Upper Tribunal
(Immigration and Asylum Chamber)

AT and another (Article 8 ECHR – Child Refugee – Family Reunification) Eritrea [2016] UKUT 00227 (IAC)

THE IMMIGRATION ACTS

Heard at The Upper Tribunal, Field House, London on 09 February 2016	**Decision promulgated**
	....

Before

The Hon. Mr Justice McCloskey, President

Between

AT AND AHI

Appellants

and

ENTRY CLEARANCE OFFICER OF ABU DHABI

Respondent

Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation

For the Appellants: Ms K Cronin and Ms A Smith, of counsel, instructed by the Joint Council for the Welfare of Immigrants

For the Respondent: Mr T Poole, of counsel, instructed by the Government Legal Department

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While the Immigration Rules make no provision for family reunification in the United Kingdom in the case of a child who has been granted asylum, a refusal to permit the family members of such child to enter and remain in the United Kingdom may constitute a disproportionate breach of the right to respect for family life enjoyed by all family members under Article 8 ECHR.

DECISION

Introduction

1. In this appeal, the Appellants are two of the three protagonists concerned. All three are members of the same family unit and all are nationals of Eritrea. They consist of a mother and her two sons. The two Appellants currently reside in Sudan. The first Appellant is the mother, now aged 34 years. The second Appellant is her younger son, now aged fifteen years. The third family member, M, is aged 19 years. He is described in many parts of the evidence as the "*sponsor*".

2. One stand out feature of M's circumstances is that, having arrived in the United Kingdom as an unaccompanied minor in 2012, then aged 16, he succeeded in his appeal against a refusal of asylum, with the result that the Secretary of State for the Home Department (the "*Secretary of State*") granted him five years limited leave to remain in the United Kingdom, as a refugee, a period which will expire on 07 April 2018. M aspires to achieve family reunification with his mother and brother, the two Appellants, in the United Kingdom. He does so primarily through the vehicle of Article 8 ECHR.

The Impugned Decisions

3. The decisions underlying these proceedings and to which the origins of these combined appeals can be traced were made by the Entry Clearance Officer of Abu Dhabi (the "*ECO*"), the alter-ego of the Secretary of State, in December 2013. By his decisions the ECO refused to grant the Appellants entry clearance to join the sponsor in the United Kingdom. In refusing the mother's application, the ECO stated:

   > "*I have considered your application under paragraph 352 of the …… Immigration Rules …..*
   >
   > *I have used all the information provided by you to determine if the Immigration Rules have been met …..*
   >
   > *Immigration Rules for family reunion only apply to dependent partners and children of sponsors, not for* [sic] *parents and siblings. As such you have applied in a category that is not covered by Rules* [sic] *and your application falls for refusal under paragraph 320(1).*"

   The refusal decision as regards the second Appellant was framed in precisely the same terms, albeit he was described erroneously as the sponsor's "*son*".

Factual Framework

4. The factual matrix is a mixture of certain uncontentious facts and my further findings, *infra.*

5. When they lived in Eritrea the family unit consisted of the three protagonists and the first Appellant's husband. He was imprisoned there for political reasons and, fearing persecution by the Government she and her two sons fled Eritrea. This occurred in two stages. First, in April 2012, M left Eritrea, accompanied by his uncle. Later, in January 2013, the two Appellants fled, travelling on foot to Sudan. There they were accommodated in the UNHCR refugee camp in Shagarab. They were given UNHCR identity cards. The first Appellant considered this an unsafe place on account of the phenomena of kidnapping refugees and human trafficking.

6. In May 2013 the first Appellant succeeded in contacting M by telephone, from the camp, assisted by a UNHCR aide. The same person assisted the two Appellants in travelling to Khartoum, some 650 kilometres away, for the purpose of making their entry clearance applications to the United Kingdom. The first Appellant decided that it would be safe to remain in Khartoum and, further, preferred to be close to the Embassy. She borrowed money to pay the visa fees. Thereafter, the two Appellants lived on the streets of the city, occasionally managing to sleep in shelters or on church floors. She succeeded in getting some limited, illegal work. Both remained in Khartoum at the time of the First-tier Tribunal ("FtT") hearing giving rise to this appeal.

7. Pausing at this juncture, I acknowledge that the FtT did not accept certain aspects of the factual case put forward on behalf of the Appellants. The basis upon and terms in which some of their assertions were rejected formed one of the grounds upon which the decision of the FtT was subsequently set aside by this Tribunal. In remaking the decision, I have considered the same evidence as that available to the FtT. Having done so, I am satisfied to the requisite standard of the truth and accuracy of the Appellants' account.

8. I have considered in particular the evidence bearing on the family bonds and the inter-dependency of its members. From this it is clear to me that this is a close, loving and mutually supportive family unit all of whose members would be overjoyed if reunification could be achieved. There is clearly discernible interdependence. The enormous efforts to which the first Appellant went, the hardships which she has borne and the sacrifices which she has made, all in pursuit of family reunification, bear eloquent testimony to the virtues and character of the mother and the strength and stability of the family unit. Notably the ECO did not suggest that the Appellants are economic migrants and I am satisfied that there is no evidence from which this could be inferred in any event. In this context it is appropriate to highlight a passage in the statement of a teacher who has formed part of M's life during almost two years:

> *"He was devastated when he received the news that the initial application had been rejected and actually had to take time off school to pull himself together. His foster parents are very caring, but I know that his real mother has a special place in his heart and he does not feel the same sense of belonging to his foster parents."*

This evidence has the supreme virtues that it is manifestly objective, independent and measured. In passing, the teacher concerned deserves commendation for taking the trouble to provide her detailed and balanced witness statement.

9. The mother and younger son plainly live in deprived and dangerous circumstances. They are destitute. The second Appellant has been unwell for a long time. This is a fractured family. Neither son has had the benefit of a father, or father figure, for several years. The mother struggles on, battling against the odds, deprived of the immense assistance and support which the sponsor would be capable of providing. Meanwhile, M has become increasingly stressed and preoccupied. He appears to be under-achieving academically and his social activities have become limited. Having reached his 18th birthday, the sponsor is no longer in foster care. Some three years have elapsed since he last saw his mother and younger brother. His status is that of a former looked after child. He cuts an isolated and unsupported figure, a teenager living in an unfamiliar foreign country without any family support whatsoever. I am satisfied that his need for reunification with his mother and younger brother has not diminished since his advent and is, if anything, greater than ever.

Family Reunification: the Secretary of State's Policy

10. The Secretary of State's policy in the realm of family reunification, as expressed in the Immigration Rules, dates from the year 2000. Its most important feature, for the purposes of these appeals, is that no provision has ever been made for family reunification in the case of a child who has gained refugee status in the United Kingdom. This discrete regime is currently contained in Part 8 of Appendix FM to the Rules, at paragraphs 352A – 352G and 819L – 819U. In short, spouses and minor children of a "sponsor" can, subject to satisfying the governing conditions, secure family reunification in the United Kingdom by the grant of leave to enter. However, this possibility does not exist where the sponsor is a child.

11. Thus a blanket prohibition is in operation. Historically, there was a short lived exception to this prohibition relating to the parents of unaccompanied children who had fled Kosovo and secured asylum in the United Kingdom. This concession was confined to the short time frame of July to September 1999. With effect from 02 October 2000, the family reunification regime enshrined in the Immigration Rules contained the aforementioned blanket prohibition. From then to 2006 the Secretary of State operated a policy of permitting the parents or siblings of unaccompanied minor refugees to enter the United Kingdom for the purpose of reunification only where compelling and compassionate circumstances were demonstrated. Since 2006 the Secretary of State's policy has extinguished this possibility. While these appeals have generated much documentary evidence pertaining to this discrete issue, it is striking that there is no evidence bearing directly on the policy aims and justification underpinning this exclusion. I shall revisit this discrete issue *infra*.

Legal Framework

12. As appears from the above, the refusal decisions of the ECO were made solely by reference to the Immigration Rules. The appeal to the FtT was based on Article 8 ECHR. One of the salient features of the legal framework is that the Immigration Rules contain no provision for family reunification in the case of a child refugee. Nor does the Secretary of State operate any policy to this effect. There is (very properly) no

dispute about the existence of family life and the interference with Article 8(1) wrought by the decisions of the ECO. Thus the fundamental question for this Tribunal is whether such interference is necessary in a democratic society viz is a proportionate means of securing the legitimate aim in play, namely immigration control. The statement of Lord Bingham of Cornhill in Huang v SSHD [2007] 2 AC 167, at [18], applies fully to these appeals:

> *"The Strasbourg Court has repeatedly recognised the general right of States to control the entry and residence of non-nationals and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their Article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of Article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate aim sought to be achieved."*

The balance to be struck involves an exercise of weighing the rights of the individual and the interests of the community: see [19]. Furthermore, this Tribunal is the arbiter of proportionality, which is to be judged objectively: R (SB) v Governors of Denbigh High School [2007] 1 AC 100, per Lord Bingham at [30].

