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Children's Best Interests

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The 1989 UN Convention on the Rights of the Child states:

“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.” (Article 3, first paragraph)

This information sheet provides information about how this requirement that the best interests of the child be a primary consideration affects immigration and asylum cases.

Relationship between international and domestic law

The 1989 UN Convention the Rights of the Child is a piece of international law. The UK has signed up to it. For many years, the UK had in place a reservation to the Convention regarding immigration. However, in 2008, the UK withdrew that reservation. By doing so, the UK agreed to respect the obligations set down by the Convention including in immigration (and asylum) cases.

International law does not generally have ‘direct effect’ in the UK unless there is specific legislation giving effect to it in the UK. This has not been done for this Convention, and so the Convention cannot be directly relied upon by a person in the UK in a UK court (this is what is meant by direct effect). However, the UK courts will generally interpret UK legislation so as to be compatible with international law, to which the UK has signed up. Also, the UK courts will generally expect Government officials to act in a way that is compatible with that international law.

Other relevant legal obligations in UK law

In immigration law, there are specific obligations upon the UK Border Agency in relation to children. These include:

- A duty to have regard to the need to safeguard and promote the welfare of children (see the August 2009 “Children – New Statutory Duty” information sheet)
- The obligation to respect the private and family life of each person in the UK, including every child (see the August 2008 “Article 8” information sheet)

These obligations plainly relate to the interests and rights of children. They should, therefore, be applied in ways that are compatible with the 1989 UN Convention on the Rights of the Child – including the Article 3 obligation to ensure that all actions affecting a child are done with a primary consideration being given to the child’s best interests.

UK court's consideration of a child's best interests

In 2010, the High Court (for England and Wales), the Court of Session (for Scotland) and the UK-wide Upper Tribunal have each considered the obligation to give primary consideration to a child's best interests in immigration-related cases.

In *R (TS) v Secretary of State for the Home Department & Anor* [2010] EWHC 2614 (Admin), the High Court held the UK Border Agency had not given primary consideration to the best interests of the child when it had decided to remove a child asylum-seeker to Belgium for his asylum claim to be dealt with there. The child had been living in the UK for several months and become settled in the environment in which he was living. He suffered from post-traumatic stress disorder and required treatment for this. The High Court accepted Belgium would treat the child in accordance with international obligations (which it shares with the UK). However, the UK Border Agency was required to consider what was best for the child, not simply whether Belgium would behave responsibly. Displacing the child from the social and educational environment to which he had become familiar would not be in his best interests, and the UK Border Agency had given no or no adequate consideration to this. The decision to remove the child to Belgium was unlawful.

In *R (MXL & Ors) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin), the High Court held the UK Border Agency had not given primary consideration to the best interests of two children when deciding to detain and continue the detention of their mother (and thus separating children and mother). The High Court also criticised immigration judges who, when refusing to grant immigration bail to the mother, had failed to give primary consideration to the children's best interests. The High Court found the mother's detention to have been unlawful.

In *HS v Secretary of State for the Home Department* [2010] CSIH 97 and *AK v Secretary of State for the Home Department* [2010] CSIH 98, the Inner House of the Court of Session (equivalent to the Court of Appeal in England and Wales) considered the decisions of the UK Border Agency in two cases concerning parents facing removal from the UK. The Court of Session made clear that it was not enough for the UK Border Agency to regard the best interests of a child as merely a relevant consideration when making a decision affecting a child. The child's best interests must be a primary consideration. However, the Court of Session concluded that in the particular cases there had been no evidence or submissions of real substance put to the UK Border Agency about the particular children. The UK Border Agency's decisions were sufficient and lawful.

In *LD (Zimbabwe)* [2010] UKUT 278 (IAC), the Upper Tribunal held the UK Border Agency and an immigration judge had failed to give primary consideration to the best interests of the children of a father facing removal to Zimbabwe. The Upper Tribunal made clear that, if removing a parent from the UK, weighty reasons would be necessary in order to justify separating a child from the parent or separating a child from a community in which the child had grown up and lived for most of his or her life. The Upper Tribunal allowed the appeal against the decision to remove the father.

General conclusions

The cases described in this information sheet show the importance of the best interests of children in immigration cases. It is not sufficient for the UK Border Agency to consider the best interests of children along with immigration or other considerations. The UK Border Agency must ensure that primary consideration is given to the best interests of any child affected by its decisions. This means the UK Border Agency must first consider what is in the child's best interests and ensure this is given a primary consideration when considering what decision it should make. However, if there is no or insufficient explanation or evidence put to the UK Border Agency about the potential consequences of its actions or decisions, it may not be expected to do much by way of considering the child's best interests. A full explanation with detailed evidence of how a child is or may be affected by a decision will therefore often be of great importance.