

ILPA comments on: *Asylum Policy Instruction: Processing Children's Asylum Claims, version 1.0* and *Family tracing: Guidance on regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005, Version 1.0*

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded 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. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

ILPA is a member of the Refugee Children's Consortium and endorses the comments already submitted by the Consortium. We have therefore confined ourselves to providing comments on additional issues within areas of ILPA's particular expertise.

Asylum Policy Instruction: Processing Children's Asylum Claims, version 1.0**Legal representation (p.16)**

The guidance states that there is no requirement for legal representation at the first encounter with a child which will focus on welfare concerns. The guidance should additionally make clear that the child may have their legal representative and interpreter present if they wish.

Children accompanied to Croydon Asylum Intake Unit by a legal representative (p.23)

This section should clarify that it refers to welfare interviews undertaken at Croydon Asylum Intake Unit rather than substantive interviews.

We consider that the guidance in this section does not properly take into account the best interests of the child. It will usually be in the best interests of the child to be represented by their legal representative accompanied by an independent interpreter and the guidance should be amended to reflect this.

It has been consistently identified, including by the Legal Aid Agency, that it is best practice for a legal representative who does not speak the child's language to be accompanied by an independent interpreter. A legal representative needs to be able to communicate with their client, including during the interview both in terms of client care and to represent them effectively. The independent interpreter may also identify difficulties in understanding between the child and the Home Office interpreter. These provisions are even more important where the client is a child.

In terms of the number of people wishing to attend the interview referenced in the guidance, it is more intimidating for a child to be in a room with a number of strangers they do not understand and to have no one to whom they can ask what is happening or express any problems with the interpreter in their own language than one additional friendly face.

Legal representatives, like other employers, have a legal requirement to ensure employees are legally entitled to work in the UK. However, this requirement does not extend to self-employed persons contracted to provide services.

The offence of illegal working under section 24B of the Immigration Act 1971, inserted by section 34 of the Immigration Act 1971 criminalises an individual who works under a contract for services. This may be contrasted with the duties placed on employers. It is unlawful under section 15 of the Asylum, Immigration and Nationality Act 2006 and a criminal offence under section 21 of that Act (as amended by section 35 of the Immigration Act 2016) for an employer to employ a person who is disqualified from working. In both cases, the reference is specified as employment under a contract of service (s.25 Asylum, Immigration and Nationality Act 2006).

It would be inappropriate for a legal representative to conduct right to work checks of self-employed persons or of interpreters engaged from an independent interpreting agency.

The guidance implies that all notes from interpreters must be confiscated at the end of the interview. The guidance should clarify that this refers to notes taken by the Home Office interpreter as the notes of the child's independent interpreter will be the property of the child's legal representative.

Welfare form (p.24)

We are concerned that neither the guidance nor the welfare form state that a child may not be interviewed without an independent adult being present. This should be a requirement and included within the guidance with space on the welfare form to provide details of the independent adult present.

We agree that the first encounter with an unaccompanied child should focus on their welfare rather than follow the format of the screening interview previously used. As the current documents indicate, children should not be asked questions about their asylum claim or journey to the UK (which may have been traumatic) at this initial contact.

The guidance states that asylum caseworkers must never rely on information obtained from an interview where no responsible adult or legal representative is present. The sentence should make clear that information may not be relied on without both the responsible adult and legal representative being present.

The additional phrase 'unless this information has also been explored and raised with the claimant during the substantive asylum interview in the presence of a responsible adult or legal representative' should be deleted as this additional provision undermines the safeguard against relying on information provided by children when they are frightened, disorientated and may have suffered a traumatic journey to the UK by allowing this to be introduced to the substantive record. It is all the more inappropriate as any written note may be incomplete and will not have been read back to the child. The child and their legal representative should instead be provided

with a record of the welfare interview so that any concerns raised in the welfare interview relevant to the asylum claim may be explored with the child by their legal representative.