13. Article 8 ECHR is in the following terms:

> *"1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

By section 3 of the Immigration Act 1971 it is provided (insofar as material):

> *"(1) Except as otherwise provided by or under this Act, where a person is not a British citizen*
> *(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act;*
> *(b) he may be given leave to enter the United Kingdom (or, when already there, leave to remain in the United Kingdom) either for a limited or for an indefinite period;*
> *(c) if he is given limited leave to enter or remain in the United Kingdom, it may be given subject to all or any of the following conditions, namely –*
> *(i) a condition restricting his employment or occupation in the United Kingdom;*
> *(ia) a condition restricting his studies in the United Kingdom;*
> *(ii) a condition requiring him to maintain and accommodate himself, and any dependants of his, without recourse to public funds;*
> *(iii) a condition requiring him to register with the police;*
> *(iv) a condition requiring him to report to an immigration officer or the Secretary of State; and*
> *(v) a condition about residence.*
>
> *(2) The Secretary of State shall from time to time (and as soon as may be) lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to*

the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter, including any rules as to the period for which leave is to be given and the conditions to be attached in different circumstances …"

Section 117A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*") provides:

"(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

By section 117B:

"(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom. "

14. M was a child, present in the United Kingdom, when the impugned decisions of the ECO were made. Accordingly, section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*") is engaged. This provides in material part:

> *"(1) The Secretary of State must make arrangements for ensuring that –*
> *(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and*
> *(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.*
>
> *(2) The functions referred to in subsection (1) are –*
> *(a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
> *(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;*
> *(c) any general customs function of the Secretary of State;*
> *(d) any customs function conferred on a designated customs official.*
>
> *(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)…*
>
> *(6) In this section –*
> *"children" means persons who are under the age of 18;*
> *"customs function", "designated customs official" and "general customs function" have the meanings given by Part 1".*

The statutory guidance made pursuant to section 55(2) is, for convenience, reproduced in the Appendix to this judgment. This will hopefully serve to give this measure the substantially greater prominence which, given my experience in children's immigration and asylum cases, it merits.

15. The United Nations Convention on the Rights of the Child ("*UNCRC*"), which has been ratified by the United Kingdom, contains, in Article 3(1) the provision wherein the genesis of section 55 reposes. Article 3(1) provides:

> *"**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."*

The argument developed on behalf of the Appellants also pray in aid certain other provisions of UNCRC.

Article 6(2)

> *"States Parties shall ensure to the maximum extent possible the survival and development of the child."*

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 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."

16. In this context the Appellants also draw on the United Nations General Comment Number 6/2005, "Treatment of Unaccompanied and Separated Children outside their Country of Origin" and, in particular, the following passages:

Paragraph 79

"The ultimate aim in addressing the fate of unaccompanied or separated children is to identify a durable solution that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or

separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated. Following a rights-based approach, the search for a durable solution commences with analysing the possibility of family reunification."

Paragraph 82

"Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of non-refoulement obligations (including those deriving from article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and articles 6 and 7 of the International Covenant on Civil and Political Rights). Accordingly, the granting of refugee status constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein. Where the circumstances in the country of origin contain lower level risks and there is concern, for example, of the child being affected by the indiscriminate effects of generalized violence, such risks must be given full attention and balanced against other rights-based considerations, including the consequences of further separation. In this context, it must be recalled that the survival of the child is of paramount importance and a precondition for the enjoyment of any other rights."

Paragraph 83

"Whenever family reunification in the country of origin is not possible, irrespective of whether this is due to legal obstacles to return or whether the best-interests-based balancing test has decided against return, the obligations under article 9 and 10 of the Convention come into effect and should govern the host country's decisions on family reunification therein. In this context, States parties are particularly reminded that "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" and "shall entail no adverse consequences for the applicants and for the members of their family" (art. 10 (1)). Countries of origin must respect "the right of the child and his or her parents to leave any country, including their own, and to enter their own country" (art. 10 (2))."

17. I record at this juncture that, invoking the well known "opt out" TEU mechanism, the United Kingdom (in common with Ireland and Denmark) does not subscribe to the *soi-disant* family reunification directive viz Council Directive 2003/86/EC of 22 September 2003. As a result, the Appellants are unable to invoke directly the benefits of Article 3, which provides:

1. This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status.

2. This Directive shall not apply where the sponsor is:
(a) applying for recognition of refugee status whose application has not yet given rise to a final decision;

(b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status;
(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

3. This Directive shall not apply to members of the family of a Union citizen.

4. This Directive is without prejudice to more favourable provisions of:
(a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;
(b) the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.

5. This Directive shall not affect the possibility for the Member States to adopt or maintain more favourable provisions."

However, I consider that indirect reliance on aspects of this measure may be possible via the guidance published by the Secretary of State under section 55(2) of the 2009 Act: see [31] *infra*.

18. In contrast, Council Directive 2004/83/EC of 29 April 2004, the co-called "Qualification Directive" does apply in the United Kingdom, having been transposed by the Refugee or Person in need of International Protection (Qualification) Regulations 2006. This prescribes "*minimum standards for the qualification and status of third country nationals or stateless persons as persons who otherwise need international protection and the content of the protection granted.*" Article 23 provides:

*"**Maintaining family unity***
1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member. In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits. In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.

5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were

wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time."

Per Article 3:

> *"**More favourable standards***
> *Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive."*

19. The governing legal framework is completed by certain well established principles of domestic, international and European human rights law. I summarise these in no particular hierarchical order. First, there is the familiar principle that every state has the right to control entry into and stay in its territory, sometimes described as the "sovereignty principle", which finds expression in the opinion of Lord Bingham of Cornhill in R (Bapio Action Limited) v SSHD [2008] 1 AC 1003, at [4]:

> *"It is one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory and to regulate and enforce the terms on which they may do so."*

The Strasbourg decisions belonging to this sphere give emphasis to the consideration that the central issue in these appeals is that formulated in [10] above. Thus, in one of its leading pronouncements, the ECtHR has stated:

> *"The Court reiterates that in the context of both positive and negative obligations, the State must strike a fair balance between the competing interests of the individual and of the community as a whole. However, in both contexts the State enjoys a certain margin of appreciation. Moreover, Article 8 does not entail a general observation for a State to respect immigrant's choice of the country of their residence and to authorise family reunion in its territory."*

See Rodrigues v The Netherlands [2007] 44 EHRR 34, paragraph [39].

20. The margin of appreciation enjoyed by the State in this context is emphasised in Draon v France [2006] 42 EHRR 40, where, in a moderately detailed treatise, the Grand Chamber pronounced at [105] – [108]:

> *"1. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective "respect" for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation (see, for example, Nuutinen v. Finland, no. 32842/96, 27 June 2000, § 127, and Kutzner v. Germany, no. 46544/99, 26 February 2002, §§ 61 and 62). Furthermore, even in relation to the positive obligations flowing from the first paragraph, "in striking [the required] balance the aims mentioned in the second paragraph*

may be of a certain relevance" (see Powell and Rayner v. the United Kingdom, judgment of 21 February 1990, Series A no. 172, § 41).

2. "Respect" for family life ... implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally (see Marckx, cited above, § 45). The Court has held that a State is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, § 32; X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; López Ostra v. Spain, judgment of 9 December 1994, Series A no. 303-C, p. 55, § 55; Guerra and Others v. Italy, judgment of 19 February 1998, Reports 1998-I, p. 227, § 58; Botta v. Italy, judgment of 24 February 1998, Reports 1998-I, § 35; and Zehnalova and Zehnal v. the Czech Republic (dec.), no. 38621/97, ECHR 2002-V).

3. However, since the concept of respect is not precisely defined, States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 67, and Zehnalova and Zehnal, cited above).

4. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions (see, for example, Handyside v. the United Kingdom, judgment of 7 December 1976, Series A no. 24, p. 22, § 48, and Hatton and Others v. the United Kingdom [GC], no. 36022/97, § 97, ECHR 2003-VIII). In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."

21. In decision making contexts in which the public interest engaged has the democratic stamp of parliamentary scrutiny, debate and decision, culminating in primary legislation, the public interest is especially strong and the role of the court or tribunal as arbiter of proportionality is correspondingly reduced: see SS (Nigeria) v SSHD [2013] EWCA Civ 550, per Laws LJ at [42]:

> *"But the margin of discretionary judgment enjoyed by the primary decision maker, though variable, means that the Court's role is kept in balance with that of the elected arms of government and this serves to quieten constitutional anxieties that the Human Rights Act draws the Judges onto ground they should not occupy ….."*
>
> [and at 47]:
>
> *"Upon the question whether the principle of minimal interference is fulfilled, the primary decision maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation."*

The variable nature of the primary decision maker's margin of appreciation, or discretionary area of judgment, is illustrated in R (Quila) v SSHD [2012] 1 AC 621 where the legal rule in play which precluded the claimants from securing leave to remain in the United Kingdom was a provision of the Immigration Rules which do not, of course, have the status of parliamentary legislation and do not, therefore, attract the

equivalent imprimatur of democratic approval: Huang v SSHD [2007] 2 AC 167, at [17]. Furthermore, it is appropriate for the court or tribunal to take into account whether the Secretary of State had access to "*special sources of knowledge and advice*" in formulating the rule or rules under scrutiny: per Lord Wilson JSC at [46].

22. Moreover, as noted by this Tribunal recently in ZAT and Others v SSHD (Article 8 ECHR – Dublin Regulation – Interface – Proportionality) IJR [2016] UKUT 61 (IAC), after [57]:

> "*Lesser weight is to be accorded to the Secretary of State's assessment to the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the* [rule in question] *embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case by case basis.*"

The ensuing sentence in the same paragraph resonates, as it applies fully to the present appeals:

> "*…. The platform upon which the Secretary of State has contested these proceedings is quite unrelated to the individual circumstances, the needs and merits of any of the seven Applicants.*"

As in ZAT and Others, the present proceedings concern a blanket exclusion, or prohibition.

23. In Secretary of State for the Home Department v SS (Congo) and Others [2015] EWCA Civ 387 the Court of Appeal paid specific attention to the factor of children in the context of applications for leave to enter and leave to remain in the United Kingdom. Having noted that the "Article 8 code", contained in Appendix FM to the Immigration Rules, constituted an "*attempt*" by the Secretary of State to reflect "*more precisely than before*" the relevant balance to be struck between the public interest and the interests of the individual in Article 8 cases, the Court formulated some general principles in [39]. These include the principle, expressed in [39](iii) that:

> "*A Court will be slow to find an implied positive obligation which would involve imposing on the State significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the State in the public interest, a matter which usually calls for consideration under democratic procedures*".

