangements cannot be made for his/her safety and welfare on return. ► See also section 13. Human rights considerations may result from an examination of the situation in the country to which the child or young person would be sent, or from an examination of the effect of forcing them to leave their life in the UK.
- 7.49 If a child or young person is not found to need protection under the European Convention on Human Rights or the Refugee Convention, he or she may still need to be granted leave to remain outside the rules where this is in his or her best interests. The views and wishes of the child should be taken into account as discussed in section 3 of these guidelines.

⁶ HC 395, paragraph 46A.

⁷ HC 395, paragraph 245ZZ ff.

Free movement rights under European law

- 7.50 Citizens of the European Union and their family members enjoy rights under the Treaty on European Union and Directive 2004/38/EC⁸ which sets out rights of free movement for citizens of member States of the European Union and their family members. Descendants up to age 21 of persons with free movement rights are protected by the Directive, including in circumstances where the person from whom their rights derive has left them, or left the UK.⁹

⁸ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States

⁹ See for example, the judgments of the Court of Justice of the European Union (formerly the European Court of Justice) in case C-480/08 *Maria Teixeira v London Borough of Lambeth v SSHD* and case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and SSHD*.

SECTION 8

Hearings and court appearances

- 8.1 In October 2008 The Senior President of Tribunals, Lord Justice Carnwath, issued the Practice Direction *First Tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses*. Subsequently the Presidents of the Immigration and Asylum Chambers published *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*.
- 8.2 Section 55 of the Borders, Immigration and Asylum Act 2009 places a duty on the Secretary of State and the UK Border Agency to discharge all immigration functions by having regard to the need to safeguard and promote the welfare of children in the UK. This duty extends to presenting officers representing the UK Border Agency in courts and tribunals.
- 8.3 The section 55 duty stands in addition to the duty under the Convention on the Rights of the Child which requires the UK to protect the best interests of children. While these are two distinct sets of duties, they should not be viewed in isolation from each other and must be considered jointly and separately in all decision-making and procedures involving children. The best interests of children and young people are discussed in section 3 of these guidelines.
- 8.4 Where a child or young person is attending a hearing or court appearance, all parties – including judges, tribunal judges, presenting officers, legal representatives, interpreters and responsible adults – should be alive to the fact that the best interests of children are relevant to all decisions and decision-making directly or indirectly affecting a child or young person. They should ensure that their role in any proceedings safeguards children’s best interests irrespective of whether they are under a statutory duty to do so.

- 8.5 The principle of best interests means that there is a need for careful case management when dealing with hearings and court appearances by children and young people who are subject to immigration control in the UK because of their potential vulnerability.
- 8.6 Some children and young people will want to participate and should be facilitated to do so. This is further supported by the Convention on the Rights of the Child which places a duty (in Article 12) on the UK to give due weight to the views of the child and the right of the child to be heard in any judicial or administrative proceedings in all matters affecting the child, either directly or through a representative, in accordance with their age or maturity. ► See also section 3.
- 8.7 A hearing or court appearance is likely to be stressful, intimidating and sometimes distressing for a child or young person.¹ No amount of ‘child-friendly’ procedures can change this, although the presence of a responsible adult can help alleviate some of these problems. ► See section 2 for an outline of the definition, role and responsibilities of the responsible adult.
- 8.8 A child or young person should always be accompanied at any hearing or court appearance by a parent or responsible adult. If a local authority has accommodated the child or young person, he or she should be escorted to the hearing centre by a social worker.
- 8.9 A child or young person should be legally represented free of charge in all immigration cases as in all other areas of child law.
- 8.10 Whenever a child or young person has to go to court or to a tribunal, the legal representative should attend. For preliminary hearings both the legal representative and the Home Office representative should attend. It may not be necessary for the child or young person to attend. If a child or young person is not represented, the case should be adjourned for legal representation to be arranged.

¹ See *Re W (Children)* [2010] UKSC 12 at paragraph 26, where Lady Hale identifies that the risk of harm to a child in giving oral evidence is an ‘ever present feature’ that the court should take into account without needing expert evidence to do so.

Before the hearing

- 8.11 Cases involving separated children and young people should be given priority listing at appeal hearing centres and heard first. The public should always be excluded from a hearing in which a child might give evidence and an order for anonymity should always be sought to ensure that judgments and determinations are anonymous. It is undesirable that a hearing involving a child or young person be adjourned part-heard.
- 8.12 If expert opinion indicates that the child or young person should not be asked to give evidence (either because the evidence would be unreliable or because the child would be too traumatised by the hearing) then consideration should be given to calling the expert instead of the child, or establishing a video link with the child being questioned outside the court or hearing room. ►See section 6 for additional guidance on the use of expert evidence and on the assessment of children's evidence.
- 8.13 The court or tribunal and legal representative should give consideration as to whether a same-sex court or tribunal would enable a child or young person to give evidence more easily.
- 8.14 Directions should be given that both parties provide a joint statement of the issues between them, together with skeleton arguments, before the hearing date.
- 8.15 The child or young person's legal representative should ensure that an independent interpreter attends the hearing to enable communication with his or her client.
- 8.16 The child or young person's legal representative or responsible adult should ensure that the child is shown the hearing room and familiarised with the layout and who sits where before the hearing begins.
- 8.17 The immigration judge should make sure that the child or young person is aware of the role of other participants, including tribunal staff, and should explain how the hearing will proceed in a language and manner that he or she can understand.

The immigration judge should make the child or young person aware that he or she should tell the tribunal, through the official interpreter, if he or she does not understand what is said, or what is happening in the proceedings.

During the hearing

- 8.18 It is important that best practice for working with children and young people subject to immigration control is complied with in all processes for information-gathering and decision-making prior to the hearing. Consideration should be given to adjourning proceedings if the guidance provided in sections 1 to 7 and sections 9, 11 and 12 of these guidelines has not been followed.
- 8.19 Cases involving children and young people should be held in private.
- 8.20 A child-friendly hearing room should always be used and should be as informal as possible. The bench should not be used and the parties should sit around a table so that all the participants are at the same (or similar) level. Hearings involving children and young people should exclude the public (be *in camera*) and the number of people required to be in the room should be kept to a minimum.
- 8.21 Throughout the hearing the immigration judge should be alert to child protection and welfare and be sensitive to the possibility that a separated child or young person may have been trafficked into the UK. ►See section 12 for further information and best practice for working with children and young people who have been trafficked.
- 8.22 If the child or young person does give evidence, he or she should not be required to give it under oath. A sensitive enquiry as to whether the child appreciates the concept of truthfulness may be appropriate.
- 8.23 All questions should be formulated in such a manner that the child or young person will understand and be able to answer them. Children and young people should be invited to concentrate on the questions asked and to do their best to answer, with the proviso that, if they do not know the answer, they should simply say so.

- 8.24 Cross-examination should never be aggressive. A style of questioning that might be acceptable to an adult might well be threatening to a child or young person. Anyone cross-examining a child or young person should be made aware of the obligations on interviewing officers when interviewing children and young people, ►see section 5, and should apply the same standards. Plenty of time should be allowed for answers. The child or young person should be offered an opportunity to add anything else at the end of his or her evidence.
- 8.25 Account should be taken of a child or young person's difficulty in concentrating for long periods. Frequent and regular breaks are necessary. Every effort should be made to keep the hearing strictly to the matters in issue and as short as possible.
- 8.26 When assessing the evidence and deciding what weight should be placed on it, the immigration judge should take into account the child's age, his or her maturity and capacity to give evidence, any relevant expert evidence about the child or young person and the circumstances from which he or she has come, and relevant cultural differences.
- 8.27 The evidence provided by children and young people during hearings and court appearances should always be approached with caution. Depending on his or her age, a child or young person is less likely than an adult to know or recall dates, the order in which events occurred, or why those events occurred. Children and young people may also struggle to understand the significance of certain events, and so fail to mention them when first interviewed. If such details emerge under further questioning at the hearing, the credibility of the child's account should not be undermined.

