

*Considering the
Best Interests of a Child
Within a Family Seeking Asylum*



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UNHCR

United Nations High Commissioner for Refugees

Haut Commissariat des Nations Unies pour les réfugiés

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Executive Summary & Recommendations

This report from the Office of the United Nations High Commissioner for Refugees (UNHCR) examines how the best interests of children in asylum-seeking families are considered throughout the asylum procedure in the United Kingdom. The report expands upon the findings of an audit of the quality of asylum decision-making in 45 family claims, the results of which were published in June 2013.¹

The report is a product of the Quality Integration (QI) Project – the second phase of a joint UNHCR and UK Government collaborative endeavour aimed at improving the quality of the refugee status determination (RSD) procedure in the UK. In 2011 UNHCR was requested by the UK Government’s Home Office to undertake an audit of RSD decisions in family claims. Together, the Home Office and UNHCR agreed that UNHCR’s audit would include an assessment of, and commentary on, the Home Office’s methodology for assessing and determining the best interests of any child within an asylum seeking family. It was agreed that this would encompass not only the assessment and determination of the child’s best interests as the family moves through the asylum procedure but also how the determination of the best interests of any child is then factored into any decision resulting from a consideration of the family’s asylum claim which will have a direct impact upon the child. The current report sets out the findings of this particular aspect of the audit.

Based on the findings of the audit, UNHCR provides recommendations with a view to strengthening the mechanisms by which children’s best interests are assessed and determined as well as how that determination is given primary consideration when undertaking actions and making decisions that affect the child.

Background to the Quality Integration Project

Set up in 2010, the joint Home Office – UNHCR QI Project builds upon the Quality Initiative Project which ran from 2004 to 2009. Both projects have their basis in Article 35 of the 1951 Refugee Convention relating to the Status of Refugees which stipulates that signatory States will undertake to co-operate with UNHCR to facilitate its duty of supervising the application of the provisions of the 1951 Convention. The UK is a signatory to the 1989 Convention on the Rights of the Child (CRC). As a UN protection agency, UNHCR has an interest not only in how children are treated as dependents of their parents’ asylum claims, but in how their own protection needs are assessed and how their human rights as children are respected throughout the asylum procedure.

UNHCR welcomes the commitment shown by the UK Home Office to improving the quality of asylum decision-making and strengthening mechanisms to ensure all children can achieve full and effective enjoyment of their rights as recognised in the CRC.

¹ See UNHCR’s ‘Untold Stories: Families in the Asylum Process’, June 2013, available at: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/aUNHCR_Report_Untold_Stories.pdf



Scope and Methodology

As a signatory to the CRC, the UK is bound by Article 3 which stipulates that the best interests of children must be the primary concern in making decisions that may affect them. A legislative measure introduced to implement the UK's obligations under this Article is that of Section 55 of the Borders, Citizenship and Immigration Act 2009 (Section 55, BCI Act). Section 55 of the BCI Act places a duty on the Secretary of State, and officers acting on her behalf, to have regard to the need to 'safeguard and promote the welfare' of children in the discharge of various functions relating to immigration, customs, nationality, and asylum.

UNHCR's audit examines how existing UK procedures facilitate the ability of Home Office staff to make asylum and immigration decisions with these duties in mind. To the extent possible with access only to the Home Office file and Case Information Database (CID), UNHCR examines how the Home Office works together with other government agencies to discharge their respective child protection duties.

For the purposes of this audit UNHCR adopted the Home Office's definition of a 'family asylum claim' as one submitted by an adult and which includes at least one child under 18 years of age. In 2011, 20,512 asylum claims were submitted by first-time applicants in the UK. Of these, 2,768 (14%) met the UK's definition of a 'family claim'. At the time of the audit and up to April 2013 asylum claims in the UK were managed and processed by the UK Border Agency (UKBA). Thereafter, UKBA was dissolved as an Executive Agency of the Home Office. The responsibility to manage and process asylum claims sits presently with the Home Office.

Cases selected for this audit were chosen randomly from UKBA offices handling the majority of family claims (London, Northwest and the Midlands and East regions). All claims were submitted after March 2011. In total 45 decisions and 17 asylum interviews were audited between March and September 2012. There were a total of 64 children dependent on the 45 claims assessed. 35 of these children were under 6 years old. 29 were between the ages of 7 and 18.

Key Findings

A. TRAINING AND GUIDANCE ON BEST INTERESTS AND CHILD WELFARE

Before undertaking its audit, UNHCR reviewed the content of the training and guidance that is directed at decision-makers who handle family asylum claims. This review highlighted that, while it is positive to observe that Home Office training and guidance on the concepts of child welfare and the best interests principle exists, it is primarily aimed at staff who handle the claims of unaccompanied asylum-seeking children. As such, at the time of the audit, not all decision-makers who were required to assess and determine the best interests of children in families had received the full training on the principle of best interests.

B. BEST INTERESTS ASSESSMENTS AS THE FAMILY MOVES THROUGH THE ASYLUM PROCESS

POSITIVE FINDINGS

The audit findings provided clear examples of individual Home Office staff actively identifying issues relevant to the welfare and best interests of children in asylum-seeking families as those families moved through the asylum procedure and, as a result of this identification, undertaking actions with these interests mind. For example by making relevant referrals to the Children's Services departments of Local Authorities.

SHORTCOMINGS

However, the findings also picked up on instances where, despite the pro-activity of Home Office staff in making referrals, the response from the Local Authority was lacking.

The audit demonstrated that some of the more routine 'actions' and decisions undertaken by the Home Office at particular stages of the asylum procedure and which directly affect children (for example, the geographical 'dispersal' of asylum-seeking families requesting accommodation support to other regions of the UK) do not yet clearly and systematically give primary consideration to the best interests of the children when making these decisions.

UNHCR's audit of the Home Office's procedures highlighted that, at present, there is no formal and systematic collection or recording of information that will be necessary and relevant to a quality best interests consideration. This includes a lack of any mechanism to obtain the views of the child and give those views weight in line with age and maturity. Without the necessary information, it is difficult for the Home Office to ensure the best interests of the child are given primacy when undertaking actions or making decisions that affect children.

C. THE BEST INTERESTS DETERMINATION

POSITIVE FINDINGS

It was positive to observe that decision-makers are required to set out legal written reasoning to demonstrate how they have considered the best interests of the child and their duties as officers acting on behalf of the Secretary of State under Section 55 BCI Act. This reasoning is found in the same Reasons for Refusal Letter (RFRL) or consideration 'minute' that sets out, in writing, the assessment of the principal asylum-seekers' application for international protection.

UNHCR was also pleased to observe some clear examples of decision-makers' active consideration of relevant and important elements necessary to the consideration of a child's welfare and to the determination of their best interests. Indeed, the audit identified cases in which the best interests of the child were determined and given primary consideration in resulting immigration decisions.

SHORTCOMINGS

UNHCR observed, however, that **not all children in the sample had their best interests determined** and that, as a result, asylum and immigration decisions that affected the children were being taken without due consideration to the child's best interests. This was common where it had been recognised that a family member (usually the parent) had international protection needs and, as a result, was being granted a form of immigration leave to remain in the UK. While a family member's circumstances will be an important element to give weight to when determining the child's best interests, those interests must still be considered.

More broadly, the audit highlighted that the **mechanisms for collecting information** relevant and necessary to determining the best interests of a child (including the views of the child as highlighted above) are currently limited to those that exist as part of the asylum procedure; a procedure that focuses primarily on obtaining evidence from and relevant to the principal applicant and to the asylum claim. While there was evidence of some Home Office decision-makers attempting to be pro-active by pursuing information about a child, it was apparent that the existing processes curtailed their ability to know when, where, and from whom they could and should solicit information as well as what sort of information they should pursue. This meant that the amount of relevant information gathered was minimal and was typically only available later in the process.

Shortcomings in the **analysis of information obtained** by decision-makers to determine the best interests of the individual child were identified. The findings showed that, in many cases, the analysis was piecemeal, did not reflect a holistic consideration of the various elements required in order to determine best interests, and was not always specific to the child's individual characteristics or situation.² Decision-makers tended to focus their analyses more commonly on some elements (e.g. family and close relationships) while not considering others (e.g. care, protection and safety of the child). Critically, it was observed that the child's views and those of relevant family members or of those close to the child are rarely considered in these analyses. The findings showed that, when performing their analysis, decision-makers do not always take into account all the information available to them about the child and relevant to either the best interests framework or the definition of what constitutes the 'welfare of the child'. Of particular concern, given the countries of origin of many of the families in the sample, was the finding that analysis of the safety of the child was rarely undertaken.

² As highlighted in the report, these should include: the child's views, identity, situation of vulnerability, right to health, right to education, preservation of the child's family environment and relationships as well as the care, protection and safety of the child.

Particularly concerning was identification of instances – highlighted in the report – where immigration control was brought directly into the determination of best interests. The Committee on the Rights of the Child has made clear that the elements that can be considered valid to bring into the balance in order to determine a child’s best interests are those that reflect the rights enshrined in the Convention on the Rights of the Child itself.

UNHCR’s audit highlighted that decision-makers rarely balance each of the elements in light of the particular child’s individual situation in order to reach a **resulting best interests determination**. Furthermore, decision-makers tended to emphasise those elements that supported an overall best interests determination that favoured the immigration decision resulting from the parent(s)’ asylum claim. While it is not inappropriate for the parents’ circumstances to be considered by the decision-maker (reflecting the element of ‘preservation of the child’s family environment and maintaining relations’) it was concerning to observe that this was often the *only* element considered or that it was given excessive weight rather than being put ‘into the balance’.

UNHCR observed that, in all cases in which a Best Interests Determination was conducted, the same Home Office decision-maker that assessed and decided the asylum claim of the parent(s) had undertaken the best interests determination for the child(ren) within that family. The findings set out above point to a resulting conflict of interest which can undermine the quality of the best interests assessment, not to mention an additional burden of responsibility and workload upon the asylum decision-maker.

D. GIVING THE BEST INTERESTS DETERMINATION ‘PRIMARY CONSIDERATION’ IN THE RESULTING IMMIGRATION DECISION

Both international and UK law require that, once a child’s best interests have been determined, they must be given “primary consideration” when making a decision that affects the child. UNHCR, therefore, examined if and how the determination of the best interests of a child within an asylum-seeking family was given ‘primary consideration’ when deciding whether to grant or refuse immigration leave to the family.

POSITIVE FINDINGS

Good practice was observed in some cases within the audit sample which reflected the decision-maker acknowledging and demonstrating the need to give the child’s best interests primary consideration when making the broader decision on immigration leave that arose out of the consideration of the principal applicant’s asylum claim.

SHORTCOMINGS

However, the findings also showed that decision-makers are unclear about where and how the consideration of a child’s best interests should fit and be factored into their wider decision-making. When reviewing the written decisions, UNHCR observed mixed practice in respect of how decision-makers reasoned their grant of immigration leave on a best interests basis, what immigration status they granted as a result of their reasoning, and to whom. In addition, the method of recording this information on the Home Office’s Case Information Database varied, potentially leading to inaccurate or incomplete data collection.