This is followed immediately by the following passage:

> "*(iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see In re E (Children) (Abduction: Custody Appeal) [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see In re E (Children) at [12] and ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on*

the Rights of the Child the interests of the child are a primary consideration – i.e. an important matter – not the primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind."

The Court further noted that Article 3(1) of UNCRC forms part of municipal law via section 55 of the 2009 Act, in observing that some of the principles and obligations contained in this international law measure have influenced domestic law.

24. There is a further, discrete dimension of the Article 8 jurisprudence which the Court of Appeal noted *en passant* in SS (Congo), at [39](v), namely the principle, or test, of the "*direct and immediate link*" forging a nexus between the measures requested by an applicant and his family life. This principle approximates to the familiar common law concept of casual nexus. In Draon v France (*supra*), the Grand Chamber, having reiterated certain well established principles, stated at [106]:

 "'Respect' for family life …. implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally. The Court has held that a State is under this type of obligation where it has found a direct and immediate link between the measures requested by an Applicant, on the one hand, and his private and/or family life on the other."

 This direct and immediate link is unlikely to be established in circumstances where family life can be carried on elsewhere: see Botta v Italy [1998] 26 EHRR 241 and Gül v Switzerland [1996] 22 EHRR 93, at [42].

25. The scope for further development and refinement of the principles, tests and touchstones to be applied in Article 8 cases of this *genre*, in the context of what is of course a "*living instrument*", is illustrated by a trilogy of decisions of the ECtHR. It is unnecessary to dwell on the first of these, Sen v Netherlands [2003] 36 EHRR 7. In the second, Tuquabo-Tekle and Others v Netherlands [2005] ECHR 803 [Application No 60665/00], which followed two years later, the Court emphasised, firstly, that every case is fact sensitive: see [43](a). In formulating an inexhaustive list of touchstones to be applied, it highlighted the age of the children concerned, their current situation in their country of origin and the extent of their dependency on their parents. In [47] it formulated the test of "*the most adequate means for the various members to develop family life together*". The Court also acknowledged, in [49], the relevance of the age of the child or children concerned, the extent of the child/parent dependency, whether the child had been reared in the cultural and linguistic environment of his country of origin, whether there are relatives there and whether it could be expected of the parents to return there: see [49].

26. This was followed by Mayeka and Mitunga v Belgium [2008] 46 EHRR 23 in which the main factors were pre-existing family life between the separated persons concerned, an unaccompanied minor and special vulnerability. Both decisions illustrate the Court's willingness, in appropriate cases, to recognise Article 8 ECHR as the vehicle for achieving family reunification on the territory of the Council of Europe State where one of the family members is present or established.

27. As the sponsor was a child (aged 17) when the impugned decisions of the ECO were made, section 55 of the 2009 Act applied. Accordingly, his best interests had the status of a primary consideration. As in so many cases involving children, there is no evidence that the statutory duty imposed by section 55(2) to have regard to the Secretary of State's statutory guidance was discharged. I readily infer that it was not. This, sadly, seems to be the rule rather than the exception in cases of this kind. This, notwithstanding that the decisions of this Tribunal in JO and Others (Section 55 Duty) Nigeria [2014] UKUT 517 (IAC) and MK (Section 55 – Tribunal Options) [2015] UKUT 223 (IAC) have drawn attention emphatically to this aspect, and others, of section 55.

28. Section 55 has been considered by the United Kingdom Supreme Court in ZH (Tanzania) v SSHD [2011] 2 AC 166 and Zoumbas v SSHD [2013] 1 WLR 3690. As these decisions make clear, no other material consideration can be treated as inherently more significant than the best interests of any affected child, albeit this can be outweighed by the cumulative effect of other considerations and it does not rank as the primary, or paramount, consideration. Per Lord Kerr in ZH (Tanzania) at [46]:

> *"It is not merely one consideration that weighs in the balance along side 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."*

Notably, while section 55 did not apply directly to the second Appellant when the decisions were made, as he was outside the United Kingdom, the Secretary of State's Immigration Directorate Instruction ("IDI") invites ECOs to consider the aforementioned statutory guidance, as noted by this Tribunal in Mundeba (Section 55 and paragraph 297(i)(f)) [2013] UKUT 88 (IAC), at [36] and [37] especially: see further [31] *infra*.

29. The issue of the status of unincorporated or partly incorporated international treaties in domestic law continues to intrigue. It has proved nothing if not organic during recent years. The determination of these appeals does not require a detailed treatise. Rather, it suffices to draw attention to three matters. The first is the opinion of Lord Wilson in Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47, at [42] – [44], which merit reproduction in full:

> *"[42] In ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166, Lady Hale at para 21 quoted with approval the observation of the Grand Chamber of the ECtHR in Neulinger v Switzerland (2010) 28 BHRC 706, para 131, that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law". The Court of Appeal concluded, however, that the circumstances of the present case left no room for either of the international conventions to give a steer to the proper interpretation of Cameron's rights. Consistently with that conclusion, the Secretary of State proceeds to submit that it is in principle illegitimate to have regard to the conventions and in this regard he relies upon the recent decision of this court in the SG case cited at para 39 above.*
>
> *[43] It is clear that in the SG case the Secretary of State submitted that, while an international covenant might inform interpretation of a substantive right conferred by the Convention, it had no role in the interpretation of the parasitic right conferred by article 14 and thus, specifically, no role in any inquiry into justification for any difference of*

treatment in the enjoyment of the substantive rights. But his submission was not upheld. While Lord Reed did not expressly rule upon it, it was rejected by Lord Carnwath (paras 113-119), by Lord Hughes (paras 142-144), by Lady Hale (paras 211-218) and by Lord Kerr (paras 258-262). Lord Carnwath, for example, pointed out at paras 117-119 that the Secretary of State's submission ran counter to observations in the Court of Appeal in the Burnip case, cited at para 23 above, and indeed to the decision of the Grand Chamber in X v Austria (2013) 57 EHRR 405. The decision of the majority in the SG case was not that international conventions were irrelevant to the interpretation of article 14 but that the UN Convention on the Rights of the Child was irrelevant to the justification of a difference of treatment visited upon women rather than directly upon children: para 89 (Lord Reed), paras 129-131 (Lord Carnwath) and para 146 (Lord Hughes).

[44] The noun adopted by the Grand Chamber in the Neulinger case, cited above, is "harmony". A conclusion, reached without reference to international conventions, that the Secretary of State has failed to establish justification for the difference in his treatment of those severely disabled children who are required to remain in hospital for a lengthy period would harmonise with a conclusion that his different treatment of them violates their rights under two international conventions."

In short, certain provisions of international treaties, in particular the UNCRC, have gently, seamlessly and progressively influenced and seasoned domestic law via the Human Rights Act 1998, as a result of the duty imposed on courts and tribunals by section 3(1) thereof and the long established practice of the ECtHR of taking into account relevant provisions of international law.

30. Second, bearing in mind section 55 of the 2009 Act, it is clear that Article 3(1) of UNCRC cannot be considered in a vacuum, isolated from the remaining provisions of the Convention. The meaning and reach of Article 3(1) must take their colour from, and be informed by, other provisions of this instrument. Article 31 of the Vienna Convention on the Law of Treaties requires no less. It provides, in material part:

"General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …. "

31. Third, decisions which give proper effect to both of the duties enshrined in section 55 may legitimately be influenced by unincorporated provisions of international law, having regard to the expression of the Secretary of State's policy in the statutory guidance made under section 55(2). This is found in "*Every Child Matters: Change For Children*", which contains, at paragraph 2.6, the following passage:

*"The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action against Trafficking in Human Beings and the UN Convention on the Rights of the Child. **The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.**"*

[Emphasis added]

Within this passage one finds the clearest of assurances that, as a matter of policy, these several instruments of international law will be given effect when the Secretary of State and her various *alter egos*, which include UKBA, UKVI and ECOs, are making immigration (and related) decisions which affect children. Moreover, the absence of any territorial limitation comparable to that contained in section 55(1) is notable.

32. Thus the principle enunciated in R v Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839 applies fully. Applying orthodox principles of public law, it matters not that the materials, or considerations, identified in "Every Child Matters (etc)" have the status of unincorporated international treaties. If this publication had the standing of a (mere) governmental policy, the Secretary of State would be expected to give effect to it: Lumba v Secretary of State for the Home Department [2011] UKSC 12 at [26], per Lord Dyson JSC. I consider that this duty applies *a fortiori* given that the publication is an instrument made pursuant to a duty imposed by primary legislation. By formulating the statutory guidance in this way the executive has chosen to give indirect status in domestic law to certain measures of international law which have not been incorporated by legislation.

33. The international law/domestic law dichotomy in United Kingdom law traditionally conjured up notions of polarisation and insularity. Having regard to the developments mapped above, the gulf between the two notional extremes has narrowed significantly and this is illustrated by the decision making context under scrutiny in these proceedings. The so-called dualist doctrine has evolved and has undergone some dilution in consequence. All of this is, ultimately, a reflection of the intrinsically organic nature of the common law.

Conclusions

34. At this juncture I remind myself of the fundamental question to be determined in these conjoined appeals: is the interference with the family life of the Appellants and M, brought about by the refusal decisions of the ECO, a proportionate means of securing the legitimate aims in play? Or, alternatively, one might ask which is to prevail: the interests of the three family members or the public interest?

35. On one side of the scales there is a strong family unit whose members are clearly united and fortified by strong bonds of love, affection and interdependency. They long to be reunited and have gone to substantial lengths and have made considerable sacrifices to achieve this goal. For as long as separation continues, this will be a disfunctioning, debilitated and under achieving family. The main feature of this under achievement will be the family's inability to attain its potential as one of the key elements of modern societies throughout the world. The under performance of family members and family units, in this respect, does not further any identifiable public interest. On the contrary it is antithetical to strong and stable societies. These features of the family unit under scrutiny in these appeals are exposed in a context where M, being the older of the two male sons, is, culturally, considered to be the head of the family. This family, bereft of its natural head by circumstances and not by choice, is now deprived of his successor and has been thus bereft for almost four years.