After the hearing

- 8.28 Any appeal by a child or young person should be determined as expeditiously as possible. Those representing the child or young person should ensure that he or she is aware of any further steps that will need to be taken to resolve his or her immigration status.

SECTION 9

Disputes over the age of the child

- 9.1 A significant number of children and young people who arrive in the UK are the subjects of age disputes. These have implications for a child's immigration status (including the process by which an application for asylum is assessed), for his or her welfare and for questions of identity.¹
- 9.2 Children or young people who arrive in the UK either without documentation which establishes their age (for example a valid passport), or with documentation that is not considered genuine by the UK Border Agency, and who are therefore unable to establish their age, are likely to have their age assessed to establish how their immigration application should be examined and who has responsibility for providing accommodation and support.
- 9.3 If a child or young person is incorrectly identified as an adult, he or she will not be entitled to the full protection of international law or procedures for child protection and the principle of best interests will be undermined. A child also experiences as demeaning and distressing to have such a fundamental aspect of his or her identity disbelieved and this disbelief can undermine trust in determination procedures and those working in them.

¹ See ILPA, Crawley, H (2007).

Difficulties in assessing age

- 9.4 It can prove difficult to ascertain the age of some children and young people because they may arrive with false identity documents or no documents at all.
- 9.5 Children and young people subject to immigration control come from cultures and contexts in which childhood is defined in ways that are different than in the UK and which reflect the social, economic and political situation in these societies. For example, in many countries births are not registered. More than 50 million children born in 2006 did not have their birth registered.² The largest number of unregistered births occurs in South Asia: nearly 23 million. Sub-Saharan Africa has the highest proportion of children under five whose births are not registered: two out of three. Many children are simply unable to produce documentary evidence of their age.
- 9.6 Children and young people may not know their date of birth and may be vague about when they were born. This does not necessarily mean that they are trying to misrepresent or conceal their age.
- 9.7 There may be confusion over the stated age of a child or young person because different calendars are used in some countries, as in Iran and Ethiopia for example. Converting from one calendar to another can be difficult. Mistakes are sometimes made and children or their interpreters may give an incorrect date of birth.
- 9.8 Children and young people may look and act older than they are because of their experience in their country of origin. Reasons for this include, but are not limited to, that children and young people have worked and taken on 'adult' responsibilities from an early age, have spent considerable time outside or at an altitude exposed to the weather, have faced serious hardships from an early age. Reasons can also include the experiences and traumas associated with migration, and differences in ethnic norms. For example, boys in some parts of the world, notably the Indian sub-continent, grow facial hair earlier than most boys in Europe.

² UNICEF (2007).

- 9.9 It is also the case that a child or young person may fabricate, embellish or exaggerate his or her account, including by providing false information about his or her age, for reasons that are unconnected to the basis of the application.
- 9.10 Some children and young people may claim to be adults when they are not because they have been told to do so by an agent or because they have been trafficked. If this is the case then the individual concerned should be treated as a child and referred to the appropriate authority. A decision will also need to be taken about whether it is in the child's best interest for a referral to be made to the National Referral Mechanism (NRM). ►See section 12 for information about best practice in working with children and young people who have been trafficked.
- 9.11 Where a child or young person claims to be a different age from that stated on a travel or other identity document that suggests he or she is an adult, other evidence must be taken into account. Obtaining a false passport or travel documentation may have been the only way to leave the country of origin. ►See also section 6 for best practice guidance on evidence and supporting information.
- 9.12 Considerable caution should be exercised in disputing the age of a child or young person because of the significant immigration and welfare implications arising from this decision. According to UK Border Agency policy, applicants must be afforded the benefit of the doubt and should be treated as children unless their physical appearance or demeanour *very strongly* suggests they are *significantly* over 18 years of age.
- 9.13 European legislation also requires that where it is suspected that an individual has been trafficked and there are reasons to believe that he or she is a child, he or she should be accorded special protection measures pending verification of his or her age, and should receive immediate access to assistance, support and protection. ►See also section 12.³

³ See Article 10.3 of the European Convention on Action against Trafficking in Human Beings 2005 and paragraph 13.2 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (replacing Council Framework Decision 2002/629/JHA).

- 9.14 Applicants whose stated age is disputed should not be exposed to risks which might compromise their safety or welfare whilst an age assessment is being undertaken. In cases of doubt, a person who says he or she is less than 18 years of age should be treated as a child. He or she must not be accommodated with adults or detained whilst the process of age assessment is undertaken and his or her claim should not be considered under fast track procedures. He or she should be provided with a responsible adult and a legal representative for any immigration interviews.
- 9.15 If a decision-maker forms the provisional view that the applicant is lying about his or her age, the law requires that the applicant should be given an opportunity to address the matters that have led to that view and have an opportunity to explain him or herself.

The context of age assessment

- 9.16 Age assessment refers to the procedures by which authorities seek to establish the chronological age of an individual. Any process of age assessment should be based on and informed by the Convention on the Rights of the Child, the UN Committee on the Rights of the Child (specifically *General Comment no. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin* (2005)) and the UNHCR's *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997).
- 9.17 The best interests of the child should be a primary consideration in procedures for age assessment. ► See also section 3. Age assessment should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age.
- 9.18 Age disputes often arise in the context of detention and removal where an age-disputed individual has been incorrectly detained pending the outcome of an age assessment, the legal representative should make a request for release to the Chief Immigration Officer, tribunal or court. ► See also section 11. In the event of a child or young person being detained there will need to be a high level of coordination between immigration and welfare representatives about the age dispute.

- 9.19 A local authority must make its own decision regarding the age of a child or young person to determine whether the child is a child in need under the Children Act 1989. It is unlawful for a local authority to conclude that a child or young person is an adult simply because the UK Border Agency has done so.⁴ This includes in a situation where a child or young person has been detained. ► See also section 11.

Procedures for assessing age

- 9.20 There is considerable variation in the process of age assessment both in the UK and across Europe.⁵ The Separated Children in Europe Programme has produced guidance on best practice for assessing age in children and young people subject to immigration control. ► See annex 2 for these guidelines.
- 9.21 In borderline cases, it is UK Border Agency's policy to give the applicant the benefit of the doubt and treat him or her as a child.
- 9.22 There is no statutory guidance in the UK on how to conduct an age assessment, and instead a body of case law has developed which gives guidance on the process required. An age assessment in line with this guidance is often described as 'Merton compliant' after one of the early leading cases in this subject.⁶ However, the expression increasingly means 'lawful', with what is lawful derived from a number of judgments.⁷

⁴ *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin), paragraph 39.

⁵ See ILPA, Crawley, H (2007) Welsh Refugee Council (2011), UNICEF, Smith, T and Brownlees, L (2011) and Separated Children in Europe Programme (2011). The Council of Europe Commissioner for Human Rights, Thomas Hammarberg, has commented that 'methods for assessing the age of migrant children must be improved,' see Council of Europe Commissioner for Human Rights (2011).

⁶ *R (B) v Merton* [2003] EWHC 1689 (Admin) 4 All ER 280.

⁷ See, for example, *R (FZ) v LB of Croydon* [2011] EWCA Civ 59, *R (AS) v LB Croydon* [2011] EWHC 2091 (Admin), *R (A) v Croydon*, *R (M) v Lambeth* [2009] UKSC 8, *R (A & WK)* [2009] EWHC 939 (Admin), *R (F) v Southwark LBC* [2009] EWHC 3542 (Admin).

