

**RCC comments on the Home Office guidance: *processing children's asylum claims, version 1.0* and *Tracing family members of unaccompanied asylum seeking children* published 12<sup>th</sup> July 2016**

In 2013, the Refugee Children's Consortium made comments on a previous version of the *Processing children's asylum claims* guidance. Although the detail of the guidance have changed, these comments remain pertinent to the current guidance and should be read alongside the current comments, the Refugee Children's Consortium has also previously commented on the family tracing guidance. The members of the NASF Children's Sub-group were asked to comment informally on the guidance *processing children's asylum claims* and *tracing family members*, although the updated versions of both were published on 12 July 2016 and are available at:

<https://www.gov.uk/government/collections/children-asylum-instructions>

While much of the interim guidance is welcome, particular the emphasis on welfare and the decision not to conduct a screen interview. However, appropriate, detailed training is required if the changes are to have the necessary effect. We welcome any attempt to make the asylum process less onerous and stressful for children at all stages.

The RCC has made comments to particular areas of the guidance, however, commentary is insufficient to raise issues of concern across both topics of guidance: best interests of children, best interest determinations, durable solutions for children and legal representation. The UK government is a signatory to the UN Convention on the Rights of the Child, and has reaffirmed this commitment both in Parliament,<sup>1</sup> and in writing to the UN Committee in 2014.<sup>2</sup> In this Government, there has been a reiteration of the commitment to give the UNCRC due consideration in making domestic policy and legislation.<sup>3</sup> These commitments are also further reinforced for child victims of trafficking in the European Directive on Trafficking (2011/36/EU).

### **Best interests**

It is settled law that a child's best interests must be a primary consideration in immigration and asylum decision-making.<sup>4</sup> The Home Office should have regard for its own guidance on this matter, as published in 'Every Child Matters'. The 2016 Concluding Observations of the UN Committee on the Rights of the Child referred to General Comment no 14 and recommended that the right to have a child's best interests taken as a primary consideration should be consistently integrated and applied. It should be made clear that s55 Borders Citizenship and Immigration Act 2009 places a duty on the Secretary of State to consider a child's best interests must be considered in relation to all immigration and asylum functions. It is not limited to selected functions, but a need to consider what is in a child's best interests should be consistent throughout the guidance.

It should also be noted that General Comment no14 (2013), and the UNCRC set out that the child's best interests should be considered at every stage **in the form of an assessment**, and that when

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<sup>1</sup> On 6 December 2010, Hansard Column 5WS

<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101206/wmstext/101206m0001.htm>

<sup>2</sup> May 2014, HM Government, The Fifth Periodic Report to the UN Committee on the Rights of the Child

<sup>3</sup> UNCRC List of Issues in relation to the Fifth Periodic Report of the UK, Replies of the UK, 11 April 2016,

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/073/44/PDF/G1607344.pdf?OpenElement>

<sup>4</sup> ZH (Tanzania) [2011] UKSC 55

making a decision which relates to a durable solution for children: family tracing, the grant of leave, then a **formal best interests determination** should be conducted which provides a clear basis for making a decision relating to a child's long-term future. The Refugee Children's Consortium would welcome a clearer understanding of the best interests determination process, and clarity between the need to safeguard and promote a child's welfare at each stage of the process, and a final determination of where their best interests lie.

To this end we would also like to draw attention to the recommendations set out in the 2016 UNCRC concluding observations, specifically that:

*With reference to its general comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee recommends that the State party, in all parts of its territory:*

(a) *Ensure that this right is appropriately integrated and **consistently interpreted** and applied in all legislative, administrative and judicial proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children*

In *Zoumbas v Secretary of State for the Home Department*,<sup>5</sup> the Supreme Court summarised the principles derived from case law relating to best interests (emphasis added):

(2)... **the best interests of a child must be a primary consideration**, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) **Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;**

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) **It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;**

Considering a child's best interests at each stage does not amount to a best interests determination. A best interests determination is one which is flexible and adaptable,<sup>6</sup> and although there are factors that should be taken into consideration when conducting a determination, there is no guarantee that asking a set form of questions as currently suggested will amount to either a good determination for the purpose of finding a durable solution, or that this should form part of the duty to consider best interests and to safeguard and promote the welfare of the child where this undermines flexibility. The RCC would suggest re-phrasing the section on a "best interests

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<sup>5</sup> [2013] 1 WLR 3690, para 10

<sup>6</sup> UNCRC, General Comment number 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration, 29 May 2013

consideration” to highlight this. A list of factors to consider may be more helpful for caseworkers making a determination in a variety of situations than adherence to the questions in *ZH (Tanzania)*.