36. The evidence establishes clearly that the sponsor is under achieving as a person. This means that his contribution, actual and potential, to United Kingdom society is diminished. This arises in circumstances where he has demonstrated his willingness to adapt to United Kingdom culture and to study earnestly in this alien country. The prediction that society will secure some benefit if the sponsor achieves family reunification in this country is readily made. Thus reunification will promote, rather than undermine, the public interest in this respect. It will be manifestly better for society than maintenance of the status quo.

37. Furthermore, if family reunification cannot be achieved in the United Kingdom, M will be driven to consider alternatives, some of them manifestly dangerous given his youth and unaccompanied and unsupported status. These include the precarious journey involved in attempting to reunite with the Appellants wherever they may be at present. The evidence points to the probability that they are either in Khartoum or the UNHCR refugee camp several hundred kilometres away. The situations in both locations are fraught with danger and imbued with deprivation. Reunification of this family in their country of origin, Eritrea, is not a feasible possibility, having regard to the factual framework rehearsed in [5] – [9] above.

38. I consider it distinctly possible that if family reunification cannot be secured in the United Kingdom, the sponsor will depart these shores in the dangerous pursuit of one of the alternatives mooted above. This would deprive him of the protections which he has obtained as a result of being recognised a refugee. This would be manifestly undesirable for him, contrary to the public interest and incompatible with the philosophy and rationale of the Refugee Convention. It would also expose him to a risk of violating his Convention rights, in particular those protected by Articles 3 and 4. In the real world, recognition of this possibility is far from fanciful. I consider this to be a potent factor in the balancing exercise. Resort to this Tribunal is very much a measure of last resort for him.

39. Next, it is necessary to give effect to the principles enunciated in Mathieson – (*supra*) together with those aspects of the Secretary of State's statutory guidance noted in [31] above. I do not deduce from any of these principles or sources that the Secretary of State is under a duty to facilitate reunification for this family in the United Kingdom with the result that the impugned decisions of the ECO are vitiated. The existence of an absolute duty of this nature was not argued and I do not consider that such duty exists. However, in my view the orientation of these principles and policies is to favour, rather than undermine, what the Appellants seek to achieve by these appeals. They qualify for substantial weight in the proportionality balancing exercise.

40. On the other side of the scales lies the public interest. This engages the provisions in sections 117A and 117B of the 2002 Act, reproduced in [13] above. Thus, in summary: the public interest in the maintenance of effective immigration controls is engaged; I shall assume that neither of the Appellants speaks English; and I further assume that neither Appellant is, or will be, financially independent, at least for the foreseeable future. Section 117B(4) does not apply. Nor does section 117B(5), given the concession – properly made – of Mr Poole on behalf of the Secretary of State that the M's immigration status in the United Kingdom has not been precarious, given the grant of five years leave to remain *qua* refugee. Nor does section 117B(6) apply.

41. Is any other public interest engaged? Mr Poole, in his skeleton argument, sought to identify two such interests:

(a) the safeguarding of children, specifically those in the position of the sponsor, who would be at risk of trafficking and exploitation in their quest to reach the United Kingdom; and

(b) additional pressure on publicly funded childrens' services.

There is no primary legislation underpinning either of these asserted public interests. Moreover, there is no evidence underlying them – in the form of, for example, reports or commentaries. I recognise that evidence of this kind is not a prerequisite to the recognition of a public interest in the Article 8(2) balancing exercise. However, I cannot overlook that these public interests are advanced through the medium of counsel's written and oral submissions.

42. Furthermore, this unsatisfactory dimension of the Secretary of State's case is highlighted by the belated production of certain data. While I have considered this material, I observe that it does not have the benefit of related reports or the illumination or elaboration of witness statements. Nor is there any financial data even at a general level. In addition, the figures require clarification, which is lacking. In my judgment, the only conclusion which can safely be made is that there has been some increase in the advent of unaccompanied children to the United Kingdom during the past two years. That said, the figures are substantially smaller than those applicable to the years 2008 and 2009. While I take all of this evidence, including counsel's submissions, into account, I consider that its potency is questionable for the reasons given. Furthermore, I reiterate my analysis of the governing legal principles above.

43. This brings me to my overarching conclusion. Taking into account the considerations, assessments and reasons highlighted in [34] – [42] above, it is my conclusion that, balancing everything, the impugned decisions of the ECO, acting on behalf of the Secretary of State, interfere disproportionately with the right to respect for family life enjoyed by the Appellants and M. As the ultimate arbiter of proportionality I decide accordingly. Thus I re-make the decision of the FtT by allowing the appeals.

Decision

The appeals are allowed under Article 8 ECHR.

Signed: Bernard McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Dated: 29 February 2016

APPENDIX

EVERY CHILD MATTERS
CHANGE FOR CHILDREN

Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children

Issued under section 55 of the Borders, Citizenship and Immigration Act 2009

November 2009

department for
children, schools and families

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MINISTERIAL FOREWORD

It is the duty of Government and of society as a whole to keep children safe. Public agencies have a particular responsibility to do this, both within their own area of business and in the way in which they work together.

Section 11 of the Children Act 2004 places a duty on specified public bodies and key individuals to carry out their functions having regard to the need to safeguard and promote the welfare of children. This applies across a wide range of public activity, from schools to prisons.

Section 55 of the Borders, Citizenship and Immigration Act 2009 now places a similar duty on the UK Border Agency. This is a natural progression for the Agency which has been steadily improving how it works with children. Last year, the Government lifted its general reservation relating to immigration on the UN Convention on the Rights of the Child, and in January of this year we introduced a statutory Code of Practice for the UK Border Agency on Keeping Children Safe from Harm. The Code is superseded by this new duty which now places the UK Border Agency on the same footing as other public bodies working with children.

As Ministers for Immigration and Children, we welcome this coming together and are confident that it will help to support more effective joint working.

The UK Border Agency undertakes difficult and sensitive work on behalf of society as a whole. Working with children presents particular challenges. To meet these challenges effectively, the UK Border Agency needs the support of all those with an interest in children. The development of this guidance has been greatly assisted by the input of a range of organisations outside Government. We are grateful for this and look forward to continued co-operation to achieve the better outcomes for children which we all want to see.

Phil Woolas Minister of State for Borders and Immigration

Baroness Delyth Morgan Parliamentary Under-Secretary of State for Children, Young People and Families

INTRODUCTION

1. Improving the way key people and bodies safeguard and promote the welfare of children is crucial to improving outcomes for children.

2. Section 55 of the Borders, Citizenship and Immigration Act 2009 (the 2009 Act) therefore places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK. A similar duty is placed on the Director of Border Revenue in respect of the Director's functions.

3. The guidance sets out the key arrangements for safeguarding and promoting the welfare of children as they apply both generally to public bodies who deal with children (Part 1) and specifically to the UK Border Agency (Part 2). These arrangements will help agencies to create and maintain the right organisational ethos for working with children. They include:

   - Senior management commitment to the importance of safeguarding and promoting children's welfare;
   - A clear statement of the agency's responsibilities towards children available for all staff;
   - A clear line of accountability within the organisation for work on safeguarding and promoting the welfare of children;
   - Service developments that take account of the need to safeguard and promote welfare and is informed, where appropriate, by the views of children and families;
   - Staff training on safeguarding and promoting the welfare of children for all staff working with or in contact with children and families;
   - Safe recruitment procedures in place;
   - Effective inter-agency working to safeguard and promote the welfare the children, and
   - Effective information sharing.

4. Section 55 is intended to achieve the same effect as section 11 of the Children Act 2004 (the 2004 Act) which places a similar duty on other public organisations[1]. As well as providing a driver for improvement within the UK Border Agency, the duty will also help to improve inter-agency working in respect of children. Section 55 applies to the carrying out of the relevant functions anywhere in the UK.

THE ROLE AND STATUS OF THIS GUIDANCE

5. This guidance is aimed at staff of the UK Border Agency and contractors when carrying out UK Border Agency functions. It sets out the key arrangements for safeguarding and promoting the welfare of children. The guidance is modelled on the guidance which supports section 11 of the 2004 Act[2]. It is in two parts. Part 1 describes the general arrangements to safeguard and promote the welfare of children which are likely to be common to all agencies covered by section 11 and, in the case of the UK Border Agency, by section 55. Part 1 is intended to make clear how the work of the UK Border Agency fits

1 For the full list of bodies covered by Section 11 see paragraph 1.1 of the guidance below.

2 Statutory Guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004 updated March 2007. Issued by DCSF and available at www.dcsf.gov.uk/ever ychildmatters/_download/?id=1372

into the wider arrangements, although not all of Part 1 is directly relevant to it. Part 2 sets out how those general arrangements apply specifically to the UK Border Agency.

6. This guidance is issued under section 55 (3) and 55 (5) which requires any person exercising immigration, asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State. **This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so.**

7. Where private or voluntary organisations are commissioned to provide services on behalf of the UK Border Agency, the agreement under which the arrangements are made should require that the private or voluntary organisation concerned takes this guidance into account in the provision of those services and, if they decide to depart from it, have clear reasons for doing so.

8. The guidance does not replace any current operational instructions and should be read alongside them.

TIMETABLE

9. The commencement date for section 55 of the Borders, Citizenship and Immigration Act 2009 was 2 November 2009.

PART 1
UNDERSTANDING THE DUTY TO MAKE ARRANGEMENTS TO SAFEGUARD AND PROMOTE THE WELFARE OF CHILDREN

1.1. Section 11 of the 2004 Act places a duty on key people and bodies in England to make arrangements to ensure that their functions are discharged with regard to the need to safeguard and promote the welfare of children. Section 28 of the Act requires similar bodies in Wales to do the same. The application of this duty will vary according to the nature of each agency and its functions. The key people and bodies that are covered by the duty are:

- local authorities, including district councils;
- the police;
- the probation service;
- NHS bodies(Strategic Health Authorities, Designated Special Health Authorities, Primary Care Trusts, NHS Trusts, Local Health Boards and NHS Foundation Trusts);
- Organisations (currently the Connexions Service) providing services under section 114 of the Learning and Skills Act 2007;
- Youth offending teams;
- Governors / Directors of Prisons and Young Offender Institutions;
- Directors of Secure Training Centres;
- The British Transport Police.

