

Working with refugee children

Current issues in best practice

Second edition

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Jackie Peirce and Colin Yeo

With a foreword by Ian Macdonald QC

Edited by Lisa Woodall

January 2012



Immigration Law Practitioners' Association

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Policy and law correct as of April 2011

The Immigration law Practitioners' Association (ILPA)
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advisers and academics practising or engaged in immigration,
asylum and nationality law.

ISBN 1 901833 15 1

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Registered in England and Wales. Reg No 2350422.

Design: Pat Kahn Printing: Russell Press

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Preface to the second edition

The Refugee Children's Project is delighted to introduce this second edition of *Working with Refugee Children, Current Issues in Best Practice*. The book has proved hugely popular and, since May 2011, over 1000 copies have been sent to a wide range of groups and individuals working with refugee children including legal practitioners, social workers, medical professionals, teachers, academics, support workers, foster carers and youth groups across England, Scotland, Wales and Northern Ireland. Requests for the book keep coming, despite its only having been published less than a year ago, and we are delighted that so many people are reading it, using it and telling us they want more copies. By printing this second edition, we hope that the book and the work of the Refugee Children's Project will reach even further and continue to influence the way in which professionals work with refugee children.

The law and policy in this book is accurate of May 2011, the date of the first edition, however the preliminary pages and the 'Resources' section have been updated in the light of feedback on the first edition to allow readers to get even more out of it.

The Refugee Children's Project remains grateful to the original contributors to the book and to all those who have read it and given such positive feedback. Our continued thanks go to the Diana, Princess of Wales Memorial Fund for funding the Refugee Children's Project and this book.

Foreword

Safeguarding the interests and rights of children should be one of everyone's primary concerns. Anyone working with children and young people, including practitioners and those working within the UK Border Agency and local authorities, should make the promotion of their welfare and ensuring the child's voice is heard their priority. This guide focuses on refugee children, but the principles and practices described apply to all migrant children.

I am no defender of the UK Border Agency and their far too frequent poor and inconsistent decision-making and their sometimes harsh and insensitive treatment of refugee children, but it is not the purpose of this guide to have a pop at the Agency. Although one of its aims is undoubtedly, to provide and share techniques and tactics to challenge the deficiencies in the UK asylum process, it is also to aid practitioners consider their own practices to see how they can be improved and developed to ensure that they play their part in safeguarding the welfare of the children whom they represent.

The protection of refugee children in the UK is not simply a matter of debate. The introduction of section 55 of the Borders, Citizenship and Immigration Act 2009 places an obligation on all public and private welfare institutions, courts of law, administrative authorities and legislative bodies to 'safeguard and promote the welfare of children who are in the United Kingdom'.

This not a new approach to the consideration of children's rights and the safeguarding of their welfare. Section 55 is intrinsically linked with the entitlements enshrined in the United Nations Convention on the Rights of the Child which, most notably in relation to this guide, provides, in Article 12, the right for children to be heard and to be able express their own views in matters concerning them. This guide explores the importance of this right, known as 'the voice of the child',

which has incurred a fresh importance in the UK, following the lifting of the reservation to the Convention which the UK maintained, until recently, in relation to children subject to immigration control. This wholesale adoption of the Convention and the introduction of section 55 into UK law has already had an impact on the rights of the child, as is demonstrated by the landmark decision of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4.

The link between the Convention and s55 is clear from the accompanying Statutory Guidance issued to the UK Border Agency which makes plain that children have the right to be consulted and express views on matters concerning them. The Statutory Guidance confirms the public duty to hear and listen to the voice of the child. 'Best interests', therefore, is not just about doing 'right', but also providing children with high quality representation to make sure that their voices are well and truly heard.

Although the specific issue in *ZH (Tanzania)* was to ascertain circumstances in which it is permissible to remove or deport a non-citizen parent, where the effect will be that a child who is a citizen of the United Kingdom will also have to leave, Lady Hale made it quite clear in the lead judgment that this question could not be answered without looking at a very wide range of international instruments and court decisions dealing with the proper weight to be accorded to the best interests of the child in a very much wider context. The court made it clear that one of the ways of ascertaining the best interests of the child was to provide a mechanism for listening to what they had to say; an approach that representatives should also take when acting for children.

This guide provides invaluable discussion about protecting the best interests of children and practical advice about some of the most common challenges faced by practitioners in their representation of young people. Despite the statutory provisions and compelling case law on this topic, there is no guarantee that public bodies will properly follow and implement the principles of acting in the child's best interests. An important responsibility for ensuring this takes place for children in the asylum process must, therefore, lie, in part, with current representatives of children, until the principles of best interests, best practice and the voice of a child become essential ingredients of UK immigration and asylum law and policy. Lady Hale stated in *ZH (Tanzania)* that 'children can often surprise one' and she was correct, but children will only have the opportunity to do so if we listen to them.

Ian Macdonald QC, 26 April 2011

About the authors

Chapter 1 'Best interests': safeguarding and promoting the welfare of children in immigration law and practice

Syd Bolton is Co-Director of the Refugee Children's Rights Project and a solicitor for the Coram Children's Legal Centre. He is chair of the Refugee Children's Consortium Returns Sub-Group and an Associate Member and Deputy Rapporteur of the Association of Refugee Law Judges.

Syd began legal aid work in public family law in 1987 and has worked on behalf of children seeking asylum since 1999, both as a not for profit solicitor and non-governmental organisation policy adviser.

He is a member of ILPA's Executive Committee and ILPA's children's subcommittee. He has contributed to ILPA's publications, conferences and training on children, best practice, policy, legislative and parliamentary briefings since 2003.

Chapter 2 Voice of the child

Kalvir Kaur is solicitor at Fadiga & Co. Kalvir holds strategic and legal expertise in advocating for the rights of refugee children and victims of trafficking. An experienced trainer, Kalvir has trained legal representatives and NGOs on protecting children's rights.

Known amongst her peers as a talented, committed and exceptional solicitor, Kalvir is particularly recognised for her work with unaccompanied children. In 2008, she won the Immigration Legal Aid Lawyer of the Year Award for her work with unaccompanied minors and victims of trafficking.

Chapter 3 Best practice in age dispute challenges

Shu Shin Luh is a barrister at Garden Court Chambers with experience in social welfare law, including community care, mental health, housing and immigration. She has particular expertise in issues relating to age disputes.

Shu Shin's immigration law background has led to specialism in representing migrant children in the full range of judicial review challenges, ranging from challenges to termination of support and accommodation under the Children Act 1989, age dispute challenges, claims involving the unlawful detention and removal of age-disputed children under the Dublin Regulation as well as international law and claims raising trafficking concerns.

Chapter 4 Representing children at appeals before the immigration tribunal

Colin Yeo is a barrister at Renaissance Chambers specialising in immigration and family law. His areas of practice include all aspects of immigration law as well as family law child care proceedings.

Colin is a highly experienced barrister in the fields of family law and immigration law and has an exceptional record of training and producing publications. Colin is a contributing editor for Butterworths Immigration Law Service, contributes to HJT immigration manual and has written articles for the *International Journal of Refugee Law* and *The Journal of Immigration, Asylum and Nationality Law* (IANL, Bloomsbury Professional).

Chapter 5 Legal aid

Jackie Peirce is a solicitor with 15 years experience, specialising in asylum and immigration cases. Until February 2011 she was Head of the Immigration Department of Glazer Delmar solicitors. She is currently taking a break from employed practice and is working as a freelance consultant.

She has been one of the co-convenors of ILPA's legal aid subcommittee since 2007.

Acknowledgments

ILPA and the authors would like to thank their co-authors and all of those who provided information, legal support and reader comments in the production of this publication including:

Nick Armstrong	Matrix Chambers
Melissa Canavan	Immigration Judge
Catriona Jarvis	Senior Immigration Judge
Helen Johnson	Refugee Council
Jane MacAdam	University of Sydney
Adrian Matthews	Office of the Children’s Commissioner for England
Sonia Routledge	Birnberg Pierce
Baljeet Sandhu	Refugee Children’s Rights Project
Steve Symonds	ILPA
Solange Valdez	Sutovic and Hartigan
Zubier Yazdani	Pierce Glynn Solicitors

Thanks are also due to those who provided feedback on earlier drafts of this publication including Alison Harvey (ILPA), Sue Shutter (ILPA Executive Committee) and Pat Kahn. Thanks to the Refugee Children’s Project Advisory Board. Members of the Advisory Board are:

Liz Barratt	Bindmans LLP
Heaven Crawley	University of Swansea
Judith Dennis	Refugee Council
Kamena Dorling	Children’s Legal Centre
Nadine Finch	Garden Court Chambers
Fiona Hannan	Legal Services Commission
Catriona Jarvis	Senior Immigration Judge
Kalvir Kaur	Fadiga and Co

Caroline Little	Association for Lawyers for Children
Adrian Matthews	Office of the Children’s Commissioner for England
Denise McDowell	Greater Manchester Immigration Aid Unit
Baljeet Sandhu	Refugee Children’s Rights Project
Sheona York	Formerly Immigration Advisory Service

ILPA would also like to thank the other tutors who participated in the Refugee Children’s Project’s training schedule including:

Steve Bravery, Simon Cox, Ruth Heatley, Amie Henshall, Adam Hundt, Richard Thomas, Kirsty Thompson, Sally Thompson and all the participants who attended the training and provided their helpful and positive feedback.

Lisa Woodall, Refugee Children’s Project Manager, ILPA, co-ordinated and edited this publication with support from Zoe Marsden, Lana Norris, Elizabeth White and Helen Williams.

ILPA is grateful to the Diana, Princess of Wales Memorial Fund for funding this project.

Using this book

This book is produced as part of ILPA's Refugee Children's Project which serves to provide practitioners with advice and guidance on how to achieve best practice in working with children subject to immigration control through the provision of training and written publications.

This book is intended to explore best practice in immigration and asylum law based on contemporary knowledge and relevant national and international norms, standards and principles in response to a complex and ever changing legal and policy framework.

It is hoped that this book will assist practitioners and others charged with representing children in safeguarding the welfare and best interests of children and ensuring that their rights are considered and upheld in the context of domestic and international legislation, including the UN Convention on the Rights of the Child, the European Convention on Human Rights, the UN Convention Relating to the Status of Refugees and the Borders, Citizenship and Immigration Act 2009.

Chapters

This book is a collection of essays on distinct topics that both stand alone and interact with each other. Whilst common themes pervade all the chapters, each chapter can be read and utilised individually and the book can be read in no particular order.

Chapter 1 deals with safeguarding and promoting the welfare of children and the best practice approach to acting in the best interests of young people.

Chapter 2 addresses the crucial principle that a child has a right to be heard in their immigration and asylum matters and how successfully to achieve this.

Chapter 3 provides tactics and strategies in dealing with children who have applied for asylum but have had their age disputed by the UK Border Agency.

Chapter 4 discusses how to best represent children in their asylum appeals before tribunals.

Chapter 5 addresses legal aid and how children's legal cases are funded.

Common terms

There are common terms used throughout this book which warrant further explanation:

Refugee child(ren)

This book uses the term 'refugee child(ren)' to describe a person under the age of 18 who is (or has been) subject to the UK asylum process. Whilst this guide focuses on the needs and rights of young people, the principles contained within are applicable to all children subject to immigration control.

Best interests

The term 'best interests' is used throughout this book and describes the duty of public bodies (and representatives) to act in a manner which safeguards and promotes the welfare of children. This principle is explored and expanded in chapter 1.

Voice of the child

This term is used to describe the principle that a child has the right to be heard, express their views and have those views taken into account in relation to all matters concerning them. This right is enshrined in the UN Convention on the Rights of the Child. This principle is addressed in chapter 2.

Unaccompanied asylum seeking child(ren)

This term is used to describe a child who is under the age of 18 and has either arrived in the UK alone or been separated from their parent(s) or legal guardian. The terms 'lone child(ren)' and 'separated child(ren)' are also used and have the same meaning.

First-Tier and Upper Tribunals

The tribunals and their Immigration and Asylum Chambers are the institutional structures of the appeals process, discussed in detail in chapter 4 but mentioned elsewhere.

If a young person is refused asylum, they have a right of appeal against this decision. The First-Tier Tribunal hears appeals against decisions made by the UK Border Agency. For the purposes of this guide, references to 'the tribunal' will generally refer to the First-Tier Tribunal. In certain circumstances decisions by the First-Tier Tribunal can be challenged by applying to the Upper Tribunal.

Abbreviated terms

This guide, for ease of reference, largely avoids the use of acronyms and abbreviations. Some short forms are used, as follows:

CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
NASS	National Asylum Support Service

References to 'the Committee' are to the UN Committee on the Rights of the Child and references to 'the Secretary of State' are to the Home Secretary.

Currency

This book covers an area in which knowledge and practice is continually changing and improving. It is not intended to be exhaustive.

It is important that practitioners keep up to date with the ever-changing law and policy within the field of immigration and asylum law. Membership of the Immigration Law Practitioners' Association will aid practitioners in ensuring their knowledge remains current.

The law and policy described in this book are correct as of 20 April 2011, the date of the first edition.

Using this book on-line

An electronic copy of this book is available on-line on ILPA's website (www.ilpa.org.uk/pages/publications.html). The electronic copy contains links to the resources referred to and relied on throughout the book for readers to access. In addition, this book gives the full title of the document any link leads to so if clicking a link in this book or copying and pasting it into a browser window does not work, the document sought should still be accessible by entering the title into a search engine.

'Best interests': safeguarding and promoting the welfare of children in immigration law and practice

Syd Bolton

'There can be no keener revelation of a society's soul than the way in which it treats its children.'

— Nelson Mandela, *Long Walk to Freedom*

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration...'

— Article 3(1), United Nations Convention on the Rights of the Child

'The Secretary of State must make arrangements for ensuring that [the UK Border Agency's] functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom...'

— Section 55, Borders, Citizenship and Immigration Act 2009

This chapter addresses two recent developments concerning children's rights and welfare in the context of immigration, asylum and nationality law, namely:

- The way in which the UK aims to meet its obligations under the 1989 United Nations Convention on the Rights of the Child (CRC), in particular Article 3 on 'the best interests of the child', essentially ensuring that States Parties act in the best interests of children, and how the meaning of those Convention rights is a necessary consideration where children are directly or indirectly affected by a decision.
- The statutory duties contained in s55 of the Borders, Immigration and Asylum Act 2009 (the 2009 Act), placed upon the Secretary of State, the UK Border Agency and others, to safeguard and promote the welfare of children as a mandatory part of their functions.

Whilst these are two distinct sets of duties deriving from different legal origins, they cannot be viewed in isolation from each other and must be considered jointly and severally in all decision-making and procedural measures affecting children. This chapter is a synthesis of law, guidance and commentary on the definition, weight, content and applicability of these duties. The duties are as directly relevant to the best practice approach to be taken by legal representatives as to all other individuals, agencies or judicial bodies.

This chapter provides a general overview of children's rights and of statutory duties and how they should be considered and applied across the wide spectrum of children's legal advice and representation where an immigration, asylum or nationality decision affects a child.

It concludes with a summary of relevant case law.

Law and jurisprudence

This has proved to be a dynamic and fast moving area of jurisprudence since the ending of the reservation to the CRC. The UK previously maintained a reservation to the CRC in respect of children subject to immigration control which is discussed later in this chapter.

The best interests of the child were considered in the landmark judgment of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC04 but consideration of CRC rights is still in its early days. Whilst the Supreme Court has now given guidance on the weight to be attached to best interests, it remains to be seen how the content and application of these rights, in the wider area of immigration and asylum law, in decisions by the UK Border Agency and in the judgments of the tribunals, will be recognised in law and implemented in UK asylum policy. The next stage is for practitioners to further develop and enhance this area of children's rights until it becomes a *sine qua non* (or essential ingredient) of immigration and asylum law and practice.

This chapter is not intended as a detailed history of the progress of children's rights generally, nor specifically in relation to children 'subject to immigration control.' Nonetheless a brief overview of where we are and how we got here is necessary to gain a better understanding of how to apply these considerations to current and future cases.

The timing of these fast-moving developments is also having an impact upon cases affecting children which may have been started, or even decided, before the full force of the lifting of the general immigration control reservation to the CRC (as described below) and the statutory safeguarding duties coming into effect.

The chapter now addresses:

- 'best interests' and the CRC and the lifting of the reservation; and
- the scope of the CRC and its relationship with UK domestic law generally, specifically immigration and asylum law, and how it influences the consideration of the best interests of children.

'Best interests' and the Convention on the Rights of the Child

The CRC is a comparatively new legal instrument in the developing body of international human rights treaties. Signed in 1989 by the vast majority of countries, and subsequently ratified by the UK in December 1991, it is now almost universally accepted (only Somalia and the USA have not yet ratified it). It marked an international consensus that children are not just the vulnerable subjects of care and protection, but autonomous rights holders to be assisted to the maximum extent to fulfil their development potential as human beings.¹

All young persons under the age of 18² are entitled under the CRC not just to be protected from harm, but additionally States Parties are obliged to treat the best interests of the child as a primary consideration in all decisions affecting an individual child and children generally. Ratifying states are obliged fully to implement all the terms of the Convention³ for all children without discrimination⁴ of any kind. These duties extend to matters of legislation, policy and practice in all areas of public authority including the prevention and punishment of acts of ill treatment against children in their private and family life.

¹ Article 6, CRC.

² Article 1, CRC.

³ See Committee on the Rights of the Child, General Comment 5 – Implementation duties.

⁴ Article 2, CRC.

Relevance to European and domestic law

In the UK, the CRC rights and duties are not expressly incorporated into domestic UK law, whereas the obligation to have regard to the jurisprudence of the European Court of Human Rights and the European Convention on Human Rights (ECHR) is given its domestic legislative applicability by virtue of the Human Rights Act 1998. The Treaty of Lisbon has been incorporated by way of the European Union Amendment Act 2008. Both these instruments and the case law of the European Court of Human Rights and the Court of Justice of the European Union set out the basis on which the UK must give effect to human rights and to European Union laws and rights respectively, including now the EU Charter of Fundamental Rights and Freedoms ('the Charter').⁵

The Charter places a duty on each Member State to interpret its European Union obligations, for example its common asylum policy directives, in a way which promotes and protects fundamental rights. The Charter is not new,⁶ but its direct effect on UK law and policy is.⁷ Article 24 of the revised Charter provides new European children's rights, derived from the CRC, that are not contained in the ECHR, as follows:

- 1 Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- 2 In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- 3 Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

⁵ Official Journal of the European Union 2010/C 83/02: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF – NB there are older versions of the Charter still on the eur-lex website and other links – care needs to be taken to refer to the current version and its explanatory notes.

⁶ The first version was adopted in 2000.

⁷ NB by way of Protocol 30 to the Lisbon Treaty, Poland and the UK entered a reservation against the justiciability of Charter rights created under Title IV of the Charter. Official Journal of the EU C83/314. The efficacy of the reservation is to be considered by the CJEU later this year.

The Explanatory Notes make it clear that the article is based on the CRC and in particular Articles 3, 9, 12 and 13.⁸

Practitioners must, in any event, look to a wider range of case law, external sources and materials for the meaning of the rights contained in the CRC. Their applicability to UK law, policy and practice will remain, for the time being at least, justiciable only indirectly via other treaty obligations, by reference to domestic case-precedent and by challenges in cases where there is a failure to give effect to domestic policies expressly containing CRC duties.⁹

This jurisprudence can be found in UK, European and international case law and guidance and its academic interpretation. In its application to UK law generally, and to immigration, asylum and nationality law, the case law of the European Court of Human Rights has, historically, been the most direct and binding source of this jurisprudence, providing legally binding interpretation of the content of human rights law. Domestic policy, practice and case law is required to follow the Strasbourg European Court of Human Rights interpretation of these rights insofar as they have been considered and used to interpret provisions of the ECHR. So far, children's rights have mainly been considered by the European and domestic courts in relation to Article 3 and Article 8 ECHR in the area of immigration control.¹⁰

On the coming into force of the Treaty of Lisbon,¹¹ and with it the incorporation of the Charter, the Court of Justice of the European Union (EU) is beginning to play a much more instrumental role in developing the meaning and application of EU rights and the way in which all EU directives, domestic law, regulations and policies must be interpreted. The asylum directives, for example the Qualification and Reception Directives which both contain special provisions in respect to the treatment of asylum seeking children and which must now be read in light of the Charter rights, are of particular relevance.

This is already having a dramatic impact on children's rights, even without direct reference to the CRC or Charter rights, in terms of the rights of children as European citizens.

⁸ Official Journal of the EU 14.12.2007 at C303/25.

⁹ For example, the UK Border Agency asylum process instructions.

¹⁰ For example, in the expulsion cases of *Uner*, *Boultif*, *Mubwilanzila Mayeke*, *Neulinger* etc.

¹¹ 1 December 2009.

The case of *Gerard Ruiz Zambrano v Office national de l'emploi* (ONEm) (Case C-34/09 8 March 2011) whilst not expressly a case about best interests, but about the rights of children under the Lisbon Treaty, requires *ZH (Tanzania)* to be read in the light of a child's Article 20 CRC citizenship rights to have their parents remain with them as third country nationals even if they were in the Member State without status. This decision has profound implications for children's rights in the European Union and should be considered in all cases concerning children. However it is in itself outside the scope of this chapter.

Domestic legislation, where it makes explicit reference to the CRC, is also of direct application but is very limited so far.¹² The principles contained in the CRC have been used to develop UK legislation and domestic practice but without explicit reference to children's rights.¹³ 'Soft jurisprudence' (i.e. UN Committee guidance, UN treaty body communiqués, commentaries, academic texts etc.) is much more diverse, and whilst not directly or even indirectly binding, has been used regularly as an interpretive tool by the European and domestic courts.

Expert guidance is to be found in the UN Committee on the Rights of the Child General Comments¹⁴ and its reports to the UN General Assembly, the reports of its Special Rapporteurs and its periodic state implementation reports.¹⁵ Other treaty body committees' guidance and supervisory mechanisms¹⁶ have also been used by the courts to assist in the interpretation of the content and use of specific rights and on the implementation of the CRC by states generally. Organisations such as UNICEF and UNHCR have been acknowledged as being authoritative, but not necessarily *the authority*, on the meaning and application of the CRC and the 1951 Convention relating to the Status of Refugees ('the Refugee Convention') respectively.¹⁷ The academic works of

¹² See Children's Commissioner's functions and duties s.2(11) Children Act 2004.

¹³ For example, s1(3) Children Act 1989 – 'the welfare checklist' reflects, *inter alia*, Articles 3, 6 and 12 CRC.

¹⁴ Currently 13 General Comments to date – see: www2.ohchr.org/english/bodies/CRC/comments.htm – see especially General Comments GC6 on Separated Children and GC12 on the right to be heard.

¹⁵ See www2.ohchr.org/english/bodies/CRC/ for the Committee's main website and links to its publications.

¹⁶ For example, UNHCR guidelines and Excoms, other UN Convention General Comments and UN General Assembly reports.

¹⁷ See Hale LJ, *ZH (Tanzania)*, para 25 on UNHCR Guidelines on Determining the Best Interests of the Child (2008).

international law scholars¹⁸ have also been cited and their interpretations relied upon by the courts in refugee law but only recently has this started to expand to refer to children's law academics.¹⁹

UK reservation to the CRC

Until November 2008, the UK maintained various reservations to the CRC on matters concerning overseas territories, aspects of child detention and most importantly all matters of immigration control. The UK's reliance on this last reservation was the subject of legal opinion concluding that it was unlawful and not in accordance with the Vienna Convention law on the construction and interpretation of treaties.²⁰ The reservation was regularly criticised by international and domestic expert lawyers and observers, independent inspectors, academics and campaigners. In advance of the publication of the UN Committee on the Rights of the Child's Concluding Observations on the 3rd and 4th Periodic Report of the UK on its implementation of the CRC,²¹ the UK government announced the withdrawal of the general reservation on immigration control matters (and also the detention reservation) with effect from 18 November 2008.²²

It is the removal of this general reservation that has paved the way for a radically new legal landscape to take shape in relation to the rights of children subject to immigration control and the duties of the UK government to ensure that these are now fully implemented. It has also led finally to the provision of statutory safeguarding duties in the UK Border Agency's own functions.

As a result, all actions and decisions made by a public authority concerning a child subject to immigration control and any policies about this group of children made after 17 November 2008 have to be made in accordance with the CRC to the same extent as those concerning any other child resident in the UK.

¹⁸ Profs. Hathaway and Goodwin-Gill in

Horvath v. Secretary of State for the Home Department [2000] UKHL37.

¹⁹ For example, citing Jacqueline Bhabha in *ZH (Tanzania)* (para 32), although during those proceedings Alston, Freeman, McAdam and Tobin were also considered.

²⁰ Opinion of Nicholas Blake QC and Sandhya Drew, 2001, 'In the Matter of the United Kingdom Reservation to the UN Convention on the Rights of the Child'.

²¹ www2.ohchr.org/english/bodies/CRC/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

²² <http://tiny.cc/fhx1w> for text of the official Notice of Withdrawal.

It is worth re-stating here that British citizen and settled children, even if they have foreign national parents, have always been able to rely on the full application of the CRC without reservation and in any event the reservation only applied to matters of immigration control, such that non-immigration-based welfare considerations were never subject to any reservation. When looking at the key dates of decisions affecting children, practitioners should be particularly alert to the date the reservation was withdrawn and to the status of the child at that time.

Case law regarding the CRC

The UK courts are not unfamiliar with considerations of the child's best interests. The Family Division of the High Court has long had the specific responsibility for considering the welfare needs of children in their proceedings, under the Children Act 1989, and indeed long before that legislation, through wardship and previous incarnations of Children Acts. These considerations have usually not been expressed in CRC terms about 'best interests' or 'children's rights', but about the paramountcy of the welfare of the child, based on the language of s1 Children Act 1989. As such, the language in most domestic law is expressed as child welfare and not child rights. The understanding of the content of child well-being and welfare can be greatly assisted through much of the High Court Family Division's own case law and child-focused procedures. These are discussed briefly later on in this chapter.

The express consideration of the CRC in UK immigration case law pre-dates the ending of the reservation, albeit that it is rather thin on the ground. For example, the Court of Appeal, giving judgment in *ID and Others v Secretary of State for the Home Department* [2005] EWCA Civ 38, significantly found, in an unlawful detention case, that if an immigration officer paid no regard to (in that case Article 37b) the CRC, 'then he will have strayed outside his wide ranging powers' (paragraph 110). The Court of Appeal made no concession to the existence of the UK's reservations in so finding.

It is noteworthy that even in senior appellate cases in which the interests of the child are held to be central to the immigration decision to remove in terms of Article 8 ECHR, reference is made to family case law²³ and child welfare principles, and even to the best interests of the child,

²³ In *re J (A Child) (Custody Rights: Jurisdiction)* [2005] UKHL 40.

but no direct mention is made of the CRC (see *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, a case concerning whether removal of a mother and her child would amount to a breach of their Article 8 rights). *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 64 (at paragraphs 24 and 27) considered the circumstances in which delay on the part of the Home Office in deciding the case of someone in the UK may be relevant when considering Article 8, but makes no mention at all of the best interests of the child, let alone the CRC.

The line of other leading Article 8 ECHR cases (for example, *Huang v Secretary of State for the Home Department* [2007] UKHL 11, *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39 and *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40) whilst dealing with Article 8 rights, children's rights and stressing the importance of needing to address the effect of decisions on the child of a family as separate considerations, all fail to mention best interests and the CRC. These were all cases decided when the reservation was still effective and this reluctance in our domestic courts to name children's rights should now be seen as perhaps no more than an historical curiosity, but the case law prior to the ending of the reservation and pre *ZH (Tanzania)* is nonetheless still vital to the articulation of the principles and contents of children's rights, whether the judgments refer to best interests or the CRC or not.

One case that did precede *ZH (Tanzania)*, however, was *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278 (IAC), heard in July 2010, in which the President of the Upper Chamber held that:

Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases. A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law.

That judgment also started to explore the content of best interests including the educational welfare of children.

ECHR case law has long referred to the CRC as an interpretive tool and to the extent that it has pronounced on children's rights in the context of human rights cases, this jurisprudence is an established part of our own domestic case law. The list of cases is too long to set out here but

ILPA has very helpfully produced a list of ECHR cases where references are made to the CRC and children's rights²⁴ drawing on the European Court of Human Rights' own HUDOC database,²⁵ an essential resource for practitioners.