Finally, UNHCR’s findings indicate that the incorporation of forms of immigration leave based on family life with a child in the new Immigration Rules at paragraph EX1 of Appendix FM may be negatively impacting upon asylum decision-makers’ understanding of what factors should be taken into account when considering the Section 55 duty and the determination of the best interests of a child in the context of an asylum-seeking family’s protection claim.

Based on the findings of its audit, UNHCR recommends:

A) **The Home Office** in close consultation with other relevant government departments including **the Department for Education, the Ministry of Justice, Local Authorities and the Association of Directors of Children's Services:**

1 **Create new (and strengthen existing) mechanisms** to ensure that assessments and determinations of an individual child's best interests:

- are undertaken **objectively, independently** of the asylum process, **and in coordination** with other relevant government bodies responsible for child protection
- respect **confidentiality and data protection arrangements**
- **allow for the collection of an increased amount of information** relevant and specific to each individual child. Depending on the specific factual context, the information collected should:
 - go beyond that obtained from the principal applicant's asylum claim;
 - be obtained from, inter alia, family members, people close to the child, as well as appropriate experts and professionals;
 - provide for the fullest consideration of each of the elements necessary to a best interests consideration³ and in compliance with the definition of 'safeguarding and promoting the welfare of children' as reflected in the UK statutory guidance⁴; and
 - be collected in a systematic fashion from the moment the child is identified as a child for whom the Home Office will need to make decisions that must consider his or her best interests.

2 Introduce mechanisms through which children in asylum-seeking families can **express their views** and have those views taken into account and given weight in line with their age and maturity in decisions that affect them.

- These mechanisms should be designed with a view to:
 - allowing the child to decide whether to be heard and how to be heard;
 - giving the child the opportunity to be heard directly;
 - and, where the child chooses to be heard through a representative:
 - mitigating any potential conflicts of interest, and
 - ensuring that the representative has sufficient knowledge and understanding of the various aspects of the decision-making process, experience in working with children, and an awareness that his or her role is to represent exclusively the interests of the child.
- The Home Office could benefit from consulting, in particular, with the Ministry of Justice to learn from their experience of developing practice and guidance in both the criminal and civil family law jurisdictions.

³ The relevant elements reflected in paragraphs 52 – 79 of the UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013): the child's views, identity, situation of vulnerability, right to health, right to education, preservation of the child's family environment and maintenance of relations, and the child's care, protection and safety.

⁴ The definition of 'safeguarding and promoting the welfare of children' as set out on page 7 of the most recent March 2013 UK statutory guidance (<http://goo.gl/ww7ZNO>): "protecting children from maltreatment; preventing impairment of children's health or development; ensuring that children grow up in circumstances consistent with the provision of safe and effective care; and taking action to enable all children to have the best outcomes.

-
- 3 Make use of existing **inter-agency working relationships and fora** to share best practice and identify areas for improvement in respect of best interests considerations for children in asylum-seeking families. This could be achieved, for example, through:
- participation in Local Safeguarding Children Board (LSCB) meetings in areas where asylum-seeking families with children are dispersed, and;
 - improved record-keeping by all parties to ensure that good and poor practice in respect of referrals and communication between agencies are collected and can be addressed where relevant.

B) The Home Office:

- 1 Facilitate the necessary conditions for children in asylum-seeking families to express their views by **creating and providing information to children, their families and caregivers in a language and format they can understand**. Information could be conveyed via leaflets, booklets, videos or other means of communication and should be aimed at - and made available to - all children, no matter their stage in the asylum procedure. The information should explain, *inter alia*:
- the asylum process;
 - the child's right to express his or her views in matters that affect him or her;
 - the option of communicating directly or through a representative; and
 - the impact that his or her views will have on the outcome of the decision-making process.
-
- 2 Review all **guidance and training** for Home Office staff on best interests to ensure that they are aimed at and accessible to all decision-makers that make decisions that affect children, whether unaccompanied, separated or with families.
- Addressing the issues highlighted in this report, the guidance and training should:
 - Emphasise the need for any decision affecting a child to be justified and explained in order to demonstrate how the child's best interests:
 - have been assessed or determined; and
 - have been taken as a primary consideration when reaching the decision;
 - Guide decision-makers on how the best interests determination should be factored into the written asylum decision reasoning and how it should impact upon the granting or refusing of immigration leave on a specific legal basis;
 - Clarify how and when to record information relevant to best interests on the physical file and / or on CID;
 - Increase the understanding and awareness of all the elements necessary to reach a balanced determination of a child's best interests; and
 - Explain how the provisions of the immigration rules at Paragraph EX1 of Appendix FM should be put into the context of the wider necessary consideration of a child's best interests.
-
- 3 Strengthen mechanisms and procedures to ensure that any **decision relating to support** (including decisions to disperse) include an evaluation of its possible impact on the child concerned. The justification for the support decision taken must then show that the best interests of the child have been given primary consideration.

④ Develop best interests / section 55 duty-specific **quality assurance mechanisms** to help ensure that appropriate standards are being met.

⑤ Strengthen **data collection and statistical** output (for example, using CID) that examines and reports on the application of Section 55 and the best interests principle.

C) The Department for Education and The Association of Directors of Children's Services (ADCS):

① Ensure awareness amongst Local Authority staff of their duties to children within families seeking international protection.

② Ensure that referrals received from the Home Office are acted upon promptly and in accordance with duties reflecting the welfare and best interests of the child.

③ Ensure that Local Authorities receive the necessary support, economic or otherwise, to facilitate the satisfaction of their own duties in respect of children in asylum-seeking families.

D) All relevant legal professional and regulatory bodies:

Encourage and support relevant legal services and advice providers to ensure that those representing asylum-seeking families with children have the relevant knowledge and skills in respect of the duties and principles that pertain to the welfare and best interests of children.

UNHCR OFFERS ITS FULL SUPPORT FOR THE IMPLEMENTATION OF THESE RECOMMENDATIONS.

1. Introduction

Historically, the large majority of asylum claims reviewed by UNHCR under the auspices of the United Kingdom Quality Initiative and Integration projects have been those of individual adult asylum applicants.⁵ This reflects the reality on the ground whereby, in 2011, 20,512 first time asylum claims lodged in the UK were those of individual applicants, whereas only 3,369 were first time applicants with dependants. Of those cases with dependants, 2,768 included at least one *minor* dependant (a child).⁶ The Home Office defines this latter category as a ‘family’ asylum claim.⁷

In June 2013, UNHCR published the findings of an audit of the quality of asylum decision-making in 45 family asylum claims. The audit found that, with some exceptions, children who are dependent on their parents’ claims do not consistently have their own individual protection needs identified or assessed. UNHCR also observed that the current UK family asylum process does not adequately facilitate children’s participation and, as a result, children’s voices and views are not sufficiently heard during the process nor, as a result, given adequate weight.⁸

As a UN protection agency, UNHCR has an interest not only in how children are treated as dependants of their parents’ asylum claims, but in how their own protection needs are assessed, as well as how their human rights as children are respected throughout the asylum procedure. With this in mind, as part of the audit of family claims, UNHCR observed whether and how the Home Office undertakes its duty to act in ways, and make decisions, that ensure a child’s best interests. The current report sets out the findings of this particular aspect of the audit.

⁵ An exception was the audit of 100 unaccompanied children’s claims, the findings of which were published in April 2009: <http://goo.gl/nk63EL>

⁶ Source: UK Border Agency. All figures quoted are management information which has been subject to internal quality checks. The numbers may differ from figures released as National Statistics in the Home Office Immigration Statistics as they are drawn from different snapshots of the UK Border Agency databases.

⁷ See definition in Asylum Policy Instruction ‘Processing Family Cases,’ Version 1.0 (01/03/2011), Section 1.1. available at: <http://goo.gl/T559F>

⁸ See UNHCR’s ‘Untold Stories: Families in the Asylum Process’, June 2013, available at: <http://goo.gl/YSYcDz>



1.1 Background and legal framework

As a signatory to the 1989 Convention on the Rights of the Child (CRC), the UK is bound by Article 3, paragraph 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.”

One legislative measure introduced to implement the UK’s obligations under Article 3 of the CRC is Section 55 of the Borders, Citizenship and Immigration Act 2009 (Section 55, BCI Act). Section 55 of the BCI Act places a duty on the Secretary of State, and officers acting on her behalf, to have regard to the need to ‘safeguard and promote the welfare’ of children in the discharge of various functions relating to immigration, customs, nationality, and asylum.⁹

In the 2011 case of *ZH (Tanzania)*, the UK Supreme Court held that Section 55 translates “... *the spirit, if not the precise language*” of Article 3 of the CRC into UK national law.¹⁰ Further, the court clarified that “[t]he duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves.”¹¹

⁹ On 1 April 2013 the then UK Border Agency (UKBA) was split into two separate units within the Home Office: a visa and immigration service and an immigration law enforcement division. At the time of UNHCR’s audit (March to September 2012), asylum functions were performed by the UKBA. At the time of writing, these functions are now performed by the Asylum Casework Directorate (ACD) which forms part of UK Visas and Immigration (UKVI).

¹⁰ *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4 at 23 per Hale L.

¹¹ *Ibid* at 24 per Hale L.

This “process and decision” understanding has been echoed by the Committee on the Rights of the Child in its 2013 ‘General Comment No 14 on the right of the child to have his or her best interests taken as a primary consideration’ (GC14) where it clarifies that the concept of ‘the best interests of the child’ is threefold: it is a substantive right, it is an interpretive legal principle and it is a rule of procedure.¹²

As a rule of procedure, the Committee explains that “[w]hen a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases.”¹³

In the UK, statutory guidance provided under Section 11 of the 2004 Children’s Act emphasises that government agencies each have a different role and a contribution to make towards determining the best interests of a child depending on the function for which they have responsibility.¹⁴ A person exercising any of the functions named in Section 55 of the BCI Act (which includes “any function of the Secretary of State in relation to immigration, asylum or nationality”) must, in exercising that function, have regard to the statutory guidance provided by the Secretary of State.¹⁵ This statutory guidance, entitled “Every Child Matters”, requires such persons “to identify and act on their concerns about the welfare of children with whom they come into contact”.¹⁶ It also explains that the term ‘safeguarding and promoting the welfare of children’ is the same as defined in the statutory guidance to Section 11 of the 2004 Children Act and includes:¹⁷

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

Importantly, the guidance also emphasises that obtaining the wishes and feelings of a child and taking those into account when deciding on action to be undertaken in relation to that child is a key feature of an effective system to safeguard and promote the welfare of an individual child.¹⁸

Since the creation of the statutory duty under Section 55 of the BCI Act, the Home Office has aimed to streamline reference to this duty into relevant asylum policy instructions and operational guidance. At the time of the audit, the main source of guidance on the duty and the concept of ‘best interests’ in the context of asylum and children was found in the Asylum Process Guidance entitled ‘Processing asylum applications

¹² Paragraph 6 of UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14.

¹³ *Ibid*, paragraph 6(3).

¹⁴ “Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children”, Department for Children, Schools and Families, March 2010, Part 1, Chapter 1.

¹⁵ Section 55(3) of Borders, Citizenship and Immigration Act 2009.

¹⁶ “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) para 1.6, available at: <http://goo.gl/KgTa9i>

¹⁷ Para 1.4 of the Statutory Guidance to the UK Border Agency refers back to para 2.8 of ‘Statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004’.