1.2. The UK Border Agency functions are not devolved, unlike those of the bodies listed in the 2004 Act, and so the Government has chosen to apply the duty to safeguard and promote the welfare of children to the UK Border Agency in an Act that deals directly with UK Border Agency work. It therefore appears in section 55 of the Borders, Citizenship and Immigration Act 2009[3].

1.3. The duty does not give the UK Border Agency any new functions, nor does it override its existing functions. It does require the Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children.

1.4. Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act (section 28 in Wales) and in *Working Together to Safeguard Children*[4] as:

- protecting children from maltreatment;
- preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');

3 In Scotland the legislative provisions for protecting children and promoting their welfare are contained in the Protection of Children (Scotland) Act 2007 and the Children (Scotland) Act 1995. The principles of co-operation and information sharing between agencies in the safeguarding of children are, however, important themes in the legislative framework and guidance governing the delivery of children's services in Northern Ireland, where the legislative provisions are the Children (Northern Ireland) Order 1995, and the Safeguarding Vulnerable Groups (Northern Ireland) Order 2007. In both jurisdictions Area Child Protection Committees are the means of providing local procedures and processes for agencies to comply with the legislation to safeguard children and to co-operate together, and for anyone working with children.

4 The Welsh Assembly Government has produced its own version of "Working Together" with a definition that matches this albeit expressed in a different way. It is available at: http://cymru.gov.uk/pubs/circulars/2007/nafwc1207en.pdf?lang=en

- ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and
- undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.

1.5. The overall framework set out in the 2004 Act is to provide a basis for achieving the vision of safeguarding set out in the report *Safeguarding Children*[5] i.e:

- all agencies working with children, young people and their families take all reasonable measures to ensure that the risks of harm to children's welfare are minimised; and
- where there are concerns about children and young people's welfare, all agencies take all appropriate actions to address those concerns, working to agreed local policies and procedures in partnership with other agencies.

FRAMEWORK FOR MAKING EFFECTIVE ARRANGEMENTS TO SAFEGUARD AND PROMOTE CHILDREN'S WELFARE

1.6. Each agency will have different contributions to make towards safeguarding and promoting the welfare of children depending on the functions for which they have responsibility. For example, the main contribution of some services might be to identify and act on their concerns about the welfare of children with whom they come into contact, perhaps during or following completion of a common assessment while others might be more involved in supporting a child once concerns have been identified. **The UK Border Agency is among the former.** There are some key features of effective arrangements to safeguard and promote the welfare of children which all agencies will need to take account of in addition to those that are particular to its own work, when undertaking their particular functions. These arrangements will help agencies to create and maintain an organisational culture and ethos that reflects the importance of safeguarding and promoting the welfare of children.

STRATEGIC AND ORGANISATIONAL ARRANGEMENTS

1.7. Many organisations subject to the section 11 duty (or in Wales the section 28 duty) are also required to take part in Local Safeguarding Children Boards (LSCBs). LSCBs are the key statutory mechanism for agreeing how the relevant organisations in each local area cooperate to safeguard and promote the welfare of children in that locality, and for ensuring their effectiveness. The Local Authority convenes and is also a member of the LSCB. The Board partners are set out in section 13(3) of the 2004 Act for England and in section 31(3) for Wales[6]. They are:

- district councils in local government areas that have them;
- the chief police officer for a police area of which any part falls within the area of the Local Authority;
- the local probation board for an area of which any part falls within the area of the Local Authority;
- the Youth Offending Team for an area of which any part falls within the area of the Local Authority;

5 Chief Inspector of Social Services, Commission for Health Improvement, Her Majesty's Chief Inspector of Constabulary, Her Majesty's Chief inspector of the Crown Prosecution Service, Her Majesty's Chief Inspector of the Magistrates' Courts Service, Her Majesty's Chief Inspector of Schools, Her Majesty's Chief Inspector of Prisons, Her Majesty's Chief Inspector of Probation (2002). *Safeguarding Children – A Joint Chief Inspectors' Report on Arrangements to Safeguard Children.* London, Department of Health.

6 In Wales they are: the members a children's services authority in Wales; a Local Health Board; an NHS trust all or most of whose hospitals, establishments and facilities are situated in Wales; the police authority and chief officer of police for a police area in Wales; the British Transport Police Authority, so far as exercising functions in relation to Wales; a local probation board for an area in Wales; a youth offending team for an area in Wales; (h) the governor of a prison or secure training centre in Wales (or, in the case of a contracted out prison or secure training centre, its director); (i) any person to the extent that he is providing services pursuant to arrangements made by a children's services authority in Wales under section 123(1)(b) of the Learning and Skills Act 2000 (c. 21) (youth support services).

- Strategic Health Authorities and Primary Care Trusts for an area of which any part falls within the area of the Local Authority;
- NHS Trusts and NHS Foundation Trusts, all or most of whose hospitals or establishments and facilities are situated in the Local Authority area;
- the Connexions service operating in any part of the area of the Local Authority;
- CAFCASS (Children and Family Courts Advisory and Support Service),
- the Governor or Director of any Secure Training Centre in the area of the Local Authority; and
- the Governor or Director of any prison in the Local Authority area that ordinarily detains children.

1.8. Other organisations can be involved in LSCB by agreement. **The UK Border Agency is one of these. For details of how the UK Border Agency fits in with these arrangements see Part 2 of this guidance.**

1.9. At an organisational or strategic level within individual agencies, key features for safeguarding and promoting the welfare of children are:

a. Senior management commitment to the importance of safeguarding and promoting children's welfare

Senior managers will need to demonstrate leadership, be informed about, and take responsibility for the actions of their staff who are providing services to children and their families. This could mean identifying a named person at senior management level to champion the importance of safeguarding and promoting the welfare of children throughout the organisation. Senior managers will also be responsible for monitoring the actions of their staff to safeguard and promote the welfare of children. This includes ensuring that children and young people are listened to appropriately and concerns expressed about their or any other child's welfare are taken seriously and responded to in an appropriate manner.

b. A clear statement of the agency's responsibilities towards children is available for all staff

This should include any children in the care of the agencies, any with whom they work directly and those with whom they come into contact. It could form part of an agency's existing policy and/or procedures. All staff should be made aware of their agency's policies and procedures on safeguarding and promoting the welfare of children and the importance of listening to children and young people, particularly when they are expressing concerns about either their own or other children's welfare. Effective systems should be in place for children, staff and other people to make a complaint where there are concerns that action to safeguard and promote a child's welfare has not been taken in accordance with the agency's procedures.

c. A clear line of accountability within the organisation for work on safeguarding and promoting the welfare of children

It should be clear who has overall responsibility for the agency's contribution to safeguarding and promoting the welfare of children and what the lines of accountability are from each staff member up through the organisation to the person with ultimate accountability for children's welfare. It should also be clear with whom each staff member should discuss, and to whom they should report, any concerns about a child's welfare. Responsibilities for safeguarding and promoting the welfare of children can operate at three levels:

i. Individual, which can be encompassed within job descriptions;
ii. Professional, which is governed by codes of conduct for different disciplines or by distinct guidance on the functions being carried out; and

iii. Organisational, with clear lines of accountability throughout the organisation to senior office level.

d. Service development takes account of the need to safeguard and promote welfare and is informed, where appropriate, by the views of children and families

In developing services, those responsible should consider how the delivery of these services will take account of the need to safeguard and promote the welfare of children.

e. Staff training on safeguarding and promoting the welfare of children for all staff working with or, depending on the agency's primary functions, in contact with children and families

Staff should have an understanding of both their roles and responsibilities and those of other professionals and organisations. This is essential for effective multi- and inter-agency collaboration. Agencies are encouraged to enable staff to participate in training provided on an inter-agency basis as well as in single agency training provided by the agency itself. Safeguarding and promoting the welfare of children is one of the six areas of the *Common Core of Skills and Knowledge for the Children's Workforce* (2005) prospectus. This prospectus informs the training provided to all those working in children's services. Training on safeguarding and promoting the welfare of children should be relevant to the roles and responsibilities of each staff member.

f. Safer recruitment

Robust recruitment and vetting procedures must be in place to help prevent unsuitable people from working with children. This means thorough checks are carried out on all people as part of the recruitment process, and references are always taken up. People who recruit staff to work with children must have the appropriate training. The Safeguarding Vulnerable Groups Act 2006 establishes a new vetting and barring scheme from October 2009 for those who work with children and vulnerable adults.

g. Effective inter-agency working to safeguard and promote the welfare of children

This involves agencies and staff working together to safeguard and promote the welfare of children. Inter-agency working is crucial to ensuring the effectiveness of such working. The sharing of information and constructive relationships between individual members of staff and teams should be supported by a strong lead from the Lead Member for Children's Services, and Director of Children's Services and commitment of all Chief Officers. This effective working should be at a strategic and an individual child level, in accordance with guidance from their LSCB, regarding safeguarding children, or for the Prison Service, in accordance with the policy agreed with the LSCB local to each prison. The LSCB guidance should be consistent with the current statutory guidance *The Framework for the Assessment of Children in Need and their Families* (2000) and *Working Together to Safeguard Children* (2006). The Government's practice guidance, *What To Do If You're Worried A Child Is Being Abused* (HM Government 2006), is for use by practitioners and their managers in all agencies to inform them about what to do when they have concerns that a child may be a child in need, including concerns about a child whom it is believed is, or may be at risk of, suffering significant harm[7]. The UK Border Agency contribution to inter-agency work is described in Part 2.

h. Information sharing

Effective information sharing by professionals is central to safeguarding and promoting the welfare of children. It is therefore essential that effective arrangements for sharing information about a child and their family within each agency and between agencies are in place. This will usually be set out in the form of a protocol or information sharing agreement setting out

7 These documents can be found at: www.dcsf.gov.uk/everychildmatters/1240; www.dcsf.gov.uk/everychildmatters/1236; www.dcsf.gov.uk/everychildmatters/_download/?id=760

the process to be followed and the legal and security issues that need to be considered. However, the lack of an information sharing agreement between agencies should never be a reason for not sharing information that could help a practitioner deliver services to a child. The Welsh version of *"Working Together"* contains non-statutory guidance on good practice in information sharing.