- 9.23 All available sources of relevant information and evidence should be considered, since no single assessment technique, or combination of techniques, is likely to determine the applicant's age with precision.⁸
- 9.24 Age assessment is impossible to do with any certainty, particularly for children and young people who are aged between 15 and 18 years, and no single approach can be relied upon. Age assessment is a process, not a single event. Guidance provided by the Royal College of Paediatrics and Child Health in 1999 and confirmed by the College in May 2004 indicates that age assessment is an inexact science and the margin of error can sometimes be as much as five years on either side.⁹ Margins of error in any assessment should be indicated clearly. If the age range resulting from the assessment includes an age under 18 years then the individual should be given the benefit of the doubt and treated as a child.
- 9.25 No professional can attempt to determine age solely on the basis of the appearance of the applicant. In general, a professional must seek to elicit the general background of the applicant, including his or her family circumstances and history, educational background and activities during the previous few years. Ethnic and cultural information may also be important.
- 9.26 Deduction of the age of an individual from medical techniques that compare human body measurements and properties, for example, teeth or bone shape and size is difficult. The poor sensitivity and specificity of such measurements often leads to inaccurate results.
- 9.27 X-rays of bones and teeth are imprecise, unethical and potentially unlawful, and should not be used for age assessment. X-rays of bones and teeth can never determine the exact age of a child or young person. Bone development varies drastically from one young person to another. Physical development depends on numerous factors including ethnic and geographical background, nutrition and socio-economic situation, and previous and current illnesses.

⁸ The UK Border Agency acknowledges this in its Asylum Process Guidance (updated 2011) entitled *Assessing Age*.

⁹ Royal College of Paediatrics and Child Health (1999).

- 9.28 Age assessment should be undertaken by professionals who are independent and have no vested interest in the outcome of the decision. They should have appropriate expertise and be adequately trained. They should be familiar with the young person's ethnic and cultural background.
- 9.29 Procedures for age assessment should be performed only with the full informed consent of the child or young person. Children and young people should be provided with appropriate information and legal advice before the age assessment takes place. Only then can a valid and informed decision be made.
- 9.30 A refusal to consent to age assessment should not prejudice the assessment of age or the outcome of the application for protection. The principle of informed consent is only meaningful if an individual is entitled to refuse consent.
- 9.31 Where the evidence supports or corroborates the child or young person's stated age then that age should be used in preference to a stated age band as the basis for all future decisions regarding the child.

Outcome of the assessment

- 9.32 The applicant is entitled to know the basis of the decision regarding his or her age and to consider, with legal assistance if available, whether the decision is a lawful one. The outcomes of the assessment should be presented in writing and he or she should be afforded an opportunity to respond to any inaccuracies or misunderstandings that may have resulted in an incorrect assessment of age.
- 9.33 If an individual's age is disputed but social services or other professionals decide that he or she is a child, the UK Border Agency should accept that decision.
- 9.34 Age assessments can be challenged by way of judicial review but may also be considered by an immigration judge in the course of determining a claim for asylum.

- 9.35 The judgment of the Supreme Court in *R(A) v LB Croydon, R(M) v LB Lambeth*¹⁰ held that, although age assessment remained the responsibility of local authorities, in the event of a challenge by judicial review, it would now be for the High Court to determine, as a matter of judicial fact, whether a person is a child and how old he or she is.¹¹ In light of this judgment, judicial review challenges will usually be based on the argument that the assessment has not been conducted properly. Such judicial review challenges are usually transferred to the Immigration and Asylum Chamber of the Upper Tribunal rather than the High Court to be heard.
- 9.36 A challenge to the outcome of an age assessment should have a suspensive effect on any decision to detain or remove an individual until the case is completed.

¹⁰ [2009] UKSC 8.

¹¹ Further information about the process of challenging an age assessment can be found in Coram Children's Legal Centre (2012).

SECTION 10

Consequences of turning 18

- 10.1 Although the legal definition of a child is someone under 18, the consequences of an application made before the age of 18 may continue when the person is beyond this age. Children and young people do not automatically become more mature and independent on the day that they turn 18. There are particular consequences for these young people when they turn 18 if they have an outstanding or unresolved immigration or asylum case.
- 10.2 It is also important to note that whilst most separated children and young people will be granted discretionary leave to remain in the UK until the age of 17½, many are refused recognition as refugees. In these cases it is important to consider carefully whether any challenge can or should be brought against the refusal of recognition as a refugee before the young person turns 18.

10

Welfare and social consequences

- 10.3 Policy and practice should be geared towards ensuring that there are no major changes in a young person's life when he or she turns 18. Although these guidelines do not cover best practice for welfare or educational provision and support, changes in these areas of a young person's life also have the potential to impact significantly on his or her immigration or asylum application.¹

¹ Further information about welfare and support available to young people who have turned 18 can be found in Macdonald QC, I and Toal, R (2010) and in Willman, S and Knapfler QC, S (2009). The Coram Children's Legal Centre website at www.childrenslegalcentre.com provides information on children and young people's rights and entitlements to services such as education, social services, benefits, housing, healthcare and legal advice.

- 10.4 For those who are leaving care, the Children (Leaving Care) Act 2000 places a duty on local authorities to assess and meet the needs of young people who were looked after or subject to a care order and are moving to live independently.²
- 10.5 The local authority is required to carry out an assessment of each child's needs with a view to determining whether the young person is ready to leave care and what advice, assistance and support is required when he or she is no longer being looked after.
- 10.6 The local authority is also required to keep in touch with a former looked after child regardless of whether he or she is still living within its area, to continue the appointment of the personal adviser, and to continue to keep the young person's Pathway Plan under regular review. This may include ongoing referrals for services such as community care assessments and considering the young person's educational and training needs. Local authorities have the same responsibilities towards children and young people subject to immigration control as they do towards other children. This role cannot be left to the UK Border Agency.

Delay in making the application

- 10.7 Legal representatives should ensure that they do not delay making an application for a child or young person subject to immigration control because of the risk that the young person will turn 18 before a decision is made. Information and evidence should be collated and submitted urgently and regular effort should be made to ensure that the application is dealt with expeditiously.

Delay in making the decision

- 10.8 It is in the best interests of children and young people that a decision is made regarding their immigration status as soon as is possible. It is the duty of the UK Border Agency to make a permanent and final decision without delay. Keeping children in limbo regarding

² Most separated children leaving care will be 'looked after' children under section 20 of the Children Act 1989 which attracts a wider range of ongoing services, support, rights and entitlements.

their status until they are 17½ or 18 years old is not in their best interests. ►See also section 7. There are long-term negative consequences for children and young people in not having a permanent solution to their situation including in terms of pathway planning for their future.

- 10.9 If an application for leave to remain in the UK is lodged before a young person turns 18, the application should be treated as if he or she were still a child. This also applies to children and young people who have been granted entry clearance for settlement and who reach 18 before arrival. Refusal of leave to enter or remain should not be solely a result of attaining 18 years old. ►See also section 13.
- 10.10 Significant unfairness can result when a young person becomes an adult during the asylum determination process, particularly where this occurs as a result of delays. Steps should be taken to eliminate unnecessary delays that can result in a young person turning 18 during the process.
- 10.11 Where the age of a child or young person is disputed and he or she is incorrectly treated as an adult but subsequently found to be under 18 years of age, steps should be taken to examine the lawfulness of any decisions made on the basis that the child or young person was an adult and remedial action taken.
- 10.12 Where a child becomes an adult during the decision-making process, he or she should continue to be treated in accordance with these guidelines.

Citizenship

- 10.13 When a child or young person is granted indefinite leave to enter or remain, consideration should be given to applying for citizenship before he or she turns 18.³ Children and young people should be given advice on the consequences of becoming British for their nationality of origin, right to return, inheritance or property rights, and on whether dual nationality is permitted by the country of origin.

³ Under the British Nationality Act 1981, which makes provision for the registration of stateless children on the basis of length of residence in the UK, when parents naturalise or by discretion.

Detention

- 10.14 A young person who is subject to immigration control should never be detained simply because he or she has turned 18 or because there is detention accommodation available.
▶ See section 11 for further information on detention.