¹⁸ “Every Child Matters”, paragraph 1.14.

from a child' (UASC Guidance).¹⁹ While this guidance focuses on processing claims from unaccompanied children, it also, at the time, provided the primary source of more thorough and specific guidance on the matter of welfare and best interests for children generally. Indeed, the asylum policy instruction, 'Processing Family Cases', for decision-makers handling claims from families referred the decision-maker not only to the Section 55 statutory guidance but also to the UASC Guidance.²⁰

It is important to point out that, as of 9 July 2012, changes to the Immigration Rules²¹ further nuanced the way in which asylum decision-makers are required, in policy, to consider the section 55 duty in certain family cases.²² Paragraph EX1 of Appendix FM within the Rules now sets out specific criteria to be considered when assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria acknowledge the statutory duty under section 55 of the BCI Act. As the criteria came into effect at the tail end of UNHCR's audit, only three cases were observed where EX1 had been applied. The findings below demonstrate how these new Immigration Rules and their associated guidance have impacted upon the way that best interests is determined by decision-makers.

1.2 Scope of UNHCR's audit

In acknowledgement of both the procedural and substantive aspects of "the best interests of a child", UNHCR's audit sought to examine if and how:

- information is collected about a child *during* the asylum process; and
- how that information is used to inform
 - a) any and all *assessments* of best interests for actions concerning a child during the asylum process; and
 - b) the final *determination* of an individual child's best interests.

A best interests *assessment* is essential before any action affecting an individual child is taken. A best interests *determination* describes a more formal process designed to determine the child's best interests for particularly important decisions affecting the child. Both require an evaluation and balancing of all the elements necessary to make a decision in a specific situation for a specific individual child.²³ However, the Committee on the Rights of the Child makes clear that, "where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate" (GC14, paragraph 20). A decision to grant or refuse a child immigration leave is one that will most certainly have a major impact on a child.

¹⁹ Home Office Asylum Process Guidance 'Processing Asylum Applications from a Child' Version 6.0 (16/04/2013), Sections 1.3, 17.8 and 20. Available at: <http://goo.gl/hw0uvf>

²⁰ UKBA Asylum Policy Instruction 'Processing Family Cases,' Version 1.0 (01/03/2011), Section 1.3. Available at: <http://goo.gl/T559F>

²¹ Statement of Changes to the Immigration Rules HC 194, laid before parliament on 13 June 2012, effective for any decision issued after 9 July 2012, available at: <http://goo.gl/bcm0Cv>

²² 'Guidance on application of EX.1 – consideration of a child's best interests under the family rules and in article 8 claims where the criminality thresholds in paragraph 399 of the rules do NOT apply', undated. Available at: <http://goo.gl/6b8IA5>

²³ See both UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, sections 3.3 and 3.4 'and 'General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)', 29 May 2013, CRC/C/GC/14, para 47.

UNHCR's 2008 'Guidelines on Determining the Best Interests of the Child' make clear that a best interests *determination* should be informed by decisions already taken or under consideration by competent State authorities.²⁴ As such, the determination of a child's best interests should be informed by the assessment of a parent(s) international protection claim.

In sum, the assessment of the asylum claim of the principal applicant in the family should inform the determination of the best interests of any child within that family which should, in turn, be given primary consideration in any resulting decision to grant or refuse immigration leave to the child.

The report is structured in line with this approach and the findings of the audit below examine the extent to which current UK procedures allow for these considerations.

²⁴ UN High Commissioner for Refugees (UNHCR), UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, section 3.3 'Balancing competing rights in making a decision'; available at: <http://www.refworld.org/docid/48480c342.html>

2. Methodology

In preparation for the audit, UNHCR reviewed the content of the relevant training and guidance available to asylum decision-makers on the subject of children's best interests at the time of the audit.²⁵ It was noted that the more full and substantive training available to asylum decision-makers on the principle of best interests is in fact found in the "Keeping Children Safe (Tier 3): Asylum Caseworkers" training. The Home Office explains that decision-makers who deal with family cases are not currently required to undergo this training as it is primarily aimed at caseworkers who handle applications from children claiming in their own right and is designed for those who have regular face-to-face contact with children. As such, at the time of the audit, not all decision-makers who were required to assess and determine the best interests of children *in families* have received the full training on the principle of best interests.

In addition to reviewing the then-relevant training and guidance, in the autumn of 2011 UNHCR undertook scoping visits to the three asylum regions where the audit would take place.

2.1 Sample Selection

The sample of cases examined for this study is the same as that used for UNHCR's audit of family asylum claims.²⁶ The cases selected were chosen from the asylum regions of London, the Northwest and the Midlands and East as these were the regions that had, in the previous year (April 2010 – March 2011), assumed the majority of family claims. In 2011 there were 20,512 asylum claims made by first time applicants. Of these, 2,768 (14%) were family claims.²⁷

2.2 Final Audit Sample

The final audit sample comprised 45 decisions and 17 asylum interviews. All claims included in the sample had been registered after 1 March 2011. The audit itself was conducted between March and September 2012.

Of the 45 decisions audited, 17 were from London, 17 from the Northwest and 11 from the Midlands and East region. UNHCR assessed decisions from 37 different decision-makers. UNHCR reviewed all decisions made in cases in which UNHCR had observed the interview bar one (as the decision had not been issued at time of analysis). The final sample of decisions included a range of nationalities: Afghanistan (1), Albania (1), Algeria (2), Dominican Republic (1), Egypt (1), Gambia (2), Georgia (1), Iraq (3), Iran (4), Kenya (2), Libya (5), Malaysia (1), Morocco (1), Nigeria (1), Pakistan (8), Somalia (2), Sri Lanka (2), Uganda (1),

²⁵ This included, **guidance**: the Section 55 statutory guidance "Every Child Matters", the "UASC Guidance" referred to above, the Asylum Policy Instruction entitled 'Processing Family Cases,' Version 1.0 (01/03/2011); and **training**: "Keeping Children Safe, Asylum Tier 3", Version 3.1 (date unknown) and the Family Returns Process Training (Module 1: General Overview, Version 4.0; Module 2: The Family Returns Conference, Version 1.1; and Module 3: Ensured Returns & the independent Family Returns Panel).

²⁶ See UNHCR's 'Untold Stories: Families in the Asylum Process', June 2013, available at: <http://goo.gl/YSYcDz>

²⁷ Source: UK Border Agency. All figures quoted are management information which has been subject to internal quality checks. The numbers may differ from figures released as National Statistics in the Home Office Immigration Statistics as they are drawn from different snapshots of the UK Border Agency databases.



Vietnam (1) and Zimbabwe (5). The gender ratio was 30 female principal applicants and 15 male principal applicants.²⁸ There were 64 children dependent on the 45 claims assessed. 35 of these children were under six years old. 29 children were between seven and 18. 38 children were female, 26 were male.

Of the 17 asylum interviews observed, six interviews took place in London, six interviews in the Northwest and five interviews in the Midlands and East region. UNHCR assessed interviews conducted by 17 different decision-makers. This sample also included a range of nationalities: Algeria (1), Bangladesh (1), Georgia (1), Iraq (1), Kenya (1), Libya (3), Nigeria (1), Pakistan (3), Sri Lanka (2), Uganda (1), Vietnam (1) and Zimbabwe (1). The gender ratio was 11 female principal applicants and 6 male principal applicants.

Of the decisions assessed, 10 resulted in a grant of refugee status, three resulted in grants of Humanitarian Protection, five resulted in grants of Discretionary Leave and 27 were outright refusals of asylum, Humanitarian Protection and Discretionary Leave. Of the 27 refused cases, six cases were certified as 'clearly unfounded' and subject to non-suspensive appeals (explained below), and in a further case the refusal letter was subsequently withdrawn and the applicant granted asylum. All of the remaining rejected applicants appealed their refusals (20). Over half of those decisions were then allowed at the appeal stage (11) while a third of decisions appealed were dismissed (7).²⁹ At the time of analysis two cases were yet to be heard.

²⁸ UNHCR prefers the use of 'principal' applicant over that of 'main' applicant (it is noted these terms are used interchangeably by the Home Office). See UN High Commissioner for Refugees (UNHCR), Procedural Standards for Refugee Status Determination Under UNHCR's Mandate, 20 November 2003, available at: <http://www.refworld.org/docid/42d66dd84.html>

²⁹ See UNHCR's 'Untold Stories: Families in the Asylum Process', June 2013, 'Decisions overturned at appeal' p37 available at: <http://goo.gl/MV4Y6Z>

2.3 Assessment Methods

UNHCR based its audit findings on a review of the original Home Office paper case file, observation of the interview where this took place, and any additional information available on the Home Office's Case Information Database (CID).³⁰

To analyse the assessment of the child's best interests for actions taken as the family moved through the asylum procedure, UNHCR used a pro-forma to record any and all information relevant to the best interests of the child(ren) available at each stage of the asylum procedure. UNHCR recorded the content of the information, its source, who had pursued it / provided it, how the information was recorded and considered, and what relevant action, if any, was taken by the Home Office based on the information. UNHCR also examined whether participation of the child(ren) was facilitated at the various stages of the family asylum procedure. If so, UNHCR considered how this was done and how any participation of the child was then given weight in the assessment of the child's best interests. UNHCR also recorded communication between the Home Office, the Local Authority (most often Children's Services Department), and any other relevant government agencies in respect of a child. Where it was considered that communication should have occurred, this was also recorded with reasons why.

To perform its analysis of the quality of the final best interests determination in the written decision, UNHCR used a separate auditing tool and framework for analysis based on its own 2008 *Best Interests Guidelines* and framework for analysis.³¹ Within this audit tool reference was also made to the section 55 duty and paragraph 1.4 of the statutory guidance,³² which defines what is meant by 'safeguarding and promoting the welfare of children' (the elements of which are set out in the introduction to this section above).

While UNHCR uses the terms 'best interests' and 'welfare' interchangeably in this report, it is considered that the safeguarding elements found within the UK statutory duties (Section 11, Children's Act 2004 and Section 55, BCI Act 2009) fit within, but are more limited than, UNHCR's wider rights-based assessment framework drawn from the CRC and GC14.³³ It was this latter framework that was used to audit the claims in the sample.

³⁰ The decision assessment involved a UNHCR team member reviewing the asylum decision in light of the case file, supporting evidence and, where relevant, specific Country of Origin Information (COI). The interview assessment, as with previous audits, involved a UNHCR QI team member observing each 'live' interview with the informed consent of the applicant. The consent of all applicants was obtained formally at the outset of the interview and each applicant was informed that consent could be withdrawn at any time. The UNHCR observer prepared for the interview in much the same way as decision-makers are required to (i.e. by consulting the information contained in the applicant's file and conducting country research relevant to the applicant's claim).

³¹ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; Section 3 "Balancing competing rights in making a decision" and Annex 9

³² 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), available at: <http://goo.gl/AS4VYL>

³³ It should be noted that, since the drafting of the auditing tools, the Committee on the Rights of the Child has further clarified the elements to be taken into account when assessing the child's best interests (see section V(A)(1) of General Comment 14). Future consideration of the applicability of the concept of 'best interests' in the UK will benefit from considering these clarified elements. In particular, it will be noted that being a refugee or an asylum-seeker is considered to be in a situation of vulnerability.