Even as this chapter is being produced, the European Court of Human Rights has found, against Greece, the detention of unaccompanied asylum seeking children to be contrary to Articles 4 and 5 ECHR, expressly referring to the CRC, Article 3 and the primacy of children's best interests in ensuring that they receive paramount consideration by the administrative authorities in making decisions concerning them.²⁶

ZH (Tanzania) itself draws heavily on Article 8 case law on removal and best interests as a factor where there are children in the family. The judgment considers *Uner v Netherlands*, *Boultif v Switzerland*, *Maslov v Austria*, *Rodrigues da Silva*, *Hoogkamer v Netherlands*, and importantly the case of *Neulinger v Switzerland* in which the court observed 'there is a broad consensus in support of the idea that in all decisions concerning children, their best interests must be paramount',²⁷ contrasting this higher standard, with the wording of 'a primary consideration' in CRC Article 3. The Supreme Court, however, remained faithful to the 'primary consideration' language of Article 3(1), the origins and meaning of which, drawing on the drafting history of the Convention, were explored in the course of the hearing of that case.

In addition to the growing body of European case law, the UK courts have frequently looked to other common law jurisdictions internationally for assistance with interpretations of international law. The leading cases on the application of best interests in deportation proceedings from Canada, (*Baker v Canada* [1997] 2FC 127(CA)) and Australia, (*Minister for Immigration and Ethnic Affairs v Teoh* [1995] HCA 20 and *Wan v Minister for Immigration and Multi-cultural Affairs* [2001] FCA 568) were referred to in *ZH (Tanzania)*.

The Supreme Court of Canada in *Baker v Canada* found that in asylum claims even if the child is not an independent claimant, their best interests have to be considered.

²⁴ Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989, ILPA, July 2009 www.ilpa.org.uk/

²⁵ <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

²⁶ See *Affaire Rahimi c. Grece Requête no 8687/08* at para 108.

²⁷ Paragraphs 17 to 21.

Others such as *Wu v Canada* [2001] FCT 1274, found that the best interests of the child should not simply be taken into account but accorded '*substantial weight*'. In the case of *Teoh* it was held that a decision-maker should be looking as to whether the force of any other consideration outweighed best interests,²⁸ and in *Wu*, whether the cumulative effect of other considerations outweighed best interests which was understood as a primary consideration.²⁹

Although Lady Hale gave the principal judgment in *ZH* it was left to Lord Kerr to make the strongest case for the weight of best interests, holding that:

where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them... the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome... and it will require considerations of substantial moment to permit a different result.³⁰

This interpretation is indeed 'emphatic', in Lord Kerr's own words, and suggests that the academic arguments on the weight of best interests submitted on behalf of *ZH*, especially the views of Philip Alston³¹ and Jane McAdam,³² have largely been taken on board by the Supreme Court. Alston in particular takes the position that the use of the indefinite article 'a', as opposed to 'the', in relation to 'primary consideration' in the drafting of the CRC, was to provide flexibility 'at least in certain extreme cases'³³ and goes on to argue that

²⁸ See *ZH (Tanzania)* at paragraph 26.

²⁹ *ibid.*

³⁰ *ZH (Tanzania)* at para 46.

³¹ Prof. Philip Alston, *The Best Interests of the Child, Reconciling Culture and Human Rights* OUP, Oxford 1994.

³² Dr Jane McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection', *The International Journal of Children's Rights*, 14: 251–274, 2006 (and also chapter 5 'Protection and The Best Interests of the Child' of her book *Complementary Protection in International Refugee Law*, Oxford Monographs in International Law 2007, and to whom the author of this chapter is indebted).

³³ Cited in McAdam, 'Seeking Asylum...' (see n32) at page 180 note 58.

whenever other interests tip the balance away from a decision in the child's best interests, the burden of proof rests on those seeking to follow that approach to show that no other acceptable alternative exists.³⁴

This interpretation is arguably the closest to Lord Kerr's conclusions and makes it clear that it is for the Secretary of State to show that every alternative has been considered to meet the best interests of the child before going through with measures that will override those interests.

The point at which, and also how, best interests are assessed is just as important as the weight given to them. *ZH (Tanzania)* again provides assistance. Hale LJ finds that not only are best interests a primary consideration but 'they must be considered first'³⁵ before going on to consider what other factors, cumulatively, might act as countervailing considerations, for example the need to maintain firm and fair immigration control.

This judgment identified that best interests are not a 'trump card'³⁶ and 'provided that the tribunal did not treat any other consideration as inherently more significant than best interests, it could conclude that the strength of the other considerations outweighed them.'³⁷ However, children should not be blamed for the acts of their parents and 'it would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held to be responsible.'³⁸

It is now clearly settled law that the best interests of the child are relevant to all decisions and decision-making processes directly or indirectly affecting a child, including unaccompanied asylum seeking children. Following *ZH (Tanzania)*, Lord Justice Pill in the Court of Appeal judgment *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 held that:

it is clear from the recent jurisprudence that the Strasbourg Court will expect national authorities to apply article 3(1) of CRC and treat the best interests of a child as 'a primary consideration....

³⁴ The Legal Framework of the Convention on the Rights of the Child, Alston 1991 at p 9.

³⁵ *ZH(Tanzania)*, para 33.

³⁶ *Ibid* para 30.

³⁷ *Ibid* para 33.

³⁸ *Ibid* para 44 (Hope LJ).

In reaching her conclusion, Lady Hale also relied on guidelines issued by the UNHCR, 'I cannot read her statements of principle as being confined to Article 8(2) considerations.'³⁹

The UK Border Agency, the courts and tribunals had, until *ZH (Tanzania)*, generally left best interests unconsidered or, if they were considered, they were seen as part of an overall 'balancing exercise' broadly in the same terms as a proportionality test in considering any interference with Article 8 ECHR rights. This is unsurprising as the case law has developed mainly in terms of Article 8 cases rather than any other provision. However, Article 8 is not the exclusive arena for the consideration of children's rights, nor the only place where Article 3 CRC rights have to be considered. They are as relevant to children's asylum claims, applications to join parents for settlement (or vice versa), detention decisions and indeed all matters of immigration control under the functions of the UK Border Agency and their guidance and policy instructions.

Statutory guidance

'Every Child Matters – Change for Children' is the statutory guidance to UK Border Agency staff issued under s55 of the 2009 Act and stipulates that, 'in accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration...'⁴⁰

The UK Border Agency Operational Instructions on Processing Asylum Applications from Children of September 2009 also clearly advises UK Border Agency case-owners that 'the UK is a signatory to the UN Convention on the Rights of the Child and its text includes key commitments that the UK Border Agency has to meet when handling asylum applications from children. Case owners should familiarise themselves with the UNCRC with particular regard to ... Article 3 ...'.⁴¹

³⁹ Pill LJ reciting para 25 of Hale LJ in *ZH*, at para 22 of his own judgment in *DS (Afghanistan)*.

⁴⁰ Page 15 para 2.7: <http://tiny.cc/eeifx>
There is further discussion of the s55 duties later in this chapter.

⁴¹ As at 4.3.11 this instruction remains withdrawn from public view, pending revisions to take account of the requirements of *ZH(Tanzania) v Secretary of State for the Home Department*. It is normally to be found at www.ukba.homeoffice.gov.uk/policyandlaw/guidance/asylumprocess/ For reference to the CRC see page 4 para 1.2 et seq.

The guidance goes on to state that 'best interests is a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been reached.'⁴²

The 'voice of the child' and the right to be heard

Whilst this chapter concentrates on Article 3(1) CRC, perhaps the most significant of all the findings of the Supreme Court in *ZH (Tanzania)* was the recognition that in order to discover what those best interests are, '[a]n important part of this is discovering the child's own views'.⁴³ This is commonly known as 'the voice of the child'. ► See also chapter 2.

Article 12 of the CRC places a duty on ratifying states to give due weight to the views of the child and a right for the child to be heard in any judicial or administrative proceedings in all matters affecting the child, either directly or through a representative, in accordance with their age and maturity.

The Supreme Court held that:

...the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. Whilst their interests may be the same as their parents' this should not be taken for granted in every case.⁴⁴

In doing so, as in its examination of the weight of Article 3 CRC rights, the Supreme Court looked to the UN Committee on the Rights of the Child and its General Comments to give content to the right of the child to be heard. General Comment 12 is especially important guidance in this regard and is recited in *ZH*, stating that 'it is of the utmost importance that the child's views are transmitted correctly to the decision-maker by the representative.'⁴⁵

⁴² UK Border Agency Operational Instructions on Processing Asylum Applications from Children (see n41), page 6 at para 1.3.

⁴³ *ZH (Tanzania)* para 34.

⁴⁴ *Ibid* para 37.

⁴⁵ *Ibid* para 37 citing para 36 of General Comment 12 'the right of the child to be heard'.

Even more than the Supreme Court's guidance on Article 3 CRC, its emphasis on listening to the child and taking their wishes and feelings properly into account may yet prove to be a more fundamental shift as, for the first time outside the family courts, UK law explicitly recognises children as individual rights holders rather than passive recipients of welfare and protection. It will require legal representatives, decision-makers and the courts to re-think their procedures where children's interests are affected, and to ensure that they have the skills and processes necessary for effective interaction with children in a way which provides child-friendly access to justice. In this regard, General Comment 12 offers comprehensive assistance.⁴⁶ The 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice'⁴⁷ and ILPA's 'Good Practice in Working with Refugee Children'⁴⁸ both also offer very helpful assistance on how to interview and obtain best evidence from children.

Other components of 'best interests'

The UNICEF CRC implementation handbook⁴⁹ and its practical checklists⁵⁰ give useful advice to States on each of the rights of the CRC:

The Convention is indivisible and its articles are interdependent. Article 3(1) has been identified by the Committee on the Rights of the Child as a general principle of relevance to implementation of the whole Convention. Article 3(2) provides States with a general obligation to ensure necessary protection and care for the child's well-being.⁵¹

Article 3 is not a freestanding consideration but one informed by reference to all other rights and duties contained in the CRC and indeed all other human rights beyond those in the CRC. In the same way that it is argued that there can be a cumulative weight of considerations

⁴⁶ www2.ohchr.org/english/bodies/CRC/comments.htm

⁴⁷ <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM>

⁴⁸ Part of ILPA's free training under the Refugee Children Project: materials produced by Colin Yeo and Kalvir Kaur.

⁴⁹ *Implementation Handbook for the Convention on the Rights of the Child*, authors Peter Newell & Rachel Hodgkin, fully revised edition, 2002.

⁵⁰ www.unicef.org/ceecis/handbook_2_CHECKLISTS.pdf

⁵¹ *Ibid* at page 11.

overriding the best interests of the child, so too there is an accumulative approach to the content of the best interests test when looking at the realisation and protection of all other rights in the Convention, including those that are considered as 'core rights.'

Core rights include:

- Article 2 (non-discrimination)
- Article 3 (best interests)
- Article 6 (survival and development)
- Article 12 (the right to be heard).

In addition there are rights to family unity, to individual identity and nationality, freedom of expression, play, education, health, refugee and humanitarian protection, a right against child labour and exploitation, prohibition of harm and the provision of psychological rehabilitation and reintegration.

An examination of the extent to which States implement these rights in their laws and policies, and the degree to which a child can enjoy these rights in reality, especially when considering issues of persecution and harm on return to country of origin, is a necessary consideration when forming an overall assessment of a child's best interests, hence the view of the Committee on the Rights of the Child in the CRC General Comment 6 that 'non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations.'⁵² This issue was given rather scant attention in *ZH (Tanzania)* and remains to be further and more fully argued.

The Supreme Court in *ZH (Tanzania)* held that best interests, following the definition in UNHCR's guidance,⁵³ means, broadly speaking, a child's general well-being and avoided any more precise definition. Whilst this may reflect the bare wording of Article 3, the CRC's General Comments and UNICEF's Implementation Handbook go well beyond this approach, which to a large extent maintains a welfare-centred rather than a rights-based best interests assessment. Whilst the UNHCR is recognised as an authority on the meaning of the 1951 Refugee Convention, and its own guidelines strongly emphasise that the best interests of the child are part of its own status determination

⁵² At para 86 – cited in *ZH* at paras 27 & 28.

⁵³ UNHCR Guidelines on Determining the Best Interests of the Child (May 2008) para 1.1.

processes, it is curious that the Supreme Court chose to adopt this broad brush definition of best interests when the authoritative guidance lies in the commentary of the Committee on the Rights of the Child and indeed with UNICEF advice.

Nonetheless, 'well-being' is an established concept and can be better understood with reference to UK government policies such as the statutory guidance on making arrangements to safeguard and promote the welfare of children under s11 of the Children Act 2004, and the five outcomes for improving the well-being of children set out in s10(2) of the Children Act 2004, namely:

- physical and mental health and emotional well-being;
- protection from harm and neglect;
- education, training and recreation;
- the contribution made by them to society; and
- social and economic well-being.

These are also otherwise referred to collectively in the 'Every Child Matters' policy document as the 'five outcomes',⁵⁴ based on the duty to co-operate to promote the well-being of children found in s10 of Children Act 2004, and which form the basis of the s11 Children Act 2004 safeguarding duties.

The s55 Borders, Citizenship and Immigration Act 2009 duty replicates this in terms of UK Border Agency functions. These functions require that children:

- be healthy;
- stay safe;
- enjoy and achieve;
- make a positive contribution;
- achieve economic well-being.

Under the statutory guidance to the duties in s55 of the Borders, Citizenship and Immigration Act 2009,⁵⁵ safeguarding and promoting the welfare of children is defined (in the guidance to s11 of the 2004 Act (s28 in Wales) and in 'Working Together to Safeguard Children') as:

⁵⁴ <http://tiny.cc/zjg8c>

⁵⁵ s1.4 page 6.

- 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
- undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully.

As a statutory minimum starting point for a 'well-being'-based definition of best interests, these criteria and guidance form a rational government policy and statutory framework for assessment, together with the welfare checklist found in s1(3) Children Act 1989 which states that the following should be considered:⁵⁶

- a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- b) his physical, emotional and educational needs;
- c) the likely effect on him of any change in his circumstances;
- d) his age, sex, background and any characteristics of his which the court considers relevant;
- e) any harm which he has suffered or is at risk of suffering;
- f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.

Whilst the Supreme Court adopted a 'well-being' approach to best interests based on the UNHCR guidelines on best interests determination,⁵⁷ those guidelines go much further than general well-being: for example:

When determining the best interests of the child, it is important to consider all the rights of the child. In addition to the norms contained in the CRC, there are other relevant legal bases,

⁵⁶ The welfare checklist featured briefly in an earlier version of the UK Border Agency Children's Asylum Policy Instructions in 2008 but was shortly afterwards withdrawn.

⁵⁷ www.unhcr.org/4566b16b2.pdf

both at the international and the national level that may affect such decisions. In accordance with Article 41 of the CRC the higher standard must always apply.⁵⁸

The guidelines also assist in looking at a range of specific factors that help to determine a child’s best interests⁵⁹ including:

- safe environment: exposure or likely exposure to severe harm usually outweighs other factors
 - safety in the geographical location/household under consideration
 - availability of life-saving medical treatment for sick children
 - past harm (frequency, patterns, trends)
 - ability to monitor
 - whether root causes of past harm still persist.
- family and close relationships:
 - quality and duration of the relationship and degree of attachment of the child to: siblings, other family members, other adults or children in the cultural community, any potential care-giver
 - potential effect of separation from family or change in care-givers on the child
 - capacity of current and potential future care-givers to care for the child.
- development and identity needs:
 - 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
 - physical and mental health considerations
 - educational needs
 - prospects for successful transition to adulthood (employment, marriage, own family).

⁵⁸ www.unhcr.org/4566b16b2.pdf, s1.2 page 15.

⁵⁹ Ibid Annex 9 pages 96/97 – best interests checklist.

UNHCR has also provided a shorter 'Best interests determination children – protection and care information sheet' which gives a very helpful overview of the application of the CRC to UNHCR's protection work.⁶⁰

How 'best interests' fits into refugee and humanitarian protection considerations

The UK Border Agency Process Instructions on Child Asylum Claims⁶¹ make it clear that the best interests of the child are part of a continuous process of consideration from the point a child makes an asylum claim until a durable solution is provided for the child. It is not just an assessment at the end of the process after refusing asylum and deciding whether or not to remove a child.

There may of course be further specific formal stages of consideration that are required where a child is not recognised as a refugee, for example, in terms of a need for other complementary forms of protection or ultimately discretionary leave to remain because no adequate care or reception arrangements are in place in the country of origin.

Failure to address the child's best interests in accordance with asylum policy instructions on the CRC may render the asylum decision unsafe and 'not in accordance with the law.' The Court of Appeal found this would be the case in relation to s55 statutory duties and by extension the same principles should apply to a failure to consider the CRC requirements as part of its asylum policies.⁶²

The best interests of refugee children must always include consideration of the protection provisions of the CRC, in particular on refugees, humanitarian protection and serious harm.

For example Articles 22(1), 37 and 38 state as follows:

⁶⁰ www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=49103ece2

⁶¹ <http://tiny.cc/pbn1g>

⁶² *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 at para 22.

Article 22(1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 37(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment

Article 38(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict

These are by no means the only Articles directly addressing the duty to protect children and practitioners should consider all the CRC protection provisions. This includes protection against exploitation (Article 36), deprivation of liberty (Article 37b), child soldiers (Article 38(2 and 3)), and the two Optional Protocols on child sexual exploitation and child soldiers/armed conflict,⁶³ as well as the rehabilitation rights (Article 39) and the civil and political and social and economic rights of the child across the whole Convention.

These articles can be used to assess child specific persecution, the extent of a state's ability to protect, and a wider child rights analysis of country conditions, in arriving at a 'best interests' understanding of past harm, future risk and the refugee and humanitarian protection needs of the child.

Professor Guy Goodwin-Gill has stated '[t]he welfare of the child, and the special protection and assistance which are due in accordance with international standards, prevail over the narrow concerns of refugee status' and '...call for a total re-alignment of protection, away from the formalities of 1951-style refugee status towards a complete welfare approach.'⁶⁴

⁶³ www.unicef.org/crc/index_protocols.html

⁶⁴ As cited by McAdam (see n32) at page 181 of *Complementary Protection*.

Dr Jane McAdam also concluded, '...if a line has to be drawn, a child is foremost a child before he or she is a refugee ... it is therefore vital to view the rights of child asylum seekers not only in the context of the Refugee Convention, but also in the specific framework of the CRC in an attempt to fill the gaps and achieve the best possible combination of protection measures available under international law.'⁶⁵

Whilst these arguments are still to run their full course through UK legal representations and into case law, the facts that the CRC contains its own freestanding refugee protection clause and that the EU Charter of Fundamental Rights must be reflected in our common asylum policies, strongly suggest that present refugee and humanitarian protection law has to be interpreted fully to reflect the special needs, the vulnerabilities and the best interests of children.

Since the UK Border Agency has accepted in its own policies a duty to consider best interests and other Convention rights as part of its asylum decision-making, all decisions must identify how the best interests of the child have been considered both in the context of their present situation and needs in the UK, and of the ability of the home state to promote and protect those rights and best interests for the particular child.

Reasons for Refusal Letters that fail to set out how the UK Border Agency has considered the best interests of the child in both the asylum claim and then any subsequent complementary and discretionary leave decisions will be 'not in accordance with the law' and therefore trigger an automatic ground for appeal.

If a child is at risk of persecution or other serious harm, it must follow that his or her best interests are not served by being returned to that situation even if there are other factors which may point towards the suitability of a child's return (family unity, the child's own wishes and feelings etc.). In an (unreported) Upper Tribunal judgment, the court found that 'applying a rights based analysis to the totality of the evidence ... using the 1989 CRC as the appropriate interpretive tool in order to give meaning to the content of this child's well-being ... it is not in his best interests to return ... because he is a refugee.'⁶⁶

⁶⁵ McAdam (see n32) at page 196 of *Complementary Protection*.

⁶⁶ *FM (Afghanistan) v Secretary of State for the Home Department* UTIAC – AA/01079/2010 dated 27.2.11.

Safeguarding duties and the promotion of children's welfare

1

In this section of this chapter, the safeguarding and welfare duties set out in s55 are considered as a domestic law obligation in all UK Border Agency functions and also as part of the implementation duties of the UK government to give effect to the CRC rights.

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires that the Secretary of State 'make arrangements for ensuring that [the UK Border Agency's] functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.'

The duty is amplified by the document, 'Every Child Matters: Change For Children – Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children.'⁶⁷

The statutory duty, and its guidance, covers all aspects of the UK Border Agency's work from border control to asylum decision-making, to private and not-for-profit contractors working for the UK Border Agency in the provision of accommodation and support, detention and enforcement services, including health, welfare and returns facilitation services.

There is an indivisible relationship between the CRC and these safeguarding and welfare duties. Arguably, even without these statutory duties, the same obligations would rest on the Secretary of State and the UK Border Agency via the European Directives, the CRC duties and other domestic duties of care.

However the inclusion of a specific safeguarding duty in the law, as it relates to the UK Border Agency's functions across the UK, is an important step in ensuring that, particularly since the lifting of the UK's reservation to the CRC, the principle that 'Every Child Matters' is observed, irrespective of status, in relation to any child who comes into contact with immigration control, not just those formally subject to immigration control.⁶⁸

⁶⁷ <http://tiny.cc/eeifx>

⁶⁸ S55(2)(a) and (b).

A British or European citizen⁶⁹ child is owed exactly the same duties when entering or exiting the UK, or where an immigration action or decision may indirectly affect such a child, as the duties owed to children who are directly the subject of immigration control decisions and measures, including asylum claimants.⁷⁰

To that extent the duties imposed on the UK Border Agency bring this government agency into line with other statutory agencies whose functions encompass working with children, from local authorities to the police and probation services.

Previous statutory duties

On s55 Borders, Citizenship and Immigration Act 2009 coming into force,⁷¹ and by virtue of s55 (8) in particular, s21 of the UK Borders Act 2007 ceased to have effect. Section 21 was the short-lived precursor to the new safeguarding duties and came into force on 6 January 2009, despite being provided for in 2007. Section 21 provided the first statutory footing for the UK Border Agency to safeguard children by having regard to a Code of Practice for Keeping Children Safe from Harm.⁷² By the time the Code of Practice was approved and in force, a clause had already been agreed by government to go into the 2008 Bill that later became s55 of the 2009 Act. The Code was in no small part a response to pressure from ILPA and the Refugee Children's Consortium to consolidate the withdrawal of the CRC reservation in November 2008 with the inclusion of the UK Border Agency as a body subject to s11 Children Act 2004 duties.

Whilst the Code was not the full Children Act 2004 duty called for, it contained much that was positive and did commit the UK Border Agency to a path that has led to the current duties and started to establish, at least on paper, a measure of child-welfare consideration in its policy and operational documents. It also brought about a more conspicuous and central policy role for the UK Border Agency's Office of the

⁶⁹ On the rights of European Citizen children see *Zambrano* above.

⁷⁰ For example, when considering a decision to deport, detain a parent of a British or European Citizen child or otherwise interfere with their family life rights.

⁷¹ Borders, Citizenship and Immigration Act 2009 (Commencement No. 1) Order 2009 SI 2009/2731.

⁷² <http://tiny.cc/k7e5j>

Children's Champion,⁷³ an internal, over-arching directorial function, established informally in or around 2005 but without independence, nor (apparently) with specific decision-making powers nor, at that point, its own department. It then progressed to statutory oversight of the s55 duties as part of the accompanying statutory guidance.

Many of the operational instructions and policies on how the Children's Champion's office works with UK Border Agency departments and interacts with decision-making are not yet in the public domain, although the courts have given some indication of how things are working in practice in the detailed judgments referred to further on in this chapter.

The reference to a Children's Champion is now included in the s55 statutory guidance:

There shall be a senior member of staff (the 'Children's Champion') who is responsible to the Chief Executive of the UK Border Agency for promoting the duty to safeguard and promote the welfare of children throughout the UK Border Agency, for offering advice and support to UK Border Agency staff in issues related to children, and identifying and escalating areas of concern.⁷⁴

The extent to which the Office of the Children's Champion has so far succeeded in its stated purpose of improving the UK Border Agency's approach to children's safeguarding and welfare can be judged, at least in part, from critical High Court and Court of Appeal judgments⁷⁵ in which the policies and practice of the UK Border Agency Children's Champion's office have been put under scrutiny in the context of its own role under s55 duties and guidance.

Section 48 of the 2009 Act also established the role of a Chief Inspector of the Border Agency about whose role the Code of Practice stated,⁷⁶ 'the Chief Inspector will also be able to look at the UK Border Agency's performance in relation to children as part of his overall assessment of the treatment of applicants and claimants.'

⁷³ Code of Practice para 7.10.

⁷⁴ Statutory Guidance page 15 para 2.9.

⁷⁵ *TS v Secretary of State for the Home Department*, and *Suppiah v Secretary of State for the Home Department* in particular.

⁷⁶ Code of Practice para 7.6.

This inspectorate is now the UK Border Agency Inspectorate which, as a function of the UK Border Agency, is itself subject to the s55 duties in how it operates and how it inspects.⁷⁷

The Independent Inspectorate has now published its inspection criteria for the UK Border Agency which specifically require all its inspections to consider whether the UK Border Agency is carrying out its functions having regard to the need to safeguard and promote the welfare of children and 'to place an expectation on the UK Border Agency that it complies with the law and considers safeguarding and welfare of children throughout its work [and] in addition, to assess how far the UK Border Agency is proactive in its approach to promoting welfare.'⁷⁸

These criteria provide a useful tool not only for inspection but for practitioners to test the UK Border Agency's application of s55 to any given situation, for example the Inspectorate's detailed assessment plan⁷⁹ contains (amongst others) questions on:

- Legislation including the Children Act and the Human Rights Act, UN guiding principles, United Nations Convention on the Rights of the Child, domestic policies on duty to safeguard with UK Border Agency policies;
- Local instructions and guidance e.g. interview instructions for caseowners and use of children as interpreters;
- Relevant referral to child protection agencies;
- Relevant involvement of children's services;
- Level and range of information sought about child circumstances;
- Risk assessments/operational briefs;
- Understanding of safeguarding and promoting welfare and what this means in practice;
- Training on safeguarding and promotion of welfare of children;
- Engagement with external organisations responsible for children's welfare;
- Views on how far safeguarding and promoting welfare is 'child-focused' and prioritised/mainstreamed in policy and practice;

⁷⁷ Statutory Guidance p19 s2.308.

⁷⁸ Inspection Criteria s7 [independent.gov.uk/wp-content/uploads/2010/03/Inspection-Criteria.pdf](https://www.independent.gov.uk/wp-content/uploads/2010/03/Inspection-Criteria.pdf)

⁷⁹ Ibid pages 15/16 s7.

- Mechanisms for correcting mistakes, learning lessons and how these are fed back to inform children's issues in policy and practice;
- Pathways in place for identifying need and referring to appropriate agencies internally and externally;
- Management understanding of law and guidance to UK Border Agency staff;
- Understanding and awareness of trafficking safeguards.

Practitioners also need to be alive to which guidance, duties and policies were in force at the time(s) material to any particular UK Border Agency decisions or actions which concerned the welfare and safeguarding of their child clients as this will determine the extent of the duties, including before and after the CRC reservation.

Given the length of time that many children remain within the ambit of the UK Border Agency's decision-making and support conditions, for example as children with discretionary leave to remain, it is likely that some children and young people now turned 18 will have had decisions made about them that span three different periods of policy and practice in this area:

- before 6 January 2009 there was no statutory duty, only operational and policy instructions;
- 6 January 2009
to 1 November 2009 there was the Code of Practice;
- from 2 November 2009 there were the s55 duties.

In addition to this, the CRC reservation was withdrawn on 18 November 2008 so there was also a short period, 18 November 2008 to 5 January 2009, when there was no code or duty within the public domain, but the reservation was no longer applicable.

Section 55: scope and jurisdiction

This section deals with the scope and jurisdiction of the s55 duties. For developments in relevant case law, see later in this chapter.

The joint introduction from the Immigration and Children's Ministers to the statutory guidance⁸⁰ clearly states that:

Section 11 of the Children Act 2004 places a duty on specified public bodies and key individuals to carry out their functions having regard to the need to safeguard and promote the welfare of children. ... Section 55 of the Borders, Citizenship and Immigration Act 2009 now places a similar duty on the UK Border Agency.