The decision to share or not to share information about a child should always be taken on a case by case basis based on professional judgement, supported by the cross-Government *Information Sharing: Practitioners' Guide* (published in April 2006)[8] and in line with the provisions of the Data Protection Act and Human Rights Act 1998 with consideration of any duty of confidence which is owed and the data security issues raised by the Cabinet Office guidelines on handling personal data. Full guidance on these issues is provided in *Information Sharing: Practitioners' Guide* (HM Government, 2006). The consent of children, young people and their caregivers should be obtained when sharing information unless to do so would place the child at risk of significant harm.

1.10. In order to safeguard and promote children's welfare, arrangements should ensure that:

- all staff in contact with children understand what to do and the most effective ways of sharing information if they believe that a child and family may require particular services in order to achieve their optimum outcomes;

- all staff in contact with children understand what to do and when to share information if they believe that a child may be a child in need, including those children suffering or at risk of suffering harm;

- appropriate agency-specific guidance is produced to complement guidance issued by central Government, and such guidance and appropriate training is made available to existing and new staff as part of their induction and ongoing training;

- guidance and training specifically covers the sharing of information between professions, organisations and agencies, as well as within them, and arrangements for training take into account the value of multi-agency training as well as single agency training;

- managers in children's services are fully conversant with the legal framework and good practice guidance issued for practitioners working with children.

CONTACT POINT[9]

1.11. Contact Point is a key part of the Every Child Matters programme to improve outcomes for children and will support practitioners, local authorities and other organisations in fulfilling their duties to safeguard and promote the welfare of children. It is currently being delivered in phases that began in May 2009 and that are gradually being rolled out to other local authorities and partners. Contact Point will be the quick way to find out who else is working with the same child or young person and allow services to contact one another more efficiently. This basic online directory will be available to authorised staff who need it do their jobs.

1.12. Contact Point will not contain any detailed information (such as case notes, assessments, and clinical data or exam results). The legal framework for the operation of Contact Point is provided by regulations, made under section 12 of the 2004 Act and further operational details are set out in Statutory Guidance that was published in late 2007.

8 This is cross-government guidance that complements and supports policies to improve information sharing across all ser vices. It is at www.dcsf.gov.uk/ever ychildmatters/_download/?id=103

9 Contact Point exists in England only.

WORK WITH INDIVIDUAL CHILDREN AND THEIR FAMILIES

1.13. The ways in which agencies work with or have contact with individual children and their families will differ depending on the functions of each agency. Some will focus on direct work with children and young people, whereas others will work with children and their families, and still others will work with adults with parenting responsibilities for children.

1.14. In order to safeguard and promote the welfare of individual children, the following should be taken into account, **in addition to the relevant section of Part 2 of this guidance**. The key features of an effective system are:

- Children and young people are listened to and what they have to say is taken seriously and acted on;
- Interventions take place at an early point when difficulties or problems are identified;
- Where possible the wishes and feelings of the particular child are obtained and taken into account when deciding on action to be undertaken in relation to him or her. Communication is according to his or her preferred communication method or language;
- Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family;
- Practitioners are clear when and how it is appropriate to make a referral to Local Authority children's services where children may need services to safeguard them or to promote their welfare;
- Where children are being provided with services to respond to their needs and support their welfare (usually by Local Authority children's services), professionals including the UK Border Agency contribute to subsequent plans, interventions and reviews in accordance with requirements in relevant regulations and guidance;
- Following assessment, relevant services are provided to respond to the assessed needs of children and to support parents or carers in effectively undertaking their parenting roles. Wherever such services are being provided the UK Border Agency will take account of them in planning their future interaction with the family and the children.

1.15. The following principles underpin work with children and their families to safeguard and promote the welfare of children. They are relevant to varying degrees depending on the functions and level of involvement of the particular agency and the individual practitioner concerned. **The UK Border Agency should seek to reflect them as appropriate.**

1.16. Work with children and families should be:

- child centred;
- rooted in child development;
- supporting the achievement of the best possible outcomes for children and improving their wellbeing;
- holistic in approach;
- ensuring equality of opportunity;
- involve children and families, taking their wishes and feelings into account;
- building on strengths as well as identifying and addressing difficulties;
- multi and inter-agency in its approach;
- a continuing process, not an event;
- designed to identify and provide the services required, and monitor the impact their provision has on a child's developmental progress;
- informed by evidence.

1.17. Some of these apply to specialised professional work, whilst others relate to more general work that can affect children.

Ensuring equality of opportunity

a. Equality of opportunity means that all children have the opportunity to achieve the best possible development. Some children may have been deprived of opportunities and assistance in early life and will, as a result, require services to meet their health and educational needs, to promote their immediate welfare so that they can achieve their potential into adulthood.

Involvement of children and families

b. In order to appreciate the child's needs and how they make sense of their circumstances it is important to listen and take account of their wishes and feelings. It is also important to develop a co-operative constructive working relationship with parents or caregivers so that they recognise that they are being respected and are being kept informed. Where there is respect and honesty in relating to parents they are likely to feel more confident about providing vital information about their child, themselves and their circumstances.

Building on strengths as well as identifying difficulties

c. Identifying both strengths and difficulties within the child, his or her family and the context in which they are living is important, as is considering how these factors have an impact on the child's health and development. Working with a child or family's strengths becomes an important part of a plan to resolve difficulties.

Multi and Inter-agency in approach

d. From birth, there will be a variety of different agencies and programmes in the community involved with children and their development, particularly in relation to their health and education. Multi and inter-agency work to safeguard and promote children's welfare starts as soon as there are concerns about a child's welfare, not just when there are questions about possible harm.

A continuing process not an event

e. Understanding what is happening to a vulnerable child within the context of his or her family and the local community, and taking appropriate action, are continuing and interactive processes, not single events. Assessment should continue throughout a period of intervention, and intervention may start at the beginning of an assessment.

Providing and Reviewing services

f. Action and services should be provided according to the identified needs of the child and family in parallel with assessment where necessary. It is not necessary to await completion of the assessment process. Immediate and practical needs should be addressed alongside more complex and longer term ones. The impact of service provision on a child's developmental progress should be reviewed.

Informed by evidence

g. Effective practice with children and families requires sound professional judgements which are underpinned by a rigorous evidence base, and draw on the practitioner's knowledge and experience.

INTER-AGENCY CO-OPERATION TO IMPROVE THE WELLBEING OF CHILDREN

1.18. A key aspect of the Every Child Matters: Change for Children programme is about encouraging relevant services to integrate around the needs of the child through children's trust arrangements[10]. To this end, section 10 of the 2004 Act places a duty on top tier and unitary local authorities in England to promote co-operation with a view to improving the wellbeing of children, and places a reciprocal duty on 'relevant partners'

10 A children's trust is the 'wrapper' that brings together all services for children and young people in an area underpinned by the duty to cooperate that is in the Children Act 2004.

to co-operate with the authority in the making of these arrangements[11]. Most of the strategic organisations covered by the section 11 (and section 28) duty are also under a duty to co-operate with the local authority in the making of co-operation arrangements (children's trust). Those that are not will however wish to engage with the local authority and partners where appropriate in the interests of promoting children's wellbeing. As a matter of law, the UK Border Agency is not subject to the duty in section 10, and details of the UK Border Agency contribution to inter-agency work is described in Part 2.

MONITORING AND INSPECTION OF ARRANGEMENTS TO SAFEGUARD AND PROMOTE WELFARE

1.19. Agencies' responsibilities for safeguarding and promoting the welfare of children, including the arrangements they make under section 11, will be monitored through the LSCB.

1.20. Agencies, and the LSCB, are subject to independent assessment and inspection. The Framework for the Inspection of Children's Services, published in July 2005 by Ofsted on behalf of all relevant inspectorates and commissions, sets out principles to be applied by an inspectorate or commission assessing any children's service, and defines the key judgements which, where appropriate and practical, inspections will seek to make[12]. It is available from www.ofsted.gov.uk. The key judgements include several relating to children and young people staying safe.

1.21. Details of the arrangements that apply to the UK Border Agency are contained in Part 2 of this guidance.

11 The relevant powers to improve cooperation and well-being are set out in s.25 for Wales, where children's trusts do not exist and which has taken a different approach to applying co-operation arrangements to that in England.

12 The inspection body in Wales is *Estyn* which performs a similar function to that of Ofsted in England.

PART 2
THE ROLE OF THE UK BORDER AGENCY IN RELATION TO SAFEGUARDING AND PROMOTING THE WELFARE OF CHILDREN

INTRODUCTION

2.1. The UK Border Agency is an executive agency of the Home Office and its primary duties are to **maintain a secure border, to detect and prevent border tax fraud, smuggling and immigration crime, and to ensure controlled, fair migration that protects the public and that contributes to economic growth and benefits the country**.

2.2. It carries out these duties by applying and enforcing the Immigration Acts and the Immigration Rules, by having regard to policy guidance and instructions issued by the Secretary of State, and by exercising general customs functions as defined in the Borders, Citizenship and Immigration Act 2009. The application and enforcement of the Immigration Acts includes removing from the UK persons who have no legal entitlement to remain in the UK and, in certain circumstances, detaining those individuals pending their removal from the UK. The UK Border Agency also has a role in granting protection to those who need it according to international conventions and the laws of the UK.