3. Best Interests Assessments as the family moves through the asylum process

The findings in this section focus on the assessment of a child's best interests in order to inform actions taken *during* the family asylum process. As part of this, UNHCR's audit examined the extent to which the Home Office asylum staff undertake their Section 55 statutory duty to *identify* child welfare and safeguarding issues and *act upon* what is identified. Also examined was the extent of pro-active and collaborative working and referral to other relevant agencies.³⁴

Encouragingly the findings below point to instances of Home Office staff identifying relevant issues and acting appropriately including, where relevant, by making relevant referrals to the Children's Services departments of Local Authorities. Unfortunately, in some cases it seemed that, despite the Home Office's pro-activity, the response by the Local Authority was lacking.

The findings also demonstrate that the Home Office does not have an appropriate mechanism in place to facilitate the participation of children and this shortcoming impacts upon the quality of a best interests assessment.³⁵ Furthermore, findings show that some routine 'actions' undertaken by the Home Office such as the geographical dispersal of asylum-seeking families to other regions of the UK do not clearly factor in any consideration of the interests of the children in those families. In general, it was not clear that the best interests of children in asylum-seeking families were being considered at every stage of the asylum process.

3.1 Participation of children in decisions throughout the asylum process

Respect for the views of the child (Article 12):

A guiding principle of the Convention on the Rights of the Child

The CRC recognises the capacities and competencies of children to have the opportunity to influence and participate in decisions that will affect their lives. Article 12 requires the child's participation in recognition of children as individual subjects of rights. Indeed, such is the importance and centrality of Article 12, the UN Committee on the Rights of the Child has stated, "[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified Article 12 as one of the four general principles of the Convention".³⁶

³⁴ As required in "Every Child Matters" guidance at para 1.9 (g)

³⁵ UNHCR does not consider the "One Stop Notice" procedure to be a sufficient and appropriate mechanism for facilitating a child's participation. This is explained in detail at section 3.2 (pages 24 – 25) of UNHCR's 'Untold Stories: Families in the Asylum Process', June 2013, available at: <http://goo.gl/Vv4qw4>

³⁶ UN Convention on the Rights of the Child, General Comment No. 12, The right of the child to be heard, para 2.



The Committee addresses what is meant by the substantive right of the child to be heard in General Comment No. 12. They elaborate that the right “assures to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity.”³⁷ In particular, the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.”³⁸

The concept of “participation” is broadly accepted as the process by which children’s voices are heard in any such proceedings. This includes, “information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of the processes.”³⁹ There is an obligation to actively listen to children’s views and take them seriously. In deciding how much weight to give to these views the child’s age and maturity must be considered.⁴⁰

However, Article 12 of the CRC not only provides for the participation of children as a right in itself. As the Committee has expounded, fulfillment of Article 12 through child participation is also crucial to enable States to determine and realise the best interests of the child.⁴¹ Thus, UNHCR is of the view that without adequate child participation, it will not be possible to uphold the principle of the best interests of the child.

³⁷ Note, the General Comment makes clear at para 10 that “the conditions of age and maturity can be assessed when an individual child is heard and also when a group of children chooses to express its views.” This General Comment makes clear that the obligation is on the State to make all efforts to listen to or seek the views of children in a collective group manner, even when there are difficulties in assessing age and maturity and that an assessment of age and maturity requires participation of the child.

³⁸ UN Committee on the Rights of the Child, General Comment No. 12, The right of the child to be heard, para. 2.

³⁹ UN Convention on the Rights of the Child, General Comment, No. 12, The right of the child to be heard, para. 3.

⁴⁰ UNICEF Implementation Handbook for the Convention on the Rights of the Child, p155.

⁴¹ *Ibid*; See also ‘General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)’, 29 May 2013, CRC/C/GC/14, para 89.

As already acknowledged above, the UK's "Every Child Matters" statutory guidance itself acknowledges the importance of child participation.⁴²

Throughout the audit, UNHCR sought to identify whether the decision-maker had facilitated the child's right to participate. The audit aimed to look wider than whether or not the child was interviewed but to also consider the adequacy of information given to the child about his/her right to participate and methods by which s/he could do so.⁴³

Findings in respect of the application of Article 12 in the context of the family asylum process

As indicated in UNHCR's family audit report, a strong overall finding was that current Home Office policy and processes do not provide for the participation of children who are dependants in a family asylum claim and this was reflected wholly in the practice. Current asylum operational policy states that decision-makers must take account of the views of any children likely to be affected by a decision of the Home Office, but that it is for the parents to provide these views.⁴⁴ Only when the best interests of the child might not be the same as their parents' interests should "steps be taken to elicit and assess the child's views."⁴⁵ This reveals an impossible tension in the policy as it will not be possible to know if the child's best interests are in conflict with the parents' interests without the child's views. In practice decision-making staff will be unable to consider what is in the best interests of the child without the child's participation in the process. Furthermore, this operational policy seems to conflict with what the "Every Child Matters" statutory guidance in fact requires.

UNHCR is concerned that the finding of an absence of the participation of children within a family unit in the asylum process impacts upon the UK's ability to assess the child's best interests.

The effective engagement of children requires many elements: appropriate and timely information provision, effective safeguards, personnel with the correct expertise, training, experience and sensitivity as well as child friendly processes that allow sufficient time to analyse cases on a child specific basis. These crucial practical considerations cannot undermine the importance of child participation as the starting point to ascertain what is in a child's best interests.

The findings below reflect the tension within the existing Home Office policy and the absence of processes which allow for child participation. UNHCR found no participation from children in respect of procedural decisions that would impact them, for example, when a decision was made by the Home Office to disperse a family to a particular geographical region.

3.2 Dispersal and the best interests of the child

Dispersal is the process by which the Home Office moves an asylum-seeker who requests accommodation as part of a granted support package to a location which could be in any part of the UK. The applicant and his or her family are first moved to initial accommodation in the dispersal region while their application for asylum support is processed. Once the application has been processed and approved they are moved within the region to longer term accommodation.

⁴² "Every Child Matters", paragraph 1.14.

⁴³ UNHCR Pro-Forma, on file with Quality Integration Project.

⁴⁴ See Asylum Instruction, 'Processing Family Cases,' Version 1.0 (01/03/2011), Section 1.4.

⁴⁵ *Ibid.*

Of the 45 family asylum claims that UNHCR audited, 28 families (62%) were dispersed. While Home Office policy requires that the dispersal process take account of a child's best interests⁴⁶, UNHCR could find no indication on the physical file nor on CID to indicate that the children's best interests been assessed prior to making the decision to disperse.

In one concerning example, UNHCR observed that the dispersal of a Zimbabwean applicant and his 5-year-old son, who was born in the UK, resulted in the son being removed from his school due to the family's being dispersed. Despite the proactive efforts of the father to submit evidence to demonstrate his son's progress in school and the impact dispersal would have on the continuation of his education, there was no indication on the file or on CID that this evidence was taken into account. What was particularly concerning in this example was that the child was still going through a process of mourning the recent death of his mother and his school had been a particular support to him in his recovery.⁴⁷ He was still receiving mental health support from the school nurse (the father provided a letter from this nurse) and had been scheduled to join a therapy group.⁴⁸ Without indication of any consideration of this information, the family was dispersed to a different part of the country.

This lack of consideration of the child's mental health during the asylum process was surprising given that the support received by the applicant's son following the death of his mother was explicitly referred to in the consideration minute when granting discretionary leave to remain. The decision-maker reasoned that removal would be a breach of the father's right to family life (Article 8 ECHR), a family life that was considered established due to his being the father of a child in whose best interests it would be to remain as the child himself had established his own private life (Article 8 ECHR) in the UK.

In a further example, a Zimbabwean family of a mother and eight year-old son who had already been living in the UK prior to claiming asylum, there was another illustration of a lack of consideration for the best interests of the child when dispersing the family. The son, who was born in the UK, was well integrated in his school. A CID note on file indicated that at the screening interview the principal applicant asked to stay in the same area, as her sister lived there and they shared childcare for their children. Yet there was nothing on the file to suggest this information had been taken into account when considering dispersal. Consequently, the family was dispersed to another area of the country. Following dispersal, a letter from the son's school was sent to his mother indicating that he may lose his school place.

These cases demonstrate the special considerations required for children of families already living in the UK, due to the likelihood that children are already well integrated into their school and local communities and the serious impact this could have on their development and well-being.

Each and every child has unique needs and may face specific challenges for example in relation to their stability, their integration, their right to education and, importantly, their right to rehabilitation. These cases illustrate the need for a more sensitive approach to the issue of dispersal, including the need to consider the impact dispersal might have on the best interests of the child.

⁴⁶ Asylum Support Policy Bulletin, 31, August 2012 available at: <http://goo.gl/SH7c7j>

⁴⁷ See Article 39 of the Convention on the Rights of the Child – the Right to Rehabilitation and “Every Child Matters” para. 1.16 which states that UKBA's work with children and families should be “designed to identify and provide the services required, and monitor the impact their provision has on a child's developmental progress”. See also para 1.1.4 which states that “where children are being provided with services to respond to their needs and support their welfare... professionals including the UK Border Agency contribute to subsequent plans, interventions and reviews in accordance with requirements in relevant regulations and guidance.”

⁴⁸ See Article 39 of the Convention on the Rights of the Child (Rehabilitation of child victims): Children who have been neglected, abused or exploited should receive special help to physically and psychologically recover and reintegrate into society. Particular attention should be paid to restoring the health, self-respect and dignity of the child.

3.3 Inter-agency working

Guidance to staff on inter-agency working and referral to other agencies

The “Every Child Matters” statutory guidance makes clear that a key aspect of safeguarding is “effective inter-agency working”. The guidance clarifies that, in order to fulfill its safeguarding duties, the Home Office is required to make timely and appropriate referrals to agencies that provide ongoing care and support to children.⁴⁹ There are various pieces of additional operational guidance to Home Office staff about how this referral mechanism should take place in practice. In addition to agency wide guidance,⁵⁰ there is guidance directed specifically at those staff members handling asylum claims involving children, whether with their families, unaccompanied or separated.⁵¹ Where staff refer a child to Children’s Services within a Local Authority, a specific referral form is required.⁵²

Findings

It is clear that there is a large amount of guidance to asylum staff about when and how they should refer cases to other agencies. Practice on the ground in this respect, however, was mixed. As indicated below, there are clear examples of pro-active and clear referrals being made. However, in some instances, it appeared that these referrals are not always followed up on by the Local Authority. Furthermore, despite UNHCR’s access to both the physical file and CID, it was not always possible to gauge why a referral had been made. For example, in a claim where a single mother had claimed asylum at the ASU with her two sons, UNHCR observed the screening officer fax the referral form to a Local Authority stating:

“We UKBA request a visit in accordance with UKBA’s commitment to keeping children safe to ensure the children are well cared for in their present surroundings.”

Nothing further on the file clarified why the referral had been made.

However, UNHCR also identified clearly minuted instances where asylum staff made particular efforts to refer to the Local Authority. For example, one decision-maker was concerned for the well-being of three children dependent on the claim of a principal male applicant and a severely disabled and immobile dependent spouse (mother of the children). When the family was dispersed to another asylum region, it was clear from the file that the decision-maker made the referral with a view to ensuring continued care and support to the family. It was apparent that the decision-maker also intervened on behalf of the family to seek a reduction in their reporting requirements, as it was clear that the burden to report would fall on the eldest daughter, due to the mother’s disability.