The duties are intended to mirror those found in s11 Children Act 2004 but were not added to that particular legislation, primarily, it was argued, because the UK Border Agency's functions, as a reserved power to Westminster, still extend across the whole of the UK, but s11 of the Children Act 2004 is legislation applicable only to child safeguarding and welfare in England and Wales. As such the duties set out in s55 of the Borders, Citizenship and Immigration Act 2009 are supported in the statutory guidance setting out the basis on which these duties fit into the specific legislation on the child safeguarding frameworks of Scotland and Northern Ireland.⁸¹ Whilst children's law in Wales is the same as that in England, local safeguarding arrangements come under different Children Act 2004 provisions. As such there is also additional guidance on how the s55 duties operate on an inter-agency basis in Wales.⁸²

The wording of s55(1)(a) restricts the duty to 'children who are in the United Kingdom.' The functions of the UK Border Agency and the Secretary of State also include, for example, juxtaposed controls, entry clearance applications made abroad and decision-making and appeal representation in the UK concerning those applications. Contractual arrangements, for example to provide reception arrangements and family reunification assessments, where the child has been returned to their country of origin, or where accompanying arrangements are

⁸⁰ Every Child Matters, Change for Children page 3.

⁸¹ See Every Child Matters, Change for Children, page 18, s2 at para 2.26: Working within the devolved administrations of Wales, Scotland and Northern Ireland.

⁸² Ibid.

made for transfers under Dublin II (where a person is removed to a safe third country where it is considered they were present prior to arriving in the UK and could have claimed asylum there) or as part of removal arrangements once the child has left the geographical jurisdiction, will not be covered by the duty. This list is by no means exhaustive.

The duty will apply where a child is in the UK (but not where a child is seeking to enter the UK as the statutory duty is clear in that it applies to children who are 'in the UK') and an adult applicant is abroad, for example a parent or relative seeking to join or visit a child, or to take part in family proceedings about contact, so the overseas office will have to show that they have fully complied with the s55 duty where their decision affects a child already in the UK.

The Statutory Guidance to s55 at 2.34–2.36 deals with overseas staff:

UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding, or presents welfare needs that require attention

and at 2.37–2.38, in relation to contractors,

although the duty does not extend to UK Border Agency staff and contractors overseas it is a matter of UK Border Agency policy that when they are escorting children overseas, they should have regard to the need to safeguard and promote the welfare of children at every stage of the journey.

These duties are good as far as they go, but are far more limited than the statutory duty in their legal nature and also their safeguarding scope, appearing as they do to refer more to the recognition of child protection and safeguarding risks than any requirement to consider the welfare of all children as part of their processes and decision-making.

The factors complicating when the duty does and does not apply within overseas functions, for example in the decision-making role of Entry Clearance Officers, also present dangers that the duty will be applied inconsistently. It remains to be seen to what extent these duties are being complied with overseas, and the need for training, clear guidance and procedures and independent compliance monitoring by the UK Border Agency Inspectorate in all aspects of these overseas activities is just as important as for the functions exercised within the UK.

The UK's duties under both s55 and the CRC regarding the best interests of the child arguably should apply wherever the child is geographically in relation to the exercise of a function or making of a decision affecting a child. It should not be limited by any requirement that the child be within the jurisdiction, nor limited to the UK Border Agency's own functions, but apply to any exercise of authority by the UK of its jurisdiction overseas.

The CRC duties should always be cited in representations for all children applying to enter from abroad as well as the duty to comply with the duty, or the 'spirit of the duty,' under s55 of the Borders, Citizenship and Immigration Act 2009.

Part V of the Nationality, Immigration and Asylum Act 2002 (as amended) provides the basis of appeal for many, but not all, applications for leave to enter the UK, including on human rights grounds and race discrimination grounds, in respect of the decision of an Entry Clearance Officer. As the tribunal has now been held by the Court of Appeal to be bound by the s55 duty, even if the Secretary of State was not subject to the duty at the time of the initial decision (see *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305), the exercise of a right of appeal brings the s55 and CRC rights fully into play in the tribunal's considerations.

In any event, the guidance requiring the spirit of the duty to be followed effectively amounts to a s55 policy alongside the direct statutory duty and a breach of that policy would render the decision not in accordance with the law.

More broadly, the CRC has been held to have extra-territorial application even if it does not fall to be taken into account by way of these appeal rights.

The finding of the International Court of Justice in 2005 on the extra-territorial application of international treaty laws has held that:

international human rights instruments as well as international humanitarian law are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory...⁸³

⁸³ *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26 at para 7 – citing *ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, 19 December 2005, paras 178–180 and 216–217.

In that case, it was held specifically that there had been an extra-territorial violation of the CRC.⁸⁴

Article 2 of the CRC requires states 'to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.' The duties are notably in relation to jurisdiction not territory and the ruling in the *DRC v Uganda* case is consistent with this interpretation.

This strongly suggests that the CRC, even when there are no appeal rights, will apply to the exercise of overseas functions and to decisions affecting any child overseas, for example in the development of reception centres, family tracing work and non-appealable decisions.

Safeguarding and promoting welfare: UK Border Agency guidance, policy and practice

Section 1.4 of the statutory guidance provides standards which should be used as part of any assessment of the child's best interests in accordance with Article 3(1) CRC, which is an express requirement of the s55 statutory guidance:⁸⁵

2.7 The UK Border Agency must also act according to the following principles: every child matters even if they are someone subject to immigration control. In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration

Failure to apply the best interests provisions, or a failure to consider the due weight to be given to best interests, or a failure to derive the content of best interests from the rights and obligations in the CRC, will also be a failure to apply the s55 duties to the UK Border Agency's functions. This includes asylum decision-making and its procedures and requires not only a child well-being and welfare approach to those decisions themselves, but also as to how those processes engage with the child to enable their effective participation and their views to be properly considered.

⁸⁴ *Al-Skeini and Others v Secretary of State for Defence* page 80, para 243.

⁸⁵ Statutory Guidance page 15 s2.7. s2.6(1) also 'acknowledges the status and importance' of the international treaty obligations including the Council of Europe Trafficking Convention, the International Covenants and the 'EU Reception Conditions Directive' and stipulates that 'the UK Border Agency must fulfill the requirements of these instruments in relation to children.'

The statutory guidance at section 1.5 requires the UK Border Agency and other agencies to ...take all reasonable measures to ensure that the risks of harm to children's welfare are minimised;'

The UK Border Agency is slowly integrating the basic s55 guidance into its other policy and operational guidance but in a way which does little more than recite the safeguarding duty at the start of other guidance, rather than reflecting its content or how the definition is to be applied in looking at all its policies and processes and revising them to meet these standards. Mere recital and recording that the duty has been considered does not give meaningful effect to the duties.

Practitioners will also need to understand how to apply the duty across all UK Border Agency policies and processes concerning children in a way that tests the welfare and safeguarding content of decision-making procedures. The guidance mentioned earlier in this chapter setting out the five outcomes of Every Child Matters, the welfare checklist of Section 1(3) of the Children Act 1989 and also the guidance given under the Every Child Matters framework documents to s11 Children Act 2004 all provide substantive assistance in testing the compliance of the UK Border Agency's procedures.

Section 55: Developments in recent case law

The case law on s55 and its application is new and developing fast.

- *R (M) v Secretary of State for the Home Department* [2010] EWHC 435 (Admin), February 2010

In this case, the Administrative Court dealt with an attempted removal of a child to Italy under the Dublin II arrangements. On the steps taken by those (whether at the Third Country Unit, or on its behalf) seeking to enforce removal, Collins J observed (paragraph 6):

'...[S]he was handcuffed and suffered some physical injury. That is to be thoroughly deprecated. It is quite appalling to think that a child is dealt with in that sort of harsh manner. The guidelines issued by the Secretary of State very properly make the point, and it is now contained in section 55 of the 2009 Act, that the welfare of a child is an important consideration and must be taken into account. How it could conceivably be suggested that it was in the interests and welfare of a child to act in the way that was done in this case is entirely beyond me.'

- *T v Secretary of State for the Home Department* [2010] UKSIAC 31/2005, March 2010

In this case, the Special Immigration Appeals Commission allowed an appeal by reason of the Secretary of State's and the UK Border Agency's duties in respect of the welfare and best interests of children. The appellant and his wife were Algerian nationals, with four children all born in the UK, facing deportation to Algeria.

- *R (MXL & Ors) v Secretary of State for the Home Department* [2010] EWHC 2397 (Admin), September 2010

In this case, the Administrative Court found unlawful the detention of a mother, by reason of the separation of her and her children and the failure of the UK Border Agency to consider and give effect to its duties to the children in maintaining detention of their mother. Blake J concluded (paragraph 64):

- i) The advice of the Children's Champion appears to have been forgotten.
- ii) The representations from [the local authority and NGOs] as well as the claimant personally that she should be with the children were not identified as strong pointers to where the interests of the children lie.
- iii) The proportionality of the detention having regard to the welfare of the children had not been kept under review and updated in the light of new information as required by the policy.

- *R (on the application of TS) v Secretary of State for the Home Department* [2010] EWHC 2614 (Admin), September 2010

In this case, the Administrative Court held a decision taken in December 2009 to return a child to Belgium under Dublin II arrangements to be unlawful by reason, in part, of a failure to comply with the statutory duty to have regard to the child's welfare. Mr Justice Wyn Williams gave judgment on the scope, meaning and effect of s55, holding that the duty must be considered before making a decision to remove and the factors to be considered identified, these being a reiteration of the wording at paragraph 1.4 of the statutory guidance.

At paragraph 59, Wyn Williams J reached the following general conclusion:

It seems to me to be incontestable [but] that the defendant could not rationally conclude that removal to Belgium would safeguard and promote the claimant's welfare or be in accordance with his best interests. The reality is that all the evidence put before the defendant suggested the opposite.

The judgment also went on to make findings about the weight and application of 'best interests' in the discharge of these functions which practitioners at the time considered to be wrong; this part of the judgment has now been superseded by the guidance of the Supreme Court in *ZH (Tanzania)* and can no longer be relied upon. The s55 aspects of the judgment are still good law however.

- *R (Suppiah & Ors) v Secretary of State for the Home Department* [2010] EWHC 11 (Admin), January 2011

In this case, the Administrative Court found the detention of two families to be unlawful by reason of the failure to comply with the s55 duty. At paragraph 163, Wyn Williams J concluded:

There is no sound basis to conclude that [the UK Border Agency] had regard to the duty imposed under section 55 of the 2009 Act to safeguard and promote the welfare of the second and third claimants ... The reality is that there is no documentation and no witness statement which demonstrates that the duty under section 55 was properly considered; there is certainly no witness statement or document which reveals the reasoning process of the person who was charged with considering it. If I am wrong in these conclusions, there is certainly no witness statement or document which demonstrates that the duty to safeguard and promote the welfare of the second and third claimants was treated as a primary consideration when the decision to detain was being considered.

- *R (SM) v Secretary of State for the Home Department* [2010] EWHC 338 (Admin), February 2011

In this case, the Administrative Court held unlawful the detention of a father facing deportation, who had been separated from his children.

Beatson J found that (paragraph 93):

...it is clear that the defendant, through the relevant officials at the UK Border Agency, has been in close contact with the OCC [Office of the Children's Champion] and has sought and followed the advice of that Office.

However, the facts are set out in the judgment in some detail (paras 33–44) and indicate, on their face, that the advice of the Office of the Children's Champion, followed by the Criminal Casework Directorate, was seriously deficient in failing to address or attempt to address the welfare and best interests of the children.

- *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC04 1 February 2011

Discussed throughout this chapter in relation to best interests, *ZH* also helpfully sets out the s55 duty at paragraph 23 of the judgment and, importantly, states:

[the Secretary of State] acknowledges that this 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. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8(2).⁸⁶

And as Hale LJ then concludes, 'both the Secretary of State and the tribunal will therefore have to address this in their decisions.'⁸⁷

- *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 22 March 2011

This was an appeal from the Upper Tribunal concerning the duties of the Secretary of State in carrying out family tracing in a 'child, particular social group' refugee claim made by an Afghan child, on the basis that the Secretary of State had failed to comply with the family tracing requirement.

⁸⁶ At para 24.

⁸⁷ Ibid.

The court found that there was a tracing duty on the Secretary of State under the Reception Directive⁸⁸ but it also addressed that duty in terms of the s55 duties:

Pill LJ at paragraph 17 said:

It is also provided, in chapter 15 [of 'Processing an asylum application from a child'], that any tracing that is undertaken must consider the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 ('the 2009 Act') 'to have regard to the need to safeguard or promote the welfare of children in the UK and whether it is in the children's best interests to return them to their family or extended family, if reunification is possible'

Lloyd LJ, in light of the date of the s55 duties coming into force (see above), said at paragraph 70:

After the rejection of the appellant's asylum application, but before the reconsideration of his appeal by the AIT, domestic law changed by the introduction on 2 November 2009 of section 55 of the Borders, Citizenship and Immigration Act 2009

Very significantly, at paragraph 71 Lloyd LJ held:

This provision did not apply directly to the appellant's case, at the time it came into force, because no function referred to in subsection (2) remained to be performed by the Secretary of State or an immigration officer as regards the appeal. What remained to be done was the hearing and determination of the reconsideration of the appeal by the AIT. Nevertheless, it seems to me that the AIT ought to have borne this obligation in mind when deciding the appeal, because of the tribunal's role as decision-maker (see *R (Razgar) v Secretary of State for the Home Department*, [2004] UKHL 27, 1 AC 368 at paragraph 15). The position might have been different if the role of the tribunal was not that of being a part of the decision-making process. If its function were equivalent to that of deciding a conventional appeal or a conventional judicial review application, then the process might be limited by reference to material which had been before the decision-maker and to the law as it stood at the time of that decision. But it has long been clear that the role of the AIT,

⁸⁸ Council Directive 2003/9/EC of 27 January 2003 Article 19.

now the First-Tier Tribunal or the Upper Tribunal, as the case may be, is not constrained in this way (see Macdonald's Immigration Law and Practice, eighth edition, paragraph 19.22). It seems to me to follow that in the present case the AIT, hearing and determining this appeal in November 2009, with section 55 in force, ought to have had regard to the contents of the section.

In paragraph 83, concluding his judgment, Lloyd LJ decided that:

I would therefore allow the appeal and remit the case to the Upper Tribunal for a further reconsideration hearing, in relation to which regard must be had to the factors relevant under section 55. The case is far from being one in which an outcome in favour of asylum for the appellant is a foregone conclusion, so that remitting the case would be a waste of time.

To the contrary, the determination of the case will depend on a best interests assessment which has not yet been considered, on which co-operation from both parties will be needed for the Upper Tribunal to be able to discharge the obligation imposed by section 55.

Both the First-Tier and Upper Tribunal are therefore required to consider the duties under s55 Borders, Citizenship and Immigration Act 2009 even if the Secretary of State did not do so, and even if the duties were not in force at the time of the initial decision. The UK Border Agency and the child's legal representatives are required to cooperate in the assessment of the child's best interests in order to satisfy the s55 duties.

As with the implications of *ZH (Tanzania)* for the UK Border Agency as to the way it applies 'best interests', this judgment will require a major change in approach by legal representatives of both parties as well as the Immigration and Asylum Chambers and the courts. Geared much more towards a joint enterprise of working in the best interests of the child, an investigative rather than adversarial approach, much more familiar to the family courts than the immigration jurisdiction, is required.

Conclusion

It is clear that the administrative and the appellate courts are alive, and willing, to give the widest possible interpretation to the scope of these duties, and to who is bound by them, and to examine s55's application in terms of substantive formal decision-making, the internal communications, practices and policies of the UK Border Agency and the Office of the Children's Champion, and to consider the procedures required to make the duties effective in promoting the welfare of children.

Practitioners should take every encouragement in this wide range of early decisions and use these duties as a fundamental tool to achieve accountability on behalf of children and thus play their part in safeguarding the best interests of the child.

CHAPTER 2

Voice of the child

Kalvir Kaur

2

This chapter discusses the legal foundations giving rise to the principle of a child's right to be heard in their legal matters, known as 'the voice of the child', and provides guidance and techniques to allow representatives to ensure this right is maintained whilst working with children in the asylum system.

International law

International law provides the basis on which the right of a child to be heard is founded and we will examine the most significant of these in this section.

Article 12 of the UN Convention on the Rights of the Child

The fundamental principle of hearing the voice of the child is enshrined in a number of international legal instruments, most notably in the UN Convention on the Rights of the Child (CRC) of which Article 12 which provides:

- 1 State Parties shall assure to the child who is 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 the age and maturity of the child.
- 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 has been identified by the United Nations Committee on the Rights of the Child (the Committee) as one of the four general principles of the CRC, the others being the right to non-discrimination, the right to life and development and the primary consideration of the child's best interests. Article 12 should be considered in the interpretation and implementation of all other rights. The Committee has noted that all the other Articles of the CRC cannot be fully implemented if the child is not respected as a subject with his or her own views on the rights enshrined in the Convention.

Valuable guidance as to the operation of Article 12 is to be found in the UN Committee on The Rights of the Child General Comment No.12 (2009). The main point, in so far as is relevant to this chapter, is the emphasis by the Committee that Article 12 applies to all relevant judicial proceedings affecting a child, without limitation, including child victims of physical or psychological violence, sexual abuse, asylum seeking and refugee children and victims of armed conflict and other emergencies. The Committee recognises that a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. It confirms that the reference to a 'representative' in Article 12(2) can be a legal representative, however provides the important warning that a representative must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience of working with children and must be aware that he or she represents exclusively the interests of the child.

The Committee explains that Articles 3 (relating to best interests) and 12 are complementary: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing the child. The correct application of Article 3 can only occur when the components of Article 12 are observed.

Likewise, within Article 5, for example, concerning parental guidance and the child's evolving capacities, this right is stimulated by Article 12 which stipulates that the child's views must be given due weight, whenever the child is capable of forming his or her own views. Thus, as children acquire capacities they are entitled to an increasing level of responsibility for the regulation of the matters affecting them.

The Committee recognises that separated children (i.e. those who have been separated from their parents or guardian or arrive in the UK unaccompanied) seeking asylum are in a particularly vulnerable situation and for this reason it is critical that immediate consideration is given to their right to express their views on all aspects of the immigration and asylum process, in addition to the child having an opportunity to present his or her reasons leading to their asylum claim.

The Committee emphasises that these children have to be provided with all relevant information, in their own language, relating to their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the process.

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Other international sources

There are other international sources which contain the right of the child to be heard. These include Article 3 of the European Convention on The Exercise of Children's Rights 1996, however this is not yet ratified by the United Kingdom, and Article 7 of the African Charter on the Rights and Welfare of the Child 1990, which provides for the child to express his or her opinion freely in all matters if capable of doing so.

Other sources include:

- *CRC Committee Concluding Observations of the United Kingdom of Great Britain and Northern Ireland*¹
20 October 2008

Signatories to the CRC are required to report regularly to the Committee on their implementation of the Convention. In its Concluding Observations in October 2008, the Committee recommended, in relation to Article 12, that the UK promote, facilitate and implement, in legislation as well as in practice, within the family, schools, and the community, as well as in institutions and in administrative and judicial proceedings, the principle of respect for the views of the child. This, in the author's view, is clearly indicative that the UK is still failing to comply with its obligations under the CRC.

¹ www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf

- *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*²
November 2010

Similarly, the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (November 2010) call upon member states to respect and implement the entitlement of all children to be informed of their rights and to be consulted and heard at all stages of any proceedings involving or affecting them. This includes giving due weight to the child's opinion bearing in mind their maturity and any speech, language or communication difficulties they may have, in order to make their participation meaningful. The guidelines call upon member states to consider and treat children as full rights holders and entitled to exercise all their rights in a manner consistent with their evolving capacities.

The asylum process and hearing the voice of the child

The asylum process for a child in the UK involves a range of statutory and non-statutory bodies. It will inevitably involve the UK Border Agency in their role as a decision-maker. It should also involve a legal representative. It may involve a foster parent or another primary caregiver, an independent adviser or befriender and also the court service. Each and every one of these parties should ensure that everything is done to ensure that the voice of the refugee child is listened to, heard and accorded due weight in the asylum process.

The UK Border Agency

The UK Border Agency publishes its own guidance entitled 'Processing an asylum application from a child.'³ In relation to the right of a child to be heard, and according due weight to a child's views, reference is made to s55 of the Borders, Citizenship and Immigration Act 2009 which introduced a statutory duty for the Secretary of State to make arrangements to ensure that UK Border Agency functions are

² <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1705197&Site=CM>.

³ www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/

'discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'. This statutory duty extends to all UK Border Agency staff and those acting on its behalf when carrying out immigration functions in relation to children who are in the UK.

The Statutory Guidance for the UK Border Agency in respect of making arrangements to safeguard and promote the welfare of children, issued under s55, sets out the key arrangements for safeguarding and promoting the welfare of children and addresses public bodies who deal with children (Part 1) and specifically the UK Border Agency (Part 2). Any person exercising immigration, asylum, nationality and customs functions is required to have regard to this guidance. In summary, the guidance indicates that the UK Border Agency must act in accordance with the following principles:

- Every child matters, even if they are someone subject to immigration control.
- The best interests of the child will be a primary consideration when making decisions affecting children.
- Ethnic identity, language, religion, faith, gender and disability must be taken into account when working with a child and their family.
- Children should be consulted and their wishes and feelings taken into account, wherever practicable, when decisions affecting them are made. Where parents and carers are present, they will have primary responsibility for the children's concerns.
- Children should have their applications dealt with in a way that minimises the uncertainty that they may experience.

Under the heading 'Collecting evidence from an asylum seeking child', the UK Border Agency 'Processing an asylum application from a child' guidance likewise makes reference to s55 and instructs that the following principles must be applied:

- be aware that children do not often provide as much detail as adults in recalling abusive experiences and may often manifest their fears differently from adults;
- assess evidence provided by a child in the light of their age and degree of mental development and maturity currently, and at all material times in the past, together with any available knowledge of their personal, family, cultural and educational background;

- be proactive in identifying, pursuing and considering objective factors and information that may be relevant to the child's asylum claim;
- consider evidence from a range of other sources such as information from other family members, accompanying adults or social workers;
- consider evidence from other agencies involved with the child which they are able to share and that may be relevant to the application;
- consult a senior caseworker who has received specialist training in assessing children's claims with regards to the appropriateness of information from other agencies, and the relevant policy unit, as to whether the information and/or the source can be relied upon.

Thus, at initial glance, it would appear that in complying with its duty under s55 the UK Border Agency has made provision to give effect to Article 12 CRC when processing applications for asylum from refugee children. However, the UNCHR Quality Initiative Project, Key Observations and Recommendations April 2008–March 2009⁴ reported on the quality of decisions made in respect of refugee children in the asylum regions of Central London, West London, Liverpool and Solihull and found that:

- not all caseowners explicitly factored the child's age and mental maturity into the credibility assessment;
- in about half of the decisions assessed, the caseowner did not demonstrate appreciation for age-specific mitigating factors when considering the level of detail and consistency in the applicant's account;
- erroneous practices in the interviewing environment denied the child the opportunity to freely express their reasons for claiming asylum.

Legal representatives

It is not only the UK Border Agency that has been the subject of research highlighting a failure to comply with Article 12, but also legal representatives. The Refugee Council's report *Lives in the Balance: the quality of immigration legal advice given to separated children seeking asylum*, February 2011⁵, whilst recognising examples of good practice amongst a minority of legal representatives, found, *inter alia*, that the number of representatives currently working with

⁴ <http://tiny.cc/72min>

⁵ www.refugeecouncil.org.uk/policy/position/2011/livesinthebalance

children who had knowledge of the relevant law and policy in this area was worryingly small. There was a majority of representatives whose practice was woefully inadequate and who did not have the requisite skills to ensure that a child they were representing was able to fully participate in the process. Concern was expressed at the poor quality of some interpreters working in this area; the report highlights one example of where, during an appointment with his legal representative, the child was told by the interpreter to speed up his instructions since he, the interpreter, had to meet a friend.

The courts

The UK courts have also now started to recognise the right of a child to be heard, with the Supreme Court leading the way. In the judgment of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, the Supreme Court emphasised the need for the UK Border Agency to engage seriously with children's welfare concerns at an early stage in proceedings and for the voice of the child to be heard accurately through legal representation where necessary:

- 34 Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child's own views. Article 12 CRC provides:
 - '1 States Parties shall assure to the child who is 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 the age and maturity of the child.
 - 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'
- 35 There are circumstances in which separate representation of a child in legal proceedings about her future is essential: in this country, this is so when a child is to be permanently removed from her family in her own best interests. There are other circumstances in which it may be desirable, as in some disputes between parents about a child's residence or contact. In most cases, however,

it will be possible to obtain the necessary information about the child's welfare and views in other ways. As I said in *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64, [2009] 1 AC 1198, at para 49:

'Separate consideration and separate representation are, however, two different things. Questions may have to be asked about the situation of other family members, especially children, and about their views. It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children's services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for.'

- 36 The important thing is that those conducting and deciding these cases should be alive to the point and prepared to ask the right questions. We have been told about a pilot scheme in the Midlands known as the Early Legal Advice Project (ELAP). This is designed to improve the quality of the initial decision, because the legal representative can assist the 'caseowner' in establishing all the facts of the claim before a decision is made. Thus cases including those involving children will be offered an appointment with a legal representative, who has had time to collect evidence before the interview. The Secretary of State tells us that the pilot is limited to asylum claims and does not apply to pure article 8 claims. However, the two will often go hand in hand. The point, however, is that it is one way of enabling the right questions to be asked and answered at the right time.
- 37 In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so.

While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

'in many cases ... there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative.'

Children can sometimes surprise one.

Best practice in hearing the voice of the child

The remainder of this chapter will focus on exploring how legal representatives can obtain the best evidence from children in order to give effect to their right to be heard and to properly represent the child in their proceedings. It is not intended to be an exhaustive checklist but a foundation to be built upon and altered according to need and individual style.

Refugee children have a right to be heard. The difficulties in eliciting good quality evidence from children should not inhibit allowing the voice of a child to be heard in proceedings that affect that child. However, a child's asylum lawyer can only act on instructions and cannot act as a guardian might in family proceedings who is charged with representing a child's best interests and must take into account the child's wishes and feelings.

The legal representative

One of the crucial elements of ensuring a child's voice is heard in the whole asylum process is effective interviewing by the legal representative. What may or not be elicited by the legal representative will have consequences for the rest of the claim. Poor interviewing can lead to the full substance and detail of the claim not being heard by the decision-maker and any attempt thereafter to remedy this failure may lead to adverse credibility findings. Poor interviewing may also be indicative of the legal representative's failure to adapt their technique and conduct to one that is more suitable for children. It will undoubtedly mean that the child's voice, even if partially heard, will be restricted.

It will be common for a child seeking legal assistance to be referred to a legal representative by a third party. This may be a social worker, foster parent or perhaps a Refugee Council Children's Panel Adviser. In these circumstances it can be easily forgotten that it is not the adult who is your client, but the child. Working with children requires a shift from the instinct of engaging with the adult to the exclusion of the child.

Of course that is not to say that the adult must not be engaged with at all, to the contrary their role is crucial. Firstly it is from the adult that you will gain initial details of your prospective child client such as name, date of birth, nationality, language, whether there has been any claim made already to the UK Border Agency (or one is to be made) and preferred gender of representative and any interpreter. Secondly, it is likely that the referrer will also act as the responsible adult (a person who is independent of the Secretary of State and who has responsibility for the child) during the whole asylum process.

In order to properly represent a child, the following factors require careful consideration.

Who is the right legal representative for the child?

Specific criteria must be met before one can assume conduct of a child's case.

All solicitors and those who provide immigration and asylum advice and services must be an accredited member of the Immigration and Asylum Accreditation Scheme to be eligible to work and receive payments for work carried out under a Legal Aid contract in the immigration category. Under this scheme one must achieve the status of senior caseworker in order to conduct work on children's cases, this means to be accredited to Level 2.

In addition, under the 2010 Standard Civil Contracts, providers are subject to new contract provisions when providing advice to separated children seeking asylum. The key provisions require that all such work is carried out by a Level 2 senior caseworker or above, and for any new cases opened on or after 15 November 2010, the representative must have had an enhanced Criminal Records Bureau check in the two years before instruction and records of the check must be available to the Legal Services Commission on request.