The *Interim National Transfer Protocol* contains a best interests annex, which includes reference to the main body of national and international law which gives rise to the best interests of children. This includes reference to the Children Act 1989, the statutory guidance on working together to safeguard children and the UNCRC to draw together a non-exhaustive list of factors which gives rise to a best interests determination. This includes (but is not limited to):

- (a) The child’s wishes and feelings
- (b) The child’s identity including their current needs and capabilities and characteristics including sex, sexual orientation, national origin.
- (c) The care, protection and safety of the child including the child’s well-being
- (d) The situation of vulnerability for this child,
- (e) The child’s right to health;
- (f) The child’s right to education

## **Interviews**

Decisions to interview should be made following a full consideration of a child’s welfare and the need to promote the wellbeing of the child. A decision which considers only a child’s physical and mental health considerations is not a welfare assessment and in our view is insufficient to meet the s55 duty to safeguard and promote children’s wellbeing.

Where an alternative interview has taken place – for example where a child victim of trafficking has completed an ABE interview the police, then this should be taken into consideration and additional interviews should only take place in exceptional circumstances. It would be preferable to prioritise the ABE interview which may result in a criminal prosecution, over any asylum interview.

**Capacity:** in the case of a child under the age of 16, an assessment of whether a young person has sufficient maturity and understanding to enable them fully to understand what is involved (whether they are ‘*Gillick* competent’) should also be carried out before an interview is arranged. This can be done through correspondence with the child’s legal representative and those who care for or provide treatment to, the child. The RCC would recommend that this step is undertaken when deciding to interview all children but that it is particularly important when interviewing children under 12. For young people over the age of 16, any assessment of capacity should take into account definitions in the Mental Capacity Act 2005. A person aged 16 or more lacks capacity in relation to a matter if, at that time, the person is unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. A person is ‘unable to make a decision’ for themselves if they are unable to do any one of the following:

- understand information which is relevant to the decision to be made
- retain that information in their mind
- use or weigh that information as part of the decision-making process, or
- communicate their decision (whether by talking, sign language or any other means).

The RCC would recommend that this is used to decide whether to interview children over the age of 16.

### **Asylum outcomes**

Whilst the RCC previously recommended that *ZH (Tanzania)* was referred to in terms of best interests and it remains the key case on children's best interests, it should be borne in mind that merely applying the questions asked of the court cannot result in a good best interests assessment. This part of the guidance goes against the best interest principles.

The case focussed on children who may be required to leave the UK despite the fact that the children were British nationals, because their parents did not have status. Although the ambit of the case includes asylum cases in terms of the importance of a child's best interests, and the assessment of these best interests as a starting point, the questions asked must still be relevant to the consideration of a child's case. At paragraph 33 of the judgment, the court sets out that the children's best interests must be considered first, before any countervailing factors.

Where a child meets the Refugee Convention, then a best interests determination should be conducted regarding what form of leave can be given to him that amounts to a durable solution. This is in line with General Comment number 14, and consideration should still be given to whether a more permanent of leave is appropriate where a child is a refugee and their future is in the UK. However, the importance for children of having their refugee status acknowledged should not be underestimated.

**Grant of UASC leave:** Page 49 of the guidance sets out the considerations where UASC leave may be granted to children under 17.5 years old who do not qualify for other forms of leave. The guidance sets a higher threshold than the Immigration Rules by importing a test of "no current prospect of [reception arrangements] being made then a casework must consider granting UASC leave. Immigration Rule 352ZC sets out that the qualifications for leave are:

*352ZC The requirements to be met in order for a grant of limited leave to remain to be made in relation to an unaccompanied asylum seeking child under paragraph 352ZE are:*

- 1. a) the applicant is an unaccompanied asylum seeking child under the age of 17 ½ years throughout the duration of leave to be granted in this capacity;*
- 2. b) the applicant must have applied for asylum and been granted neither refugee status nor Humanitarian Protection;*
- 3. c) there are no adequate reception arrangements in the country to which they would be returned if leave to remain was not granted;*
- 4. d) the applicant must not be excluded from being a refugee under Regulation 7 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 or excluded from a grant of Humanitarian Protection under paragraph 339D or both;*
- 5. e) there are no reasonable grounds for regarding the applicant as a danger to the security of the United Kingdom;*