Still, while this was positive, it was clear that the steps taken by the decision-maker were undertaken to mitigate against the negative impacts that dispersal had already imposed on the family in the first place. This was another example where it would have been appropriate to consider the impact of dispersal on the children prior to taking the decision to disperse.

UNHCR was concerned to come across two cases in the audit sample where, despite a referral having been made to Children’s Services within the relevant Local Authority, the latter service appeared not to have followed up on the referral.

⁴⁹ See “Every Child Matters”, paragraphs 1.9 and 2.5.

⁵⁰ ‘Referring Children in Need’, 31st March 2009 found at: [previous version of UASC.

⁵¹ See UASC Guidance, Section 9 ‘Referrals to Local Authorities’ provides a step-by-step procedure and requires that any action taken must be minuted in the file notes. There is also guidance on referring children when there are signs of trafficking in Section 7.2. See Processing Family Claims guidance at section 3.3 ‘Referrals to Local Authorities’ which provides some limited guidance but refers back to the “Every Child Matters” statutory guidance and the “UASC Guidance”.

⁵² No external link to a copy of this form is available.

In one case, UNHCR observed the decision-maker inform the principal applicant during his substantive interview that she would contact the Local Authority to inform them of the family's limited accommodation (a family of four were staying in one room) and to pass on the information shared by the applicant that he feared his daughter's incontinence was possibly a sign of an effect on her mental health after she had witnessed her mother being threatened at gunpoint. A number of months later, UNHCR learned from the decision-maker herself that, despite her efforts to contact the Local Authority, they had been reluctant to take up the case because a) they "did not deal with accommodation issues" and b) because the family was in private accommodation. This was a surprising finding as it is clear that Local Authorities have a duty to all children within their jurisdiction, unaccompanied or not, subject to immigration control or not.

In the second example, a Screening Officer in Croydon faxed a referral to a duty social worker in Liverpool on behalf of a family with two young children stating, "we UKBA request a visit in accordance with UKBA's commitment to Keeping Children Safe to ensure the children are well cared for in their present surroundings." Later, at her substantive asylum interview, the interviewer asked the mother whether the Local Authority had been in contact with the family. She confirmed they had not.

These examples suggest that the protection of children within asylum-seeking family units can be put at risk by a lack of understanding or follow-up on the part of Local Authorities as to their duties. This might suggest a need for a clearer demarcation of joined-up responsibility between government agencies in respect of refugee and asylum-seeking children within family units.

3.4 Health and the Best Interests of the Child

Throughout the audit UNHCR observed that a standard question was asked of the principal applicant during the substantive asylum interview regarding the health of his/her child(ren). While such questioning is useful and necessary, UNHCR observed a lack of proactive use of such information to ensure the child's best interests were then safeguarded during the asylum process or factored into any later decision-making.

Where health concerns were raised by parents on behalf of their children, there was no evidence of any action being taken by decision-makers: either to inform parents about the available health services or to follow up and ask for more information. UNHCR noted a lack of policy in regard to the inter-agency working relationship between the Home Office and health services despite the "Every Child Matters" guidance and its requirement for inter-agency working.

In the case of a 9-year-old child with Coeliac disease, despite the father having highlighted her 'special diet' at both his screening and substantive asylum interviews, there was a lack of follow-up on the part of the decision-maker to ask more questions around how the disease impacts her life both in the UK and in her country of origin. This is a clear example of a health concern that will be relevant both to any best interests assessment or determination.

In another example, the health of the daughter had been raised by the father when the family claimed asylum at the airport after arriving on a direct flight from Egypt. He explained that his daughter had been experiencing incontinence due to the trauma experienced by the family in their home country. The family, including children, had been detained at Heathrow until the early hours of the morning before being moved to temporary accommodation. When the family came to Liverpool for screening the father explained that the children were not present as they were unwell. There was no indication that this health concern was given any further consideration either in the asylum process or in the final immigration decision. Not only would the daughter's health be directly relevant to determining her best interests, but it could also indicate that she has her own well-founded fear of persecution and an asylum claim in her own right.

4. The Best Interests Determination

Above, UNHCR has set out observations of how the Home Office performs its duty to ensure best interests is considered *during* the family asylum procedure.

Below, UNHCR sets out findings of an examination into how the child's best interests are formally determined and whether and how the outcome of that determination is given primary consideration in any resulting decision on the child's future.

Asylum and Human Rights Decision-Making in the UK

Before setting out the findings below, it is important to briefly clarify how asylum claims are assessed in the UK, what written reasoning is provided in respect of that assessment, and what 'decision' the assessment gives rise to.

In the UK, when a decision-maker assesses an asylum claim from the principal applicant within a family, he or she will examine whether the evidence provided by the principal applicant (and, where relevant, dependent family members) along with country of origin information suggests that, to return the main applicant or any members of his/her family to his or her country of origin (or to remove them from the UK) would give rise to a breach of any of the family member's rights under:

- the 1951 Geneva Convention Relating to the Status of Refugees;
- the 1950 European Convention on Human Rights (ECHR); and
- the European Union Asylum Qualification Directive

If the information suggests a 'real risk' or 'reasonable likelihood' of a breach (again, to the principal applicant and/or one of his or her family members), this can give rise to one of three types of immigration leave:

- Refugee Leave;
- Humanitarian Protection; or
- Discretionary Leave⁵³

To whom the immigration leave is granted and for how long it is granted will depend on the individual facts and circumstances of the case.

In the UK, all of these considerations take place under a single procedure. This means that, in the context of a principal applicant claiming asylum with his family members as dependants on his claim, all relevant considerations under the Conventions and Directives for each of the family members linked to the claim should be considered.

Written reasoning demonstrating the assessment of these considerations is in the form of a 'Reasons for Refusal Letter' (RFRL) and / or 'Consideration Minute'.⁵⁴ Based upon this written assessment, the Home

⁵³ However, there may be additional circumstances in which Discretionary Leave may be granted. See Asylum Instruction, 'Discretionary Leave' Version 6.0 (24/06/2013), in particular at section 2.6. Available at: <http://goo.gl/33ZWlc>

⁵⁴ While applicants are provided with the RFRL in the instance of a refusal, Consideration Minutes are not disclosed by the Home Office but kept both on the physical file and CID.

Office then formally grants or refuses leave to remain to one or more of the family members (an “immigration decision”) with the family members granted or refused leave in line.⁵⁵

It is based on this written reasoning that UNHCR was able to audit not only the quality of the best interests determination but if and how this determination was given ‘primary consideration’ when deciding whether to grant or refuse immigration leave to a child within the family.

Findings in respect of written reasoning on best interests

The Committee on the Rights of the Child points out that ‘legal reasoning’ is one of the necessary procedural safeguards required to ensure that the best interests of the child are properly determined and given primary consideration.⁵⁶

Of the 45 claims that UNHCR reviewed, 30 contained some form of formal written analysis of a child’s best interests in the written decision. In almost all instances, this was identified by explicit reference to Section 55 of the BCI Act 2009 in the RFRL or the ‘Consideration Minute’ and a series of sentences or paragraphs with the decision-maker’s reasoning. For example, if the decision was an outright refusal, the reasoning was provided in the RFRL whereas, if the decision was to refuse asylum but grant Humanitarian Protection (HP) or Discretionary Leave (DL), the reasoning would not be found in RFRL on the asylum claim but instead in the ‘consideration minute’ which provided the reasoning for the grant of leave. In one instance there was no explicit reference to Section 55 but it was clear from the reasoning that some form of assessment of the child’s best interests was being undertaken.

In the remaining 15 claims reviewed there was no clear or obvious consideration of the child’s best interests or of how this impacted upon the assessment of the asylum claim more broadly.⁵⁷

In the 30 cases where there *was* an assessment of best interests, the written reasoning was provided in the following types of decisions: 6 grants of DL and 25 RFRLs.⁵⁸

In the 14 cases where there was no observed assessment of best interests, the decision outcomes were: 9 grants of asylum, 2 grants of HP, 1 grant of DL and 2 outright refusals.

What is important to note from these findings is that, *where refugee or humanitarian protection is granted*, no determination of best interests appears to be made. This reflects a possible misunderstanding of the principle of best interests. It is necessary to determine a child’s best interests *in every instance* where the Home Office takes an ‘action’ that concerns a child.⁵⁹ To make an immigration decision based on an assessment of a family’s protection needs is an action that affects a child. While the decision, in these cases, has been to grant the family protection, this does not preclude the necessity to ensure that this outcome is in line with the child’s best interests. The fact that the family has been granted protection and been granted

⁵⁵ Where refused, the applicant receives a ‘Notice of Decision’ (usually a ‘notice of liability to removal’ but, if the applicant was already in receipt of leave, this can be a ‘notice of refusal to vary leave’). It is this ‘Notice of Decision’ that triggers a right of appeal under Section 82 of the Nationality, Immigration and Asylum Act 2002. The ‘Immigration (Notices) Regulations 2003’ set out what is required to appeal. Where granted, it is the biometric residence permit that provides ‘proof’ of leave granted.

⁵⁶ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraph 97.

⁵⁷ At the time of writing, no decision had been issued for the final case in the sample.

⁵⁸ Five of the refusals were certified under Section 94 of the Nationality, Immigration and Asylum Act 2002 which results in a non-suspensive appeal right. The total reaches 31 due to the fact that, in one case, the best interests assessment was made twice; both in the refusal of asylum and in the subsequent grant of discretionary leave.

⁵⁹ Article 3, para 1 Convention on the Rights of the Child; UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para 17 and 18 provides further explanation of ‘all actions’ stating ‘the word “action” does not only include decisions, but also acts, conduct, proposals, services, procedures and other measures. Inaction or failure to take action and omissions are also “actions” [..]’

immigration leave in line with that grant should no doubt strongly affect the determination of an outcome that is in the individual child's best interests.

UNHCR's audit found that in all cases in which a Best Interests Determination was conducted, the same Home Office decision-maker that assessed the asylum claim had undertaken the best interests determination. In all cases this was the same person that had made the decision on the asylum claim.

These findings show that not all children who are dependants on an asylum claim are having their best interests determined. Those who are, as is explained below, are not having them considered fully and appropriately.

Below UNHCR provides more detailed findings of how, in the 30 cases where there was a determination of a child's best interests, that determination was reached. Further, UNHCR examines whether and how that determination is currently given consideration in the wider assessment of protection needs and the granting or refusing of immigration leave.

4.1 Collecting Relevant Information

Information collection is clearly important to inform all on-going assessments of a child's best interests for actions and decisions that affect them as they move through the asylum procedure. It is also vital for a full and proper determination of those interests when identifying a longer-term outcome for the child.

The process of information collection – a process which should begin from the moment the child is identified with his or her family – should be child-centred and gender-sensitive; it should guarantee the child's participation and have a forward-looking approach. The information gathered must be factual and credible. Confidentiality is important, as it is possible that disclosing information may in fact be detrimental to the child's best interests.⁶⁰ Equally important are the skills and expertise of any professional tasked with collecting and analysing this information.