For solicitors and non-solicitors alike, it is best practice to always bear in mind Rule 2.01(1)(b) of the Solicitor's Code of Conduct which states

that a person must refuse to act or cease to act for a client where they have insufficient resources or lack the competence to deal with the matter. This means having both the appropriate legal knowledge and skills. Acting for refugee children can become testing at times; if during any stage a representative feels that they are not best placed to do justice to the case and properly represent the child, serious consideration must be given to transferring the matter to another fee-earner who possesses the necessary mix of knowledge and skills.

The interpreter

Most refugee children will not speak English as their first language and in order to listen to and hear their voice fully, an interpreter will need to be employed. The role of the interpreter is vital. The consequences of poor interpreting are clear: distortion of instructions, confusion, inaccuracy, the full claim never being in front of the UK Border Agency and seemingly internal contradictions.

Always use a reputable, professional interpreting agency. It may be that some agencies have specific child-trained interpreters; indeed this is one of the recommendations made in the Refugee Council report *Lives in the Balance*. Never use friends or family members to interpret. Not only does this increase the scope for mistakes, as such people are not likely to be professional interpreters, but it can often place the client in a very difficult position as they may not want to disclose certain matters that form part of their claim owing to embarrassment or fear of loss of ties with their community. There is potentially real concern that cultural norms may dictate it unacceptable or taboo to talk of certain matters to others outside of the community or indeed to be spoken of at all. Legal representatives must ensure that they provide the necessary tools for the child to speak freely without fear, embarrassment or hindrance.

A choice as to the gender of the interpreter is a must; it may be that a female child trafficked for sexual exploitation does not feel comfortable with a male interpreter and thus feel she is not able to disclose her whole claim.

At the start of the interview, ensure the child is made fully aware of the role of the interpreter. Namely this is to provide an impartial, complete and confidential rendition of everything that is said and that the interpreter is not to offer opinion, comment or answer questions on behalf of the child.

If both the representative and the child are satisfied with the interpreter, it is good practice to retain the same interpreter for all appointments. This will allow the child to feel more at ease with the interpreter and consequently more at ease in disclosing his or her experiences.

It is of great importance that despite the involvement of the interpreter, a representative must conduct every appointment by asking questions directly to the client in the first person. For example, 'can you tell me what happened that day?' rather than asking questions of the interpreter such as 'can you ask him what happened that day?' An interpreter is employed to ensure that a non-English speaking client is placed on an equal footing with those who understand English, so speak to a non-English speaking client as one would to a English speaking client.

When acting for a child, a representative must remain vigilant to any modulation in the interpreter's voice as this can sometimes be a sign of a reproaching or disbelieving attitude on the part of the interpreter. Children are less likely than adults to indicate that they have any difficulties or unease with the interpreter.

Remain aware of the non-verbal indicators such as body language and facial expressions and if required, terminate the appointment. Following this, re-arrange a further appointment within a very short time period with a different interpreter. Inform the child, and the appropriate adult, why there has been a change in interpreter and enquire whether there had been any problems with the first interpreter, do not just assume there had been.

Stress to the child the importance of ensuring that they are comfortable and are able to speak at their own pace with the interpreter. If the child seems hesitant in his or her response, emphasise that they have done nothing wrong and that it is not a problem for their legal representative to book different interpreters until they feel at ease with any particular one. It is only then that an interview can proceed knowing that this element has been duly executed to aid the flow of instructions.

The interview

The interview itself requires certain practical considerations to aid the flow of instructions and in order to set a child at ease.

The interviewing room

Prior thought to the layout of the interview room can aid effective communication and avoid subtle non-verbal messages which may undermine the relationship of trust yet to be established.

UNHCR's training document on interviewing clients⁶ explains the best placing of parties attending an interview in order to facilitate an optimal environment. Try to arrange the seating so that the interpreter is to the side of the interview and slightly withdrawn which will allow the interviewer and applicant to communicate face to face. When interviewing a child, the interpreter should sit closer to the child than to the interviewer in order to avoid being perceived in a position of authority and to put the child at ease.

To aid concentration, ensure the interviewing room is free, as far as possible, from distracting noises such as ringing telephones and other secondary noise. Try to arrange seating all on one level to avoid perceptions of authority and do not have the client seated in such a position that they are facing a source of light, such as a window, in order to avoid 'blinding' light. All this will achieve is for the client to suffer from a headache from the blinding light resulting in loss in concentration and consequently greater risk of errors and inaccuracies.

Refreshments are important and ensure they are at hand or easily accessible. It is common for young children not to drink tea or coffee, however experience has shown that they are more willing to accept hot chocolate! Equally popular are diluted fruit drinks.

Representative's appearance

Many refugee children have, in some way or form, been exploited, deceived or otherwise mistreated by an adult in a position of authority. Representatives should consider how their dress impacts on the child

⁶ www.unhcr.org/3ae6bd670.html

during the interview. Is it stating they too are an adult in a position of authority or is it stating that they are an adult who the child can trust? Stuffy suits and sterile offices do not always provide the best environment for interviewing vulnerable children.

Starting the interview

Once the interview is ready to begin, the following points should be borne in mind in order to create a positive initial meeting; the first meeting is crucial and will set the tone for all subsequent appointments.

- **Put the client at ease:** employ steady, friendly visual expressions and maintain good eye contact, open body language and an appropriate vocal tone. Explain who everyone in the room is and their roles. Check that the child is comfortable with all parties present (this is more appropriate for older children and should be ascertained before the start of the interview). Check to see if the child is well and whether he or she has eaten or requires something to drink.
- **Ownership:** Representatives should emphasise to the child that as their representative they will be working for them, irrespective of the number of bodies in the interviewing room, that they are the most important person there and it is them who will be heard. Representatives should provide their child client with their contact details, as opposed to simply providing them to the appropriate adult, and make certain that the child is aware that he or she can talk to their representative at any time in confidence and call whenever they need to. Utilise modern methods of communication to facilitate a relationship; encourage the child to text or 'miss call'. This simple process will make representatives more accessible by means which most young people are familiar with. Constantly encourage the child to ask questions.
- **Adaptation:** interviewing techniques will need to be adapted according to the understanding of the child. A simple tick-box exercise is not advisable as it is likely to only produce the most rudimentary of instructions. The most thorough of instructions are obtained by those practitioners who are skilled listeners, who ask numerous questions and who remain patient at all times.

- **Plan the time:** lengthy appointments are not appropriate for children and two hours for any appointment is more than sufficient at any one time. Children are not able to retain focus for a prolonged period and frequent breaks are a must, on average a 10 minute break after 45 minutes should be enforced. Plan the time accordingly. Related to this is planning diaries. Do not work on the basis that instructions for a statement from a child can be obtained within one or two appointments. Ensure there is sufficient space in the diary to see the child frequently over a short period of time.
- **Managing expectations:** define the boundaries and explain everyone's role. Do not promise that which cannot be delivered. Be honest with the child. Whilst one can show empathy, being emotional is unhelpful. It may sometimes seem easier to tell a child that 'everything will be ok' or 'don't worry' out of fear that they become upset. However this will simply be neglecting representative's duties and will ultimately be to the detriment of the child.
- **Assumptions:** do not assume that all children from a particular country will have certain documents and experiences. Not all Afghan children, for example, will have an identity document or will have been forcibly recruited by the Taliban. Doing the best for each client means not pre-judging or making assumptions.

Taking instructions

Interviewing children is one of the hardest skills to master and when taking instructions from a child, different factors need to be considered than when interviewing an adult. Children will very often defer to adults and follow the line of least resistance. Most younger children want to avoid getting into trouble or doing something wrong. An interviewer may often reveal an agenda, sometimes inadvertently, and a child will seek to please them therefore leading questions may well elicit the response sought by the questioner. All of this will mean that the true voice of the child is suppressed because the optimal environment has not been fostered to allow the child to give instructions freely without any fear of rebuke or having done wrong.

This all means that the evidence of children must be carefully evaluated. For example, leading questions may be necessary to elicit meaningful responses and prompt a child to recall events, yet also throw up a clear danger of suggesting answers to a child.

Questions to children should be simple and short. Other techniques can also be used, such as play, drawings or demonstrations. If the child feels more able to explain by way of drawings, for example, encourage this and submit the drawing as part of the child's evidence. This can be particularly effective for descriptive elements, for example when describing the flag of the country or the markings on a currency. Demonstrations are a very useful tool and may, for example, consist of role play when advising the child what to expect at a UK Border Agency interview by replicating, as far as possible, the UK Border Agency interviewing room layout and assuming the role of the interviewing officer.

A starting point is a simple framework from the Police Training on Child Rights & Child Protection Manual of the Consortium for Street Children⁷ which can be kept in mind and inform practitioners' interviewing of children:

Avoid ✘ Long sentences ✘ Complicated sentences

Use → Short sentences → Simple sentences

- ✘ The passive voice ('Was he hit by the man?')
- The active voice ('Did the man hit him?')
- ✘ Negative sentences ('Didn't you tell him?')
- Positive sentences ('Did you tell him?')
- ✘ Questions with more than one meaning
- Questions with only one meaning
- ✘ Double negatives ('Didn't your mother tell you not to go out?')
- Single negatives ('Did your mother tell you not to go out?')
- ✘ Hypothetical questions ('If you are tired, tell me.')
- Direct approach ('Are you tired?')

⁷ <http://tiny.cc/yw167>

Interviewing techniques and tips

The following techniques may assist in conducting an effective, productive interview that sets the child at ease and maximises their opportunity to have their voice heard.

- **Language and body language:** It is clear that sometimes children will merely respond in a manner which they believe will please the adult interviewer. Therefore it is of the utmost importance to remain self-aware of body language, facial expressions, tone of voice and any other non-verbal indicator of displeasure, frustration, disbelief, judgment or a lack of patience. Language must be adapted to ensure that it is child-friendly and jargon-free, it is highly unlikely that the child will understand the same vocabulary employed for an adult. Find analogies if it is difficult to make any point clearly. Constantly reiterate and emphasise that there is no 'right' or 'wrong' answer but simply the answer that is in the child's knowledge. Remind the child that it is perfectly acceptable to say 'I cannot remember / I do not know / I do not want to talk about it'.
- **Cognitive interviewing:** 'The cognitive interview of children' by the Institute of Forensic Expert Opinion, Krakow⁸ informs us that the cognitive interview is a method of enhancing memory through facilitating the process of recall. Its objective, in relation to children, is to help them improve the process of recall without increasing the amount of inaccurate or invented data. It attempts to do this by focusing on memory and communication process. A child must firstly recall the details of an event and then secondly, communicate this information to the interviewer. Successful interviewing depends on both processes being properly followed.

The cognitive interview is based on two fundamental laws concerning human memory:

- 1 A memory trace consists of several elements and the effectiveness of its recall is closely related to the number of overlapping elements, i.e. with the complexity of the event;
- 2 There are several possible ways of retrieving an encoded event, so information that cannot be retrieved in one way, may be accessible using another method.

⁸ www.canee.net/files/The%20Cognitive%20Interview%20of%20Children.pdf

When employing the cognitive interviewing technique with a child, the child must be allowed to speak continuously, and auxiliary questions asked only when it is really necessary; the following principles must be adhered to:

- sit naturally, leaned towards the child;
- express friendliness and support;
- use eye contact frequently but do not stare at the child;
- speak slowly, use short sentences and pause between sentences;
- express your attention through nodding, saying 'aha' etc, but do not use evaluative terms such as 'that's right';
- praise the child for his or her efforts;
- avoid rapid movements or chaotic style of speaking;
- do not interrupt the child;
- allow breaks;
- show patience.

Effective cognitive interviewing of children consists of several phases which have been identified by the Institute of Forensic Opinion and are summarised as follows:

PHASE 1 *Personalise the interview and establish rapport*

In order to establish rapport with a child, the following techniques should be employed:

- greet the child using his or her name;
- introduce self and any third parties;
- begin a brief conversation on a totally unrelated issue.

PHASE 2 *Explain the goals of the interview to the child*

So that the child understands the reason for the interview, the following steps should take place:

- emphasise that the child should describe everything that comes into his or her mind when asked questions even if he or she believes it not to be important;
- explain that the appointment will require concentration;
- discourage the child from guessing or inventing things when he or she cannot remember or does not know.

PHASE 3 *Reinstating the context of the event*

This can be obtained by either asking specific questions or free account

- if by questions:
 - ask the child to listen to the instruction carefully. Emphasize that you want to help him or her to recall all details of the event;
 - give the child enough time to reinstate the context;
 - ask questions slowly, making intentional pauses;
 - ask one question at a time;
- if by free account:
 - ask the child to describe his or her memories of the event;
 - do not interrupt the child or ask any specific questions;
 - paraphrase the child's last thought, without adding any details (active listening);
 - if the child stops at some point when giving the account, demonstrate patience and stay quiet, even if the pauses in the child's report are long. It is important to remember that this phase precedes asking questions, and silence may be a very effective tool of eliciting more elaborate answers;
 - when the child makes an impression of having finished the narrative account, do not start asking questions immediately, but rather encourage the child to try to recall more details, by asking: 'Do you remember anything else?', and waiting a few more seconds.

PHASE 4 *Asking questions*

The questioning phase needs to be properly conducted in order to elicit full instructions from a child:

- explain to the child that he or she is going to be asked about the detail of the event;
- emphasise once again that the child should describe everything that comes to his or her mind, without guessing or inventing anything;
- add that this may be a difficult task, which requires much effort and attention.

- Asking questions is associated with activating imaginative pictures (or representations) in the interviewee's mind. Asking a question makes the child use an imaginative picture and 'read out' the required information. For example, if we request the child to describe his or her teacher, a picture of that person will emerge in the child's consciousness. If the next question concerns the same picture (e.g., 'what was he wearing?'), the child will continue to use the same picture. If, however, the next question concerns another imaginative representation (e.g., 'who else was there in the room?'), the first representation will be abandoned and the child will evoke another picture, corresponding to the question.

Every single act of evoking a new representation interrupts the process of memory scanning and requires some mental effort. Therefore, hopping from representation to representation may seriously reduce the amount of information recalled by the child.

- Among older children who have reached the appropriate level of cognitive development, when more details are needed concerning a particular circumstance of the event, the reversed sequence mnemonic may be of use. The child may start such an account from the most recent episode or another important fact that has already been described, and then move on to describing earlier events. It can be helpful to use the instruction: 'Tell me about it as if it was a movie played backward from the end.'
- The changed perspective mnemonic, i.e. the instruction to report the event from the perspective of another person involved in the event, may prove difficult, especially for younger children. If, however, this technique is applied, it may be helpful to use the instruction: 'Tell me what your teddy-bear could see if he or she was there.'

PHASE 5 *Closure*

It is important to end the interview properly so the child feels reassured and understands what will happen next:

- try to create a positive impression of the whole process;
- thank the child for his or her participation and effort, praising the child for the detailed instructions, and expressing interest in the child's feelings and emotional state.

Cognitive interviewing may be employed as an effective technique when interviewing children. It may, however, need to be adapted according to the age and understanding of the child, thus it may be that for younger children phase three consists of both questions and free account since younger children generally find free account more difficult than older children.

There are other interviewing methods that have been employed when interviewing children, more commonly used in criminal proceedings, such as the Phased Interview. For more information see 'Ministry of Justice Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures March 2011'.⁹

Whichever interviewing method is opted for, it is crucial that every interview has a closure phase ensuring that the child is in a positive frame of mind and not distressed by the process. This may be achieved by ending the appointment by talking about neutral topics unrelated to the asylum claim.

Children do not have a developed range of vocabulary and can struggle to find the correct words to describe their experiences. This can be perpetuated if interpretation is not accurate. Therefore it is of utmost importance that there is sufficient probing into the child's use of words that they employ in giving instructions. The right to be heard does not mean that you simply take what is said at face value. Representatives must investigate, clarify, probe and expand on the instructions of a child. As an example, a child may initially say that she has been raped by an uncle. Further gentle questioning may ascertain that the child was using the word 'rape' to describe her uncle touching her back and arm in a manner which made her feel extremely uncomfortable.

Effective questioning includes the use of appropriate language whilst creating an environment in which the child does not feel scared, embarrassed or inhibited by feelings of wrongdoing. Without probing, especially round difficult subjects such as rape, sexual abuse, female genital mutilation and forced abortions, there remains the real possibility that an accurate account of the child's experience will not have been elicited.

⁹ <http://tiny.cc/w5560>

Understanding also refers to the duty to ensure that at each appointment the child knows what the purpose of the appointment is, what you seek to achieve, why you seek to achieve it and how you seek to achieve it. It is only when children understand why they are being asked questions and the purpose of them that they become more engaged and provide more coherent accounts.

Obstacles to effective interviewing

There will be times when, despite best endeavours, a carefully planned appointment simply does not fulfil the objective hoped due to the lack of any real instructions in respect of the asylum claim from the child. Children going through the asylum process may have distinct reasons which impact on their ability at any one given time to give instructions. Some of these may be:

- **Repetition.** Usually the representative will not be the first person to whom the child has had to reveal part or all of their experiences. By the time a legal representative is instructed it is probable that the child has had to disclose information to at least two people if not more. Children are often frustrated and fed up and tired of having to state their circumstances again. Patience is required.
- **Time of appointment.** Many children have a fear of the dark thus it not a good idea to arrange appointments late in the day. If an appointment is made after school, the child may be tired and not want to have to think and talk about traumatic experiences.
- **Safe environment.** Interviews should take place where the child feels safe, this does not necessarily mean at the solicitor's office. If appropriate, identify another safe space as the Legal Services Commission will fund travel to and from the office to the safe space if this can be justified.
- **Other factors.** Studies such as *Trees only move in wind*¹⁰ and *Leveling the playing field*¹¹ give us a glimpse into the some of the issues that are faced by refugee children.

¹⁰ Christine Mougne, UNHCR (2009) *Trees only move in the wind: A study of unaccompanied Afghan children in Europe*. www.unhcr.org/4c1229669.html

¹¹ <http://tiny.cc/85mbc>

Children have often endured horrific experiences on their journey to safety and continue to face problems in the UK such as isolation, very poor accommodation and harassment. These may impact on a child's state of mind and may be considered to be more important to the child than the matter being addressed in the interview.

- **Other fears.** There may be specific barriers which are hampering effective communication and stifling the voice of the child. These may include a professional relationship devoid of trust, fear of those in positions of authority, fear of interpreters and any related ties, anger and fear of having to divulge their experiences through concern of shame and reprisals. Some children, especially those who may have been trafficked, may be under very strong voodoo or Juju which effectively silences them.
- **Trauma.** In addition to the above potential factors, trauma is a common factor amongst most refugee children. The UNHCR Guidelines on Evaluation and Care of Victims of Trauma and Violence recognise:

Unaccompanied children and children having experienced especially traumatising events, inter alia, to be categories of children at the most risk of developing immediate or long lasting psychological disorders.

UNHCR found that adolescents are usually the most neglected of all age groups because of the mature adult-like behaviour they adopt under stress. Throughout the whole of the conduct of the client's case, it is important to remember that a child is still a child and appointments with them should be conducted accordingly.

UNHCR found that manifestation of trauma included, but was not limited to, 'shut down' consisting of uncontrollable weeping, self-blame, head down and disengagement.

In such a scenario it may be appropriate make a referral to a specialised counselling service with consent of the client.¹²

¹² The following specialised counselling services accept referrals of children:
The Medical Foundation for the Care of Victims of Torture: www.torturecare.org.uk/
The Helen Bamber Foundation: www.helenbamber.org/
The Baobab Centre for Young Services in Exile: www.baobabsurvivors.org/

Limited instructions

There may be occasions when the child will not be able to give instructions relating to his or her claim at all or only partly.

In such circumstances the following suggestions may be useful:

- Ask the child to write out their statement in their own language, if they are able to do so, to be translated for readback and clarification. This should then stand to serve as the foundation for a more comprehensive statement further to clarification and expansion by interviewing.
- Rely on third party sources such as social workers assessments, how and why the child came into care, child protection assessments, medical evidence, educational psychologist assessments, Refugee Council Panel Adviser statement, foster parent and a statement of the representative themselves detailing the difficulties in taking instructions and objective evidence in order to draft detailed representations in support of the child's claim.
- Make clear in the child's statement that he or she was not able to speak about xyz at this point in time. This will serve to protect the child to a degree against allegation of bolstering their claim by the UK Border Agency if at a later date the child feels able to disclose further.
- Some children may feel more comfortable conveying their experiences by drawing, if so this should be encouraged and the drawings to stand as part of the statement.

Some children only appear able to give vague accounts and instructions. The legal representative's role is to elicit as much accurate information and detail as possible, and they must ensure that the child understands why the representative feels vagueness may prove problematic in the future and how it may be viewed by the decision-maker. Once children understand the reasoning behind the question, they are likely to be much more forthcoming.

Be aware it is common for children to have a very different perspective of time to that of an adult. Six months may feel like over a year ago. Questions about dates or even a sequence of events are unlikely to produce identical results if asked more than once. If the child cannot say how long ago a particular event happened, try to find a point of reference such as birthdays, school terms, religious festivities etc.

In such instances the statement must refer to the child's point of reference.

Finally, throughout the whole of the process, continuously reassure the child that it is perfectly acceptable to respond that he or she does not know the answer or has simply forgotten, if this is the truth.

Inevitably, limited instructions will impact on the progression of the asylum claim. Currently when a child claims asylum, upon registration they are issued with a Statement of Evidence Form (SEF) by the UK Border Agency. The form is divided into two, the first part requests details of the child's personal history, family history and journey details. The second part requests details of the basis of the claim to be completed in boxes provided. It is wholly unrealistic that information regarding why the child has claimed asylum can be categorised into neat boxes and thus it is best practice to draft a statement of the child's instructions instead.

The SEF is time limited and is required to be returned to the the UK Border Agency by the twentieth working day after issue. For all the reasons stated above, this may not always be possible. In such circumstances negotiate an extension of time with the caseowner for submission. With reference to Article 12 CRC, a child feeling pressurised to give instructions regarding their basis of claim within a short period of time will, in most cases, result in the child not being heard effectively. It is stressed that since the form, including the statement, will be considered by the UK Border Agency as being the complete basis of claim, the length of time it takes to complete should be that which is required by the child irrespective of arbitrary deadlines imposed by the UK Border Agency.

Following submission of the SEF, the UK Border Agency will seek to interview the child to explore the basis of claim if they are twelve years old or over. It may be that the child is not ready to be interviewed and should this be the case it is imperative that a request for postponement is made to the UK Border Agency with persuasive reasons explaining why the interview would be a futile exercise. If need be supporting evidence such as medical reports or reports from third parties should be obtained. It has been known for the UK Border Agency to waive the interview and proceed to make a decision based on the information contained in the SEF, statement, representations and supporting evidence.

Should the interview proceed, the the UK Border Agency's own guidance allows for the interview to take place somewhere other than its own offices. It may be worthwhile to consider making a request for this provision to be utilised if, owing to the particular circumstances of the child, it would result in the child engaging with the substantive interview in a more meaningful manner.

Wherever the interview takes place, the child must only be interviewed by an immigration officer who has been trained in how to interview children, referred to as a 'minors-trained immigration officer'. Despite this requirement, the role of the legal representative at the substantive interview is to ensure that the interviewing officer does not ask questions in an inappropriate tone or language, ask irrelevant questions, ask ambiguous or unclear questions or present as hostile, confronting, disbelieving or impatient. Should this happen, the representative must intervene immediately for such an environment would only serve to stifle the child's voice.

Conclusion

The chapter started with some exploration around Article 12 CRC; it has hopefully concluded by providing practical suggestions on how we, as legal representatives, can ensure that we do all that we can to make the voice of the child heard throughout the whole of the asylum process with the interdependent principles of best interests informing our conduct. If we fail to do so, we fail the child.

CHAPTER 3

Best practice in age dispute challenges

Shu Shin Luh with Baljeet Sandhu and Zubier Yazdani

This chapter looks at the issue of age disputes and the impact it has on the experiences of unaccompanied asylum seeking children in the asylum process. It considers the circumstances in which age disputes arise and provides practical advice on how to tackle age disputes and safeguard the welfare of young people subject to them.

3

Why does age matter?

The question of 'How old are you?' has been the subject of much litigation in recent years. A young person's age is disputed most often either when they present to the immigration authorities to make an asylum claim or when they are brought to the attention of a local authority children's services. This is often because asylum seeking young people arrive in the UK without reliable and authentic documentation to prove their age. They may have handed their documents to agents along the journey and not had those documents returned. They may never have had documents to prove their age in the conventional sense because in their country of origin, they are no similar systems of registering births and households. Determining a person's age in these circumstances is not an easy task. Yet age features as a crucial characteristic of a person's identity both in immigration and asylum law and in social welfare law. The erroneous determination of a young person's age has a significant impact on their experience in the UK.

As the Supreme Court has made clear in *R (A) v Croydon LBC* [2009] UKSC 8, age is an objective and immutable characteristic of a person's identity. There can only be a right or wrong answer as to what a person's age and date of birth are and that answer is not solely left to the evaluative judgment of a public authority.

In immigration and asylum law, whether a person is a child or an adult affects how an immigration officer assesses the merits of an international protection claim, the young person's credibility and the safeguards they are entitled to during the asylum determination process. Paragraphs 350–352 and 352 ZA–B of the Immigration Rules set out the specific procedure by which a child's asylum claim has to be assessed and when a child can be interviewed. The rules are coupled with specific guidance on how children's cases should be handled, the Asylum Process Guidance *Processing asylum applications from a child* and *Assessing age*. Lone asylum seeking children are usually granted a period of discretionary leave up to their turning 17½ years old irrespective of whether their initial asylum claim is allowed or dismissed.

Age is also relevant to the exercise of the Secretary of State's powers to detain and remove persons subject to immigration control. The Secretary of State's policy is not to detain, save in exceptional circumstances, or 'fast-track' a child's claim.

The Secretary of State's powers to deal with age-disputed children are now further underpinned by the specific safeguarding children's welfare duty under s55 of the Borders, Citizenship and Immigration Act 2009, which came into force in November 2009. It imposes on the Secretary of State the equivalent duty owed by other public authorities including prisons, schools and social services, to place the best interest of the child at the heart of decision-making. In immigration and asylum law, the duty not only applies to safeguarding and promoting the welfare of children whilst their immigration decisions are pending, but also requires the Secretary of State to consider their welfare as a primary factor in the making of any immigration decision relating to children to the standard required by the UN Convention on the Rights of the Child ('UNCRC'): *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. This has meant a significant shift in the Secretary of State's approach to age disputes. A young person is now to be presumed a child and afforded the safeguards of s55 of the Borders, Citizenship and Immigration Act 2009 until their age is properly verified.

In social welfare law, age is the staging post to a young person accessing support and accommodation under the Children Act 1989 from local authority social services departments. There is a range of duties and powers social services can owe a child under the Children Act 1989

irrespective of immigration status. It is inevitable, by virtue of being alone in the United Kingdom with no social networks, support or accommodation, that an unaccompanied asylum seeking child will be a 'child in need' within the meaning of s17(10) of the Children Act 1989. An age-disputed child who is treated as an adult would be precluded from accessing the safeguarding provisions of the Children Act.

How age is determined

There is now a widely accepted assessment process by which most age-disputed cases are resolved. Certainly there will be young people who have documentary evidence which may resolve the dispute over age because the documents are verifiable and authentic. This, however, is likely to be a rare occurrence. Most young people will be subjected to an age assessment, either by the request of the immigration authorities or because the local authority decides to raise a dispute even when the UK Border Agency has accepted a child's age.

There is no statutory underpinning to the age assessment process. In principle either the immigration authorities or the local authority children's services can assess age. In practice, as age assessments are well-recognised to be an imprecise science, the expertise falls squarely within the discipline of social work.

The Secretary of State's policy, set out in *Assessing age*, is to accept an assessment of age carried out by the local authority if it is lawfully conducted in accordance with the guidelines in *R (B) v Merton LBC* [2003] EWHC 1689.