Return and removal

- 10.15 Young people who have recently turned 18 and who have been in the UK for several years will be reasonably settled and may, therefore, find it difficult to adjust to life abroad. A child or young person may not have made an informed decision to come to the UK and may have grown up in the UK as a consequence of the actions and decisions of others. The ties established by these young people in the UK will, in some cases, outweigh other considerations to the extent that it is considered right and fair that the young person and, if appropriate, their family members, should be allowed to stay.
- 10.16 It is of paramount importance that an assessment is carried out as to whether or not it is in a young person's best interests to be returned or removed to his or her country of origin on turning 18, paying careful attention to matters such as education, life and ties in the UK and support networks as well as the situation in the country of origin and the support that is available there.
▶ See section 3 for a discussion of best interests. ▶ See section 13 for a discussion of return and removal.

SECTION 11

Detention

- 11.1 Immigration detention can have devastating effects on the mental and physical health of separated children and young people, as well as on children detained with their parents. The impacts of detention are increasingly well documented.¹
- 11.2 Article 37 of the Convention on the Rights of the Child provides children with a general right not to be detained or deprived of their liberty. ► See annex 1.² The European Court of Human Rights observed in *Muskhadzhiyeva*³ that the extreme vulnerability of a child takes precedence over immigration control. Illegal entry into a country may be justified according to general principles of law where such entry is the only way of preventing a violation of a child's fundamental human rights.⁴ The best interests of children and young people should be the paramount consideration and are discussed in section 3 of these guidelines.

¹ See, for example, Save the Children, Crawley, H and Lester, T (2005), Lorek et al. (2009), Children's Commissioner for England (2009) and Save the Children, Campbell, S, Baqueriza, M and Ingram, J (2011) .

² See also UNHCR (1997) .

³ *Muskhadzhiyeva and Others v. Belgium* (Application no. 41442/07). The Court held that by detaining four young children and their mother in a secure detention centre for over a month before sending them back to Poland in January 2007, Belgium had violated Article 3 of the European Convention on Human Rights (prohibition of torture and other ill-treatment) and Article 5 (the right to liberty) in respect of the four children. For more detail on European case law on the detention of children and young people see UNHCR, Edwards A (2011).

⁴ UN Committee on the Rights of the Child (2005), paragraphs 61–63.

- 11.3 UK Border Agency staff must have regard to the need to safeguard and promote the welfare of children and young people when taking decisions on detention involving or affecting them, and must be able to demonstrate that this has happened, for example by recording the factors they have taken into account.
- 11.4 In May 2010 the UK Government announced a commitment to end the detention of children and young people.⁵ The implementation of this policy has been controversial.
- 11.5 The High Court has ruled that detention of families was unlawful because officials had not applied the UK Border Agency's own policy, which is to detain only when necessary as a last resort, and had failed to consider alternatives to detention.⁶
- 11.6 Any alternatives to detention must be appropriate and proportionate, and in line with domestic and international legal standards (in particular the Convention on the Rights of the Child and section 55 of the Borders, Citizenship and Immigration Act 2009). These require that the best interests of children are a primary consideration. Alternative approaches should ensure that families are kept together and that they are able to access independent legal advice and representation throughout the process.
- 11.7 Access to free legal representation should be provided to all those who are detained. Legal representatives should advise immediately on temporary release, temporary admission, and bail. Any application should be listed for hearing immediately.⁷

⁵ *Coalition Government* (2010) at page 21. In September 2010, the Minister of State for Immigration, Damian Green MP, stated that the Government in fact planned to 'minimise' the number of children and young people who are detained for the purpose of immigration control.

⁶ *R (Suppiah et ors) v SSHD* [2011] EWHC 2 (Admin), 11 January 2011.

⁷ For further information see ILPA, BID and The Law Society (October 2003) and BID (2010).

Separated children and young people

- 11.8 Separated children and young people should never be detained.⁸ The UK Border Agency's policy is not to detain separated children except in the most exceptional circumstances and then it states that this should be for no more than 24 hours to make appropriate welfare arrangements. The detention of separated children and young people for the purpose of immigration control is unlawful.
- 11.9 Where a legal representative is aware that a client under 18 years of age has been detained, the immigration removal centre where the child or young person is being held should be alerted and his or her release actively pursued. If the age of the child is disputed then steps should be taken to secure a 'Merton compliant' age assessment if one has not previously been undertaken.
▶ See section 9 of these guidelines for further information on age disputes.
- 11.10 If the UK Border Agency is in breach of its own policy regarding the detention of separated children it will be open to legal challenge and claims for damages for unlawful detention.
- 11.11 Where it has been established that a child or young person detained under immigration powers is under 18 years of age and is, as a consequence, released from detention, then the local authority is under a duty to provide him or her with accommodation under the Children Act 1989 if he or she remains within that area. If social services do not intend to provide accommodation then the UK Border Agency can get in touch with the police who can require social services to do so, and legal representatives should be vigilant to ensure that this is done.

⁸ UN Committee on the Rights of the Child (2005) .

Detention of families⁹

- 11.12 International law and policy says that the detention of children should be avoided and that where a decision is made to detain a child or young person with his or her family, such detention should be used only as a measure of last resort and for the shortest possible period of time.¹⁰ It is arguable that if detention of children were truly used as a measure of last resort, it would never be used at all.
- 11.13 In March 2011 the UK Border Agency introduced a new process for family returns.¹¹ According to documents produced by the Agency, the new process must have regard to the need to safeguard and promote the welfare of children in the UK in accordance with statutory and international obligations and must treat families with children humanely and with compassion. Legal representatives and other professionals working with children and young people subject to immigration control should ensure that they are familiar with UK Border Agency detention policy in family cases.
- 11.14 Under the new process, families with children can only be detained when they have entered what is called 'the Ensured Return' route. This is for families who have been through the 'assisted' and 'required' returns stages and have failed to comply. When families with children enter the Ensured Return route the policy is that a number of measures – such as escorted check-in and the use of open accommodation arrangements – should be taken before a family is detained in 'Pre-Departure Accommodation'. Legal representatives should take all steps to have the family released from 'Pre-Departure Accommodation' just as they would with other forms of detention and can rely on the Agency's descriptions of the new process to make the case that alternatives to detention are available to the Agency and remain to be explored.

⁹ Families are defined as having at least one child, where that child is solely or principally dependent on the main applicant.

¹⁰ UNHCR (1997).

¹¹ The main policy document setting out the process for family returns is chapter 45 of the UK Border Agency's *Enforcement Guidance and Instructions*.

- 11.15 Family cases are not considered by the UK Border Agency to be 'suitable' for the Detained Fast-Track.¹² Sometimes children and one parent, usually the mother, remain at liberty, while the other parent is detained. The best interests of the child are affected by the detention of a parent, just as they are engaged by the detention of the child him or herself. Applications for the parent's bail or temporary admission or temporary release should refer to the best interests of the child and to the UK Border Agency's duty to safeguard and promote the welfare of children.¹³

Age-disputed cases

- 11.16 Children and young people whose age is disputed should not be detained in an immigration removal centre, a prison or a police cell for the purpose of immigration control.
- 11.17 UK Border Agency policy is that individuals whose age is disputed can only be detained if there is credible and clear documentary evidence that they are 18 years of age or over, or if there is written confirmation from a local authority that a full 'Merton compliant' age assessment has been undertaken and that the individual has been found to be 18 years of age or over, or where an individual's physical appearance/demeanour very strongly indicates that they are *significantly* over 18 years of age and no other credible evidence exists to the contrary.¹⁴ In all other cases the applicant should be given the benefit of the doubt and treated as a child. ► See also section 9 for best practice in cases where age is disputed.
- 11.18 Where a child or young person is age disputed, the legal representative should immediately request information about the reasons for the age dispute and, if no age assessment has previously been conducted, inform the social services department in the area where the child or young person is being detained.

¹² Home Office UK Border Agency (2009a), paragraph 2.3.

¹³ This is in line with the UK Border Agency Enforcement Guidance and Instructions, s45.7, which focuses on the splitting of families for the purposes of removal and the Agency's Criminal Casework Directorate (undated) *Children and Family Cases Process Instruction*, which indicates at 3.1.5 that where detention involves splitting a family this must be approved at the level of the Criminal Casework Directorate Director.