Through its audit, UNHCR observed that all oral evidence was gathered from the principal applicant at his or her substantive asylum interview. There was no evidence of mechanisms of consultation – whether with the principal applicant in the family's asylum claim, close family members, or with the child him or herself – that allowed for the collection of oral evidence for the purposes of assessing or determining the child's best interests.

The findings set out in detail below highlight concerns about the current methods by which information is collected for the purposes of determining best interests. At present, there is no appropriate mechanism for directly obtaining the views of children and no children amongst the sample of claims reviewed were interviewed. UNHCR shares the view of the Committee on the Rights of the Child that the best interests of a child cannot be properly analysed or determined where the child has not been given the opportunity to express those views and for the child's views to be given weight in accordance with their age and maturity.⁶¹ The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings and acknowledges the risk of a conflict of interest where the child is represented by their parent(s).⁶²

⁶⁰ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; section 3.2 "Collecting Information".

⁶¹ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraph 43.

⁶² General Comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, paragraphs 35 – 36.



Parents are consulted minimally for the purposes of best interests, specifically. Within the sample, where a parent was consulted, this was undertaken primarily at the substantive asylum interview of the parent who was the principal applicant on the family's claim. The other parent was thus not consulted. With the father being the principal applicant in the greater majority of family claims, this means that the mother, very often the main carer of the child, is not being given the opportunity to share her views on the best interests of her child.

Given the need to ensure substantive asylum interviews are of a high quality, UNHCR is concerned that using the substantive asylum interview to gain information about a child can in fact distract the decision-maker from the separate but important matter of eliciting evidence for the specific purpose of assessing the asylum claim.

The findings below indicate mixed practice in respect of the level of pro-activity on the part of the decision-maker to collect information relevant to assessing and determining best interests. Of the 45 cases reviewed, UNHCR recorded 21 instances whereby it was considered that the decision-maker had acted pro-actively to obtain information about the child. In general, because the current mechanisms to assess best interests are squeezed into the existing asylum system, decision-makers are only able to act within the system that exists. This means they are inhibited in their ability to know when, where and from whom they can and should solicit information and what sort of information they should pursue. This typically results in relevant information arriving at the back-end of the process i.e. at interview or post-interview. Instances of eliciting and collecting information relevant to the child prior to interview are rare. Interestingly and importantly, the findings demonstrate how 'front-loading' of evidence gathering in the context of a pilot that was running in the Midlands asylum region during the period of UNHCR's audit led to a greater level of information collection.

4.1.1 The child's views

In line with the findings above (Section 3.1), UNHCR found that it was rare to observe any indication of the Home Office obtaining the views of the child to inform the determination of his or her best interests. Despite the fact that 29 of the 64 children dependent on the claims reviewed (just under half) were above the age of 7, in only one instance was UNHCR able to gauge from the file a record of the views of a child. In that particular instance, the decision-maker had recorded down in a 'CID note' the views of two teenage children dependent in their mother's asylum claim as expressed at their 'Family Return Conference'.⁶³ This indicates that the children's first opportunity to express their views to the immigration authorities was provided only after the decision on their mother's asylum claim had been taken. Yet, it was in this asylum decision that their best interests had been determined.

In another claim a 'statement of additional grounds' had been submitted by the family's lawyer on behalf of the principal applicant's daughter (with content relevant to the assessment of her best interests). Apart from this, there were no other instances of a statement from or an interview with a child either for the purposes of the asylum claim or for the purposes of determining the child's best interests.

In some instances, UNHCR observed the decision-maker attempt to use the substantive asylum interview of the principal applicant to ask questions about how their child felt, seemingly to elicit information about the child's views and feelings which might be relevant to the assessment of best interests. For example:

Applicant: *"I was advised by [my daughter's] tutors that her performance at school is not good and that she isolates herself, not mixing, nor playing with other children."*

Decision-maker: *"Why she was like that?" [sic]*

[and later in the same interview]

Applicant: *"Especially [one of applicant's daughters] prefers school in English."*

Decision-maker: *"Why?"*

It is clear that, currently, the right of the children going through the family asylum process to express their views in matters that affect them and to have those views given due weight in accordance with their age and maturity is not being afforded.⁶⁴ As a result the quality of any analysis of a child's best interests is seriously inhibited. The Supreme Court has stated that an important part of determining best interests is to discover the child's views⁶⁵. The court acknowledges that the child's views may be obtained directly or indirectly via a representative (who can include the parent). However, the court highlights the need for the decision-maker to be alive to the possibility that the child's views conflict with his or her parents and thereby render the parent as representative inappropriate. The findings of the audit suggest that the current family asylum process does not provide an adequate mechanism for the views of children to be heard directly nor indirectly via a representative. Furthermore, there is no clear safeguard in place through which the child's views could be gathered in circumstances where those views may conflict with his or her parents.

⁶³ A 'family return conference' takes place once a decision has been taken that a family must leave the UK and any in-country appeal rights have been exhausted. At the 'Assisted Return' stage post decision, Home Office staff undertake a Family Return Conference with the family to discuss future options and the specific option of assisted return. See Section 8 of the Home Office Asylum Process Guidance 'Processing Asylum Applications from a Child' Version 6.0 (16/04/2013), available at: <http://goo.gl/hw0uvf>

⁶⁴ Article 12, 1989 Convention on the Rights of the Child.

⁶⁵ *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4 at 34 - 37 per Hale L.

4.1.2 The views of family members and others close to the child

In line with UNHCR's general findings regarding the lack of evidence collection from dependent family members, UNHCR's audit also found that family members were not consistently asked in any systematic way about factors affecting their children's lives in an effort to discover information relevant to welfare or best interests.

In one third of the cases the decision-maker used the substantive asylum interview of the principal asylum applicant to gain the views of that particular parent by asking him or her questions about their child's (children's) health, schooling and private life in the UK. While it is important to obtain the views of the child's family members, using the parent(s)' asylum interview for this purpose gives rise to concerns about excessively lengthy asylum interviews possibly distracting the decision-maker from focusing on an examination of the core of the parent's asylum claim.

In a handful of cases UNHCR observed the use of the Home Office's Best Interests Consideration Pro Forma to elicit information from the family about the child.⁶⁶ In one claim it was possible to gauge from CID that the pro-forma had been issued in hard copy to the female principal applicant at a pre-interview 'First Reporting Event' (FRE) at which point she was asked to bring the completed form back with her to her substantive asylum interview. The Home Office has explained that the pro-forma was not intended to be used to obtain the views of family members but was instead created for case workers when contacting social workers at Local Authorities in respect of unaccompanied children claiming in their own right. Unfortunately, the asylum process guidance does not in fact clarify the pro-forma's purpose and intended use.

In a particular case that was run as part of the "Early Legal Advice Project" pilot (explained further in the next section), the process led to the withdrawal of the asylum claim at the start of a substantive asylum interview. This allowed the decision-maker to focus exclusively on gaining the Zimbabwean child's mother's views on the best interests of her son, her only dependant, as part of a 'pure' Article 8 ECHR claim. Interestingly, the Supreme Court had itself highlighted the potential benefit of such an 'ELAP' scenario to gain the views of a child.⁶⁷

4.1.3 Other sources of information

Other sources of information about the child available to the decision-maker were most often provided by other parties; for example, by the principal applicant (the child's parent) at interview⁶⁸ or via submission of other evidence⁶⁹ or by the legal representative.⁷⁰

In terms of when, during the procedure, the information became available, UNHCR recorded that the large majority of the information was forthcoming either at the substantive asylum interview itself or after the interview, with rare instances where it was provided (by the applicant or the legal representative) prior to interview.

⁶⁶ A blank copy of the pro-forma was previously annexed to UKBA's internal Asylum Process Guidance 'Processing an Asylum Application from a Child' V 5.0 August 2010; Final Annex is 'Best Interests Consideration Pro Forma' (form is "ASL 4262" on CID).

⁶⁷ *ZH (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4 at 36 per Hale L.

⁶⁸ These instances are distinguished from the preceding section in that the child's parent (principal asylum applicant) had him/herself volunteered the information or answered an open question from the decision-maker when the decision-maker had not explicitly questioned the applicant about the child but the applicant provided this information anyway (in other words, the information was gained because the parent chose to give it, not because the interviewer explicitly questioned on it).

⁶⁹ For example, a statement, a school record, a medical record, invitations to parties or social events, photographs of family and friends or of the child at school, etc.

⁷⁰ For example, a medical report or country of origin information.

There were a small number of occasions where the decision-maker's own pro-activity was demonstrated via the pursuit of child-specific COI post interview which was then included in the best interests determination in the decision.

One particular case was unique amongst the sample of cases reviewed not only in relation to the amount of child-specific information it gave rise to but also when this information became available to the decision-maker. Due to their having had a conversation prior to the principal applicant's interview (a key feature of the Early Legal Advice Project process),⁷¹ the legal representative was aware of the decision-maker's view that an Article 8 ECHR claim linked to the child's best interests was strong and of her intention to focus on that at interview. During their conversation, the decision-maker indicated what type of evidence might be useful to help make the decision. The legal representative was thus able to assist his client more effectively and the applicant arrived at her substantive interview with a significant amount of documentary evidence⁷² to complement the oral evidence she provided at interview about her son's life both in the UK and in relation to Zimbabwe.

In essence, the front-loaded design of the ELAP process along with its requirement that the decision-maker and the legal representative discuss the case prior to interview allowed for a significantly higher amount of information relevant to the determination of a child's best interests to be collected at an earlier stage in the process than UNHCR observed in any of the other cases in the sample.

4.2 Analysis (of collected information)

Having considered how Home Office processes allow for relevant information collection, UNHCR went on to examine how the information collected was then analysed and balanced to determine the child's best interests.

As explained above (see 'Assessment Methods' section), in order to undertake its audit of the quality of the best interests analysis and the subsequent determination, UNHCR used an audit tool and framework for analysis based on its own 2008 *Best Interests Guidelines*; one that ensures consideration of the full range of a child's rights under the CRC.⁷³

The tool and framework allowed for a holistic assessment of whether the decision-maker had taken into account a list of non-hierarchical elements relevant to assessing and determining a child's best interests. These elements were devised to ensure the full and effective enjoyment of the rights recognised in the CRC and the holistic development of the child. They include:⁷⁴

- The child's views
- Preservation of the child's family environment and maintaining relations
- Care, protection and safety of the child
- Identity and development rights (including right to health and education).

⁷¹ For a description of the Early Legal Advice Pilot, see 'The Early Legal Advice Pilot' in section 1 "Context" of the "Evaluation of the Early Legal Advice Project, Final Report", authored by Mike Lane, Daniel Murray, Rajith Lakshman (GVA), Claire Devine and Andrew Zurawan (Home Office Science), May 2013, available at: <http://goo.gl/ee33c5>

⁷² Evidence included attendance records and school reports spanning the period of the child's education, baptism and holy communion certificates indicating the child's relationship with his church, photographs of the child with his father and half siblings as well as letters from his great aunt and step-father as evidence of his relationships.

⁷³ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; Section 3 "Balancing competing rights in making a decision" and Annex 9.

⁷⁴ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraphs 52-79.