Legal framework: general principles for dealing with age disputes

Age as a fact precedent

Although the Supreme Court in *A v Croydon* held that the question of age is a precedent fact which ultimately falls to the court to determine, the judgment provided no indication of how the court should approach this task save for stating that this remains within the ambit of judicial review. Whether that will be the case in the future remains to be seen in view of the recent powers granted to the Administrative Court

to transfer age dispute claims to the Upper Tribunal (Immigration and Asylum Chamber) pursuant to s31A, Senior Courts Act 1981.

Whilst the evaluative judgment of the local authority is no longer determinative of age, the Supreme Court has stated that the starting point is still an assessment of the disputed child's age by the public authority, immigration or social services. If a dispute remains between the child and the public authority over age, the challenge should be brought to the judicial review court. Although the Supreme Court considered age as a precedent fact by reference to a challenge to a local authority age assessment, it must be the case that the principle that age is a precedent fact which admits only one answer is binding on the immigration tribunals and the Secretary of State. See *R (H) v Secretary of State for the Home Department and Wigan Metropolitan Borough Council* [2010] EWHC.

In the immigration context, the tribunals and the Secretary of State have long sought to determine the fact of age independent of the judicial review jurisdiction. When the judicial review age dispute jurisdiction was confined to an attack on the *Wednesbury* reasonableness of a local authority age assessment, the findings made by the tribunals proved valuable as they came closest to making a determination of fact of age, which could then be relied on in a judicial review application to attack the rationality of the local authority assessment.

Tribunal determinations of age, however, have seldom been precise. The tribunal is only required, in effect, to make a finding as to whether a young person is an adult or a child and, if a child, an approximation of where they fall in an age range. This is because the primary jurisdiction of the immigration tribunals is not to determine age but to determine the merits of a person's asylum, human rights or humanitarian protection claim, albeit age may, in many cases, be relevant to the asylum claim. It is often sufficient to accept that a young person is a child, not an adult, for the purposes of assessing their claim, or that they are under or over 12 for purposes of interviewing by the UK Border Agency.

The Supreme Court's judgment in *A v Croydon* and the subsequent judgment of *R (F) v Lewisham LBC* [2009] EWHC 3542 (Admin) now demands that age be determined with more precision. It remains to be seen whether the approach existing in the immigration context

can continue subsequent to the *A v Croydon* judgment and the introduction of s55 of the Borders, Citizenship and Immigration Act 2009 safeguarding welfare duty. In the light of the recent developments in the law, there will be more demand for a uniform approach to how age is assessed across jurisdictions to avoid anomalies arising.

How should the local authority determine age?

There is no formalised central government guidance as to how local authorities should conduct age assessments. In *R (FZ) v LB of Croydon* [2011] EWCA Civ 59, the Court of Appeal suggested that this might be something for the government to consider. The UK Border Agency has its own guidance, generated primarily for immigration purposes. In Wales, the government is consulting on a joint social services / UK Border Agency statutory guidance on age assessments but there is no time scale for the rolling out of this protocol which would have otherwise been the first piece of statutory guidance on assessing age.

The difficulties of assessing age have been recognised by social workers, the immigration authorities and the courts alike. The difficulties are compounded when the young person in question is of an ethnicity, culture, education, background and dietary regime that are foreign and unfamiliar to the decision-maker.

In 2003, the London Boroughs of Hillingdon and Croydon developed a protocol, *Practice guidelines for age assessment of young unaccompanied asylum seekers*, in conjunction with various refugee children's charities and local authority practitioners. This protocol recommended a holistic approach to age determination, taking into account the child's demeanour, social, cultural and family background, life experiences and educational history. Medical evidence of age was said to be useful but not determinative, as were the views of other adults with whom the child has had contact, such as foster carers, teachers, residential workers and legal representatives. A pro forma, now the standard form in which age assessments are prepared, was developed with margin notes guiding social workers on the information they ought to be seeking. The pro forma clearly illustrates what it means to carry out a holistic assessment of a disputed child in the course of determining their age.

This approach was judicially approved in *R (B) v Merton LBC*, heard the same year that the Hillingdon–Croydon protocol was finalised.

Collectively, they have become known as the *Merton* guidelines, and an assessment that properly adheres to the guidelines is called a *Merton*-compliant assessment. The *Merton* approach has been approved in subsequent age assessment cases, and most recently in the judgment of the Court of Appeal in *FZ v Croydon*.

That these guidelines have been developed in the context of judicial review and by reference to the tasks that social workers have to undertake as primary assessors of age gives indication of the primacy of the jurisdiction of social work in determining age.

Basic principles in assessing age: the *Merton* guidelines

The *Merton* principles have evolved over the years through litigation. It is important that practitioners understand what *Merton* means. A summary follows.

Procedure

- **Two qualified and properly trained social workers should conduct the age assessment.** See the Court of Appeal in *A v Croydon LBC* [2008] EWCA Civ 1445. The qualifications of social workers can be checked with the register at the General Social Care Council.
- **An appropriate adult should be present.** The child should be offered the opportunity to have an appropriate adult (*FZ v Croydon*). The purpose of an appropriate adult has been set out in clear terms by the Home Office in the context of criminal law.

The appropriate adult's role is:

- i) to ensure that the child understands what is happening to them and why;
- ii) to support, advise and assist the child, including asking for breaks in interviews if the child needs the break either to consult with the appropriate adult or to assist the child to seek legal advice (particularly if the interview is a lengthy one or the child is distressed or ill);
- iii) to observe whether the assessors are acting properly and fairly and to intervene if they are not;
- iv) to assist with communication between the child and the assessors; and
- v) to ensure that the child understands their rights, including the right to seek legal advice before continuing further with any interview, and the appropriate adult's role in protecting the child's rights.

- **The child should be informed of the purpose of the assessment.** Often age assessments are done in the context of a Child in Need assessment under the Children Act 1989. In principle, using this assessment process is not problematic but the child in this context must be told that the assessment is being done for the primary purpose of assessing age.
- **The child should be informed of the consequences of the assessment decision.** This is not only for determination of services by the local authority but also will be relied on by the UK Border Agency for the determination of the asylum claim.
- **Duty to give reasons.** The decision must be based on firm grounds and the reasons for them must be fully set out and explained to the child. The duty to give reasons is not just for the sake of formality but must be based on evidence. Thus consideration should be paid to whether the information gathered in the course of the assessment actually backs up the conclusion on age reached by the assessors.
- **Child-friendly approach.** The approach of the assessors must be professional and sensitive to the young person. Concerns raised in the past about the approach taken to the assessment interview highlight the importance of having an appropriate adult present, who can intervene.
- **Procedural fairness.** The child should be given a fair and proper opportunity to deal with important points adverse to their age case: see the Court of Appeal's judgment in *FZ v Croydon*. Whilst there is no prescriptive way in which the disputed child should be given an opportunity to respond to, rebut or clarify information which may be adversely relied upon to dispute their age, simply asking a series of questions during the course of an interview would be a haphazard way of discharging the duty of fairness and would be intrinsically likely to lead to subsequent controversy in the absence of an expensive transcript of the interview.
- **Burden of proof at assessment stage.** As is affirmed by *Merton* and *FZ*, the disputed child is not to be put in a position where they have to prove their age. The assessment should be a process by which the assessors and the child explore the necessary information to establish age.
- **Benefit of doubt.** The benefit of the doubt should always be given to the unaccompanied asylum seeking child since it is recognised that age assessment is not a scientific process (*A & WK*). There should be no assumption that the child is telling untruths; on the contrary,

there should be an assumption that the child is telling the truth. Where there are doubts or inconsistencies, questions should be put in an open-ended way to explore these doubts.

Substance of assessment

- **Physical appearance:** An assessing social worker is not entitled to simply look at a child and determine they look 18 years old and therefore does not require an assessment of their age, particularly where the child is claiming to be a child (*A & WK*).

The Secretary of State's policy divides unaccompanied asylum seeking minors into three categories:

- 1 Those who are obviously children (whether the age claimed or some years older);
- 2 Those whose physical appearance and demeanour *very strongly* suggest they are *significantly* over the age of 18;
- 3 Those who are borderline (i.e. may be an adult or a child)

The Secretary of State refers all applicants in the third category to the local authority for an age assessment. Some in the first category, although accepted as children by the Secretary of State, may be age-disputed after referral to the local authority.

- **Demeanour** is not determinative of age. See *A & WK* per Collins J: 'What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself.' It can only be relevant in the totality of the evidence before the assessors.
- **Age must be decided on particular facts of particular case:** Questions asked must relate to the determination of age. Although general credibility may be relevant, a history that is accepted as true and is consistent with an age below 18 will enable the decision-maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin.
- **Medical evidence:** It is not determinative, but the local authority is not entitled to ignore a medical report. It adds weight rather than providing conclusive evidence of age.

- **Other expert evidence:** The same principle should apply to expert evidence of a different nature. See further below on ‘How to prove age’.

How should the Secretary of State approach the question of age disputes?

In circumstances where there is no documentary evidence, the Secretary of State’s stated policy is to rely on a local authority age assessment. This however is subject to the *Assessing age* guidance, which requires the Secretary of State to satisfy herself that the local authority assessment is *Merton*-compliant. The following principles are of particular relevance:

- ‘Considerable weight’ is to be given to the findings of age made by local authority social workers, recognising their particular expertise.
- Where the social workers’ assessment is the only source of information about the person’s age, their assessment will normally be accepted as the decisive evidence of the person’s age.
- A full copy of the actual assessment must be obtained to ensure that the age assessment is *Merton*-compliant and could sensibly be relied upon: *A & WK*.
- The disputed child should not be detained or accommodated with adults until age is verified.
- Even where there is documentary evidence or a visa application made in the name of the disputed child giving a different date of birth, that evidence must be considered in the round. See chapter 5 of the Asylum Process Guidance *Assessing age*.

How should the court approach assessments of age?

It is not unusual for a disputed child to have an ongoing asylum appeal running parallel to a judicial review challenge to their age. *A v Croydon* makes clear that the primary jurisdiction for resolving an age dispute is judicial review. This does not and should not ignore the importance of fact findings of age in the immigration context. An immigration judge’s findings on age are not binding *in rem* (i.e. binding on the world) but they are nevertheless important findings.

The question arises as to whether an age dispute judicial review application needs to be resolved before a young person can proceed with their asylum appeal. There is no one right answer.

It will depend on a multitude of factors and importantly on the merits of both the judicial review and the asylum appeal. If the asylum appeal has strong merits and good prospects of succeeding independent of the age dispute, there may be no reason to delay the asylum appeal irrespective of the ongoing dispute over age. Where age features heavily in an appeal which is otherwise weak, there may be reason to wait for the resolution of the age dispute before proceeding with the asylum appeal (or there may not for the same reason).

The approach of the judicial review court

There are no clear guidelines on how age disputes should be resolved in the immigration tribunal context. It is informative to consider the approach of the judicial review courts. Although issues relating to permission in a judicial review may not at first glance seem relevant, the dicta of the courts on the correct judicial approach to assessing evidence on age is informative.

■ Test on permission: *F v Lewisham*

The short point confirmed in *F v Lewisham* is that permission is still relevant in a judicial review claim bringing an age dispute challenge. The test is whether the claim is arguable. The court must ask:

Is there a realistic prospect, or arguable case that at a substantive fact-finding hearing the court will reach a relevant conclusion that the claimant is of a younger age than that assessed by the local authority and if so what age is the claimant?

In applying the permission test, the court must appreciate that the ultimate substantive question will be a pure question of fact. This is not limited to determining whether a person is a child or an adult, but how old the person actually is. To that extent, questions as to *Wednesbury* unreasonableness of a local authority's assessment are subsumed into the substantive question of fact and go to the weight to be placed on the assessment.

■ How to assess arguability at permission stage: *FZ v Croydon*

Whereas *F v Lewisham* confirmed the test of arguability, the Court of Appeal's judgment in *FZ v Croydon* set down how the court should assess arguability. The court must ask:

Does the material before the court raise a factual case which, taken at its highest, could not properly succeed in a contested factual hearing?

If yes, permission should be refused. If not, permission should normally be granted subject to other discretionary factors such as delay.

The phrase 'taken at its highest' suggests the threshold is a low one, and possibly lower than the standard applicable in the immigration tribunals on the merits of an asylum claim.

FZ importantly confirmed the *Merton* guidelines as the correct approach to assessing age. *FZ* also sets out the approach the Court should take as follows:

- i) There is no starting presumption the local authority's decision was correct.
- ii) Burden of proof does not factor into the local authority assessment or the permission stage.
- iii) Fairness of the local authority assessment influences the weight a court can place on the assessment.
- iv) A child should be given a fair and proper opportunity to deal with important points adverse to their age case which may weigh against them.
- v) Whilst social workers will have been able to judge a child's demeanour and general appearance and make a general credibility judgment from the manner in which they answered their questions, it does not follow that the court is bound to make the same judgments.
- vi) General credibility, judged by others, is not alone sufficient for the court to determine that the child has no case to support their claimed age.

FZ v Croydon highlights that the judicial role in age dispute cases is to ascertain the facts and form a view of age, which may or may not agree with either of the ages offered by the disputed child or the local authority.

A similar approach should be adopted at the substantive stage, see *MC v Liverpool City Council* [2010] EWHC 2211 (Admin) where it was held that the process of determining age is an assessment of all the evidence before the fact-finder (the court). It is open to the court to arrive at a conclusion within the range marked by the two alternatives put forward by the child and the local authority (or possibly outside that range). This approach was also correctly adopted in *A v Camden LBC* [2010] EWHC 2882 (Admin).

In assuming its inquisitorial fact-finding role in an age dispute, the court should afford the disputed child the benefit of the doubt both at the start and the end of the process. This is not the same as imposing a burden of proof on either party. See *R (CJ) v Cardiff County Council* [2011] EWHC 23 (Admin) which held that there are cases which are in the 'grey middle range of 17–19 with the crucial age falling in the middle. Giving the benefit of the doubt to such a Claimant wisely reflects the uncertain nature of age assessment. But that is not the issue here.'

■ **Burden of proof at substantive stage: *CJ v Cardiff***

In the post-*A v Croydon* jurisdiction, *CJ v Cardiff* is the first case to deal substantively with the question of burden of proof at the substantive stage. The question was considered in *Merton* in the context of conventional judicial review principles and Stanley Burnton J held that concepts of onus of proof were not helpful to resolving age disputes. Post-*A v Croydon*, the question of burden was canvassed first in *F v Lewisham*. That debate, however, centred around the evidential burden, not necessarily the legal burden. In subsequent substantive age trials, the burden of proof was raised again, but the trial judges found it unnecessary to make a determination as to where the burden lies as the conclusion appeared clear to the judge.

The issue was finally considered in a substantive way in *CJ v Cardiff*. Context is important to understand the judgment. The dispute over age in *CJ* related to a five year gulf. That is a significantly larger gap than the dispute in *MC* and *A v Camden* and in *A v Croydon* and *FZ v Croydon*. The determination of *CJ* turned almost entirely on the claimant's credibility and the reliability of the documents he produced and that 'it is not a case of ignorance, uncertainty or forgetfulness where a fine line divides the parties'.

The inquisitorial approach of ascertaining age taken in *MC* was approved. However, the trial judge found that the basis for the age assessment

decisions was frail. The judge also found the claimant incredible. It was in this context that the burden of proof became a significant issue. The judgment in *CJ* held that the claimant ultimately bore the burden of proof to prove *his* age for three reasons:

- 1 Age dispute challenges are brought by way of judicial review. In this jurisdiction the burden is on the claimant to show a breach of duty on the part of the local authority.
- 2 He who seeks to benefit from a duty must show that the duty is owed. In an age dispute claim, it is the claimant child who is asserting a duty is owed as against the local authority, thus the child has the onus to prove his case.
- 3 The readier means of knowledge as to age lies with the claimant child.

Whether this is the correct analysis remains to be seen, as an application for leave to appeal has been made in respect of this point on the burden of proof in *CJ*.

It may be said that the effect of *CJ* is to wrongly constrain the role of the court as the fact finder in age dispute claims. It means that where one party fails to discharge the burden of proof satisfactorily, the only alternative for the court is to accept the age proposed by the other party. That appears inconsistent with the approach in *MC* that the court as a fact finder ascertains for itself the conclusion as to a person's age which may be one of three answers: the answer provided by the claimant, the answer provided by the local authority or some other answer either within or outside that range.

Further, to determine the burden of proof by reference to the ordinary rule in the forum where it is litigated may seem to be inappropriate in view of the fundamental shift in how courts are to approach age dispute claims post-*A v Croydon*. To do so is to misunderstand the nature of age dispute claims. The determination of the precedent fact of age is not purely for the purpose of identifying a particular local authority function (whether a power or duty).

As stated in *NA v Croydon*, the precedent fact of age has significant implications on a wide range of aspects of social life and on the determination of a broad range of duties and powers which may be owed by other public bodies (which themselves may not be subject to the judicial review proceedings). That claims can now be transferred to the Upper Tribunal indicates recognition that this is a class of cases requiring specialist tribunal attention.

The evidence as to age also cannot lie entirely with the child. The dispute over age arises in the first place because the child has no proof of age accepted in the UK. In the course of ascertaining age, the fact-finder, whether the local authority or the court, has to consider all further relevant matters such as the child's physical appearance, demeanour and the expert evidence that the parties adduce, such as medical, psychological and social work opinion. This is the holistic approach required by the *Merton* guidelines.

The right of the child to have age determined correctly

The importance of affording the disputed child the benefit of doubt is underpinned by the child's right to his identity under Article 8 of the UN Convention on the Rights of the Child (CRC):

- 1 States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
- 2 Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

An erroneous determination of that characteristic by a public authority would arguably deprive the child of a fundamental aspect of their identity. That the CRC is applicable to the decisions made in respect of children within the UK has now been confirmed by the Supreme Court in *ZH (Tanzania)*. ► See chapters 1 and 2.

See also Article 8 of the European Convention on Human Rights (ECHR), age being arguably a characteristic of identity which forms part of a person's private life. In the context of a child who is belatedly age-disputed when at first accepted to be a child, consideration would have to be given to whether the interference by way of an age dispute and a subsequent (and unlawful) assessment of the child's age constitutes justifiable interference in view of the serious consequences of an age dispute on a child's immigration status and access to suitable education and welfare support.

How to prove age

Not all young people come from cultures and countries of origin where dates and months and years have the same significance as they do in the UK. Passage of time may be measured in different ways, by seasons, by a different calendar, by the movements of the sun and moon, to give a few examples. Most young people will also have no documents to prove their age. To add to this, most age-disputed young people will have experienced a difficult and traumatic journey to get to the UK as well as difficulties in their country of origin resulting in mental trauma, which is often undiagnosed until much later. Some children may present as obviously vulnerable whilst others will portray a lot of resilience and will find it hard to engage with professionals.

Asking the right questions

Teasing out information from a young person is not always an easy task. They do not often understand or know what is or is not relevant information to recount for the purposes of proving age. Young people may also fear authority figures and/or seek to please adults and say what they think they want to hear. Thus, the basic 'who what, when, where, how and why' questioning is crucial to drawing out all the relevant information around age.

Whereas for immigration purposes the focus is on the young person's account of persecution, the reasons they say they have been persecuted and consideration of what risks, if any, they may face if returned to their country of origin, the dispute over age centres on the question of whether the young person can establish a plausible time line of their life to show the probability of their claimed chronological age. This is all the more important when the young person's explanation of their knowledge of age is simply 'my mother told me so', which is not sufficient to prove age.

Assumptions should not be made as to how a child goes about marking time. Days, months and years may be foreign concepts; many will never have used a calendar before. Those who come from Afghanistan or Iran may be familiar with the calendars in use there but they do not always translate directly to the Gregorian calendar. Mistakes can be made in the conversion of dates.

Other concepts such as schooling, primary, secondary, further education, may also be foreign concepts because the education system is different or because the young people come from remote/rural areas where access to education is limited or not available at all.

However, young people may recognise other markers of time. For example:

- Seasons would be of relevance to someone from a farming background.
- Those from Muslim countries may recognise the Muslim festival of Eid which helps mark time, although it is important to note that there are two Eids in a given year.
- Those from Iran or Afghanistan might celebrate the New Year which normally falls in March.
- Some might mark the passing of the weeks from one Friday to the next, Friday being the weekly day of congregational prayer, if they are practising Muslims.
- Equally they may also be aware of the practice of fasting during Ramadan. Whether they had started fasting before leaving their country of origin to come to the UK may be a useful marker of their age. Some may have started fasting but not for the whole of Ramadan because they were too young to do so. That again gives an indicator of where they fall in the age range.
- It is important to understand the different calendars so a certain degree of country background/cultural knowledge is necessary to elicit this information.

Many young people might have been instructed by the agents who brought them to the UK not to reveal details about their journey or their life to the authorities here and have no appreciation of the distinction between local authorities and the UK Border Agency. This may cause particular difficulty to those professionals dealing with a young person's asylum claim if the evidence given about their country of origin is inconsistent. This should not affect the process of challenging an age assessment.

The task practitioners embark on is not dissimilar to the task social workers are expected to undertake in a *Merton*-compliant assessment. Consideration should be paid to the headings set out in the pro forma.

Documentary evidence

Whilst it is not unusual for young people not to have any documents when they first arrive in the UK, it is important to explore with them what documents can be obtained from family members who may still be in their country of origin which may assist in establishing their date of birth. Documentary evidence may in certain circumstances be determinative of age: see The Court of Appeal in *SA (Kuwait) v Secretary of State for the Home Department* [2009] EWCA Civ 1157. This is, however, only the case if the documentary evidence can be shown to be authentic and the provenance of the document does not raise issues as to whether it can be linked to the young person.

For some countries of origin, there will already be a body of objective evidence addressing the authenticity of documentary evidence issued in those countries and documents, such as Afghan Taskeras, should be considered in the light of such objective evidence.

Vaccination records are a source illustrating early childhood development and often record dates of birth. This was the case in *FZ*. These are unlikely to be determinative of age because they are not documents issued for the purpose of proving age. They are medical documents. However, if authenticated, the information contained in the vaccination records may provide a genuine time line positively consistent with a young person's claimed age.

It would almost always be necessary to consult an expert on the authenticity of documents. In reality it is unlikely that documentary evidence will be conclusively determinative of the factual dispute over age. However, it can feature as a weighty and important piece of evidence going to the determination of age.

Mental health concerns

Concerns may emerge as to the young person's mental well-being which may affect the young person's ability to recount their past and details of dates, events and the passage of time, all of which provide an indication of age. Consideration needs to be paid to different types of evidence which can assist in the determination of age that is not necessarily confined to the memory of the young person.

Experts' evidence

The role of experts in age dispute claims has been the subject of much consideration by the courts. Although there is nothing requiring that expert evidence be produced to resolve an age dispute, the evidence will often strengthen the evidence proving age.

Experts will need to be aware of the duties owed to the court under the Civil Procedure Rules Part 35. They will need to be told they may need to give live evidence. Where there are parallel asylum appeal and judicial review proceedings, and the young person is separately represented by immigration and community care solicitors, consideration should be paid as to whether there should be joint instructions. From a pure cost point of view, this may also be argued to be a more efficient use of public funds.

Social workers' reports

Evidence from independent social workers can be crucial to arriving at a *Merton*-compliant assessment in circumstances where there is disagreement with the local authority's assessment.

There has been no judicial determination on the use of such expert reports. What must be borne in mind is if the purpose is to obtain a *Merton* assessment via independent experts, then the basic principles of the *Merton* process must be followed by the independent experts. This would inevitably mean instructing two social workers to carry out the assessment, rather than one.

This also means there may be a necessity for a second meeting, because clarifications need to be sought with the young person following a first meeting, in order for the experts to finalise their view and their reasons for arriving at their assessment of the young person's age.

As is required by *Merton*, the independent social workers should be asked to seek other sources of information insofar as is necessary, such as the examples suggested below under the heading 'Other sources of information'.

Whether independent social workers are 'experts' within the meaning of the Civil Procedure Rules Part 35 remains to be seen, given what they are asked to produce is a *Merton*-compliant age assessment much in the same way that local authority assessors are expected to produce.

If local authority assessors are not expected to be bound by Part 35, why should an independent social worker necessarily be so bound? They are arguably assessors of facts which lead to a determination of the fact of age.

Paediatricians' reports

Paediatrician reports have been a common feature in age dispute challenges. The reliability of such reports has been scrutinised by the Court: see *A & WK*. Although the methodology of using statistics to assess age has been questioned, the court held that paediatricians' reports cannot be dismissed by the local authority or the Secretary of State and should form a part of the evidence going to establishing the young person's age, on the balance of probabilities.

A & WK was decided before the Supreme Court's decision in *A v Croydon*. There has not yet been an age dispute claim where the court heard live evidence from paediatricians to assess the methodology. In *A v Camden*, the trial judge considered medical evidence on the papers and repeated criticisms of such expert evidence. Some care must therefore be taken in respect of reliance on paediatricians' reports. That said, paediatricians' reports can contain important information about physical development of a child which over time can illustrate a child perhaps going to puberty in such a way as to place him or her squarely under 18.

The criticisms in *A & WK* and in *A v Camden* have been confined to judicial review challenges to age disputes. In the immigration tribunals, medical evidence has sometimes been preferred to the local authority's age assessment, often because the local authority's assessment does not appear to be *Merton*-compliant. In the absence of other objective evidence, the medical evidence features prominently and attractively as positively supportive of claimed age. Practitioners should nevertheless be aware of the critique of medical evidence in the judicial review context.

Dental reports

The use of dental reports has been heavily criticised by the Royal College of Paediatrics, the Royal College of Radiologists and the British Dental Association.

In brief, the concerns relate to:

- Wide margin of error: ranging from +/- 2 years to +/- 4.5 years.
- Not a holistic assessment: There is unlikely to be reliable data available about dental development from the countries of origin of the young person whose age is being disputed. The reference point for comparison and determination of age is notoriously unreliable and is unlikely to have taken account of cultural, racial or socio-economic factors which may affect nutrition, quality of medical care and dental development.
- Ethics: Clear concerns have been raised by medical professional bodies as to the ethics of obtaining x-rays for non-medical purposes.

If a public authority proposes to obtain a dental x-ray for the purposes of age estimation for a young person, the young person can be advised that they are entitled to refuse to give consent to an x-ray which has no therapeutic/medical benefit. If a dental assessment has already been done or the young person has given consent (mistakenly or otherwise), objections may be more appropriately directed to an attack on the reliability of such evidence for the purposes of assessing age.

Psychological and psychiatric reports

A young person's mental well-being may have an impact on their ability to recollect information or their ability to explain certain events with precision. This may form a basis for adverse credibility findings if no plausible explanation for the lack of recollection can be provided. In these circumstances, a child/adolescent psychiatric or psychological report may be appropriate.

Educational psychology reports

Difficulties to recollect could relate not necessarily to trauma but to possible special educational needs. Depending on what the needs are, they may impair a young person's general ability to retain and process information, analyse and recollect memories. A local authority's criticisms of the young person's credibility owing to their lack of recall may be explained by an understanding of the young person's special educational needs. Such expert evidence will also be useful in considering the extent to which a young person ought to be giving live evidence in either their asylum appeal or in a substantive fact-finding of their age.

Other sources of information

In the absence of documentary evidence, or even in the face of inconclusive documentary evidence, it will be useful to seek out other sources of information to assist in establishing a young person's claimed age. Professionals who have had long involvement with the young person may provide insight into the young person's behaviour and demeanour which, whilst not determinative, may inform where within the age range of young people the particular young person falls.

- **Teachers/tutors:** Although a teacher is not an expert on assessing age *per se* and emotional maturity or immaturity does not always causally link to chronological age, the observations made by a teacher are often valuable because they will have viewed the young person from an educational perspective without the baggage of being a gate keeper of social welfare resources which an assessor of age may have to be.
- **School/college records:** If the claimed date of birth is recorded on the school records and/or a decision is taken to place the young person in the year group of their claimed age, this may arguably illustrate that the local authority had, at least at some point in their dealings with the young person, believed their age. School records will also contain personal educational plans and reviews thereof as well as possible comments from teachers on annual review reports which can support an overall picture of a young person who presents in a manner which is consistent with their claimed age.
- **Key workers/foster carers:** They will have first hand and detailed knowledge of the young person's interaction with other young people and have views of the young person's self-care skills and maturity. However, often key workers and foster carers are on the pay roll of the local authority and will be hesitant to get involved. It may be worth having an off-record conversation with the worker/ foster carer. Where the worker/ foster carer's evidence is strong, consideration would have to be paid to whether they should give evidence on behalf of the young person.
- **Other professionals** such as pastors, charity support workers or GPs (not including expert medical experts) should also be considered.