2.3. Within this legislative and policy framework, section 55 of the 2009 Act requires the Secretary of State to make arrangements to ensure that immigration, asylum, nationality and customs functions are exercised having regard to the need to safeguard and promote the welfare of children in the United Kingdom. The functions of the Director of Border Revenue must also be exercised having regard to the need to safeguard and promote the welfare of children in the United Kingdom. The duty does not create any new functions, nor does it over-ride any existing functions, rather it requires them to be carried out in a way that takes into account the need to safeguard and promote the welfare of children.

2.4. The UK Border Agency's main contributions to safeguarding and promoting the welfare of children include:

- Ensuring good treatment and good interactions with children throughout the immigration and customs process.
- Applying laws and policies that prevent the exploitation of children throughout and following facilitated illegal entry and trafficking.
- Detecting at the border any material linked to child exploitation through pornography.

2.5. Other parts of the UK Border Agency's contribution include:

- Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm.
- Making timely and appropriate referrals to agencies that provide ongoing care and support to children.

MAKING ARRANGEMENTS TO SAFEGUARD AND PROMOTE WELFARE IN THE UK BORDER AGENCY

2.6. The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action

Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.

2.7. The UK Border Agency must also act according to the following principles:

- Every child matters even if they are someone subject to immigration control.
- In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children[13].
- Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
- Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.
- Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

2.8. When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child's needs. Staff must respond to them in a way that communicates respect, taking into account their needs, and their responsibilities to safeguard and promote their welfare.

13 Cf. UNHCR Guidelines on Determining the Best Interests of the Child, pages 14 -15 section entitled "The Use of the Term 'Best Interests' in the CRC" (CRC = Convention on the Rights of the Child).

SENIOR MANAGEMENT COMMITMENT AND ACCOUNTABILITY

2.9. There shall be a senior member of staff (the "Children's Champion") who is responsible to the Chief Executive of the UK Border Agency for promoting the duty to safeguard and promote the welfare of children throughout the UK Border Agency, for offering advice and support to UK Border Agency staff in issues related to children, and identifying and escalating areas of concern.

2.10. Senior managers throughout the UK Border Agency remain directly responsible for monitoring the actions of their staff to safeguard and promote the welfare of children. This includes ensuring that children are listened to appropriately and concerns expressed about their or any other child's welfare are taken seriously and responded to in an appropriate manner. In addition, an identified member of the senior civil service will have lead responsibility for promoting the duty within each business area.

CLEAR STATEMENTS OF RESPONSIBILITY, A CLEAR LINE OF ACCOUNTABILITY

2.11. Responsibility for the UK Border Agency's contribution to safeguarding and promoting the welfare of children lies with each member of staff according to their role. They are accountable to their line managers for this, with ultimate accountability for the Agency's contribution lying with the Chief Executive. Within the UK Border Agency each function or unit led at senior civil service level must be proactive in ensuring that staff at all levels within that unit are aware of the duty and its relevance to their work. The approach might take the form of regularly finding time at team meetings to ensure that the requirements are known and understood or issuing specific instructions depending on the role and work of the unit. Managers should aim to encourage and enable a positive attitude to the needs of children among their staff as well as setting out clear formal instructions.

2.12. There must be clear arrangements whereby staff who become aware of instances where

the duty is not being taken properly into account are able to report their concerns. These may be general concerns about the effectiveness of these arrangements; they may relate to the way in which a particular child was dealt with by the UK Border Agency; or, they may relate to the attitude and behaviour of staff towards children. Where staff members have any concern of this sort, they should first consider raising the matter with their line manager or with a line manager above that level (e.g. their countersigning officer). However, there may be occasions when because of the nature of their concerns, staff feel unable to report their concerns in this way. In such cases, staff should express their concerns to the UK Border Agency's Children's Champion or other senior official with lead responsibility for children's issues. The Children's Champion should treat the matter as a confidential referral as far as possible.

DEVELOPMENT OF THE AGENCY'S POLICIES

2.13. The duty will be taken into account when developing any new policies. Where appropriate new operational and policy instructions should make reference to the duty and how it is to be taken into account.

TRAINING

2.14. The UK Border Agency must ensure that members of staff are appropriately trained with regard to their duty to safeguard and promote the welfare of children.

2.15. Training on safeguarding and promoting the welfare of children must be provided that is proportionate and relevant to the roles and responsibilities of staff members. All Agency staff should have a general understanding of children's issues, while those whose work brings them into contact with children, directly or indirectly, should have more in-depth training.

SAFER RECRUITMENT, VETTING AND COMPLAINTS PROCEDURES

2.16. Recruitment and vetting procedures must ensure that new members of staff and those existing employees who move to posts with contact with children work safely and competently with children. The Safeguarding Vulnerable Groups Act 2006 will establish a new vetting and barring scheme for those who work with children and vulnerable adults which the UK Border Agency will implement.

2.17. The UK Border Agency complaints systems will be reviewed, and adapted if necessary, to ensure that they are suitably accessible to children.

WORK WITH INDIVIDUAL CHILDREN

2.18. This guidance cannot cover all the different situations in which the UK Border Agency comes in to contact with children. Staff need to be ready to use their judgement in how to apply the duty in particular situations and to refer to the detailed operational guidance which applies to their specific area of work. In general, staff should seek to be as responsive as they reasonably can be to the needs of the children with whom they deal, whilst still carrying out their core functions.

2.19. It may be helpful to set out here, by way of example, some of the key policy commitments which apply at different stages of the process:

- Where there is doubt on arrival or subsequently about who is caring for the child staff must take action, for instance by seeking evidence that a particular named adult is caring for the child with the parent's consent.

- Special care must be taken when dealing with unaccompanied asylum seeking children, for instance by checking with them that they understand the process for making and resolving their asylum claim, and ensuring that the physical settings in which their applications are dealt with are as child-friendly as possible to ensure that the child feels safe and protected.

- When unaccompanied or separated children are being escorted from their normal place of residence to a port where removal will take place, they must be

subject to detention procedures in the sense of being served with formal notice whilst the supervised escort is taking place. Other than in these situations, unaccompanied or separated children must be detained only in the most exceptional circumstances whilst other arrangements for their care and safety are made.

- Families who have no right to be in this country must be encouraged to leave voluntarily and detention should be used only as a last resort and for the shortest possible time.
- During any period of detention, reasonable steps should be taken to ensure that a child is able to continue his or her education, maintain contact with friends, and practise his or her religion.
- Family detention arrangements must respect as fully as possible the principle that the primary responsibility for a child during this time still rests with the parents.
- When children have to be transported from one venue to another, only suitable vehicles are used.
- Nursing mothers and their children must not be separated at any stage unless there is a compelling reason that involves the safety of the child (for instance, an accompanying parent has threatened to harm the child). Other than in the most urgent circumstances involving the safety of the child, such a decision must be made and supervised by a qualified children's social worker.

2.20. There should also be recognition that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them.

2.21. In co-operation with the bodies qualified to plan for children's futures, including Local Authority Children's Services, schools, primary and specialist health services, arrangements must be put in place to secure the support needed by the individual child as they mature and develop into adulthood. Unless it is clear from the outset that a child's future is going to be in the UK, these arrangements will necessarily involve planning for the possibility that children and their families may have to be returned to their countries of origin (or in some cases the EU country in which they first claimed asylum).

2.22. The UK Border Agency must always make a referral to a statutory agency responsible for child protection or child welfare such as the police, the Health Service, or the Children's Department of a Local Authority[14] in the following circumstances:

- When a potential indicator of harm (the most comprehensive such list is found in *Working Together to Safeguard Children who have been Trafficked*[15] and their application is wider than trafficking cases alone) has been identified.
- When a child appears to have no adult to care for them and the Local Authority has not been notified.
- When the child appears to be cared for by a person who is not a close relative (i.e. where a private fostering arrangement has been identified). The Children Act 1989 (Part IX, section 66) defines privately fostered children. All professionals and agencies that work with children must establish the relationship that exists between any child and those who care for him or her. If that relationship appears to be a private fostering relationship — or if the relationship cannot be established — a referral to the relevant Local Authority must be made.

14 All references to a Local Authority here in Part 2 should be taken as a reference to Local Authority Children's Services in England and Wales and Scotland. In Northern Ireland this will be the local Health and Social Care Trust.

15 Working Together to Safeguard Children who have been Trafficked issued by Home Office and DCSF, December 2007. The indicators are reproduced at Annex A. Separate guidance for Wales was issued by the Welsh Assembly Government in April 2008.

- When a child is a potential victim of trafficking.
- When a child is identified as having run away from their parents, or where they are looked after by a Local Authority and have gone missing from their care placement[16].

HUMAN TRAFFICKING AND TRAFFICKING OF CHILDREN

2.23. Since 1 April 2009, the UK has been bound by the Council of Europe Convention on action against trafficking in human beings. The purpose of the Convention is to:

- prevent and combat trafficking in human beings;
- identify and protect victims of trafficking and to safeguard their rights;
- promote international co-operation against trafficking.

2.24. Although the UK Border Agency was already active in identifying and supporting victims of trafficking, the Convention has resulted in the introduction of even stronger arrangements. All UK Border Agency staff at operational and case working grades are required to complete training on how to identify potential victims of trafficking, which contains specific sections on the features of child trafficking. Where a child is identified as vulnerable as a result of a suspicion of trafficking, details of the case are referred simultaneously to the relevant Local Authority and to specially trained 'competent authority' teams based in the UK Border Agency and the UK Human Trafficking Centre.