Role of the legal representative and responsible adult during interviews (p.35)

The guidance on the role of legal representatives during interviews does not reflect good practice in relation to the representation of children at interviews and existing Home Office guidance on interviewing practice. The Asylum Policy Instruction on Interviewing states (at 7.3):

Legal representatives are normally invited to add any comments at the end of the interview rather than during questioning, but this must not be rigidly applied, particularly where interviews with children are concerned. The interview should be conducted in a constructive spirit of cooperation between interviewer, interviewee and representative. Interventions by the legal representative may be justified for a variety of reasons; a legal representative can, for example, assist the interview process by drawing attention to a misunderstanding.

There is however a difference between helpful interventions and unnecessary interruptions. If the interviewer considers that an adviser or legal representative is acting unreasonably by making repeated interruptions that are disrupting the flow of the interview, this should be raised with the legal representative. The difficulties should be resolved by agreement if at all possible but if it cannot be resolved, the conduct of the interview should be discussed with a senior officer and appropriate action taken. In the rare instance of the most serious misconduct, this must be reported to senior management to consider referral to the relevant professional body.

The guidance on substantive interviews with a child should be amended to reflect the approach adopted in the Asylum Policy Instruction on Interviewing. Whilst the circumstances identified in the draft instruction on children indicates circumstances where interventions by the legal representative may be appropriate, these should not be framed as exceptional circumstances but as examples of some of the variety of reasons interventions of a legal representative may be justified.

Sharing information about the child

There are a number of places within the draft Asylum Policy Instruction where caseworkers are encouraged to obtain information to investigate the child's claim from other sources, including, for example, family members (p.31) and teachers or social workers (p.33).

The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status identifies that it may be necessary to have regard to objective factors and the circumstances of parents and other family members in the cases of unaccompanied children as they may not have a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult (paragraphs 217-219).

We are concerned, however, that the processes for obtaining information about the child's circumstances do not take adequate account of the rights of the child under the UN Convention on the Rights of the Child and under Article 8 of the European Convention on Human Rights.

In the recent case of *The Christian Institute and Others v The Lord Advocate* [2016] UKSC 51, 28 July 2016, the Supreme Court highlighted the privacy of a child or young person as an important

interest, protected under Article 16 of the UN Convention on the Rights of the Child and Article 8 of the European Convention on Human Rights (para 75) and identified that sharing personal data between relevant public authorities may constitute an interference with the article 8 rights of the child involved and the need to consider whether this was justified (para 78).

The Supreme Court found that the disclosure of confidential information about a child in circumstances in which there was no objectively compelling reason for the failure to ascertain and have regard to their views would not meet the requirement that any interference with rights under Article 8 of the European Convention on Human Rights be “in accordance with the law” (para 84). Consideration of whether less intrusive measures may be used also forms part of the court’s address to address the question of proportionality (para 90). In the case under consideration by the Supreme Court, the lack of any requirement to obtain the consent of the child or young person to disclosure was identified as one of the central problems. Whilst there may be reasonable exceptions, for example where the child is unable to give consent or the child’s best interests might be harmed, the overriding of confidentiality is likely often to be disproportionate in the absence of safeguards (para 100).

Legal representatives play a necessary role in assessing children’s competence, their capacity to make decisions and enabling the child to be heard in asylum and immigration proceedings in accordance with Article 12 of the UN Convention on the Rights of the Child. The importance of enabling the child to be heard was stressed by the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. The guidance should therefore indicate that requests for information should be made to the instructed legal representative so that the child has the opportunity to give informed consent to any disclosure of personal information about them. This would provide for objective information to be provided in the least intrusive manner and in accordance with the child’s best interests. The role of the legal representative is particularly important given the absence of legal guardians for unaccompanied children with responsibility for protecting the child’s best interests.

Further, the section on obtaining information from family members does not take into account potential safeguarding risks and highlights the importance of seeking information via the legal representative, so that the child’s views may be considered and heard, rather than simply informing the legal representative of information being sought.

Family tracing: Guidance on regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005, Version 1.0

ILPA has responded to Home Office guidance on family tracing in the past, see for example: *ILPA Response to consultation on new Family Tracing policy, Statement of Evidence Form and Unaccompanied Children’s Arrival Proforma, 2 October 2014*. We are pleased to see textual evidence that those comments have informed the latest draft.