- **Social services records:** Depending on which stage of the process the young person is at when referred for legal advice on the age dispute, if there is already existing age assessments, it will be useful and almost always essential to obtain the handwritten notes of the social workers who carried out the assessment. More often than not, the handwritten notes may disclose inconsistencies between the assessors on what the young person said, clarify inconsistencies relied upon by the assessors as to what a young person said or did not say and/or reveal information told by the young person to the assessors during the course of the assessment which is crucial to the determination of age but which is not included in the typed report produced by the local authority.

Full disclosure of the social services records will be particularly important in cases where the age-disputed young person had been in care for some time and had only had their age belatedly disputed. The records may shed light on how the dispute arose and whether it was reasonable for a dispute as to age to arise. The records often reveal that there was no concern about the young person's age for a significant period of time before the age assessment was done. This may form a basis for running a pure public law challenge as to whether there was a rational basis for the local authority to have undertaken an assessment of age, after all, age assessments are not a statutory creature and there is no mandatory duty to undertake an age assessment to determine the right to services under the Children Act 1989. The corollary is that the exercise of any public law discretion to conduct an age assessment must be based on good reason to so do.

- **Medical records:** It is useful to check such records to see if they shed light on any health problems and whether these might have affected any ability to give information to the local authority during the age assessment.

How to challenge age

Irrespective of whether there is an ongoing asylum appeal, it is difficult to imagine a situation where a challenge should not be brought by way of judicial review to resolve the age dispute. This is because a determination by the immigration tribunal on the fact of age cannot bind *in rem*. Thus even if a positive finding is gained from the tribunal as to age, that is insufficient to compel social services and other public authorities to accept the finding of age by the tribunals.

Judicial review is the primary jurisdiction for a finding of fact of age. This was first set out in *A v Croydon* and now affirmed in *R (PM) v Hertfordshire CC [2010] EWHC 2056*. There the local authority refused to carry out an assessment of age in the light of an adverse finding of age by the First-Tier Tribunal, arguing that the First-Tier Tribunal's finding of fact of age is binding *in rem* and the local authority has no power to disregard its finding. In a careful judgment considering the nature and scope of the jurisdiction of the First-Tier Immigration Tribunal, Hickinbottom J held that the primary jurisdiction of the First-Tier Tribunal is to determine the merits of an immigration decision and not age. Thus although a judicial determination on age is capable of being a precedent fact binding on the world, the First-Tier Tribunal did not have that jurisdiction.

As already stated, this does not mean that the jurisdiction of the immigration tribunal is irrelevant. It remains to be seen how the First-Tier Tribunal will now approach the precedent fact of age. Detailed research carried out in *Seeking asylum alone* (November 2006) looked at the experiences of unaccompanied minors in the tribunals and found inconsistencies in the approach at the tribunal to resolving age disputes and lack of reference to the *Merton* guidelines in the tribunals' consideration of age disputes. Since that research, the UK Border Agency's guidance *Assessing age* and s55 of the Borders, Citizenship and Immigration Act 2009 have come into the fold. Anecdotally, age disputes have become a more familiar part of the tribunals' consideration now as practitioners have persistently raised issues of age in the course of the asylum appeal process.

The fact-finding jurisdiction in judicial review has developed robustly since the judgment of *A v Croydon* and the approach of the Court is useful to inform how tribunals might wish to approach fact-finding of age.

Bringing a judicial review challenge to age

What kind of challenge?

That the question of age is ultimately a purely factual question does not mean that in every age dispute claim a substantive fact-finding hearing is necessary. As it is a judicial review jurisdiction, public law challenges to the perversity and illegality of the local authority's decision or the Secretary of State's decision in respect of age can be and will still remain relevant.

To give an example, there will be cases where the young person has been looked after by the local authority for a long period of time and the local authority decides belatedly to dispute the young person's age and carry out an age assessment. There may be good reason to dispute age because of concerns raised by professionals (such as foster carers, key workers, teachers, allocated social workers). Documents may have emerged showing a different date of birth from that claimed. These may be a justifiable basis for an age dispute. However, there will be occasions when the dispute arises out of no clear rational basis. In those circumstances a conventional judicial review challenge can be brought in conjunction with or instead of a fact-finding hearing.

If fresh evidence has emerged to support the claimed age but has not been submitted to the local authority, depending on the strength of the new evidence, the remedy sought might be a request for a re-assessment of age or for an outright acceptance of age. In respect of the former remedy (a re-assessment), the refusal to re-assess in the light of fresh evidence may give rise to a conventional public law challenge in circumstances where a view is taken that it is unclear whether the available evidence in support of the young person's age would meet the permission threshold set out in *F v Lewisham* and *FZ v Croydon*.

Judicial review time limits

The judicial review three-month time limit is applicable to age dispute challenges.

In conventional judicial review terms, time runs from the date of the decision, not the date on which the young person is informed of the decision (*R v Secretary of State for Transport ex parte Presvac Engineering Ltd* [1992] 4 Admin LR 121). There is often the difficult question as to when the decision was made and whether the age dispute can be seen as an ongoing decision. Arguably, if the decision is not a final one, i.e. not procedurally fair or not communicated to the young person, time could be said to have not truly started running. This may be the position where the young person has no knowledge of their age being disputed or where the young person has not been properly advised of their right to challenge the age assessment. If time limits serve to prevent a young person to have their age determined, query whether that amounts to a breach of their rights to their

identity under Article 8 CRC. This would arise most frequently in circumstances where young people are age-assessed on arrival and dispersed to NASS accommodation. It may then be many months or even a year or two before they are referred for legal advice.

Grounds of challenge

That age is a precedent fact does not mean that the propriety and rationality of the local authority's assessment of age should not be challenged. The local authority's assessment of age is an important piece of evidence in the substantive fact-finding before the court on age. A successful challenge will require the young person to undermine the weight that can be placed on the local authority's age assessment on conventional judicial review grounds such as:

- Was there a rational basis for disputing the young person's age?
- Was it conducted in a procedurally fair manner?
- Was there an appropriate adult present?
- Were there two qualified social workers?
- Did having two qualified social workers make a material difference to the quality of the assessment process?
- Was there a proper interpreter? Or a telephone interpreter? Did the interpreter speak the correct dialect of the language that the young person spoke?
- Were inconsistencies properly put to the young person?
- Was information sought from other sources? Was that information sourced properly? What evidence can be shown as to the further inquiries? Is that recorded in social services/education records?
- What other sources information ought to have been solicited by the assessors?
- Did the assessors fail to have regard to material relevant information and place too much weight or any weight on irrelevant information?
- Was it *Merton*-compliant both in the procedural and substantive way?
- Does the information gathered in the age assessment provide a rational basis for the assessors' conclusion as to the young person's age?

Burden of proof

At April 2011, *CJ v Cardiff* is being appealed as discussed above. Until the determination, where the burden of proof lies in age dispute challenges is under review.

Permission

Permission stage remains an important filter for age dispute challenges. Rolled-up hearings are not encouraged. However, there will be circumstances in age dispute challenges where a rolled-up hearing may be necessary particularly where the determination of the fact of age is required for urgent access to services, preventing removal, detention, for example. This will be fact-dependent.

Trial

Preparing a substantive fact-finding hearing on age is a long process. The approach is akin to the preparation for a civil trial. Consideration needs to be given to the following issues, which are applicable to judicial review and immigration appeals:

- **Witnesses for the claimant:** If evidence has been sought from other professionals, the young person may wish to call these professionals to give evidence on their behalf. It may also be the case that the defendant local authority will wish to call these professionals to be cross-examined. In these circumstances, it will be necessary to prepare a witness statement in respect of each of these professionals. They will need to have explained to them the possibility of having to be called to give evidence and what that will entail.
- **Witnesses for the defendant:** The assessors will be obvious witnesses particularly as a central feature of the age trial will be a critique of the assessment of age carried out by the local authority. A decision will need to be made as to whether both assessors or just one should be called. This applies both in the judicial review and immigration context.

In circumstances where there is more than one age assessment in evidence, consideration needs to be paid to whether the earlier assessments have been withdrawn. If so, there will be no need to call the assessors in those assessments and indeed it may be wise to avoid doing so. Live evidence is difficult to predict thus judgments will need to be made as to how much live evidence should be called and that will be dependent on the quality of the paper evidence before the court.

- **Expert witnesses:** The Civil Procedure Rules provide generally that expert evidence should be dealt with on the papers. However as the experts giving paper evidence in age dispute cases will be addressing the direct question as to age, it will be the normal course that the parties will want to call the experts to give evidence. There is nothing preventing the parties from suggesting an experts' meeting in advance so that certain aspects can be agreed, if possible. That could be useful in limiting the evidence that is required from the experts.

Should the claimant give evidence?

The central issue of the age dispute is: how old is this young person? In circumstances where on the young person's claimed age, by the time of the trial the young person is an adult, subject to any concerns as to their vulnerabilities, it would be the normal course to call the young person to give live evidence: *F v Lewisham*. That said, each case should be considered its facts as to whether the young person should give evidence at all.

It is informative to consider existing legal guidelines for children giving evidence in other domestic court and tribunal jurisdictions.

The practice direction for First-Tier and Upper Tribunal (Asylum and Immigration Chamber): Child, vulnerable adult and sensitive witnesses issued by Carnwath LJ pursuant to the Tribunals, Courts and Enforcement Act 2007, cautions against necessarily requiring a child to give oral evidence at an asylum appeal hearing unless 'the tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so'.

This practice direction is informative in view of the new powers to transfer age disputes from the High Court to the Upper Tribunal (Immigration and Asylum Chambers). Thus the guidelines set down by Carnwath LJ are highly relevant and should arguably be applicable to age trials currently ongoing in the High Court so as to avoid any anomaly in the approach of the courts in the *A v Croydon* fact-finding jurisdiction to the ascertaining of live evidence.

Further, the test on children giving evidence was recently set out by the Supreme Court in *Re W (Children) (Abuse: Oral Evidence)* [2010] 1 FLR 1485. Whilst it was held that the presumption against a child giving evidence was irreconcilable with Article 6 of the ECHR, the Supreme Court set out the correct test for whether oral evidence

should be called from a child or whether justice could be done to all parties without further questioning of the child.

In weighing the advantages of the child's evidence to the fair and accurate determination of the case, the Supreme Court outlined the following relevant factors:

- issues in the case;
- quality of other evidence;
- nature of the challenge to the child's evidence;
- whether because of the quality of the evidence already available to the court there would be nothing useful to be gained from the child's oral evidence. (The court is unlikely to be helped by generalised accusations or fishing expeditions, whereas focused questions that put forward a different explanation for certain events might help the court to do justice);
- age and maturity of the child;
- length of time since the events in question.

Against this are the risks of harm to the child of giving evidence (a topic which does not require expert evidence).

Relevant factors include:

- age/maturity of child;
- length of time since the events in question;
- support/lack thereof available to the child;
- child's own wishes and feelings about giving evidence;
- risk of further delay;
- views of child's guardian.

In striking this balance, the court should factor in steps which could be taken both to improve the quality of the child's evidence and to decrease the risk of harm to the child. This approach is underpinned by the CRC.

The question as to whether the claimant should give live evidence at all was considered recently in *YA v LB of Hillingdon* [2011] EWHC 744 (Admin). It was noted that the young person's background was as a trafficked victim, an aspect of her claim which was accepted by the local authority. However applying the considerations set out above on the giving of live evidence, the court nevertheless held that it would be necessary for the young person to give live evidence.

In so deciding, the court took on board concerns raised on behalf of the young person as to her major depressive disorder arising out of being trafficked and trauma that may be caused by giving live evidence as suggested by a chartered clinical psychologist. The court took judicial notice of how her vulnerabilities might affect her ability to recollect in live evidence and how little inference can be drawn from the omissions or inconsistencies in her evidence.

Are there special measures which can be sought?

In *YA*, although the court directed that the young person was required to give live evidence, it considered special measures which could be put in place to ensure that the quality of her evidence was not compromised by her vulnerabilities.

The concept of special measures for vulnerable witnesses, including children, is well-established in other court jurisdictions. In the criminal courts, the safeguard is specifically provided for in primary legislation (see ss23–46 of the Youth Justice and Criminal Evidence Act 1999).

Last year, in the Upper Tribunal (Asylum and Immigration Chamber), the 'Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance' ('Joint Presidential Guidance') was issued to address the specific issue of children giving evidence.

The guidance is in particular informative and persuasive in view of the recent First-Tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI/2010/2655) which now permits the transfer of age dispute claims from the Administrative Court to the Upper Tribunal. If a trial on age is transferred, the Joint Presidential Guidance applies and specific consideration will need to be given to the necessity for a child or vulnerable adult to give live evidence when there is a wealth of written evidence already before the tribunal.

Such measures are also consistent with the CRC, Article 3 (best interests of the child) and Article 12 (child's right to be heard).

Suggested special measures accepted in *YA v Hillingdon* include the following:

- Removal of gowns by the trial judge and counsel for the claimant and the defendant;
- Removal of bands and wigs by counsel for the claimant and the defendant;

- Exclusion of members of the public from the trial when the claimant gives evidence;
- Restriction on the number of people present in the courtroom when the claimant gives evidence to the trial judge. Only the following should be present: counsel for the parties, no more than two solicitors for each party, the court clerk, the stenographer, the court usher, the claimant's appropriate adult and the two social workers employed by the defendant who carried out the age assessment under challenge;
- Insofar as is reasonably practicable in the court room allocated, informal seating arrangements shall be made for when the claimant gives evidence;
- It will not be necessary for counsel to stand when questions are put to the claimant or when addressing the judge;
- The trial judge will be referred to as 'Judge' when being addressed;
- Close attention will be paid to how the claimant is coping with giving evidence and consideration will be given to breaks with such regularity and length as appropriate;
- If the trial judge discerns that the claimant is becoming distressed, he or she shall inquire as sensitively as he or she can whether they mind answering the question and if it is decided that they are not willing to continue, they will not be required to do so. However this will affect the weight which can be placed on their evidence;
- Questions should be asked of the claimant in a non-confrontational way.

Should the claim be transferred to the Upper Tribunal?

The Upper Tribunal's judicial review jurisdiction is governed by s15 of the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act'). As to the power to transfer claims for judicial review from the Administrative Court to the Upper Tribunal, this is governed by s31A of the Senior Courts Act 1981, as inserted by s19 of the 2007 Act. By the First-Tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI/2010/2655) (in force from 26 November 2010), claims raising an age dispute can be transferred to the Upper Tribunal (Immigration and Asylum Chamber). This is subject to s31A(7) of the Senior Courts Act 1981, i.e. that a case cannot be transferred if it calls into question an immigration decision. It is understood that currently, where a claim has been made in the Administrative Court and transfer is directed, the claimant has 14 days to make representations as to why a transfer should not be made.

That age disputes can now be transferred, and seem to be transferred as a matter of course to the Upper Tribunal does give rise to an interesting question as to how the two distinct jurisdictions of immigration and community care have found themselves overlapping in an even more intimate way.

This undoubtedly will give rise to questions as to how an Upper Tribunal might deal simultaneously with an appeal from the First-Tier Tribunal raising an age dispute alongside a judicial review on a substantive fact-finding in respect of a single applicant. It remains to be seen how well the transfer powers will work in the Upper Tribunal.

Asylum appeal v judicial review

Whether a judicial review should run its course first before an asylum appeal is determined is a difficult judgment call. It will be dependent upon the evidence available and the evidence which can be sought in any given case coupled with a careful analysis of the merits of the asylum claim and the age claim.

Some reasons why a stay of the asylum appeal is inappropriate

- The child is being 'aged out' for immigration purposes, thus losing the procedural rights and safeguards awarded to children in the asylum determination process.
- The merits of an asylum appeal are strong irrespective of the age dispute. A positive immigration determination relating to age is a judicial finding on age which can lend weight to support a judicial review claim on age.
- The young person may not wish to adjourn his or her appeal pending the outcome of a judicial review although it has to be explained to him or her that the effect of *PM v Hertfordshire* may mean that he or she will still have to have a trial on age in the High Court as the UK Border Agency will want a specific date of birth on the status document if granted status. Social services may also not accept the tribunal's finding on age.

Some reasons why a stay would be appropriate

- Where there is little or no evidence to corroborate the young person's case, it may well be difficult to persuade an immigration judge that the young person's evidence should be preferred over a local authority age assessment. A negative finding on age might affect the credibility of the child in other respects.
- Many immigration judges may be reluctant to deviate from the age assessment, if it has not been formally challenged by way of judicial review.
- Having the case heard in the tribunal may open up the opportunity for the UK Border Agency and/or the immigration judge to make negative findings on credibility using the local authority age assessment.
- Unlike a fact finding trial in the High Court, a number of local authorities will not attend tribunal hearings to accompany a child and/or give evidence.
- The current circumstances of the child or young person may well dictate whether a judicial review or an appeal will be necessary. If the child is homeless and/or unable to access the relevant support and services that they need, then a judicial review will be necessary against the local authority's decision to dispute age and failure to provide services.

Facts to consider on whether to adjourn a tribunal appeal

- At what stage is the judicial review application? Pre-action? Permission or has a trial date been listed?
- If there is no judicial review yet, should there be one?
- If the judicial review is only at a pre-action stage, is the full age assessment available to the appellant child?
- Is expert evidence needed? Have experts been instructed? What is the time scale?
- Is injunctive relief needed? Can that be dealt with in the tribunal or the judicial review?

Even if an adjournment application fails, practitioners may wish to ask for age to be dealt with as a preliminary issue. Directions may be sought for disclosure of the social services records and for the social workers to attend to give evidence.

**Burden of proof in refugee claims:
'reasonable degree of likelihood' that the child is a child**

The burden of proof is different in an asylum appeal than in a judicial review. The standard of proof is also lower than the normal civil standard of proof.

Whether the issue of age necessarily should fall to the appellant child in an asylum appeal to prove remains debatable, particularly as judicial review case law illustrates by and large that the concept of a burden of proof is not helpful for resolving age, save for in situations like *CJ* where there is a large gulf between the age claimed and age assessed. Nothing may turn on any debate as to the burden of proof applicable to age disputes in the asylum context, as what the immigration judge is in fact being asked to do is make a finding on risk under the Refugee Convention. Age as a finding of fact in that context is only necessary to the extent that it goes to risk. To that extent, the immigration judge can be asked to make a finding on age as part of the 'risk assessment' and to the standard applied to all risk factors under the Refugee Convention, which is the reasonable degree of likelihood.

The shortcomings of the assessment, the weight to be given to it, the failure of the UK Border Agency to follow its own policy and any additional supporting evidence could persuade an immigration judge to find there is a reasonable degree of likelihood that the client is the age that they say they are, especially since it has been well documented that age assessment is not an exact science.

More tricky is whether the introduction of the s55 of the Borders, Citizenship and Immigration Act 2009 duty and the judgment of the Supreme Court in *A v Croydon* now mean that the tribunal ought to make a finding of age akin to the High Court's precedent-fact jurisdiction. In the context of detained fast track, the argument that the precedent-fact jurisdiction should apply may be a good basis for finding that age dispute cases are in fact not suitable for the fast track. This issue is currently being considered by the Court of Appeal (as at April 2011).

Ancillary matters to age disputes

Many issues arise from age disputes. This section considers four which are significant. Each merits its own paper, thus this section only attempts to raise awareness of the issues.

Support and accommodation under the Children Act 1989

If a young person is a child, a whole host of duties are owed to them by the local authority under the Children Act 1989. The duty to provide accommodation under s20 of the Children Act 1989 is mandatory where the criteria are met. A lone asylum seeking child would inevitably be eligible for accommodation.

Children under the age of 16 are normally placed in foster care; 16- and 17 year olds are usually placed in supported accommodation. The difficulty arises when the local authority disputes that a child is under 16, and has assessed him or her to be two years older. In those circumstances, more often than not the young person is placed in semi-independent accommodation with limited floating support, expected to know how to live independently when in fact they are not able to do so either because of their youth or because they have never done so and simply do not have the skills to do so.

Determination of the support to provide to a young person must not be based on any standard policy that the local authority has but on an assessment of the young person's needs. Thus a challenge can be brought to the suitability of the support and accommodation even though there is an age dispute ongoing.

NASS v Children Act 1989

Those who have been assessed out of Children Act services will be dispersed to NASS accommodation. Often they will have been dispersed before a challenge can be launched against the local authority disputing the young person's age. In circumstances where an age dispute arises after dispersal, practitioners may wish to liaise with NASS and the local authority in the area where the NASS accommodation is located to ask for a fresh assessment of age to be carried out. Any refusal may give rise to a public law challenge if there is good evidence supporting the claimed age or good evidence a previous age assessment was perverse/flawed. Consideration will need to be paid to whether a challenge should be brought to the previous age assessment.

This will depend on factors such as time limits, or whether that assessment is being relied upon by other agencies such as the present local authority or UK Border Agency as well as the wishes and feelings of the young person.

Education

Where a child arrives in the UK alone and comes into public care of the local authority pursuant to s20 of the Children Act 1989, the local authority effectively becomes *in loco parentis* for the child. Specific welfare duties apply. Of particular note is the duty under s22(3A) of the Children Act 1989 to promote the educational achievement of the looked after child. Statutory Guidance, issued pursuant to s22(3A) states at paragraph 13 of the Introduction: 'it is the duty of the Local Authority as a corporate parent, to safeguard and promote his or her welfare. This means that alongside planning secure and reliable care and responding to the child's need to be well and healthy, local authorities have a specific responsibility to support his or her educational achievement'.

In *R (KS) v Croydon*, the failure to educate three unaccompanied asylum seeking minors for almost a year was held to be unlawful. Croydon was ordered to provide suitable education to the claimant children pursuant to s19 of the Education Act 1996 pending the identification of a full-time mainstream placement. They were placed on an English as a Second Language course as a result.

In quashing Croydon's decision to place the claimant children on a language course, Lindblom J held that s19 contained a duty to provide full time suitable education and when considering the child's individual needs, various factors needed to be balanced including the history and the ability of the child to speak and write English. Section 19 countenanced that suitable education might be provided otherwise than at a school. In deciding what provision to provide a child, the local authority must put its corporate mind to the individual child's circumstances so as to determine what that child's educational needs are and how they should be met. Croydon failed to do so when deciding to deny the children mainstream education, placing them on a language course.

Detention and removal of children

Age disputes often arise in detention and removal cases. The UK Border Agency's policy is not to detain unaccompanied children save in the most exceptional circumstances and even then, for no more than 24 hours. The purpose of the detention should be for making appropriate welfare arrangements and not for other purposes.

Unaccompanied children should also not be subject to fast-track procedures. That is because the detained fast track system is only supposed to be for straightforward claims (*R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Vic 1481). Cases where a quick decision may not be possible and where further enquiries are necessary should not be placed in fast track. This would include age-dispute cases. However, although the UK Border Agency guidance requires case owners to presume a disputed child is a child unless otherwise verified, the Asylum Policy Instruction on detained fast track still advises case owners that with age-disputed claimants detention may still be suitable. The instruction does not appear to have been amended in line with the change in *Assessing age*, which provides for a presumption, even in cases of age dispute, that the child is a child as claimed unless and until verified one way or another. Thus age-disputed children should be presumed children and should not be detained.

Practitioners should be mindful of the test of transferring out of fast track under Rule 30 of the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005. Rule 28 deals with adjournments to allow further evidence to be filed.

CHAPTER 4

Representing children at appeals before the immigration tribunal

Colin Yeo

'The whole premise of *Achieving best evidence* and the special measures in criminal cases is that this will improve rather than diminish the quality of the evidence to the court. It does not assume that the most reliable account of any incident is one made from recollection months or years later in the stressful conditions of a courtroom. Nor does it assume that an 'Old Bailey style' cross-examination is the best way of testing that evidence. It may be the best way of casting doubt upon it in the eyes of a jury but that is another matter...

...There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly.'

— Lady Hale, *Re W (Children)* [2010] 2 All ER 418

The representation of children at immigration appeal hearings is a vexed issue. Fundamental questions arise about the harm that exposing a child to the legal process and cross-examination might cause, the importance of the 'voice of the child' being heard ►see chapter 2, whether the child should be called as a witness in her or his own cause at all, if so for what reason and how this impacts on the conduct of the judge and other parties at the hearing. Parallels might be drawn with criminal and family proceedings, where the issues around the evidence of children have been subjected to considerable scrutiny and consideration over the years, but how far is this relevant in immigration proceedings?

Training for legal representatives, UK Border Agency presenting officers and immigration judges appears to be scarce and examples of bad or

even appalling practice abound. This chapter seeks to highlight the relevant issues, provide a guide as to how to resolve those issues in individual cases and suggest ways of mitigating the potential harm that might be done to a child witness through the experience of giving evidence in an immigration tribunal. The principles explored here apply where a child is a witness in another (adult) person's case or where he or she potentially gives evidence in his or her own individual case.

Giving evidence in the tribunal

Many presenting officers, like defence counsel in a criminal trial or counsel for the parents in family law care order proceedings, will usually want to cross-examine a witness in the hope that this will at the very least throw up an opportunity to undermine the witness' case. This is commonly referred to as a 'fishing expedition', a practice criticised by the Supreme Court in the case of *W (Children)* in relation to child witnesses.

The elephant in the room in discussing the potential cross-examination of children is the perception amongst some immigration judges and presenting officers that representatives will try to shield their client from cross-examination specifically in order to avoid damage to the child's case. This perception is potentially very harmful. Representatives have to be more effective in communicating that it is the child client, rather than their case, that needs shielding from harm and that fishing expeditions are not appropriate for child witnesses. Immigration judges and presenting officers are less likely to regard a decision not to call the child as cynical where the issues for and against them giving evidence have been fully considered, as explored in this chapter.

Ultimately the decision to call a child witness to give evidence requires an assessment of where the least chance of harm may lie: in the harm inherent in exposure to the legal process or in the harm caused through less weight being attached to the child's evidence. This chapter seeks to show that on both sides of this equation there is usually potential for reducing harm. For example, special measures (or safeguards) can be adopted to make giving evidence less stressful and representatives can robustly explore in advance whether cross-examination is really necessary and whether declining to give evidence actually will significantly reduce the weight to be attached to that evidence in a particular case.

Available guidance

There is helpful guidance available which can assist representatives and the courts when dealing with vulnerable witnesses and children.

Tribunal guidance notes

There is some official guidance available to judges and legal representatives, in the form of practice directions and guidance notes.¹

- *Senior President Practice Direction: Child, vulnerable adult and sensitive witnesses*

This practice direction was issued by the Senior President of Tribunals, Lord Justice Carnwath, on 30 October 2008, and applies in both the First-Tier and Upper Tribunals. It applies in all Chambers, including the Immigration and Asylum Chamber, and is appended to the specific guidance note for the Immigration and Asylum Chamber dealt with below. The practice direction addresses the issue of whether a child should be called to give live evidence as well as how that evidence should be heard.

Importantly, even though the decision to call a child witness rests with the client and their advocate, the practice direction states that the tribunal can and should decline to hear evidence from a child unless satisfied their welfare would not be prejudiced by their doing so.

- *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*

This applies equally in the Immigration and Asylum Chamber of both the First-Tier and Upper Tribunals, being issued jointly by both relevant presidents. It is mainly addressed to how evidence should be heard and assessed rather than to whether the evidence should be heard at all.

- *Adjudicator Guidance Note No. 8 April 2004: Unaccompanied children*

This is the historic guidance note that applied in the Immigration Appellate Authority and then the Asylum and Immigration Tribunal. It is retained on the website of the First-Tier Tribunal Immigration and

¹ www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/immigration-and-asylum/first-tier/rules-and-legislation.htm

Asylum Chamber. It addresses procedural issues and how evidence should be heard and assessed. This guidance note has largely been superseded by the later guidance note and practice direction but may be useful for reference.

***Achieving best evidence* and other guidance**

Achieving best evidence is a guide published by the Crown Prosecution Service in respect of achieving the best possible evidence in criminal proceedings where a child witness is involved. Questioning methods and techniques are explored in the guide and an *Achieving best evidence*-compliant interview is often video recorded at an early stage in a police investigation in order to document near contemporaneous evidence.

For those interested in learning about best practice in interviewing children, *Achieving best evidence* is essential reading. It can be downloaded for free from the internet.² Whilst written in the context of criminal proceedings, it provides useful guidance, techniques and tips which practitioners can use and adapt in their own dealings with children.