2.25. These specially trained 'competent authority' teams were established under the Council of Europe Convention on Action against Trafficking in Human Beings and consider all relevant information, including any provided by local authority Children Services, in determining whether a case meets the thresholds for trafficking set out in the Convention. A positive decision will lead to a 45-day reflection period during which the victim will have access to support and will not be removed from the UK. This may be followed by the grant of an extendable residence permit. This is a significant safeguarding role for all UK Border Agency staff and a major contribution by the Agency to the wider safeguarding of children[17].

WORKING WITHIN THE DEVOLVED ADMINISTRATIONS OF WALES, SCOTLAND AND NORTHERN IRELAND

2.26. Statutory children's services have been devolved to each of the devolved administrations of Scotland, Wales, and Northern Ireland. Referrals to children's services must be made to the relevant public authority by the UK Border Agency when members of staff have identified children as being in need or at risk. Differences in legislation and local arrangements for making referrals must be respected and, where necessary, the relevant UK Border Agency regional directors will ensure that these differences are taken into account and suitable arrangements developed in Northern Ireland, Scotland and Wales.

2.27. For instance, in Scotland there is a Children's Charter that sets out what children and young people need and expect to help protect them from harm. It has been developed through talking to children and young people who have experienced the need to be protected and supported - but what it says applies to any child.

2.28. It is available at www.scotland.gov.uk/library5/education/ccel-00.asp and UK

16 UKBA staff must always make a referral to a Local Authority using the UKBA form available for this purpose at http://horizon/ind/manuals/keeping-children-safe/resources/word/ReferralForm15.doc (Word), or http://horizon/ind/manuals/keeping-children-safe/resources/word/ReferralForm16.doc.(E-mail). Further useful information can be found in "Statutor y Guidance on Children who run away and go missing from home or care" prepared to support Local Authorities and issued under s. 7 of the Local Authority Social Services Act 1970 by the DCSF in July 2009. It is available at www.dcsf.gov.uk/ever ychildmatters/_download/?id=6178

Whilst the guidance is specific to England the challenge is common across all four countries of the United Kingdom and each is working to address the issues in ways that meet their own circumstances and needs.

17 The arrangements in over view are on the Home Office website at http://police.homeoffice.gov.uk/operational-policing/safeguarding-vulnerable-persons/child-trafficking/

Border Agency staff working in Scotland should seek to be guided by and to follow it in their interactions with children.

LOCAL SAFEGUARDING CHILDREN BOARDS AND INTER-AGENCY WORKING

2.29. In support of effective interagency working, the UK Border Agency should participate in LSCBs where appropriate and invited to do so, and should seek to contribute in accordance with *Working Together to Safeguard Children* (2006). The UK Border Agency is not a statutory member of LSCB nor is it a statutory partner under section 13 (section 31 in Wales) of the 2004 Act. Instead the UK Border Agency will be invited to participate in those LSCBs where its presence is agreed to be necessary or desirable by Directors for Children and Learning in Regional Government Offices, or the Director of Children's Services with responsibility for the particular Board or by the UK Border Agency regional director. The work of LSCBs is co-ordinated by regional and national meetings and the UK Border Agency will make an appropriate contribution to these by agreement with the meeting organisers. The UK Border Agency should also take part in any appropriate inter-agency training arranged by LSCBs. In Scotland and Northern Ireland the UK Border Agency will co-operate with Child Protection Committees in the same way.

2.30. The UK Border Agency will allow any LSCB in whose work it participates as an invited partner to include it in these monitoring and continuous improvement processes and must respond appropriately to concerns that are expressed as a result. The UK Border Agency is also subject to inspection from the independent Chief Inspector of the Border Agency which may include children's issues in its inspections, and from the Chief Inspector of Prisons who inspects all facilities in which children and young people may be detained.

2.31. The UK Border Agency will assist other appropriate agencies who have contact with children and who are seeking to safeguard a child and promote his or her welfare.

INFORMATION SHARING

2.32. The UK Border Agency should make best use of information exchanges between agencies including Contact Point and should ensure that other safeguarding agencies recognise, accept and respond to the referral forms that it sends to these and other bodies.

2.33. UK Border Agency staff should work with other statutory agencies, including but not limited to, LSCBs, children's services, the police and other relevant agencies. UK Border Agency staff should ensure that they share information appropriately with those agencies and with due regard to the provisions of the Data Protection and Human Rights Act 1998 and any duty of confidentiality which may exist. There should be clear responsibility within the agency for putting in place, and ensuring that all staff are aware of and follow procedures for ensuring that relevant information is passed to those other agencies where necessary.

CHILDREN AND UK BORDER AGENCY STAFF OVERSEAS

2.34. The statutory duty in section 55 of the 2009 Act does not apply in relation to children who are outside the United Kingdom. However, UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention. In some instances international or local agreements are in place that permit or require children to be referred to the authorities of other countries and UK Border Agency staff will abide by these.

2.35. As a matter of policy, posts overseas that receive or deal with applications will seek to work with local agencies in order to develop arrangements that will protect children, or promote their welfare, or reduce the risk of their being trafficked and exploited.

2.36. Before taking up entry clearance or visa duties, UK Border Agency staff must receive

training on the importance of having regard to the need safeguard and promote the welfare of children that they may encounter when working overseas.

CONTRACTORS

2.37. Any services provided by contractors which relate to the discharge of UK Border Agency functions must be carried out having regard to the need to safeguard and promote the welfare of children. Operational instructions for contractors providing such services must refer explicitly to this. Examples of such services are detention and escorting functions. Although the duty does not extend to UK Border Agency staff and contractors overseas it is a matter of UK Border Agency policy that when they are escorting children overseas, they should have regard to the need to safeguard and promote the welfare of children at every stage of the journey.

2.38. Contractors must be adequately monitored to ensure that they have regard to the duty and the guidance.

ANNEx A
POSSIBLE INDICATORS THAT A CHILD MAY HAVE BEEN TRAFFICKED

There a number of indicators which suggest that a child may have been trafficked into the UK, and may still be controlled by the traffickers or receiving adults. These are as follows:

AT THE PORT OF ENTRY

The child:

- has entered the country illegally;
- has no passport or other means of identification;
- has false documentation;
- possesses money and goods not accounted for;
- is malnourished;
- is unable to confirm the name and address of the person meeting them on arrival;
- has had their journey or visa arranged by someone other than themselves or their family;
- is accompanied by an adult who insists on remaining with the child at all times;
- is withdrawn and refuses to talk or appears afraid to talk to a person in authority;
- has a prepared story very similar to those that other children have given;
- exhibits self-assurance, maturity and self-confidence not expected to be seen in a child of such age;
- does not appear to have money but does have a mobile phone; and/or
- is unable, or reluctant to give details of accommodation or other personal details.

The sponsor:

- has previously made multiple visa applications for other children and/or has acted as the guarantor for other children's visa applications; and/or
- is known to have acted as the guarantor on the visa applications for other visitors who have not returned to their countries of origin on the expiry of those visas.

WHILST RESIDENT IN THE UK

The child:

- does not appear to have money but does have a mobile phone;
- receives unexplained/unidentified phone calls whilst in placement / temporary accommodation;
- possesses money and goods not accounted for;
- exhibits self assurance, maturity and self-confidence not expected to be seen in a child of such age;
- has a prepared story very similar to those that other children have given;
- shows signs of physical or sexual abuse, and/or has contracted a sexually transmitted infection or has an unwanted pregnancy;
- has a history with missing links and unexplained moves;
- has gone missing from local authority care;
- is required to earn a minimum amount of money every day;

- works in various locations;
- has limited freedom of movement;
- appears to be missing for periods;
- is known to beg for money;
- performs excessive housework chores and rarely leaves the residence;
- is malnourished;
- is being cared for by adult/s who are not their parents and the quality of the relationship between the child and their adult carers is not good;
- is one among a number of unrelated children found at one address;
- has not been registered with or attended a GP practice;
- has not been enrolled in school;
- has to pay off an exorbitant debt, e.g. for travel costs, before having control over own earnings;
- is permanently deprived of a large part of their earnings by another person; and/or
- is excessively afraid of being deported.

CHILDREN INTERNALLY TRAFFICKED WITHIN THE UK

Indicators include:

- Physical symptoms (bruising indicating either physical or sexual assault);
- Prevalence of a sexually transmitted infection or unwanted pregnancy;
- Young person known to be sexually active;
- Reports from reliable sources suggesting the likelihood of involvement in sexual exploitation;
- Reports that the child has been seen in places known to be used for sexual exploitation;
- Evidence of drug, alcohol or substance misuse;
- Leaving home/care setting in clothing unusual for the individual child (inappropriate for age, borrowing clothing from older people);
- Phone calls or letters from adults outside the usual range of social contacts;
- Adults loitering outside the child's usual place of residence;
- Significantly older boyfriend;
- Accounts of social activities with no plausible explanation of the source of necessary funding;
- Persistently missing, staying out overnight or returning late with no plausible explanation;
- Returning after having been missing, looking well cared for despite having no known base;
- Missing for long periods, with no known base;
- Placement breakdown;
- Pattern of street homelessness;
- Possession of large amounts of money with no plausible explanation;
- Acquisition of expensive clothes, mobile phones or other possessions without plausible explanation;
- Having keys to premises other than those known about;
- Low self-image, low self-esteem, self-harming behaviour including cutting, overdosing, eating disorder, promiscuity;
- Truancy/disengagement with education;
- Entering or leaving vehicles driven by unknown adults;
- Going missing and being found in areas where the child or young person has no known links; and/or

- Possible inappropriate use of the internet and forming on-line relationships, particularly with adults.

The indicators above should not be read as a definitive list and practitioners should be aware of any other unusual factors that may suggest a child might have been trafficked. They are intended as a guide, which should be included in a wider assessment of the young person's circumstances. The final set of indicators is applicable to both cases of sexual exploitation and internal trafficking.

It is also important to note that trafficked children might not show obvious signs of distress or abuse and this makes identifying children who may have been trafficked difficult. Some children are unaware that they have been trafficked, while others may actively participate in hiding that they have been trafficked.

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