¹⁴ Home Office (2009a) UK Border Agency, paragraph 2.3.1.

- 11.19 Social services have a statutory duty to assess the age and needs of individuals residing or living in their local authority area who claim to be under the age of 18. Any individual who is detained, even for a short period of time, and claims to be a child must be referred to social services for a full age assessment. The UK Border Agency should ensure that a full age assessment is undertaken at the earliest possible opportunity. If this has not been done, a legal representative should instigate the referral.
- 11.20 If it is possible that an individual may be under 18, he or she must be released from detention and alternative arrangements made for his or her care. ►See also section 9 for best practice in cases where age is disputed.

Young people who turn 18

- 11.21 The possibility of being returned and the likelihood of being detained as part of the process is one of the main anxieties asylum-seeking young people have as they turn 18, particularly for young people granted discretionary leave that expires at 17½ or earlier, or at age 18.
- 11.22 A young person should never be detained simply because he or she has turned 18 and there is detention accommodation available. ►See also section 10 for best practice when children who are subject to immigration control turn 18.

SECTION 12

Trafficked children and young people

- 12.1 The UK is obliged under international law to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons and to protect victims of trafficking in persons, especially women and children.
- 12.2 The UK is a party to:
- the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ('the Palermo Protocol'), which supplements the UN Convention against Transnational Organised Crime (2000)¹
 - the Council of Europe Convention on Action against Trafficking in Human Beings², and
 - Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims.³

¹ The UN Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organised crime. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

² Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (2005), Council of Europe Treaty Series – no. 197.

³ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

- 12.3 All three instruments contribute to the protection of trafficked persons in the UK. There is considerable overlap between them but in addition specific protections derive from each. The Palermo Protocol sets out the accepted definition of trafficking. The Council of Europe Convention elaborates upon, amongst other things, the protection and assistance to be afforded trafficked persons. Article 2.1 of Directive 2011/26/EU obliges Member States to criminalise all forms of human trafficking.
- 12.4 Article 4.1 of the European Convention on Human Rights states that no one shall be held in slavery or servitude. In the case of *Rantsev v Cyprus and Russia*,⁴ the European Court of Human Rights held that the act of human trafficking fell directly within the scope of Article 4 of the European Convention on Human Rights and that it was not necessary to decide whether the treatment suffered should be classified as slavery, servitude or forced labour.
- 12.5 The UK ratified the Council of Europe Convention on Action against Trafficking in Human Beings in 2008. The Convention came into force in the United Kingdom on 1 April 2009, and the UK is bound by its provisions. The Convention sets out measures to protect and promote the rights of victims of trafficking which States are obliged to implement, including standards in relation to: identifying victims, providing assistance, putting in place recovery and reflection periods, residence permits, compensation and legal redress, and ensuring any return to the home country is safe and dignified. Many of the Convention's provisions inform the policies on protecting those who have been trafficked which have been adopted by the Home Office.⁵

⁴ Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010.

⁵ The Home Office published its most recent strategy on tackling human trafficking on 19 July 2011. Separate practice guidance has also been published by the Department of Education (2011) *Safeguarding Children who may have been Trafficked*. The Serious and Organised Crime Agency has also produced a Best Practice Guide (undated) for working with those who have potentially been trafficked.

Definition of trafficking

- 12.6 The definition of human trafficking commonly accepted by governments, law enforcement bodies and other agencies derives from the Palermo Protocol. According to Article 3 of that Protocol, ‘trafficking in persons’ means:
- The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁶
- 12.7 Exploitation is further defined to include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.
- 12.8 In the case of children and young people, the use of force or other forms of coercion, such as abduction, fraud, deception, the abuse of power or a position of vulnerability do not need to be present in order for the crime to be considered trafficking. This is because children cannot give informed consent. Exploitation is all that is required in the case of a child or young person.
- 12.9 Trafficking and smuggling are not the same thing and the two should not be confused although the distinction between them is not always clear. For example, the entry route and agent may be the same. The key difference between the two lies in the relationship between the individuals involved and the elements of fraud, force, or coercion. Smuggling refers to the facilitation of illegal entry and any relationship of indebtedness between the smuggler and the person who has been smuggled will normally come to an end when any fee and any interest has been paid. Trafficking refers to the movement of people for their exploitation and the trafficker will treat the trafficked person as a commodity and retain control of him or her.

⁶ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime (2000), Article 3(a) as adopted by the Council of Europe Convention and the EU Directive.

Forms of trafficking

- 12.10 There is limited specific information on the trafficking of children and young people into, and through, the UK. Trafficking is, by its very nature, a hidden trade and therefore difficult to quantify. The purposes for which children and young people are trafficked to and through the UK are diverse. This is reflected in research into the phenomena.⁷
- 12.11 Children and young people, both female and male, are trafficked for the purposes of prostitution and other forms of sexual exploitation, domestic servitude and slavery, benefit fraud, enforced criminality (such as begging, cannabis cultivation and robbery), forced labour, for example in restaurants and agricultural work, and for ritual sacrifice.
- 12.12 Children and young people are perceived by their traffickers to be easier to control and manipulate and less likely to be able to escape from exploitation than adults because of their lack of experience and vulnerability. Children and young people are often trafficked in the same way, and through the same routes, as adults but may also be 'sold' by a family member to the trafficker either for profit or to ease the financial burden falling on their family, or both. In other cases, family members may be tricked into believing that a child or young person will have a better life elsewhere, or a child or young person may be told that their parents will be subject to physical or financial sanctions if they do not co-operate with the trafficker.

⁷ See, for example, Child Exploitation and Online Protection Centre (2010), ECPAT UK (2010), Anti Trafficking Monitoring Group (2010a, 2010b), Scotland's Commissioner for Children and Young People (2011).

- 12.13 Children and young people are trafficked into the UK by a variety of means. The *modus operandi* tend to be particular to the community involved in a particular trafficking route and/or purpose and can include, but are not limited to, the following (which may be combined):
- children and young people who are groomed or subjected to extreme punishment and ill treatment, including rape and sexual assault, before they reach their country of destination
 - children and young people who are subjected to ritual ceremonies and oaths in their countries of origin to ensure their co-operation and to ensure that they do not disclose any details about their traffickers or the means by which they were transported to the country of destination for fear of provoking malign retaliation by spirit forces
 - children and young people who are deceived into believing that they are entering as students or for another legal purpose. This may be combined with requiring them to use false names and/or dates of birth and may also be combined with obtaining visas for them as a student, language student or visitor
 - children and young people who are deceived or tricked into believing that they are being accompanied by 'good Samaritans' and will have a better life than in the country of origin
 - children and young people who are told to ask for asylum on arrival so that they gain entry to the UK and are accommodated by social services. These children are then removed or abducted from their accommodation at a later date by their traffickers. Often the children make contact with the traffickers as instructed
 - children and young people who enter the country with adults who are, or purport to be, parents or family members or are brought into the UK by clandestine means and do not come into contact with immigration control and therefore do not come into contact with social services or other agencies (and in the case of those making a clandestine entry, do not come into contact with immigration control), and
 - children who are alone when they arrive in the UK and are collected by an adult (sometimes loosely referred to as a 'sponsor') who claims responsibility for them.

Implications for trafficked children and young people

- 12.14 Children and young people who have been trafficked are extremely vulnerable to exploitation and it is the responsibility of the professionals who come into contact with them to provide support and protection. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a duty on the UK Border Agency and other statutory agencies to ensure that their functions are discharged having regard to the need to safeguard and promote the welfare of children.
- 12.15 The UK has established a National Referral Mechanism under which the police, children's services and a number of named non-governmental organisations, can refer a child or young person whom they have reasonable grounds to believe has been trafficked, to the appropriate competent authority.⁸ This is the UK Human Trafficking Centre, part of the Serious and Organised Crime Agency, in situations where a British or EEA national is thought to have been trafficked, or the UK Border Agency where a non-EEA national is the suspected trafficked person.⁹
- 12.16 The UK Border Agency has issued policies and guidance on correctly identifying those who have been trafficked,¹⁰ guidance for frontline staff¹¹ and guidance for competent authorities.¹² Legal representatives and other professionals working with children and young people subject to immigration control should ensure that they are familiar with this guidance.