At the time of the design of the tool, the Committee on the Rights of the Child had not yet published its 2013 GC14 which provides a similar list of elements to be taken into account when assessing and determining best interests. While these elements accord with those used in this audit, the General Comment provides additional useful guidance about what each of these elements is and how each should be considered:

- The child's views
- The child's identity
- Preservation of the child's family environment and maintaining relations
- Care, protection and safety of the child
- Situation of vulnerability
- The child's right to health
- The child's right to education

Having used this tool to guide its analysis, UNHCR found that Home Office decision-makers focused their analyses more strongly on some of these elements while tending to overlook others.

Of note, in 21 of the claims examined, the family had more than one child under 18. Yet there was inconsistent practice in respect of whether each child had their best interests determined in turn or whether children were grouped together and referred to as 'your children'. Sometimes (most often when it resulted in a grant of leave based on an individual child's best interests), there was individual consideration of a specific child's circumstances; examples of which are highlighted below. More often, however, children were grouped together to have their best interests assessed and determined as 'children' in the family. This in itself suggests a lack of understanding of the principle of 'best interests' and that it should be analysed on an individual and fact-specific basis.⁷⁵

As the specific findings outlined below demonstrate, not all children within families that come into contact with the Home Office through the asylum procedure are having their best interests fully and properly analysed. Some children's best interests are analysed to some degree, others are considered as the same as their siblings, others are not referred to at all. Where they are considered, some of the necessary elements are examined for some children; others for other children. Children's views are not considered in these analyses nor are the views of other family members apart from the principal asylum applicant or other individuals who are close to the child. When performing their analysis, decision-makers do not always take into account information relevant to either the best interests framework or the definition of what constitutes the 'welfare of the child'. Particularly concerning, given the countries from which many of the families in the sample came from, was the finding that analysis of the safety of the child was very often not considered at all. Finally, it is clear that there are necessary aspects of the best interests analysis that Home Office decision-makers are not appropriately placed to perform, for example an assessment of the child's maturity.

4.2.1 The child's views

As children do not participate in the current family asylum process, and because there is no other mechanism by which to obtain their views, the best interests analyses reviewed did not include any reference to children's views and thus no accompanying analysis of what weight should be given to those views in an individual case.

⁷⁵ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraphs 24 and 48.

As noted above, facilitating child participation in best interests determinations requires procedural safeguards including giving appropriate information to the child, the involvement of those with relevant expertise, as well as child-friendly processes. At present, UNHCR considers that these safeguards are either absent or insufficient. Further, UNHCR observes there is no mechanism that facilitates any expert assessment of a child's maturity, which would allow for any views obtained to be considered and given appropriate weight.

During the course of the audit, UNHCR observed that the Home Office's 'Best Interests Pro-Forma' includes a request for the person filling it out to give the decision-maker "an assessment of the important factors listed below" one of which includes "the child's views (including age & maturity)." While the form appears to be directed at local authorities, UNHCR observed an instance where the mother of the child was asked to complete the form. In this field the mother wrote "My son [X] who is now six years old understands everythings [sic] and he asks a lot." While a parent's view of their child's maturity can certainly inform the assessment of that maturity, the person who undertakes the assessment of maturity must have the necessary skills and expertise to do so.⁷⁶

The child's views are an important and necessary element of consideration in the analysis of the child's best interests. However, without expert mechanisms to assess age and maturity, the child's views cannot be given appropriate weight in the wider analysis and balancing of all the elements listed here. Below, UNHCR has recommended that the Home Office benefit from the progress made by other parts of government to ensure appropriate participation of children and allow their views to be given weight in line with their age and maturity.

4.2.2 Preservation of the child's family environment and maintaining relations

Except for safety considerations, the interests of a child are generally best met when the child remains with his or her family. While individual circumstances and the quality of relationships should be considered, emphasis should be placed on the continuity of the child's relationships with parents, siblings and other family members.⁷⁷ With this in mind, UNHCR examined the way family and close relationships were considered by the Home Office in the best interests analysis in light of the fact that the children within this audit sample were, by definition, children within families.

The findings showed that family and close relationships were referenced in just under half the claims.

It was rare to observe the collection of evidence from any family member or from anyone else who might be close to the child other than the parent making the asylum claim.

UNHCR observed that when the views of the parents of the children were obtained, his or her views were pursued during the substantive asylum interview. Of the sample of cases reviewed, UNHCR observed only one instance whereby the views of a family member not involved in the asylum claim (the child's step-father) were obtained and taken into account.

Without the views of other family members the subsequent analysis of this element was thereby weakened.

In the instances where relationships were examined, it was most common to observe an analysis and resulting determination that pointed to a desirability for a continuity of care that aligned with the outcome of the parent's asylum claim (i.e. that the child continue his or her relationship with the parent being returned, in their country of origin), rather than relationships being assessed as a factor to determine best

⁷⁶ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; paragraph 1.4.

⁷⁷ See UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraphs 89 – 91 and 94 – 95. See also UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; section 3.4 "The importance of the family and of close relationships".

interests. While continuity of care is relevant, what concerned UNHCR was the lack of accompanying analysis of the other elements necessary to a holistic best interests analysis. For example – as pointed out below – safety considerations were very often lacking. Appreciations of family and close relationships were therefore skewed and appeared to have been argued to support the immigration decision rather than fully examine what was best for a specific child within his/her family.

It was positive to see, however, one decision-maker demonstrating a need to consider the child's past, present and future relationships in both the UK and Zimbabwe (the family's country of origin). She acknowledged and considered not only the child's present relationship to his Nigerian (and UK-based) father, but considered how the child's removal from the UK to Zimbabwe might impact upon this relationship. Further, she considered the lack of potential for an ongoing relationship with his deceased Zimbabwean grandmother in Zimbabwe and how this might impact upon his potential re-integration:

It is further noted that he spent those visits [previous visits to Zimbabwe] with his grandmother, who has since passed away (Death certificate for claimant's mother) and therefore, it is considered that support network is no longer available to the claimant's son to aid his integration.

While a very complex and difficult area to analyse it was nevertheless observed that there was an overall lack of consideration of the capacity of the child's carer(s) where this was clearly relevant to the analysis of best interests. In a claim from an Afghani couple with three daughters, there was no consideration of how their mother's serious physical disability (accepted by the decision-maker) might affect any possible outcome for the family and the children's best interests. While it was clear the decision-maker was aware of the mother's condition (demonstrated by some contact with the Local Authority on the matter) she then failed to include this aspect into her analysis of best interests in any way.

UNHCR appreciates that an assessment of the capacity of carers is and should be outside the scope of any asylum process and is outside the remit of Home Office staff. It is vital, however, for any best interests mechanism to ensure that best interests analysis allows, where necessary, for just such a professional assessment.

4.2.3 Care, protection and safety of the child

When analysing the child's safety for the purposes of the best interests determination, there will inevitably be overlap with the assessment of risk of harm to the family upon return to the country of origin under the auspices of the asylum claim. However, UNHCR's June 2013 report on family asylum claims highlighted that, while there were exceptions, the Home Office tends to focus on risk to the main applicant without consideration of potential harm to family members including child dependents. This means the best interests analysis may be the first and only time that issues around safety for the child are specifically examined.

Furthermore, while there is a threshold of what might be considered risk of persecution to an adult in an asylum claim, considerations around care, protection and safety for a child do not have to reach a particular threshold in order to be factored in as one of the elements to be balanced when determining best interests.⁷⁸

UNHCR audit findings were that care, protection and safety of the child were very rarely considered when determining best interests. In only 7 claims was there any acknowledgement of these factors in the analysis. It is difficult to know why decision-makers routinely did not take safety elements into consideration particularly given the countries of origin of the families in the sample. It may be that if it was concluded that safety was not enough of an issue for the family to reach the threshold of persecution on return, it was considered that it would not be an issue for a child. However, this would demonstrate a lack of appreciation of how safety issues, whilst not reaching persecutory levels for adults may do so for children, and may still require serious examination when considering what outcome will be in a child's best interest.

⁷⁸ See paragraphs 52 to 84 of UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14.

In one of the claims examined the decision-maker refused the asylum claim of a Coptic Christian family from Egypt, arguing that there was sufficient protection for the family on return. However, even while she had accepted the father's claims of past persecution of himself and his family including threats, verbal abuse and attacks on the applicant's children by Muslim fundamentalists when they walked around in public, her analysis of the children's best interests makes no reference to this information:

It is a general principle that children should be kept with and grow up with their family in their own cultural identity whenever possible. It is noted that you are in the UK with your children who are 12, 9 and 5 years old. However, it is considered that it is in your children's best interests to be kept with you. Your children have spent the majority of their lives in Egypt, so it is considered that there is no reason why they could readapt [sic] to life back in Egypt on their return.

In other instances, consideration of the safety of the *home* environment was also missing where it would have been relevant. For example, a female applicant from Malaysia cited various incidents of domestic spousal violence in her claim. She explained she had sent her children to live with her own parents after they witnessed some of the violence and after she became pregnant when she was raped by her husband. In the asylum refusal letter, no credibility assessment of the applicant's claims had been made due to the applicant's claim having been certified.⁷⁹ Disappointingly, the analysis of the best interests of her children makes no reference to violence in the home environment and how this might affect the children. Instead, the analysis focused solely on family ties, education and health facilities in Malaysia.

4.2.4 Identity and development rights

Identity and development rights include consideration of:⁸⁰

- The child's cultural and community network;
- Continuity in the child's ethnic, religious, cultural and linguistic background;
- Specific considerations based on age, sex, ability and other characteristics of the child;
- Particular physical or emotional needs;
- Child's right to physical and mental health;
- Child's right to education;
- Prospects for successful transition to adulthood

UNHCR's audit found that identity and development rights were touched upon in one way or another in just fewer than half the claims examined. This typically involved some exploration of the health of the child, education provision, identity and nationality, and levels of integration in the UK versus the proposed country of return. However, UNHCR observed that the analyses of these areas were piecemeal and not always specific to the child's individual characteristics nor to the possible outcomes for that individual child. For example, a decision-maker might quote generic COI citing healthcare provision in the country of origin whereas the child's specific health difficulty related to mental health, a sub-area of health that the COI did not touch upon. In this way, the best interests analysis was not tailored to the individual child.

⁷⁹ "When considering certification under section 94, claims are assessed at their highest and are only certified when they are bound to fail, even if it is accepted that the claim is true. It is therefore rare for credibility issues to be addressed within certified decisions." UKBA Asylum Policy Instruction 'Non Suspensive Appeals (NSA) Certification under Section 94 of the NIA Act 2002' Version 1.3 (21/12/2012), Section 2.2.

⁸⁰ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; Annex 9: Factors that determine a child's "best interests." See also paragraphs 55 to 57 of UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14.



UNHCR notes the express reference in the Statutory Guidance to the Home Office’s role in enabling children to have optimum life chances and to enter adulthood successfully.⁸¹ Despite this, it was in fact rare to observe any proper consideration or assessment of a child’s physical, intellectual, emotional, social and behavioural development and how these might be affected as the child transitions into adulthood. For example, a single female Albanian applicant expressed in her witness statement her view that, if returned, her newborn child would not be accepted by her family nor by society due to being a child born outside of marriage. She expressed her worry that he would encounter problems growing up and would be bullied at school due to this status. Yet these concerns were not explored during interview nor were they acknowledged or taken into consideration in the analysis of the child’s best interests in the RFRL.