6. *f) the applicant has not been convicted by a final judgment of a particularly serious crime, and the applicant does not constitute a danger to the community of the United Kingdom; and*
7. *g) the applicant is not, at the date of their application, the subject of a deportation order or a decision to make a deportation order.*

There is no requirement to look into the future to grant leave. The RCC is concerned that where an additional test is imported into the rules which requires caseworkers to look into the future, then there is a risk that children will be left without any form of leave depending on the possibility of return. UNCRC General comment no 6 states that: *In the absence of the availability of care provided by parents or members of the extended family, return to the country of origin should, in principle, not take place without advance secure and concrete arrangements of care and custodial responsibilities upon return to the country of origin.*

There is no national or international precedent to require caseworkers to examine the future predictability of care arrangements. The General Comment no. 6 calls for local integration if removal is not possible, and sets out that local integration must be based on secure legal status.<sup>7</sup> The guidance later states that if an assessment can be undertaken within 6 weeks then the refusal of UASC leave can be delayed. Again, this is not wholly satisfactory, although a time limit for delaying the grant of leave is more appropriate.

**Trafficking process:** The references to other guidance on modern slavery and trafficking (p18), such as First Responder guidance and information about the NRM, should be hyperlinked for easy access. There should also be links to relevant information about the Duty to Notify. **All** instances of exploitation and trafficking should be reported to the police and to the relevant children's social services (p25) as exploitation and trafficking are criminal activity – the wording currently doesn't reflect this. The RCC does not believe this guidance is worded strongly enough to impress upon case workers the safeguarding duty when encountering a victim of potential trafficking or modern slavery, which is child abuse and so should trigger a multi-agency child protection response. For example, p8 doesn't specifically note the need to refer to children's services. The responses required if a child presents with indicators of trafficking is spread out across various sections and so not particularly clear for those using the document. A dedicated section of 'what to do if a child presents with trafficking indicators' should be included. This element of the processing of a claim should be much more clearly worded and set out, with the correct links to relevant guidance (and be mindful of forthcoming Modern Slavery statutory guidance).

On p40, references to 'child pornography' and 'forced prostitution' in relation to children are not appropriate and should be referred to as 'child abuse images' and 'child sexual exploitation', respectively.

**Curtailed UASC leave (page 57):** The decision that there are adequate reception arrangements for a child should require a further assessment of a child's best interests. The RCC believe it would be inappropriate to curtail a child's leave where there are now adequate reception arrangements without conducting a best interests assessment of a child's current situation. Where for example reception conditions become available months or even years after the initial grant of leave, there

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<sup>7</sup> UNCRC General Comment no. 6, 2005, §88

may be other considerations relating to the duty to safeguard and promote the child's welfare which will need to be considered. We suggest that the guidance is altered to require a further reconsideration of the grant of UASC leave, and where required to invite further information from the child and those around him prior to taking an immediate decision to curtail leave.

**Certification (pages 50-51):** It is appropriate that the guidance states that the Home Office will not certify claims of unaccompanied children in circumstances where no adequate reception arrangements are available. The guidance should also state that the Home Office will not certify claims of unaccompanied children as a whole. The RCC does not consider that it is appropriate to certify children's asylum or human rights claims because of the shared burden on the Home Office which reflects the recognised evidential and other difficulties that children face in presenting their claims. The certification of a claim prevents judicial oversight of the decision made in relation to a child's protection needs. This is inappropriate given the difficulties children face in presenting their claim and the risk of getting it wrong.

Further and in the alternative, certification under s.94 NIAA 2002 is an immigration decision and that it should therefore only be made following a best interests determination. Whilst there may be cases where the best interests of the child may be served by not pursuing an appeal without merit, this is not possible properly to determine against the instructions of the child without the involvement of a legal guardian independently considering their best interests.

The API on *Certification of Protection and Human Rights claims under section 94* and the current guidance on *Processing children's asylum claims* imply that a s55 best interests assessment will only need to be conducted following the certification decision, and where the child is with family members.