⁸ The National Referral Mechanism is a framework intended to identify those who have been trafficked and ensure that they receive the appropriate protection and support. It was introduced in 2009 when the UK acceded to the Council of Europe Convention on Action against Trafficking in Human Beings.

⁹ The role of the UK Human Trafficking Centre is to provide a central point of expertise and coordination in relation to the UK's response to the trafficking of human beings. Further information can be found at www.soca.gov.uk/about-soca/about-the-ukhtc

¹⁰ UK Border Agency (undated) *Enforcement Instructions and Guidance: Chapter 9 – Identifying Victims of Trafficking*.

¹¹ Home Office UK Border Agency (2010a).

¹² Home Office UK Border Agency (2010b).

- 12.17 In the case of a child or young person who has been trafficked, the appropriate local authority must undertake a child in need assessment under section 17 of the Children Act 1989. It must then either accommodate any child in need under section 20 of the Children Act 1989 or undertake care proceedings under section 31 of that Act. Local authorities are thus in a position to provide the child with the necessary care and support under the Children Act 1989 without having to use the National Referral Mechanism as a gateway to support. In some cases, children's services and others may decide that it is not appropriate also to refer a child into the National Referral Mechanism. The local authority will need to refer the child or young person to a legal representative for advice on immigration so that, in appropriate cases, an application for asylum or discretionary leave can be made.
- 12.18 Professionals who first come into contact with a child or young person who may have been trafficked may have doubts about the child's age and/or identity. This is because children and young people who are trafficked rarely enter on their own passports and traffickers tend to provide them with identity documents which state that they are older than they are to avoid the extra exit and entry requirements imposed on children.
- 12.19 Problems with documentation and the unwillingness of children and young people to discuss their experiences can lead to difficulties in determining the age of some trafficked children. Article 10.3 of the Council of Europe Convention on Action Against Trafficking in Human Beings states that:

when the age of the victim [of human trafficking] is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

► See section 9 for guidance on best practice in relation to age disputes.

12.20 Article 13.2 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims states that Member States shall ensure that:

where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection.

12.21 Trafficked children and young people are highly unlikely to reveal all that has happened to them when they initially come into contact with the immigration authorities or other professionals. In addition to the factors outlined in section 5 of these guidelines, a number of factors may particularly affect the willingness and ability of trafficked children and young people to discuss their experiences. These include, but are not limited to:

- fear of retaliation from traffickers against themselves or their families
- concern about the reaction of their families when it is discovered that they have not earned the anticipated income or that they fled from the trafficker without repaying a debt which may accrue to their family
- an unwillingness to discuss what has happened to them because of trauma or shame at being deceived or involved in sexual or other exploitation and abuse
- concern about how their family, friends and the community will react if they find out they have been working as prostitutes or were sexually abused and about whether they will be socially excluded or punished as a consequence in their countries and communities of origin, and
- a distrust of authorities and adults in the UK because of their past experiences coupled with a fear that they will be prosecuted or removed because of the acts which they were forced to undertake by their traffickers.

12.22 Article 10.4 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that as soon as a separated child is identified as a victim of human trafficking he or she should be provided with representation by a legal guardian, organisation or authority which shall act in his or her best interests.

- 12.23 Article 16.3 of Directive 2011/36/EU provides that Member States shall take the necessary measures to ensure that, where appropriate, a guardian is appointed to separated children and young people who have been trafficked.

Procedures for protecting trafficked children and young people

- 12.24 Children and young people who have been trafficked need to be provided with a durable solution based on an individual assessment of their best interests. This is a requirement under Article 16.2 of Directive 2011/36/EU. This durable solution may take the form of recognition as a refugee, humanitarian protection or protection under the European Convention on Human Rights or leave to remain in the UK.
- 12.25 Where it is in the child or young person's best interests to do so, he or she should be referred to the National Referral Mechanism by the relevant local authority or the police. While in the case of an adult the National Referral Mechanism may be the gateway to support and recognition of the need for protection, both may be achieved for a child without such a referral. For this reason, especially in cases where the child or young person has a claim for asylum or humanitarian protection and is not therefore seeking leave as a trafficked person, many legal representatives advise that there is no reason for a referral.
- 12.26 Where a child or young person who is a non-EEA national is referred to the National Referral Mechanism, it is then the responsibility of the UK Border Agency to determine whether there are reasonable grounds to suspect that he or she has been trafficked. If this is the case, the child or young person will be granted a 'recovery and reflection' period, in the UK of 45 days, during which time he or she will continue to be looked after by a local authority. The reflection period allows the child or young person to begin to recover from their experiences and helps them to make an informed decision about whether to assist and cooperate in any criminal proceedings taken against their traffickers.

- 12.27 During the reflection period, the UK Border Agency will determine whether there are 'conclusive grounds' to suggest that a child or young person has been trafficked. If the child or young person is found to have been trafficked and has not been recognised as a refugee or granted humanitarian protection, he or she may be granted discretionary leave to remain in the UK for one year as a trafficked person as provided in the Council of Europe Convention on Action against Trafficking in Human Beings. Leave is most often granted where this will allow a child to co-operate fully in any police investigation and subsequent prosecution or where there is a practical barrier to the child or young person leaving the UK, such as illness. The period of discretionary leave can be extended if required.
- 12.28 Regardless of the status granted to children and young people who have been trafficked, they will continue to require access to additional specialist support services. Children and young people who continue to be at risk will also need to be provided with safe accommodation to ensure their safety.

SECTION 13

The decision and its consequences

- 13.1 In view of their needs and potential vulnerability, priority should be given to the handling of applications from children and young people. The decision-making process should reflect, and be sensitive to, this vulnerability. Applications from children and young people should be handled expertly and carefully at all stages. Particular attention should be given to children's capacity, level of understanding, maturity and awareness, and the increased or separate risks children and young people may face compared to adults.
- 13.2 It is in the best interests of children and young people that a decision is made regarding their immigration status as soon as is possible. Keeping children and young people in limbo regarding their status – and hence their security and their future – is not in their best interests. ►See sections 7 and 10.
- 13.3 Every decision should be communicated properly to the child or young person and his or her responsible adult and acted on promptly.

Making a decision

- 13.4 A decision about a child or young person's immigration status should always be in the best interests of the child and should take into account that a child or young person may have his or her own view about the future. ►See section 3 for further discussion on the duty that decision-makers have to safeguard the best interests of children.

- 13.5 If an application for leave to remain in the UK is lodged before a child or young person is 18 years old, the application should be treated as if he or she were still under 18. This also applies to children and young people who have been granted entry clearance for settlement and who reach 18 before arrival. Leave to enter or remain should not be refused solely because the young person has reached 18 years old. ►See section 10 for further guidance on what should happen when a young person turns 18.

Communicating the decision

- 13.6 Any substantive decision should be provided in writing and should also be communicated and explained to a child or young person orally in a language that he or she understands. A responsible adult should communicate the decision in the presence of a legal representative. In the absence of a responsible adult, the child or young person's legal representative should communicate the decision. Legal representatives should ensure that any advice they give to a child or young person is in writing and in a language a child can understand if he or she is literate. The legal representative should tell the child or young person what action will be taken.
- 13.7 Where a child or young person is of sufficient maturity and understanding he or she has a right to know the reasons why a decision has been made. These reasons may need to be carefully explained to a child or young person in a sensitive way because refusal is likely to be a distressing and upsetting experience.