Pressures of other work means that we have struggled to provide very many comments on such voluminous guidance. We do wonder if casework staff have time to read such lengthy guidance and would suggest that monitoring and evaluation will be required to establish whether, and if so how, the guidance is being used.

General

As we did in 2014, we question whether it is appropriate that the Home Office be the lead agency on family tracing. The primary purpose of tracing is to safeguard and promote the welfare of the child, not to gather information for consideration of an asylum claim. While the Home Office may have a role to play, its desire to gather information that may cast doubt on the veracity of the claim for asylum creates a conflict of interest that make it inappropriate for it to be the lead agency, particularly in respect of taking decisions on the timing of tracing. The “Reception Conditions Directive”¹ places the obligation to trace on the Member State, not upon any particular department therein. While we provide comments on the policy instruction none should be taken to imply endorsement of the Home Office’s undertaking this role.

As we have stated previously, the caseworker should not limit tracing enquiries (where these are appropriate) based upon the apparent credibility or not of the child’s account given as part of his or her claim for asylum. The risk of conflation between these two matters underscores our points above that the Home Office not be the lead agency for tracing enquiries. Another reason is that tracing remains relevant to a child whose asylum claim is granted or refused, in the former case perhaps long after the Home Office has ceased to have any involvement in the case.

The general principles set out in “Contacting the Family” make clear that the re-establishment of contact between the child and their family must be facilitated by the child’s social worker, another reason for concluding that the Home Office is not the appropriate lead agency but should be acting in an advisory capacity only.

Informed consent, freely given

It is important to foreground that tracing should only take place if and when it is the child’s best interests. The wording of Regulation 6 of the Reception Directive², reflects this (“so as to protect the minor’s best interests”; see also General Comment No 6³, paragraph 80). By whomsoever undertaken, the obligation to trace arises only if, upon considering all of the information, tracing would be in the child’s best interests.⁴ A conclusion should not be reached prematurely: the need to assess whether tracing is in the child’s best interests is an ongoing one. Ascertaining the child’s wishes is highly relevant to determining where his or her best interests lie. The child should to understand what the tracing process may entail, particularly the consequences of finding / not finding his or her family members, so that s/he is in a position to give informed consent to the process. It is stated at page 17 that a child’s lack of consent in itself would not always prevent family tracing. It cannot be said that the obligation to trace overrides consent because the obligation only arises when tracing is in the child’s best interests and consent is a part of this. We recall the comments of the Supreme Court in *TN, MA and AA (Afghanistan) v Secretary of State for the Home Department* [2015] UKSC 40 (24 June 2015):

69. The O[ffice of the] C[hildren’s] C[ommisioner] rightly emphasised that before any tracing process is embarked upon the child must be properly consulted about his or her wishes. This is a necessary part of considering the child’s best interests.

¹ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L31/24, 6 February 2003, see Article 19(3).

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

³ UN Committee on the Rights of the Child, General Comment (No 6) "Treatment of Unaccompanied and Separated Children outside their Country of Origin" (2005)

⁴ Ibid.

Efforts should always be made to obtain the child's consent and it is necessary to ensure that this is informed consent, freely given, for without these two features it is not consent at all. Absent a guardian it is necessary that a child's legal representative have an opportunity to take instructions on a child's consent or otherwise to tracing and to put this forward to the Home Office. It is likely that, absent a guardian, consent will not be obtained in cases where, with a guardian, it would have been. Absent a guardian we find it difficult to envisage circumstances in which it could be demonstrated that it was in the best interests of a child who did not give informed consent, to trace that child's family.

We have considered the section on *Relevance of family tracing to the consideration of asylum claims*. The instruction should state clearly that no adverse inference as to general credibility should be drawn from a refusal to provide information to enable family members to be traced. Without this we do not identify how the child's consent can be said to be freely given.

We suggest that Article 19(3) of the Reception Directive (2003/9/EC) be quoted in full in the guidance⁵:

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

In the case of TN, the Supreme Court said of this paragraph *“9. The importance of the second sentence cannot be overstressed.”*

Ensuring the safety of family members is an integral part of safeguarding and promoting the welfare of a child.

Immigration Law Practitioners' Association (ILPA)

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⁵ The same duty has been transposed by Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005.