There is additional useful academic and practical material on interviewing children, some of which is referred to below. It is an extremely complex issue because it is difficult to establish and comprehend how differently the minds of children operate compared to adults. It is certain that superimposing a model of behaviour or expectations based on a perception of how adults behave does no favours to children and is an approach that should not be adopted.

In criminal and family proceedings these issues are particularly acute because there are cases, particularly child abuse cases, where the testimony of a child might be the only, or at least a key part of, evidence that abuse has taken place. If the evidence of that child is rejected as inadmissible by the court or is unfairly undermined, then an abuser may go unpunished and other children may be exposed to harm.

² <http://tiny.cc/w5560>

In addition to *Achieving best evidence* the following reading may assist practitioners when representing children before the tribunal:

- *General Comment No. 12* (1989) by the UN Committee on the Rights of the Child, which is very useful generally on the right of children to be heard and also includes a short section on migrant children.
- *The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (2010) are extremely useful on judicial process and are essential reading for representatives and judges. See section D entitled 'Child-friendly justice during judicial proceedings' in particular.

Statute

Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a duty on the Secretary of State to discharge all immigration functions having regard to the need to safeguard and promote the welfare of children in the United Kingdom (s55(1)(a)). It also imposes a duty on officials to have regard to guidance given by the Secretary of State for that purpose (s55(3)).

This duty undoubtedly applies to presenting officers in the way that cases involving children are managed and hearings conducted. For example, it could be argued that continuity of personnel, (so children deal with the same UK Border Agency staff throughout the asylum process) is required by s55, as are the avoidance of delay and compliance with the requirements of the tribunal practice direction and guidance. Judicial review is one option for ensuring compliance and avoiding harm to the child as it can be said that following a flawed hearing in the tribunal there is no adequate alternative remedy to protect the child's best interests.

Case law

The Supreme Court gave detailed consideration to the issues around hearing the evidence of children, in the context of family proceedings, in the case of *Re W (Children)* [2010] 2 All ER 418. There are parallels to be drawn with immigration proceedings, but only if done so with care.

W (Children) must be used with caution because of the considerable differences between family or criminal proceedings and immigration proceedings. For example:

- It would be very rare that there is a risk of a potential past abuser being present in court when a child is giving evidence in immigration cases, which reduces the harm of the type envisaged in *W (Children)* that might be done to a child being called to give evidence.
- In family or criminal cases, a respondent or defendant normally has a right to cross-examine a hostile witness. A fair trial is at stake and the rights of the child have to be balanced against the rights of other parties to that fair trial. The same does not apply in immigration cases.
- If a child's evidence is misinterpreted or wrongly accepted because of lack of challenge in a family or criminal case, a defendant may go to prison or lose their child as a consequence. The worst that can happen in an immigration case if the child's evidence is wrongly accepted is that the child gains a status to which they were not entitled.

As an example, the author was in court throughout the proceedings in *LM v Medway Council, RM and YM* [2007] 1 FLR 1698, considered the leading authority on whether children should give evidence until *W (Children)*. It was alleged that the parents had abused the child and the parents wanted to cross-examine her. The local authority and guardian (a person employed in family proceedings to protect the welfare of a child) considered this to be too potentially damaging to her. The trial judge ordered that cross-examination take place by video link, that order was appealed to the Court of Appeal and the order was upheld. When the cross-examination finally took place, the parents were able to show, very gently and carefully with no obvious distress to the child, that the child's evidence had been misinterpreted and the abuse had not taken place.

Ultimately, Lady Hale held in *W (Children)* that where the court makes the decision as to whether to hear the evidence of a child, the court's task is as follows:

When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.

Although in an immigration context the decision to call a child will usually lie with the child and perhaps their advocate, the Senior President practice direction states that the tribunal may decline to hear evidence from a child. Alternatively, the tribunal has case management powers that could very substantially or completely curtail cross-examination should a child be called.

Deciding whether to call the child

The decision whether or not to call a child to give live evidence will ultimately depend on the child concerned, their own wishes and feelings and an assessment of their best interests by whoever holds parental responsibility for them. If a child does not want to give evidence they should not be forced to, so their wishes and feelings may effectively prevail.

Some children are very keen to give live evidence, sometimes because they are angry and hurt at adverse comments about their truthfulness in a decision letter and sometimes simply because they want to be part of the proceedings that will determine their future. Where a parent faces removal or deportation, a child may well have something to say about such an outcome and may want to say it directly to the judge. Sometimes a child may be desperate to avoid giving evidence or even attending court for fear of being asked questions or facing people in authority in relatively formal surroundings.

Where a child may act as a witness in an appeal to which they not a party, great care should be taken to ensure that the child is genuinely willing, and not, for example, being coerced, to give evidence and be cross-examined and it is necessary and safe for the child to do so.

If there is an important reason for a child to give evidence (for example because credibility issues have been raised in an asylum case or perhaps in a human rights case where family life is disputed) it is important to consult the child and explore whether the child does want to, and feel capable of, giving evidence and answering questions and assist the child in making an informed decision.

Right of the child to be heard

It is important to recall that every child has a right to be heard in proceedings that affect them. This is also known as the 'voice of the child' ►see chapter 2.

Article 12 of the 1989 UN Convention on the Rights of the Child provides as follows:

- 1 States Parties shall assure to the child who is 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 the age and maturity of the child.
- 2 For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In 'General Comment No. 12' (1989) the UN Committee on the Rights of the Child said, at paragraph 123, in respect of migrant children:

Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim.

The point was also made in *ZH (Tanzania) v Secretary of State* [2011] UKSC 4 in the Supreme Court. Lady Hale emphasised the importance of hearing from the child and considering the impact of an immigration decision on affected children then went on as follows at paragraph 37:

In this case, the mother's representatives did obtain a letter from the children's school and a report from a youth worker in the Refugee and Migrant Forum of East London (Ramfel), which runs a Children's Participation Forum and other activities in which the children had taken part. But the immigration authorities must be prepared at least to consider hearing directly from a child who

wishes to express a view and is old enough to do so. While their interests may be the same as their parents' this should not be taken for granted in every case. As the Committee on the Rights of the Child said, in General Comment No 12 (2009) on the Right of the Child to be Heard, at para 36:

'in many cases ... there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision-maker by the representative.'

Children can sometimes surprise one.

Lady Hale's point is a profound one and yet it eludes many lawyers and judges outside the family law jurisdiction. Children have a right to be heard and their views *must* be considered by the decision-maker. It is all too easy to assume:

- what the child might think and/or
- that the child has no voice of their own and/or
- that what the child thinks does not really matter in any event because the child's thoughts are not determinative of best interests and best interests are not determinative of the case.

In order that a child's views and their best interests be explicitly in the mind of the judge in family law care order proceedings at all times, children are allocated their own representative, a guardian. There is no equivalent to a guardian in immigration proceedings. It is therefore imperative that representatives are fully alive to the views of an affected child and to the impact that an immigration decision will have on them. Because a child, as part of a family, does not generally instruct their own lawyer (although see below regarding separate representation) it is crucial that lawyers for other parties ensure that the views of the child and impact on the child are fully articulated to the tribunal.

Imagine that an immigration judge is reluctant or unwilling to hear from a child, for example in a case in which a parent faces deportation for serious criminal offences. The judge feels that the outcome to the case is unlikely to be affected by a child's evidence. A number of serious errors are in danger of being committed here. The judge is assuming he or she knows what the child will say, is effectively pre-judging the outcome of the case and is failing to have regard to the principles

in Article 12 of the CRC, *W (Children)* and *ZH (Tanzania)*. It is important that a representative is able to prevent such errors being committed.

None of this is to say that the views of a child will be determinative of the outcome of a case. It is trite point, but what a child wants and what a child needs or what might be in their best interests, do not always coincide. Further, the best interests of children are not necessarily determinative of the outcome of immigration proceedings in the same way they are in family proceedings. Nevertheless, the voice of an affected child must be heard.

It may be helpful to think of the right of the child to be heard as an essential precursor to other steps in the determination of a case:

- 1 The voice of the child must be heard and the impact of the decision on the child must be considered separately to the impact on affected adults ►see chapter 2.
- 2 It must be established what the best interests of the child actually are, which cannot be achieved without first having gone through step 1 ►see chapter 1.
- 3 Once it is established what is in the child's best interests, the views of the child must be considered and weighed against other relevant considerations as a primary consideration, taking care not to give more weight or importance to any other single factor or consideration ►see chapter 1.

Is a child affected by an immigration decision?

It is always vitally important to consider whether a child is affected by an immigration decision and appeal. As discussed above, if so, very careful consideration must always be given to the right of that child to be heard.

If a child is subject to immigration control and is served with an immigration decision at the same time as their parents it is important to lodge a separate appeal on behalf of the child in order to promote separate consideration of the child's case. This practice is not universal amongst representatives but should be. Further, the practice of the immigration tribunal in referring to dependent children as merely '+1' or '+2' is depreciated as it tends to undermine the importance of the children referred to.

Even if a child is not directly part of the appeal process but is affected by the outcome (for example in cases where the children are British citizens through one of the parents but the other parent is a foreign national and faces removal or deportation) it is still very important to consider carefully how to facilitate the voice of the child being heard, potentially by calling the child to give evidence or by other indirect means as discussed below.

Age and maturity

Every child is different. Levels of maturity and vulnerability may tend to increase or decrease with age, but are influenced by many other factors and cannot and must not be assumed. A trafficking victim aged 17 may be so traumatised that they are incapable of giving meaningful evidence, but some very young children have been cross-examined in family and criminal cases and a motivated 11 year old might want to give evidence for various reasons.

As very approximate guidance, if the child is 15 or over then they may often be of sufficient maturity to give useful and meaningful evidence. If the child is 12 or younger then it may well be the case that it would be needlessly traumatic to call them as no useful evidence would be likely to be produced. As stated this is approximate and will not apply in all cases where a child has a higher or lower level of maturity than their peers.

Harm done to children by giving evidence

It is accepted in criminal and family proceedings that calling a child to give evidence will be harmful to the child. There is a seemingly universal consensus amongst child welfare professionals and child psychologists that giving evidence about past traumatic events and it being suggested to the child that those events are fabricated is abusive of the child concerned.

It is particularly harmful for a child to have to face a possible past abuser in court and to face questions and accusations from his or her advocate.

In *W (Children)*, Lady Hale, herself an acknowledged expert in family proceedings, reviewed some of the academic material and concluded, at paragraph 26 of the judgment, that the risk of harm to children

if called to give evidence 'is an ever-present feature to which, on the present evidence, the court must give great weight'. She went on to find that the level of risk may vary from case to case 'but the court must always take it into account and does not need expert evidence in order to do so.'

It can therefore be assumed, without any need for expert evidence, that being called to give evidence will be potentially harmful to a child, albeit less so in immigration proceedings than in family or criminal proceedings where abuse allegations would be revisited with the alleged abuser part of that process. This point may need to be made firmly to immigration judges unfamiliar with the academic literature Lady Hale reviewed in *W (Children)*.

It should also be recalled that the mitigating or protective mechanisms available in criminal and family proceedings are, inexplicably, yet to be deployed in immigration proceedings. Videoed *Achieving best evidence*-style interviews are not used, nor are pre-recorded videos, intermediaries or video link cross-examination. The potential harm done to children by the process of giving evidence, albeit without the important element of a child having to face a possible past abuser in court, is therefore potentially greater in immigration proceedings than in proceedings where all the parties are more alive to these issues. Suggestions on how to mitigate harm are made below in the section on special measures.

Separate representation

Sometimes a child affected by an immigration decision will require their own representative in order to articulate their case and present their own evidence. This may arise, for example, where there is a conflict of interest between a parent and child. For example, imagine a situation where the child is the subject of parallel family law care order and immigration proceedings and it is alleged that the child has been abused by the parent. Here, the child's wishes and feelings may not be the same as those of their parents and might lead to a different outcome. Alternatively, the position may arise where the parent is so tainted by his or her own misdeeds that the child is best served by putting forward their own distinct arguments and evidence.

In *EM (Lebanon) v Secretary of State* [2009] AC 1198 Baroness Hale commented that it had been a 'great help' in that case to be able to consider the case from the child's point of view.

She went on as follows at paragraph 49:

‘It cannot be assumed that the interests of all the family members are identical. In particular, a child is not to be held responsible for the moral failures of either of his parents. Sometimes, further information may be required. If the Child and Family Court Advisory and Support Service or, more probably, the local children’s services authority can be persuaded to help in difficult cases, then so much the better. But in most immigration situations, unlike many ordinary abduction cases, the interests of different family members are unlikely to be in conflict with one another. Separate legal (or other) representation will rarely be called for.’

Lady Hale reiterated these points in *ZH (Tanzania)*. It is therefore considered to be unusual that separate *representation* will be necessary, but separate *consideration* of a child’s case is crucial.

The only two reported immigration cases in which a child was separately represented are *EM (Lebanon)* and *ZH (Tanzania)*, and in those cases the children only intervened at the House of Lords and Supreme Court respectively. However, there have been many examples of separate representation in the tribunal which have not been reported, so representatives should not be afraid of taking this route where it is appropriate.

An alternative solicitor with experience in working with children will need to be found and a referral made. If a separate appeal for that child has not been lodged as it should have been (as discussed earlier) then an out of time appeal may also need to be lodged.

Preparing for the hearing

The following suggestions may assist representatives in the challenging yet crucial process of preparing a child for court whether that child is to give live evidence or simply be present in the hearing room.

Gathering alternative evidence

Giving live evidence in court with no special measures other than the assumed delicacy and training of the advocates and judge is not the only way for the voice of the child to be heard in court and for separate consideration to be given to a child’s case.

Witness statements and reports

In immigration proceedings there are no rules of evidence as such, other than that any evidence must be relevant and served in accordance with directions. There is no procedure rule or rule of law that requires a witness who has submitted written evidence to the tribunal to attend the hearing itself, at least in lieu of a witness summons.

It is therefore perfectly possible to submit a witness statement or other material, such as drawings, on behalf of a child and for that to be considered by the tribunal. It is also possible for the tribunal to consider indirect evidence, such as statements or reports by others, such as school teachers, youth workers, social workers and medical professionals about how the child has reacted to their circumstances, what the child's wishes and feelings have been expressed to be and similar.

Another possibility is to commission a report from an independent social worker. Independent social workers can observe the child and their family and report back on the nature and depth of a relationship between a parent and child, a process that will involve talking to a child who is old enough and perhaps talking to other individuals such as teachers, family members and youth workers. Such reports can be expensive as they require a great deal of work.

Disclosure from family law proceedings

In cases where there are concluded or ongoing family law proceedings regarding children, it may be the case that useful evidence has come into being regarding, for example, the nature and quality of the relationship between one or both parents and a child. This may be in the form of statements from parents or reports from CAFCASS, from a guardian, from a social worker, from a family assessment centre of some sort or from an independent social worker.

It is crucially important that practitioners are aware that it is contempt of court to disclose any evidence or documents produced for the purposes of family proceedings involving children. This is taken seriously by the courts and at least one solicitor has been suspended for a breach of this rule. The UK Border Agency has no automatic entitlement to see family law papers, nor does the tribunal. The legal advisers to a party to family proceedings are permitted to see such documents but not disclose them further without permission.

A specific disclosure order from the family court concerned will therefore be required to disclose any family law proceedings evidence to the UK Border Agency or in tribunal proceedings.

The usual way to obtain a disclosure order is to write a consent order for disclosure. For example, such an order might provide as follows:

IT IS ORDERED BY CONSENT

- 1 The [party] may disclose documents [X, Y and Z] to the UK Border Agency and the tribunal for the purpose of immigration proceedings.
- 2 There be no order as to the costs of the application.

Because confidentiality is taken very seriously, the other parties and the court will expect any disclosure order to be as narrowly drawn as possible, to provide only for disclosure by a certain party, of certain documents, to certain parties for certain purposes. The order should therefore specify exactly what documents are to be disclosed and should not be drafted in a general way. It may also be necessary to obtain separate later disclosure orders should documents be amended over time, such as contact orders, or should new useful evidence be generated in the family proceedings.

The staff at different courts differ as to their helpfulness. Some court staff have proven to be extremely helpful, offering to contact all the parties, even in closed cases, in order to facilitate swift disclosure. Other court staff may insist on dealing only with the existing nominated solicitors who are already acting in the family proceedings. Such solicitors will therefore need to be persuaded to cooperate and carry out the necessary tasks to obtain disclosure and to do so with alacrity. The coruscating judgment in *In the matter of M and N (Children)* [2008] 2 FLR 2030 may be of assistance and can be sent to defaulting solicitors as a reminder of the importance of co-operation. Mr Justice Munby launched a scathing attack on the lack of cooperation between the family and immigration solicitors in disclosing relevant documentation, causing serious delay to the proceedings.

As a word of warning, family solicitors charged with representing a client's best interests in family proceedings may not welcome a request for disclosure of evidence into immigration proceedings. Tactically, it may cast doubt upon the motives of that party for participating in family proceedings and it offers a potential argument to another parent opposed to contact or residence.

If not all of the parties will consent to disclosure, a short contested hearing in the family court will be required. The value of the evidence would need to be carefully balanced against the delay, cost and potential damage this might do in the family proceedings.

Weight to be attached to evidence

All the above evidence is admissible. The real question is how much weight will be attached to it by an immigration judge.

In *W (Children)* at paragraph 26, Lady Hale explicitly recognised that the family courts will give less weight to untested evidence, which might itself lead to harm to a child who was as a result not believed. The adequacy of these other forms of evidence must therefore be carefully considered. There will be cases where there is no need for cross-examination or live evidence, but in other cases the child's case will be irrevocably damaged if they are not called to give evidence.

Here, everything depends on the circumstances of the case. If the child has been seriously and materially inconsistent about material past events, there is a genuinely implausible material event to ask the child about or there are other legitimate questions to be put to the child regarding their version of material past events, their evidence will inevitably carry less weight if they are not questioned in court. If there are no serious inconsistencies and the proposed questions are about the local situation or local culture or customs and the plausibility of the claimed past events, there is little more, realistically, that a child will be able to say that has not already been addressed in a witness statement that will be relevant to the issues to be decided by the tribunal. In such circumstances it would be unfair to attach less weight to the evidence of the child.

The key word, it will be apparent from the preceding paragraph, is 'material': does the issue on which cross-examination is contemplated directly affect the outcome of the case?

Less weight should never be attached to the evidence of a child simply for not being exposed to a pure 'fishing expedition' on the part of a presenting officer. As Lady Hale said in *W (Children)* at paragraph 25:

The court is unlikely to be helped by generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up...

If there is nothing that would require testing through cross-examination or causes concern in a child's witness statement, it would be unfair to attach less weight to evidence because the child has not been called.

Pre-hearing review

It can be presumed that calling a child to give evidence is harmful for the reasons explored above. The question therefore becomes whether the harm done to the child by being exposed to the legal process is counterbalanced by any benefit to the child in answering legitimate questions.

This issue (and others) must be considered at a pre-hearing review so that the day of the hearing is not taken up by lengthy legal discussions and so that the child can, if necessary, be properly prepared to give evidence, for example by meeting the advocate in advance of the hearing and visiting the hearing centre. The pre-hearing review will be an opportunity for representatives and immigration judges to assess whether there is a genuine evidential purpose for cross-examination or whether it is simply a 'fishing expedition'.

If the presenting officer at the pre-hearing review is reluctant to bind whichever presenting officer will conduct the full hearing (not an uncommon occurrence), this is categorically not a relevant consideration for an immigration judge. Despite any protestations from the presenting officer, the hearing should be used for the purpose for which it was convened, in accordance with the practice direction and the guidance on child witnesses. In such circumstances it is important that the judge records any agreements clearly or makes a decision on directions requested by the representative for the child.

Appropriate adult

If a child is unaccompanied, it is important to ensure that an appropriate adult is going to be available for the full hearing, whether or not the child will give evidence. The hearing will need to be adjourned if one is not available, so the tribunal will be anxious to ensure compliance. The identity and availability of the appropriate adult should be established in advance of the pre-hearing review.

Suitable presenting officer

Whether children training is available or given specifically to presenting officers is unknown, but the UK Border Agency certainly gives some sort of children interview training to some of its staff.

A UK Border Agency representative who has undergone such training should be requested. The provision of such a representative is required by s55 of the Borders, Citizenship and Immigration Act 2009. Paragraphs 2.14–15 of the statutory guidance under s55(3), *Every Child Matters*, reads as follows:

- 2.14 The UK Border Agency must ensure that members of staff are appropriately trained with regard to their duty to safeguard and promote the welfare of children.
- 2.15 Training on safeguarding and promoting the welfare of children must be provided that is proportionate and relevant to the roles and responsibilities of staff members. All Agency staff should have a general understanding of children’s issues, while those whose work brings them into contact with children, directly or indirectly, should have more in-depth training.

The tribunal has no power to interfere with the identity of the official sent to present the Secretary of State’s case but can make a request in the course of giving directions. The tribunal is specifically empowered to limit issues, the time allowed for cross-examination and the length of oral submissions and could make clear that such powers will be used to protect a child witness unless a suitably qualified representative is instructed.

The tribunal’s decision on whether a child should give evidence

The Senior President practice direction provides as follows at paragraph 2:

A child, vulnerable adult or sensitive witness will only be required to attend as a witness and give evidence at a hearing where the tribunal determines that the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so.

At paragraph 5 the practice direction then says as follows:

The tribunal may decline to issue a witness summons under the Tribunal Procedure Rules or to permit a child, vulnerable adult or sensitive witness to give evidence where it is satisfied that the evidence is not necessary to enable the fair hearing of the case and must decline to do so where the witness's welfare would be prejudiced by them giving evidence.

Given that the Supreme Court holds in *W (Children)* that giving evidence (in family proceedings) will always be harmful to a child and that expert evidence need not be adduced to prove this point in particular cases, it might be argued that there is effectively a presumption against children giving evidence in the tribunal. This would be inconsistent with the central message and *ratio* (reasoning) of *W (Children)*, however, which is that there is no presumption or starting point that children should not give evidence, at least in family proceedings.

Rather, careful consideration has to be given whether it is necessary for a child to give evidence, what harm to the child will be caused if they do and what harm to their case will be caused if they do not.

In any event, the practice direction makes clear that an assessment is necessary by the tribunal and an active decision must be made. It is not good enough for the tribunal to passively sit back and allow a child to give evidence without any assessment of the impact on their welfare. The immigration judge should therefore be pressed for a decision on this issue, which should be recorded clearly in writing in the form of a direction at the pre-hearing review.

In *W (Children)* Lady Hale sets out, at paragraph 25, the factors to be considered by the court in whether to hear evidence from a child, from which the following considerations are drawn:

- What are the issues before the tribunal? Sometimes it may be possible to decide the case without making findings on particular allegations.
- What quality of evidence is already available? Sometimes there may be enough evidence to make the findings needed whether or not the child is cross-examined. Sometimes there will be nothing useful to be gained from the child's oral evidence.
- The quality of any prior interview evidence will be a factor.

- The nature of any challenge made against the child's case will be relevant. The court is unlikely to be helped by generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up. On the other hand, focused questions which put forward a different explanation for certain events may help the court to do justice between the parties.
- The age and maturity of the child and the length of time since the events in question will be relevant, for these will have a bearing on whether an account now can be as reliable as a near-contemporaneous account, especially if given in a well-conducted previous interview.
- The risk of harm to the child must also be considered. Further specific factors may be the support which the child has from family or other sources, or the lack of it, the child's own wishes and feelings about giving evidence, and the views of the child's guardian and, where appropriate, those with parental responsibility. An unwilling child should rarely, if ever, be obliged to give evidence.

In short, if the UK Border Agency can identify at the pre-hearing review legitimate questions or areas of questioning where it is reasonably clear the child might be expected to provide useful further evidence then it will damage the child's case if the child does not give evidence. That does not necessarily mean that the child *should* give evidence, but it is a factor to take into account in deciding whether to call the child.

Identifying the issues for any cross-examination

As is strongly suggested above, it is important to identify what the relevant issues are in the case on which evidence might be called. It is inadequate to simply cite 'credibility' as an issue to justify evidence being called. Much more focused areas of dispute need to be identified if a fishing expedition by the presenting officer is to be avoided.

These issues can and should then be recorded in directions following a pre-hearing review for the avoidance of doubt later. The tribunal possesses extensive case management powers and has power to make such a direction. For example, the First-Tier Tribunal Immigration Asylum Chamber procedure rule 45(4)(f)(iv) states:

Directions of the tribunal may, in particular ... limit ... the issues which are to be addressed at a hearing.

Special measures

There is no history in immigration proceedings of the use of special enabling and protective measures used in the criminal and family courts to promote the giving of evidence by children in a safe environment. This is not of itself a bar to their adoption. In an appropriate case, for example, where it is considered that cross-examination is required but the child is particularly vulnerable or reluctant to attend court to give evidence, special measures such as pre-recorded evidence or video link cross-examination should be requested.

It is unlikely that an immigration judge will welcome such a request because, at the time of writing, there are no administrative measures in place to permit the adoption of special measures. The unfavourable comments of the Court of Appeal in the case of *R (on the application of AM (Cameroon)) v Asylum and Immigration Tribunal* [2007] EWCA Civ 131 regarding the unwillingness of an immigration judge to contemplate hearing telephone evidence from abroad might usefully be recalled if an immigration judge is reluctant to contemplate special measures. It might also be persuasive to remember that video links are used in bail hearings because it is convenient to the tribunal. Innovative thinking is required when seeking to ensure the voice of a child is properly heard in terms of the type of evidence to submit and how to approach the matter of testing that evidence in the hearing.

It should be understood, though, that there is less acute need for special measures in the immigration tribunal than in criminal and family proceedings, where giving live evidence in person in court would involve being in the same space as potential abusers. That does not mean that there is no need for special measures as they may, for example, assist in minimising the harm that could flow from a child being in court recalling traumatic events or being subject to an insensitive cross-examination from a presenting officer, or could enable a particularly vulnerable or reluctant child to give evidence and have their voice heard directly by the judge.

Special measures might include (but are not limited to) the following:

- A pre-recorded videoed interview or message from a child might be one way forward, which would have the virtue of enabling a judge to see a child giving live evidence and hear directly from the child. It would also make more compelling evidence than a letter addressed to the judge, for example. This could be particularly helpful where

the child is a potential witness but not the appellant, as in deportation and some Article 8 ECHR cases. Digital video recorders are now relatively commonplace so this would be reasonably straightforward to implement.

- Video linked cross-examination might be contemplated where a child is a particularly reluctant and/or vulnerable witness but their evidence is considered crucial and failure to give it would perhaps irreversibly damage their case. If cost and the inconvenience of setting up a full quality video link is an issue, then Skype or a similar service could potentially be used.
- Use of an intermediary in order to talk to the child and ascertain their views, opinions or answers to certain questions then report to the court and themselves face questions from the parties could also be a way forward. An independent social worker could be instructed for this purpose and a list of questions or areas of questions for the child agreed with the UK Border Agency and tribunal in advance.

It is important to be imaginative about how to promote the voice of the child.

Reference might usefully be made to First-Tier Tribunal Immigration and Asylum Chamber procedure rule 45, which specifically allows for 'a hearing to be conducted or evidence given or representations made by video link or "by other electronic means".' (r.45(4)(h))

Preparing the child for the hearing

It is important not to do or say anything to make a child afraid of attending the tribunal and/or giving evidence. Children are often heavily influenced and led by adults, and it is not the function of the representative to silence a child; quite the contrary.

As should be clear by now from this chapter, some children will see the tribunal hearing as an opportunity to influence the outcome of proceedings and to have their voice heard directly by the immigration judge. In such cases it is more appropriate to take all necessary measures to make sure the child can give evidence in a safe and controlled environment than to try and dissuade the child from giving evidence at all.

If a child is to give evidence (or, at least, this is the intention in advance of the hearing) then the child should be appropriately prepared. The following steps should be considered:

- A detailed witness statement is essential if a child is to give evidence. It will normally take several meetings to prepare such a statement. A well prepared statement by a child will speak with the child's authentic voice and will not include legal or formal language. The statement should address the relevant reasons for refusal.
- It is imperative that the child meets their advocate before the day of the hearing.
- A visit to the tribunal hearing centre may be useful, if feasible, to limit the number of entirely new experiences on the day of the hearing. If this is not feasible then a simple drawing of a typical court room showing how all the participants will be seated can assist.
- Role play can be a useful way of preparing a child to go to court and to give evidence, although extreme care should be taken not to coach any witness.
- It is important to explain to the child that it is very unlikely a decision on their future will be made by the judge on the day of the hearing and that the judge will need time to carefully consider all of the evidence including what the child has said.