**Article 1F exclusion:** exclusion from the asylum process for children requires a best interests assessment. It is important both to take into account the liability of a child for actions that would lead to their exclusion, but a separate best interests determination should still be conducted. As the best interests of the child is a primary consideration, looking at their best interests in making a decision to exclude is critical, and is a first step wherein the countervailing factors in favour of exclusion at balanced against the completed test of what is in the child's best interests (as per ZH (Tanzania)). The current exclusion guidance sets out much more clearly the level of investigation required and sets the threshold for exclusion much higher at "very rare". The RCC would suggest using this existing guidance:

*The application of exclusion clauses to asylum claims from children will be rare and must always be exercised with great caution, given the particular circumstances and vulnerabilities of children. Exclusion on grounds of crimes or acts committed by children must always involve an assessment of their ability to understand acts that they may have been ordered to undertake and how far they can be held criminally responsible for them. If there are serious reasons for believing that a claimant (whether a child or an adult at the time of the claim) committed acts or crimes contrary to Article 1F whilst they were a child, for example, while being compelled to serve with armed forces or an armed*

*group, the individual is more likely to have been a victim of offences against international law than a perpetrator, see section issues of complicity and culpability.*<sup>8</sup>

## **Durable solutions**

The second issue to highlight is one of durable solutions, which looks more explicitly at the form of leave to be given to a child. This does not necessarily mean at the end of the asylum process. UNCRC General Comment number 6 states that the ultimate aim in cases involving unaccompanied or separated children is to achieve a durable solution. The first principle of a durable solution is to reunite a child with their parents where possible. The UNCRC and Unicef recommend a formal process of identifying a child's best interests to commence the process.<sup>9</sup> In the case of potential child victims of trafficking, there is a specific legal duty under Article 16(2) of the EU Trafficking Directive "to find a durable solution based on an individual assessment of the best interests of the child".

The RCC recommends that the forms of leave should be organised from most favourable to least favourable, and case-workers should be invited to consider them in this order. A child should be granted the most favourable form of leave available, and only if he does not meet the criteria for that form of leave should he be granted leave that may leave him with status that requires frequent renewal, which may exclude him from leaving care provisions or from accessing student finance and support, or which may otherwise hinder his progress.

**Refugee status:** For the reasons set out above, the RCC is concerned that the statement on exclusion from refugee leave is set too low, and that the appropriate threshold is found in the existing exclusions API.

**Family reunion:** family reunion should not be limited to locations where a child can be sent to join his family but should consider the possibility of reuniting a child with family members in the UK, particularly in light of *AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea* [2016] UKUT 00227

**Discretionary leave and Indefinite Leave to Remain (pages 47 and 49):** As set out above, in our view, case-workers should consider a grant of discretionary leave and the exceptional circumstances that may prevail before going onto consider family life under the rules. This would give effect to the decision in *R(SM & Others) v SSHD* that a best interests consideration required a decision-maker to look at the form of leave to be given.

The threshold of "very exceptional circumstances" (page 47) for the grant of Indefinite Leave to Remain was found in *SM* to be too high to amount to a proper best interests determination.

Children who have been trafficked into the UK should also be granted ILR or discretionary leave where appropriate, and where this is in line with the European Convention on Action Against Trafficking to have a renewable residence permit. Child victims of trafficking should not be returned solely because there may be safe reception conditions (page 48) but consideration should also be

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<sup>8</sup> Exclusion (Article 1F) and Article 33(2) of the Refugee Convention (version 6.0), Home Office, 1 July 2016

<sup>9</sup> Unicef, achieving a durable solution for trafficked children, 2015

[https://www.unicef.org.uk/Documents/Unicef\\_DurableSolutions\\_Report2015.pdf](https://www.unicef.org.uk/Documents/Unicef_DurableSolutions_Report2015.pdf)

given to their personal circumstances via a best interests determination, as well as whether they are assisting authorities or in physical or psycho-social recovery. A trafficking decision should be made via the National Referral Mechanism independently of a decision relating to an asylum or protection claim in order to be in conformity with the EU trafficking directive and the Modern Slavery guidance.<sup>10</sup>

Children who are victims of trafficking should not receive lesser forms of leave than adults. The EU Directive on Trafficking (2011/36/EU) highlights that a child victim of trafficking should have their best interests determined as a primary consideration.

### **Legal Representation**

The RCC has consistently highlighted the need for children to have high quality legal representation throughout the process. The need to obtain this assistance is more pressing with the transfer scheme to move children to regions where the necessary experience of representing children may be lacking, and in some areas that have not previously been dispersal areas, there may be limited asylum representatives.

It is critical that children have representation at each stage of the process to assess their competence and capacity to make decisions, and to enable them to give informed consent. UNCRC General Comment no6 makes clear that there is a duty on states to secure representation and *“States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child’s best interests.”*<sup>11</sup>

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<sup>10</sup> Modern Slavery Guidance for Competent Authorities, version 3.0  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521763/Victims\\_of\\_modern\\_slavery\\_-\\_Competent\\_Authority\\_guidance\\_v3\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf)

<sup>11</sup> General Comment No. 6, 2005 paragraph 33