Granting of leave

- 13.8 A child or young person may be allowed to remain in the UK for a number of reasons. He or she may be recognised as a refugee, granted humanitarian leave, granted indefinite leave to remain, granted discretionary leave, or leave to remain outside the Immigration Rules. This may be because it is not safe to return to the country of origin due, for example, to armed conflict or because no suitable carer can be identified.

A child or young person may also be allowed to remain under an immigration category or on compassionate grounds. There are a number of concessions and policies outside the immigration rules relating to children and young people. ►See also section 7.¹

- 13.9 Where an asylum or human rights application is made, and a decision to grant leave is made, this should be for an indefinite period.
- 13.10 When a child or young person is granted indefinite leave to enter or remain, consideration should be given to applying for citizenship before a young person turns 18. Children and young people should be given advice on the consequences of becoming British on their nationality of origin, right to return, inheritance or property rights, and on whether dual nationality is permitted by the country of origin.

Family reunion

- 13.11 Maintaining and developing contact with family and relatives, and preserving cultural links with the country of origin, are of emotional and psychological importance to the child or young person. A separated child or young person's parents may still live in the country of origin, or may be missing but not officially reported dead. As a guiding concept, reunification with parents or other carers will generally be in the best interests of a child or young person.
- 13.12 Before pursuing family reunion, a child or young person's protection needs must be addressed fully and properly. All professionals should be aware of the protection needs of the child or young person and whether these are best met in the UK, the country of origin or a third country.
- 13.13 Circumstances may exist which call into question the appropriateness of a child or young person reuniting with his or her parents or other primary caregiver. Examples of this include where there are substantiated allegations of abuse, trafficking, or similarly serious considerations.

¹ Many of these concessions and policies are set out in the UK Border Agency's instructions to its staff, available at www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ The information available on the UK Border Agency website is not complete and can be contradictory, illustrating the tension between immigration policy and policy concerned with safeguarding and promoting the rights and welfare of children.

- 13.14 The responsible adult, in conjunction with the child's legal representative, should consider whether and when it is appropriate to trace the members of the family of a separated child or young person, bearing in mind the child's best interests. ► See also section 3 for a discussion of best interests. Professionals should be aware of the potential dangers of tracing to both the child or young person and his or her family. For example, it may endanger a family if it becomes known that a child or young person is abroad or that an application for asylum has been made.
- 13.15 Separated children and young people may be encouraged and assisted to get in touch with the International Committee of the Red Cross, national Red Cross organisations, or other organisations for the purpose of tracing their family members. Whenever steps toward tracing are taken, confidentiality should be respected to protect both the child or young person and the members of his or her family. While Article 19(3) of the EU Reception Directive² provides that Member States, should endeavour to trace the members of the child's family as soon as possible, it qualifies this with reference to protecting the child's best interests and highlights the potential risks to the child and to members of the family.
- 13.16 Separated children and young people seeking asylum or otherwise present in the UK sometimes have family member(s) who have settled in other countries outside the country of origin. Family reunion, either in the UK or elsewhere, should be facilitated quickly where this is in the child or young person's best interests. A responsible adult should initiate this process.
- 13.17 Where a separated child or young person has applied for asylum in the UK and a member of his or her family is legally present in another EU State who is willing to take charge of him or her, then the child or young person's application for asylum should be transferred to that country unless this is not in the best interests of the child.³

² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

³ Articles 6 and 12 of Commission Regulation no.1560/2003 (Dublin II Regulation).

Return and removal

- 13.18 Return is a complex matter and a decision about whether a child or young person should be returned to his or her country of origin or another country will require a broad and detailed assessment of whether this is in his or her best interests. ► See section 3 for guidance on best interests. The child or young person's legal representative, his or her responsible adult and other professionals working with the child or young person have an important role to play in ensuring that the circumstances and experiences of the individual are understood.
- 13.19 A child or young person will need to feel secure about the future for return to be in his or her best interests. Return should always be carried out in a manner that is sensitive to the needs, concerns and particular vulnerabilities of children and young people. Children should be fully consulted at all stages of the process and be assisted to fully understand the consequences of any decision they may make to return.
- 13.20 Children and young people's opinions about whether return is in their best interests will be strongly affected by the conditions and expectations that surrounded their departure, the expectations of their family and the home community, and the quality of the information available to them.
- 13.21 Determining whether the best interests of the child or young person are served by allowing him or her to stay in the UK, or by returning him or her to the country of origin or a third country can mean balancing potentially conflicting rights.
- 13.22 Before pursuing return, a child or young person's protection needs must be fully and properly addressed. All professionals should be aware of the protection needs of the child or young person and whether these are best met in the UK, the country of origin or a third country. A child or young person should not be returned to a country where there is evidence of a serious threat to a civilian's life or person because of indiscriminate violence in situations of international or internal armed conflict.⁴

⁴ Article 15c Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

What is considered safe for an adult may not be considered safe for a child or young person. Evidence in relation to conditions in the country of origin is discussed in section 6.

- 13.23 In cases involving children and young people, including where they are with their families, it will have been necessary during the course of the application to obtain expert evidence as to the consequences for the children of their own return or that of a parent. ► See also section 6. When a final decision has been received, any expert evidence should be reviewed and consideration given to obtaining updated reports particularly regarding the consequences for the child or young person of return.
- 13.24 Before a child or young person can be returned to a country of origin, a careful assessment must be made of the family situation in the home country and whether it is safe to return a child to that country. Professional and independent individuals or organisations should carry out this investigation. Their full report must be available to the legal representative and a responsible adult in the UK.
- 13.25 The independent assessment must include an investigation of the child or young person's family (parents or other family members) to establish whether they are able to provide appropriate care. In the absence of parents or other family members, the suitability of child-care agencies in the country of origin should be investigated. The legal representative and responsible adult should be advised of the outcome of this process.
- 13.26 A local authority can only arrange for, or assist in arranging for, any child or young person 'in their care' to be removed from the UK with the approval of the court.⁵ The court can only consent for a separated child to be removed from the UK if it is satisfied that:
- living outside the UK would be in the child's best interests
 - suitable arrangements have been, or will be, made for his or her reception and welfare in the country in which he or she will live
 - the child has consented to living in that country, and
 - every person who has parental responsibility for the child has consented to him or her living in that country.

⁵ This means looked after, assisted or subject to a care order. See Schedule 2, paragraph 19 of the Children Act 1989.

- 13.27 A child or young person should be fully informed orally by a responsible adult or legal representative at all stages regarding progress in relation to return, and should be fully informed of any decisions regarding his or her future return. The preparation for any return home should involve a long and careful engagement with the child or young person to allow them to understand the process of return and reintegration.
- 13.28 If return or removal is not possible or appropriate, the child or young person should be given indefinite leave to remain in the UK.

Glossary

'Assisted' child

It is the general duty of every local authority to safeguard and promote the welfare of children within their area who are in need and, provided it is consistent with that duty, to promote the upbringing of such children by their families. An 'assisted child' is a child who is given assistance under section 17 of the Children Act 1979 because without such assistance he or she is unlikely to achieve or maintain a reasonable standard of health or development, his or her health or development is likely to be significantly impaired, or further impaired, or he or she is disabled. This assistance may be provided in kind or, in exceptional circumstances, in cash, or through facilitating the provision of services by others (including in particular voluntary organisations).

Child protection

The purpose of child protection is to ensure that appropriate protective action is taken when it is suspected that a child is being abused or at risk from parents, guardians, carers, adult visitors to the home or others. Every organisation working with children should have a child protection officer who is responsible for operating the organisation's relevant procedures if it is suspected that a child is being abused.

Learning difficulties

A 'learning difficulty' is understood as arising from cognitive, physical and/or sensory impairments, a medical or health problem, emotional and/or behavioural difficulties, social and economic disadvantage etc. A specific learning difficulty is used to describe a child with, for example, dyslexia. Children and young people with learning difficulties are very diverse: many attend mainstream schools and are able to live independently as adults; others require high levels of support. Learning difficulties are usually evident from early childhood, but can be acquired through illness or accident later in life. Learning difficulties must not be confused with mental health problems.