Even where information was provided by the applicant and was, as such, available to the Home Office, this information was not always factored into the wider best interests analysis. Above, UNHCR makes reference to the asylum claim of an Egyptian family, of which the father expressed concerns both at screening and at the substantive asylum interview regarding his daughter’s physical and mental health as a result of what the family had experienced before flight. Not only did his expressions of concern not lead to any observable protective action on the part of the Home Office during the asylum procedure, but this information was not factored into the overall best interests analysis for the particular child. It was concerning to observe no mention of the trauma the child had experienced in Egypt, no consideration of how these experiences were physically and mentally affecting her in the present and no examination of how the potential outcome of return to Egypt may “impair [her] health or development”.⁸² Such considerations are vital to a balanced best interests analysis.

⁸¹ 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, Section 1.4.

⁸² *Ibid.*

4.3 The resulting ‘Best Interests Determination’

The Committee on the Rights of the Child, at paragraph 50 of its GC14, explains that the elements outlined in the preceding section, while necessary to assess and determine a child’s best interests, are “non-exhaustive” and “non-hierarchical”. They go on to say “[a]ll the elements of the list must be taken into consideration and **balanced** in light of each situation. The list should provide concrete guidance, yet flexibility” [emphasis added].

At paragraph 82 of the GC14 the Committee states, “[i]n weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognised in the Convention and its Optional Protocols, and the holistic development of the child.”

The above section of this report demonstrates that, at present, only selective aspects of the child rights framework are being brought into consideration for the determination of a child’s best interests.

UNHCR observes that decision-makers tended to underutilise the information available to them and relevant to a best interests consideration. Of the 30 cases where a determination of best interests had been undertaken, in only half did UNHCR find that the decision-maker had considered and made reference to all the relevant information that had been collected. Furthermore, in every case reviewed it was considered that additional relevant information was needed to allow for a properly informed best interests determination.

After collecting and analysing all relevant information it is important for the decision-maker to balance all relevant factors to determine which of the possible outcomes is in the best interests of the child.⁸³ This ‘balancing’ exercise was rarely if ever observed in Home Office decisions. Not only was it considered that this was not possible due to a lack of sufficient information to enable the decision-makers to do so, but the reasoning in the decisions did not suggest the various factors were all looked at or ‘balanced’ in any way. At best, UNHCR observed the following sentence in one decision: “The case of *EM & Others (returnees) Zimbabwe CG* [2011] UKUT 98 IAC has been considered in full. In particular paragraph 308 lists a number of factors when considering the claim in the best interests of the child”. Some of those factors had been considered in the decision.

Instead of balancing all the relevant elements, decision-makers tended to highlight the elements that supported a determination on best interests that lent in favour of the immigration decision as a result of the consideration of the parent’s asylum claim. A particular aspect that weighed heavily in decision-makers’ findings on best interests was the outcome of their parent, asylum claim or immigration status. The below sentence was observed in at least one third of the decisions reviewed:

Given that it has been concluded that you should not qualify for refugee status, humanitarian protection or any other form of leave in the United Kingdom, the appropriate and enduring solution is considered to be that your children return to [enter country] with you as soon as possible.

While it is not inappropriate that this was referred to by the decision-makers (reflecting the element of ‘preservation of the child’s family environment and maintaining relations’) what was problematic was that it was often the *only* element considered or it was given excessive weight rather than being put ‘into the balance’.

Decision-makers were rarely explicit in their drafting about how much weight they gave to each element specific to the child in question. However, through reading of the written reasoning, UNHCR’s audit found that the most weight was implicitly given to ‘family and close relationships’ (19 cases) and identity and

⁸³ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008; Chapter 3, Section 3 “Balancing competing rights in making a decision.”

development rights (6 cases). In 13 of these cases, UNHCR considered the weight accorded to the relevant element to be appropriate.

These findings indicate there is room for increased appreciation that the identification of an outcome that is in the best interests of a child within a family is a consideration that is broader than the determination of whether or not the principal applicant in the family is a refugee. If a child's parent is recognised as a refugee, this will of course be an extremely important aspect to consider when determining the child's best interests. However, again, it is not the only element.

Decision-makers also demonstrated a misunderstanding of what elements should be brought into the analysis of the best interests determination. In just under a quarter of claims, immigration control was brought directly into the analysis of best interests. Some examples:

*“It is noted that your daughter was born in the UK in June 2010. She has not integrated into UK society to any extent and retains strong cultural, linguistic and familial bonds to Algeria. Furthermore, given her age, she would not remember her time in the UK, and would easily adapt to life in Algeria. It is noted that she is not receiving education in the UK. **Regard has also been given to the UK's need to maintain an effective immigration control which is also a primary consideration.** It is a generally accepted principle that children should grow up within their family and their own cultural identity wherever possible. It is considered that it would be in your daughter's best interests to return with you to Algeria where not only is education available but where it is considered you have the support of your family with whom you share the same background and culture [emphasis added]”*

In another case:

*“Furthermore, it is pointed out that Article 2 of Protocol 1 (the right to education) is a qualified not an absolute right. **It must therefore be viewed in the light of its consideration against the Immigration Rules and the legitimate aim of maintaining effective immigration control.** [emphasis added]”*

The Committee on the Rights of the Child has made clear that the elements that can be considered valid to bring into the balance in order to determine a child's best interests are those that reflect the rights enshrined in the Convention on the Rights of the Child itself.⁸⁴

⁸⁴ General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, paragraph 51.

5. Giving the Best Interests Determination “primary consideration” in the resulting immigration decision

Once the child’s best interests have been determined they must then be given “primary consideration” when making any decision that affects the child.⁸⁵ “If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child’s best interests were a primary consideration despite the result.” (GC14 paragraph 97)

Of the 30 out of 45 decisions audited where there was written legal reasoning available, 12 included explicit reference to the best interests of the child having been given ‘primary consideration’.

However, the audit findings suggested to UNHCR that decision-makers are unclear about where the consideration of a child’s best interests should fit into their decision-making. In half of the 30 cases that included an explicit and reasoned best interests analysis with a resulting determination, UNHCR observed that this consideration was ‘stand-alone’, often with its own section entitled ‘Consideration of Section 55 of the Borders, Citizenship and Immigration Act 2009’. In the other half, the consideration of best interests fell under the ‘Discretionary Leave’ section of the written reasoning; sometimes as part of the Article 8 ECHR private and family life considerations, sometimes as a stand alone section under discretionary leave after the Article 8 ECHR reasoning had been concluded.

In six cases it was observed that discretionary leave had been granted in relation to a best interests determination. In these cases, the decision-maker reasoned his or her finding on the basis that, due to it being in the child’s best interests to remain in the UK, this brought about implications for the Article 8 ECHR rights (sometimes private life, sometimes family life) of either the principal applicant or the child. It was therefore a potential Article 8 ECHR breach that gave rise to the discretionary leave then granted.

However, decision-makers demonstrated mixed practice in how they reasoned their grant of leave on this basis, what immigration status they granted as a result of their reasoning, and to whom. In addition, the recording of this information in CID varied, potentially leading to inaccurate and incomplete data collection.⁸⁶

In five of the six cases where a best interests determination formed the basis of a grant of leave, the decision-maker granted discretionary leave directly to the parent. Dependants (including the child dependant upon whom the grant was largely based) were then granted leave in line with the parent. In the other case, the consideration minute listed the principal applicant’s daughter as the ‘claimant / applicant’ while acknowledging she had initially been a dependant of her mother. The decision-maker reasoned, in the minute, that removing the daughter, due to her serious medical condition, would breach her Article 8

⁸⁵ Article 3, para 1 Convention on the Rights of the Child; UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, para 37 ‘the expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations.’

⁸⁶ For example, in some claims where a grant of leave resulted based on the child’s best interests, the principal adult applicant was listed as associated to the claim as the ‘main applicant’. In others, the adult was listed as associated to the claim as the ‘responsible adult – parent’ after leave was granted (five out of the six times) to the parent on a best interests basis.

ECHR right to ‘physical and moral integrity’. *“It is further noted that it cannot be argued under Section 55 that her best interests will be served by returning her to Iraq.”* The conclusion at the bottom of the minute made clear that leave was being granted to the daughter based on the combination of these bases. Her mother was then, in a separate consideration minute, granted discretionary leave under the Immigration Rules as the parent of a child for whom it was not reasonable to expect to leave the UK. The remaining children were granted leave in line with their mother.

The findings indicate that some decision-makers understand that a determination of the best interests of a child can impact upon the type of leave to be granted to the child or to the family. However, for the most part there is a general lack of clarity about how a best interests determination should be factored into the written decision reasoning and how it should impact upon the granting or refusing of immigration leave on a specific legal basis.

UNHCR considers it appropriate that, where it is determined to be in the child’s best interests to remain in the UK (and where other family members have not themselves fulfilled any criteria for immigration leave), that the immigration status and the leave granted in line with that status should be granted directly to the child with other family members’ leave being brought into line with the child’s grant. This will ensure that protection is being granted appropriately to the right person and will act as a safeguard for any future variations on leave that might occur.

As the granting of immigration leave is also an ‘action’, the type of leave granted as well as the length of time for which it is granted should also be in line with the best interests determination.⁸⁷

UNHCR’s observation is that the incorporation of forms of immigration leave based on family life into the new Immigration Rules has potentially exacerbated the misunderstandings highlighted above.⁸⁸ Paragraph EX1 of Appendix FM to the Rules sets out the criteria to be applied in assessing whether to grant leave to a family member on the basis of their family life with a child in the UK. The criteria reflect the duty in section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK. As the new rules came into effect only at the tail end of UNHCR’s audit, only three cases were observed where EX1 had been applied. Of these, one decision-maker applied the EX1 criteria as the sole assessment of a child’s best interests and the impact of that assessment on the granting of leave:

“You state that your daughter has been in the UK since 05.04.12 and is a national of Pakistan. Your daughter has not spent 7 years in the UK and you have not demonstrated any exceptional circumstances as to why she cannot return with you to Pakistan. You therefore fail to fulfil EX.1(a) (aa) – (cc) of Appendix FM of the Immigration Rules. You have failed to fulfil the requirements of Section D-LTRP 1.2 of Appendix FM of the Immigration Rules and it is considered that it would be in your child’s best interest to return with you to your country of origin where you can enjoy family life as a complete family unit.”

Such reasoning is clearly not sufficient to an appropriate determination of the best interests of a child or of how that determination then affects the wider immigration decision. Indeed, since the introduction of Appendix FM to the Rules, UK courts have expressed the same concern.⁸⁹

⁸⁷ The UK High Court has acknowledged this view in the case of ‘SM and TM and JD and Others v SSHD [2013] EWHC 1144 (Admin) (8 May 2013)’. Positively, this has been reflected at section 4.4 of Asylum Instruction, ‘Discretionary Leave’ Version 6.0 (24/06/2013), available at: <http://goo.gl/dQJEX2>

⁸⁸ Statement of Changes to the Immigration Rules HC 194, laid before parliament on 13 June 2012, effective for any decision issued after 9 July 2012.

⁸⁹ The UK Upper Tribunal (Immigration and Asylum Chamber) has also expressed concern that the provisions of the new rules do not appear to sufficiently reflect the best interests principle – see *Ogundimu (Article 8 – new rules) Nigeria* [2013] UKUT 60 (IAC), *Izuazu (Article 8 – new rules)* [2013] UKUT 45 (IAC) and *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC).