'Looked after' child

A child is said to be 'looked after' when he or she has been provided with somewhere to live by a local authority whether or not he or she is subject to a care order. A 'looked after' child might be staying with foster carers, or in a children's home or boarding school, or in bed and breakfast accommodation or with another responsible adult who is known to the child, or the child's parents or guardians.

Parental responsibility

Having parental responsibility means assuming all the rights, duties, powers, responsibilities and authority that a parent of a child has by law. In general terms, this means the power to make important decisions in relation to a child – for example, decisions about where a child is to live, whether a child can receive medical treatment, what religion they are brought up in and which school they attend. In England, mothers and fathers who are married to the mother of their children at the time of the birth. In Scotland a father has parental responsibility if he is married to the mother when the child is conceived, or any time after that date and an unmarried father has parental responsibility if he is named on the child's birth certificate issued after May 2006, including where the birth is re-registered. In Northern Ireland a father has parental responsibility if he is married to the mother at the time of the child's birth, he marries the mother after the child's birth and lives in Northern Ireland at the time of the marriage or, if he is not married to the mother, if he is named or becomes named on the child's birth certificate from 15 April 2002.

Unmarried fathers can obtain parental responsibility by going to court for a parental responsibility order by entering into a formal parental responsibility agreement with the mother or, in England, by registering the birth jointly with the mother.

Where parental responsibility does not exist through operation of law it can be obtained by order of the court, for example, residence order, care order, appointment of a guardian. A local authority does not have parental responsibility for a child where that child is being 'looked after' by the authority (see definition of 'looked after' child) but may do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare.

Pathway Plan

The Children (Leaving Care) Act 2000 requires a Pathway Plan for all eligible young people who have been 'looked after' by a local authority. The responsible authority must complete a Needs Assessment and a Pathway Plan that maps out a clear route to independence. It should be reviewed every six months until the young person reaches 21 (or beyond if they are in education or training).

Private fostering

Private fostering is a private arrangement between a child's parents and foster parents. Children are privately fostered if they live with someone for 28 days or more or are placed with the intention that they will stay for 28 days or more. This applies to children under 16 years old (or 18 years old if they are disabled). It does not apply to children living with a birth parent or a person with parental responsibility or a relative.

Social services departments and other local authority agencies and the National Health Service are under a duty to work with private foster parents and the child's natural parents to safeguard the child's welfare.

A person who is fostering a child privately should inform social services before the child arrives. In the case of an emergency or unplanned placement, social services must be informed with 48 hours of the child arriving.

Trauma

Although the word 'trauma' is used in everyday language to mean a highly stressful event, the key to understanding traumatic events is that it refers to extreme stress that overwhelms a person's ability to cope. It is an individual's subjective experience that determines whether an event is or is not traumatic. Thus, a traumatic event or situation creates psychological trauma when it overwhelms the individual's perceived ability to cope, and leaves that person fearing, for example, death, annihilation, mutilation, or psychosis. The individual feels emotionally, cognitively, and physically overwhelmed. The circumstances of the event commonly include abuse of power, betrayal of trust, entrapment, helplessness, pain, confusion, and/or loss.

ANNEX 1

Convention on the Rights of the Child

This annex contains Part 1 of the Convention on the Rights of Child most frequently relied upon in immigration, asylum and nationality cases. The full text of the Convention can be obtained at www2.ohchr.org/english/law/crc.htm

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

- 1 States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
- 2 States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

- 1 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.
- 2 States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 3, continued

- 3 States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

- 1 States Parties recognize that every child has the inherent right to life.
- 2 States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

- 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.
- 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.

Article 8

- 1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
- 2 Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

- 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.
- 2 In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
- 3 States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
- 4 Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

- 1 In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
- 2 A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

- 1 States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
- 2 To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

- 1 States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

- 1 The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
- 2 The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others; or
 - b) For the protection of national security or of public order (public), or of public health or morals.

Article 14

- 1 States Parties shall respect the right of the child to freedom of thought, conscience and religion.
- 2 States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
- 3 Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

- 1 States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
- 2 No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

- 1 No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

Article 16, continued

- 2 The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.

To this end, States Parties shall:

- a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- c) Encourage the production and dissemination of children's books;
- d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

- 1 States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

- 2 For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
- 3 States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

- 1 States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
- 2 Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

- 1 A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
- 2 States Parties shall in accordance with their national laws ensure alternative care for such a child.
- 3 Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

- 1 States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

- 2 For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations 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. 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.

Article 23

- 1 States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
- 2 States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
- 3 Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
- 4 States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services,

Article 23, continued

with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

- 1 States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
- 2 States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - a) To diminish infant and child mortality;
 - b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - f) To develop preventive health care, guidance for parents and family planning education and services.
- 2 States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

- 4 States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

- 1 States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
- 2 The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

- 1 States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
- 2 The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
- 3 States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

Article 27, continued

- 4 States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

- 1 States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - a) Make primary education compulsory and available free to all;
 - b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - d) Make educational and vocational information and guidance available and accessible to all children;
 - e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
- 2 States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
- 3 States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

- 1 States Parties agree that the education of the child shall be directed to:
 - a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - e) The development of respect for the natural environment.
- 2 No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

- 1 States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
- 2 States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

- 1 States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
- 2 States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - a) Provide for a minimum age or minimum ages for admission to employment;
 - b) Provide for appropriate regulation of the hours and conditions of employment;
 - c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- b) The exploitative use of children in prostitution or other unlawful sexual practices;
- c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's

Article 37, continued

best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

- d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

- 1 States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
- 2 States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
- 3 States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
- 4 In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

- 1 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.
- 2 To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - i) To be presumed innocent until proven guilty according to law;
 - ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

Article 40, continued

- vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - vii) To have his or her privacy fully respected at all stages of the proceedings.
- 3 States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- 4 A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

- a) The law of a State party; or
- b) International law in force for that State.

ANNEX 2

Separated Children in Europe Programme (2010) *Statement of good practice: Age assessment*¹

- D5.1 Age assessment procedures should only be undertaken as a measure of last resort, not as standard or routine practice, where there are grounds for serious doubt and where other approaches, such as interviews and attempts to gather documentary evidence, have failed to establish the individual's age. If an age assessment is thought to be necessary, informed consent must be gained and the procedure should be multi-disciplinary and undertaken by independent professionals with appropriate expertise and familiarity with the child's ethnic and cultural background. They must balance physical, developmental, psychological, environmental and cultural factors. It is important to note that age assessment is not an exact science and a considerable margin of uncertainty will always remain inherent in any procedure. When making an age assessment, individuals whose age is being assessed should be given the benefit of the doubt. Examinations must never be forced or culturally inappropriate. The least invasive option must always be followed and the individual's dignity must be respected at all times. Particular care must be taken to ensure assessments are gender appropriate and that an independent guardian has oversight of the procedure and should be present if requested to attend by the individual concerned.
- D5.2 The procedure, outcome and the consequences of the assessment must be explained to the individual in a language that they understand. The outcome must also be presented in writing. There should be a procedure to appeal against the decision and the provision of the necessary support to do so.

¹ Extracted from (4th revised edition), Copenhagen: Save the Children. See also the Royal College of Paediatrics and Child Health *Assessment of the Age of Refugee Children* (2003)

D5.3 In cases of doubt the person claiming to be less than 18 years of age should provisionally be treated as such. An individual should be allowed to refuse to undergo an assessment of age where the specific procedure would be an affront to their dignity or where the procedure would be harmful to their physical or mental health. A refusal to agree to the procedure must not prejudice the assessment of age or the outcome of the application for protection.

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Cases are organised by court and name. Other materials are organised by source and date. Websites were accessed in March 2012. For materials relevant to work with refugee children see the latest edition of ILPA's *Resources Guide for Legal Practitioners Working with Refugee Children* available at www.ilpa.org.uk/pages/publications.html

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