Again, it is important to be imaginative.

Material for the judge

It is essential that the judge be made aware in advance of the hearing of the relevant practice directions and the case of *W (Children)*. These should be submitted well in advance of the hearing along with a skeleton argument. If the judge, come the day of the hearing, is not aware of these authorities, it is doubtful whether the hearing should proceed as the risk of injury to the child and compromising the quality of their evidence will be considerably increased.

Highlighting or sidelining the relevant passages of the judge's copy of *W (Children)* in advance may be a useful exercise as the case may be new to many judges and it represents a radically different approach to hearing cases.

Unfortunately, there is no obvious quick reference document that sets out accepted best practice in interviewing children. This is partly because interviewing children is inherently complex. *Achieving best evidence* is an invaluable reference point but is far too long to be a realistic aide in the immigration tribunal for most judges.

There is some case law from the higher courts on the way in which the evidence of a child should be assessed in a specific immigration context. In *MD (Guinea) v Secretary of State* [2009] EWCA Civ 733 (17 June 2009), Lord Justice Laws accepted that the evidence of children must be carefully considered and due weight given to the inherent differences, and therefore expectations, of the evidence of children and adults, but was careful to state that this does not require detailed reference to various pieces of guidance:

The importance of dealing very carefully with the evidence of children must not in my judgment be allowed to usher in a whole subspecies of asylum litigation based on complaints that immigration judges have not dealt with every nook and cranny of all the reasoning to be found in the very extensive literature on the subject. The immigration judge must of course show himself aware of the child's age and be sensitive of it. He is likely to recognise the particular importance in a child case of the effect of the background objective evidence, and the fact moreover that inconsistencies and other defects which might be fatal to the veracity of an adult's account may not necessarily be so when a child's evidence is involved. But it is of particular importance that the plethora of guidance coming from many sources is not to be degraded into a set of concrete rules, departure from any one of which then falls to be characterised as an error of law. It is not for example a rule of law that a child's evidence should be accorded 'a liberal application of the benefit of the doubt', a phrase appearing in some of the guidance documents. That said, the phrase represents or points to an approach which in some cases it may be very useful to have in mind.

At the hearing

Many of the measures below are particularly addressed to a case in which a child is called to give evidence. However, the same approach applies even where a child is not giving evidence but is present in court. Representatives should be alive to the need to be inclusive and not to speak or conduct the hearing in such a way so that the child feels excluded.

Before the hearing starts

The presidential guidance note on hearings involving children states that those cases should be heard first on the daily hearing list at the given tribunal. If necessary this should be firmly reiterated to an usher and the judge. Waiting at court will cause many children to become bored and frustrated.

In addition, any case involving children should be heard 'in camera' (essentially with only parties to the proceedings being present) and a request should be made for members of the public to be excluded. This is particularly the case if a child is going to give evidence.

The pre-hearing review should have been used to issue directions for how the evidence of the child will be heard and to limit the issues for cross-examination, amongst other things. If so, this should minimise the delay at the beginning of the hearing, which in turn may help to avoid a child becoming increasingly nervous and/or bored.

It can be useful to have an advocates-only discussion about these and other issues before bring a child into a hearing room. It is desirable to avoid exposing a child to a complex legal discussion and to potentially acrimonious disputes about the layout of the hearing room and the issues to be covered in cross-examination. Exposure to such a discussion is very unlikely to improve the quality of the child's evidence once the hearing begins.

However, it is also important to include the child in the process so far as is possible and is consistent with their welfare. It will not help the child deal with the hearing and its consequences if the child feels excluded from the process leading to the decision.

Responsible adult

The presidential guidance note requires that a child be accompanied by a responsible adult to their hearing. The representative cannot act as the responsible adult.

Usually a parent, foster carer, social worker, family proceedings guardian or Refugee Council panel adviser will be available and suitable to accompany the child.

The role of the responsible adult is to support and reassure the child at court, whether they are giving evidence or not. This does not absolve the representative from responsibility for safeguarding the child, however. For example, the representative must insist on a break after 40 minutes but the responsible adult may detect that one is required before that and intervene to say so.

Not every designated responsible adult will have performed this function at the immigration tribunal on previous occasions. Even if he or she has, he or she may not be aware of the functions of the responsible adult and these should be explained carefully by the representative (and ideally by the judge). Some care should be taken to ensure that that the responsible adult, if unfamiliar with the immigration case, does not, perhaps with the best of intentions, undo or reverse preparatory work already undertaken.

Child-friendly hearing room

A child-friendly court layout is essential where a child is going to give evidence. It is desirable even where a child is going to be present in court without giving evidence. Care should be taken not to expose that child to harm by hearing potentially traumatic evidence or submissions from adults.

The presidential guidance note suggests that immigration judges should consider coming out from behind the raised bench down to the level of the parties. The willingness of an immigration judge to take this step can be a useful litmus test for whether the judge in question is knowledgeable about hearing children cases and is willing to take measures to promote the ability of a child to give good quality evidence in a safe environment.

If not, consideration should be given to adjourning the proceedings, spending time with the judge going through the practice directions and guidance and *W (Children)* or simply not calling the child to give evidence.

A child witness should not be isolated in court but instead should be seated next to their responsible adult. The representatives can be seated together, which may serve to reduce the adversarial appearance of the proceedings.

Questioning

During the hearing itself, the following points in relation to taking evidence through questioning should be considered.

Examining in chief

If a child is going to be called to give evidence then it is important that questions are asked in chief (questions that are put to the child by their own representative) before the child is cross-examined. If best practice is being followed then the representative will be aware of the issues in dispute and will ask questions about these issues, giving the child an opportunity to explain their account and/or their wishes and feelings. If the representative is already known to the child (as should be the case) then these questions will hopefully also serve to relax the child.

Questions need to be asked in a child-friendly manner that is appropriate to the child's maturity and understanding but which avoids patronising and alienating the child. Guidance on interviewing children is given elsewhere in this guide ►see chapter 2, but best practice includes:

- short sentences
- simple sentences
- the active voice ('what did he do?' not 'what was done by him?')
- positive sentences ('did you tell him?' not 'didn't you tell him?')
- questions with only one meaning
- single negatives ('did your mother tell you not to go out?' not 'didn't your mother tell you not to go out?')
- direct approach ('are you tired?' not 'if you are tired, tell me.').

Asking simple, straightforward, comprehensible questions can be a hard skill to master for lawyers accustomed to the use of complex language, meanings and sentences.

Monitoring cross-examination

Lady Hale makes clear in *W (Children)* that an 'Old Bailey style' cross-examination months or years after the events in question is inappropriate and will not elicit good quality evidence, which is the ultimate concern of the court.

As discussed earlier in this chapter, a request can be made at the pre-hearing review that a children-trained presenting officer is deployed by the UK Border Agency for the hearing (see above). Where it transpires that a presenting officer has not received specific training in interviewing children, very serious consideration should be given to adjourning the hearing or not calling the child to give evidence.

Even where the presenting officer is or claims to be children-trained there may well be problems with the way in which he or she cross-examines the child. Once a child begins to give evidence it is crucial that the child's representative intervene where appropriate.

An aggressive or acrimonious tone should be avoided by the representative at all times, even where the conduct of the presenting officer or judge is considered to be inappropriate and/or inadequate. Ultimately, an evidence session or even a hearing can be curtailed if necessary. A judge may be surprised and reluctant that an evidence session is ended prematurely but has no power to detain a child in a hearing room and force them to answer questions.

It is imperative that a child be given regular breaks during a hearing, whether or not the child is giving evidence. Research suggests that children can only concentrate for 40 minutes or so at one time. If asked whether a break is wanted, though, most children will say that they are fine and would like to carry on, even if they are not. The representative should therefore take the lead not in asking whether a break is necessary but in stating that one is required.

It would, however, be unusual for cross-examination of more than 40 minutes to be strictly necessary if the issues have been properly narrowed and the presenting officer is only putting appropriate questions to the child.

The presidential guidance note urges judges to be vigilant and to intervene appropriately. Experience suggests that some judges are unwilling or unable to depart from their normal passive and permissive approach to managing hearings. Where this occurs, robust but courteous and professional intervention by the representative will be necessary in order to safeguard the child and the quality of the child's evidence. A more proactive approach can be requested of the judge.

If necessary any evidence session should be terminated, and perhaps also the hearing itself. An adjournment and/or an alternative judge to hear the case *de novo* (afresh) should be requested. This is a difficult position for representatives to adopt, and hostility on the part of a judge who has made such a request necessary is almost inevitable, but this may be required in order to safeguard the child and representative would be failing in their duty to their client if they failed to take this step if it becomes necessary.

Conclusion

A child affected by immigration proceedings has a right to be heard and to have separate consideration given to the effect of the decision on them. They also have a right to be kept safe. Being kept safe means that re-traumatisation through the legal process must not occur. However, where a failure to give evidence may reduce the weight to be given to a child's evidence and lead to a rejection of a claim to refugee status or separation from a parent, the balance of harm might tip in favour of giving evidence, but in a controlled and safe way.

The collective lack of experience in dealing professionally and expertly with the evidence of children in the immigration tribunal means that there is a danger of harm occurring if a child is called to give live evidence in person. Alternatives must be considered. If a child does give evidence, it should be planned carefully in advance, limited only to relevant issues and carried out in a sensitive and appropriate fashion. Where failings occur and the judge remains passive, immediate intervention will be required by a representative. Safeguarding and promoting the welfare of children in immigration proceedings is a shared responsibility in which a representative plays a key role in maximising the potential of a child's case but also protecting that child from harm.

CHAPTER 5

Legal aid

Jackie Peirce

This chapter assumes some familiarity with the various legal aid schemes and funding for different stages of an asylum application or for an application for further leave to remain. It will concentrate on aspects of legal aid which are of particular relevance to young people, including special rules for children. It will also deal with some general issues of best practice which apply to wider client groups.

Most children who register an asylum claim in their own right (as opposed to claiming only as a dependent family member of an adult asylum seeker) will be 'separated children'. A separated child is one separated from their parents or legal or primary carer regardless of whether they are with another family member or adult in the UK. This chapter will concentrate on services to them and explain the differences that apply to those children who are here with family members and what happens when a child turns 18 years of age.

Definitions

The following explains some common terms which are used in respect of legal aid in immigration and asylum cases.

Legal aid schemes/contracts

All the various schemes for legal aid arise from statutory provisions and are the subject of detailed contractual terms and/or guidance. The precise terms of each scheme must be followed. There are a number of pervasive definitions that must be borne in mind.

It should be remembered that the available 'guidance' is only the Legal Services Commission's interpretation of the legal aid schemes and may not necessarily be a correct interpretation of the contract or

statutory scheme, however a supplier must have regard to the guidance.¹ The terms contract and statutory scheme are explored below.

The most important documents containing the legal aid rules are the documents which form the contracts between the Legal Services Commission and its suppliers of legal services (generally solicitors firms or not-for-profit organisations). The current 2010 Standard Civil Contract came into effect on 15 November 2010. This contract governs all 'matters' (essentially a legal case for an individual conducted by a supplier as it goes through the different stages funded by legal help and Controlled Legal Representation) which commenced on or after 15 November 2010. It also governs the arrangements (apart from the fees payable to the suppliers) for any work done on or after 15 November 2010 on cases commenced under any previous contract.

Child

A child is defined under the current contract as a person under the age of 18.² This was a change from the previous contract (the 'Unified Contract (Civil)') under which a child was defined as a person under the age of 16.³ There were, however, a number of provisions of the Unified Contract that set out special rules for a person under the age of 18 and not just under 16. This rule change has particular significance when considering whether the person is a child for the purpose of signing an application for any type of legal aid.

Asylum matter⁴

An asylum matter is essentially a claim under the 1951 Refugee Convention or Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, including a fresh claim or extension of leave application which makes such a claim.

¹ Para 1.20, Civil Specification to the 2010 Standard Contract www.legalservices.gov.uk/docs/civil_contracting/Sections_1_-_6_December_09.pdf

² Para 1.14, *ibid*.

³ Paragraph 1.14, Unified Contract Standard Terms 2007 as amended www.legalservices.gov.uk/docs/civil_contracting/080701StandardTerms.pdf

⁴ Para 8.7, immigration chapter of the Civil Specification to the 2010 Standard Civil Contract <http://tiny.cc/n9o2r>

It also includes cases which concern an application for an extension of leave by a former asylum seeker who has refugee status, humanitarian protection or discretionary leave to remain which involves an active review by the UK Border Agency in order to establish if further leave or settlement should be granted, regardless of whether the applicant is still making any refugee or Article 3 claim. This is important in determining the funding that applies to the case.

Unaccompanied asylum seeking child

Although the term 'separated child' is to be preferred, 'unaccompanied asylum seeking child' is the term used in the contract and to determine when certain special rules and funding arrangements apply. Unaccompanied asylum seeking child will be used in this chapter to indicate when the Legal Services Commission definition applies. It means a child who is under 18, or claims on reasonable grounds to be under 18, applying for asylum in their own right and who is separated from both parents and 'not being cared for by an adult who, by law or custom, has responsibility to do so'.⁵ This is stated to be the same definition used by the UK Border Agency but differs by the inclusion of the words 'or custom'. There is guidance from the Legal Services Commission that any 'adult family member' with whom the child lives takes them out of the definition of unaccompanied asylum seeking child.⁶

Restrictions on work carried out under legal aid funding

The following restrictions affect which suppliers and their advisers can work under the different legal aid schemes for refugee children at different stages in their case:

- Only suppliers holding a current immigration and asylum contract with a schedule for asylum cases and available 'matter starts' (these are authorised funded cases a supplier is permitted to open as live cases and generally limited to a specified number by the Legal Services Commission) can commence a matter, other than age disputes (which can be done under other law categories as explained below).

⁵ Para 8.1, immigration chapter of the Civil Specification *ibid*.

⁶ Question B3, Immigration & Asylum Frequently Asked Questions – November 2010 version 6 <http://tiny.cc/dle4p>

- A 'caseworker' working on the case of a unaccompanied asylum seeking child must have had an enhanced Criminal Records Bureau check carried out in the previous 24 months prior to instruction on that case.⁷ 'Caseworker' is not defined within the specification for this purpose but is a term used within the Immigration and Asylum Accreditation Scheme (as discussed below) and also within the contracting tender documents. It should be taken to mean anyone carrying out casework (not administrative work which is not remunerated) but it does not, however, include counsel (i.e. barristers in independent practice).

There is no requirement to maintain the currency of the record check in order to continue representing a child once the case has started (but the caseworker cannot start any new matters without the check). It would clearly be good practice for suppliers nevertheless to undertake the record check on all casework staff even if there is no intention to start any new cases for children. There is also no rule or guidance as to in what circumstances information revealed by the check should prevent the adviser from representing children (although evidence of the check must be kept and made available to the Legal Services Commission on request).⁸ However, it would be a breach of the solicitors' professional conduct rules to fail to take appropriate action if an enhanced check indicated a risk to children. Both the conduct rules and the rules of the Immigration and Asylum Accreditation Scheme (as below) require notification of potential unsuitability to practice or misconduct.⁹

A records check is not required for an adviser to continue working on the case of an unaccompanied asylum seeking child where the matter commenced before 15 November 2010. Barristers in independent practice working on any unaccompanied asylum seeking child cases are not required to have a records check.

⁷ Para 8.11 (d), immigration chapter of the Civil Specification *ibid*.

⁸ This requirement is not set out expressly within the Civil Specification but is set out on the Legal Services Commission website ([www.legalservices.gov.uk/civil/immigration/5527.asp#Unaccompanied Asylum Seeking Child_Cases](http://www.legalservices.gov.uk/civil/immigration/5527.asp#Unaccompanied%20Asylum%20Seeking%20Child%20Cases)) that 'successful' checks (presumably those of advisers who go on after the check to work with unaccompanied asylum seeking children) must be kept and made available to the Legal Services Commission.

⁹ To the Solicitors Regulation Authority for a person employed in a solicitor's practice and to the Law Society Accreditation Scheme for any accredited person (see s7 Criteria and Guidance Notes May 2010).

- Anyone working on any legal aid funded immigration or asylum case must be accredited under the Law Society's Immigration and Asylum Accreditation Scheme and comply with the Legal Services Commission's work restrictions dependent on the level of accreditation.¹⁰ This limitation does not apply to counsel (meaning only a member of the Bar in independent practice; an employed barrister is not excluded) as they are exempted from the accreditation scheme.
- Specifically anyone (apart from counsel) carrying out any work (not just who may have conduct of the matter) for an unaccompanied asylum seeking child must be accredited at Level 2 or above under the accreditation scheme.¹¹ Any work done by someone who is not accredited at Level 2 cannot be claimed for.¹²
- For any asylum and immigration work, suppliers must have a supervisor who meets the Legal Services Commission's standard for the immigration category and there must be a ratio of 'supervisors' to 'caseworkers' of at least 1:6.¹³ Also there must be a ratio of Level 2 accredited caseworkers to the lower Level 1 caseworkers of at least 1:2.¹⁴ The supplier must also continue to meet the terms of their own tender for a Standard Contract regarding the hours of presence of supervisors. For example, should a supplier have made a contract bid on the basis of having a supervisor based at the place of work 100% of the time, this will become a term of their individual contract and must be maintained throughout the period of the contract. If it transpires that the supervisor is not available for the stated amount of time, then the contract may be terminated by the Legal Services Commission.
- Suppliers must ensure that within any contract year (April to March) they do not start cases for more clients from outside the defined contract procurement area in which they operate than allowed. This is defined in the Civil Specification as requiring the supplier to deliver 90% of the asylum matter start allocation and 70% of the immigration non-asylum matter start allocation to clients who are physically located in the procurement area designated in the supplier's schedule.¹⁵

¹⁰ Para 8.11 (b) and (c), immigration session of the Civil Specification *ibid*.

¹¹ Para 8.16, *ibid*.

¹² Para 8.18, *ibid*.

¹³ Para 2.35, General Civil Specification *ibid*.

¹⁴ Para 8.13, immigration section of the Civil Specification *ibid*.
This does not specify any adjustment to be made if either is part-time.

¹⁵ Para 8.20, immigration chapter of the Civil Specification *ibid*.

Legal aid schemes

The three relevant legal aid schemes all come within the Community Legal Service. Full details of them will be found in the contract documents for the 2010 Standard Contract (available on the Legal Services Commission website www.legalservices.gov.uk) and its Manual (by subscription only). In outline they comprise:

- **Legal help** (for advice and assistance other than in the course of proceedings whether in the tribunals or the higher courts; the High Court, the Court of Appeal and the Supreme Court).
- **Controlled Legal Representation** (which funds proceedings within the First-Tier or Upper Tier Tribunal).
- **Licensed work – Legal Representation** (also known as a public funding certificate) which funds proceedings within the higher courts.

Funding for the European Court of Human Rights is beyond the scope of this chapter.

Applying for funding for a child

There are a number of considerations to be had when an application for funding is made for a child in respect of (a) their capacity to instruct a representative and (b) their financial means and entitlement to receive funding.

Capacity

The first question for the representative to consider is whether the child has sufficient understanding to instruct an adviser themselves (this means they have at least the ability to take decisions that need to be taken at that stage of their case even if they may not have sufficient capacity to make every possible decision on their own behalf). Where a child is considered not to have such capacity at the start, that assessment must be kept under review throughout the case so that when the child does develop the capacity, in relation to at least some matters, they can then take those decisions for themselves. A child of 16 or 17 will, absent learning difficulties or other mental health problems, have sufficient capacity to give their own instructions.

Where a child does not have capacity to give instructions

If a child does not have sufficient capacity to give instructions then a responsible adult must apply both for legal aid and give instructions for the case on the child's behalf. That person must not have any conflict of interest with the child, as if they do, professional conduct rules will prevent a representative from acting. Both rule 3 of the Solicitors Regulation Authority Code of Conduct and rules 15 and 16 of the Office of the Immigration Service's Commissioner Code of Standards ban a representative from acting when there is a conflict of interest between two clients, and in this situation both the child and adult would be a 'client' owed duties from the representative to act in their best interests.

In this situation, for Legal Services Commission purposes, the application for legal aid such as legal help or Controlled Legal Representation for the child should be:

- 1 in the name of the child, but
- 2 signed for on the child's behalf by the responsible adult.¹⁶

It is important to define the role of the responsible adult. For Legal Services Commission purposes, the responsible (or appropriate) adult will be someone from the list and in the priority set out in rule B5 of the Legal Services Commission Funding Code Criteria,¹⁷ principally either a) a parent or guardian, b) the person who is or will be the child's litigation friend or c) any other person having sufficient interest in and knowledge of the child (but not a member of staff employed at the adviser's organisation) and who does not have their own interest in the case which conflicts with that of the child. Responsible (or appropriate) adults are expected to accompany children to all meetings with legal representatives and statutory bodies such as the UK Border Agency.

Alternatively, if the child does not have sufficient capacity, an application can be made by an adult in their own name if they have sufficient interest in the application to be the client and to seek advice about the child. For example, if a young child asylum seeker is with an aunt in the UK, the aunt can apply for legal help to receive advice and assistance herself about the child's asylum application.

¹⁶ Para 3.24, General Civil Specification 2010 *ibid*.

¹⁷ Also in para 8.23, immigration specification *ibid*.

This is not the best option as it is preferable for the identity of the child, as the primary client, to be established by using their name on the file and the legal aid records, especially where the child is a separated child.

In this circumstance, and where the child does not have capacity, then both the child and the adult are 'clients' for the case and professional duties are owed to both.

As the existence of two 'clients' in one matter has the potential to give rise to conflict of interest (for example, if the child wishes to keep something secret from the adult) great care must be taken from the outset to establish with both of them how the conduct rules affect the way the representative interacts with each of them and the duties they have to both clients.

This could include the representative explaining to the child that although they can tell them something in confidence, if they did they might have to transfer the case to another representative at another organisation. It is important that the child understands that this does not mean they cannot tell their lawyer something to be kept in confidence from the adult, as the duty of confidentiality still applies, but gives rise to a conflict of interest preventing the representative from continuing to act. Care should be taken to ensure that the child is not inhibited from revealing important information that they may feel unable to divulge to others, for example abuse by their carer.

Where a child has capacity to give instructions

If a separated child does have sufficient capacity, then the child should have a legal representative representing solely their interests (not trying to take into account the interests of an adult family member) and it is generally inappropriate for an adult to be giving instructions on their behalf. It may be appropriate (if the child agrees) for a responsible adult to be more closely involved in the case (for example being kept informed about the case and to give their opinion on what is in the child's best interests and to ensure the child understands, and feels able to take an active role in, their case). Representatives must be alive to the possibility that a child could have been trafficked and be mindful of this in allowing a role in the case to any adult who is not the child's parent or legal guardian or social worker.

The legal help form for a separated child with capacity:

- 1 should be in the name of the child and
- 2 may be signed either by the responsible adult or the child.

The Legal Services Commission regulations state,¹⁸ however, that the application may only be accepted from the child (i.e. in their name and signed by them) where there is either no specified appropriate adult to sign the legal help application, or where it is in relation to proceedings (which can include proceedings before the First-Tier and Upper Tier Tribunals) which the child can bring without a litigation friend. It is not sufficient justification for the child to sign the legal help form under the rules for legal help (which is not generally 'in relation to proceedings') simply because the child has capacity to instruct on their own behalf. A 'good reason' must be recorded for allowing them to sign the form. For Controlled Legal Representation, the child always has justification to sign the form as they relate to 'proceedings' which are ones which the child can bring without a litigation friend.

When an adult does sign the form for a child with capacity this may, on a reading of the Civil Specification, suggest that the adult is the client rather than the child and therefore is giving the instructions. This is likely to be a misreading of the Specification as no such status could have been intended for the adult. The adult signing the form for the child should be considered merely as a person with legal capacity to sign the declarations on the form on behalf of the child. Where the separated child has sufficient capacity, then the legal representative should make clear to the adult who signs the legal help form on their behalf that they are not the client and as such not owed client duties.

Financial eligibility

Having decided whose name is on the form and who will sign it, the next and entirely separate question in order to grant funding, is whose means are to be assessed to establish if the child is financially eligible for legal aid.

¹⁸ See section B5 of the Funding Code Criteria *ibid* as quoted in s3 of the Civil Specification *ibid*.

Whose means are to be assessed?

The Legal Services Commission immigration section of the decision-making guidance to the Funding Code states that for the purposes of asylum matters related to minors 'it is considered that for all cases it would be inequitable for foster carers'/social workers' income and capital to be aggregated with that of the child.'¹⁹ So a child who was looked after by or supported by Social Services who was bringing an asylum claim or extension application (or any case within the extended asylum definition set out above) can be assessed purely on their own means.

Otherwise, for an asylum seeking child here with adult family members or for any child in a non-asylum case, for legal help only, the presumption is in favour of aggregation of the means of the person responsible for maintaining the child. This is the case even when the application has been made in the name of and signed by the child.²⁰ The representative must consider whether aggregating the adult's means would not be 'just and equitable'. This potentially causes difficulties where the relevant 'person' for the means assessment may not be willing to declare their funds for the assessment or pay for the child's representation and, as a result of their means, the child is assessed ineligible for legal help.

Clearly if there is a conflict of interest between the child and the responsible adult then it would not be just and equitable to assess their means (as it would be unjust to expect the adult to have financial responsibility for funding a case for the child contrary to their own interests).²¹

In respect of an application for legal representation (meaning either Controlled Legal Representation or a funding certificate), the assessment of means is carried out using the child's own resources only.

¹⁹ Para 29.11.2, Immigration 'Decision-making guidance to the Funding Code' November 2010 <http://tiny.cc/qjrar>

²⁰ The Community Legal Service (Financial) Regulations 2000, Regulation 11(3) and 2(A).

²¹ Para 29.11.1. Decision-making guidance the Funding Code *ibid*.

Separately funded children

If the child is not a separated child there is an additional consideration to be made as to whether the child's case justifies a separate Legal Services Commission funded matter. So, for example, justification must be given for giving separate legal advice to a child who is with adult family members who are claiming asylum with the child as their dependant.

The question as to whether the child should submit their own asylum claim is potentially a complex one, considering many factors including whether the child has her or his own freestanding risks of persecution, the child's age and understanding and their wishes. The funding arrangements should play no part in that decision. It should be noted that any child who is an individually funded client is entitled to be accompanied by a legal representative to an interview with the UK Border Agency and so the child will have the protections afforded to a separated child in that respect.²² However, if separate funding for the child cannot be justified then the representation of the child at interview will not be funded (see below).

If a separate claim for asylum by the child is necessary in addition to the claim by the adult, the adviser must then justify the issue of the additional funding. This may be straightforward if the asylum claims are sufficiently distinct to be clearly separate matters. However, given that the asylum claim of the child is likely to have been advanced by the adult as part of their claim (for example a parent will include the need for protection for their child as a key part of their own asylum claim) consideration has to move instead to whether funding is justified for more than one client in relation to the same legal problem.

Matter starts in respect of more than one client may be commenced only where the following are satisfied:

- a) if proceedings were issued each client would need to be a party to those proceedings;
- b) each client has a separate and distinct legal interest in the problem or issue; and

²² Question, Immigration FAQ, November 2010.

- c) in considering whether there is sufficient benefit for the second or any subsequent client to receive Legal Help, you take into account the fact of the Legal Help that is already being provided in relation to the same general problem.²³

If the child has sufficient reason to justify submitting a separate asylum claim they are likely to be able to justify separate funding. Certainly the child would have their own right of appeal if refused and the risk to the child themselves means that the child has a separate and distinct legal interest in the problem of the family not to be returned to their country of origin. Difficulties arise most often in assessing whether there is sufficient benefit for additional funding. If the reasons for justifying the separate asylum claim are clearly recorded, then it is considered that would be sufficient to justify additional funding given that the child will (if old enough) be required to go through all the steps of the asylum claim including interview. If separate funding is not justified, it is doubtful whether the funding for the adult's asylum claim could be used to fund the attendance at a UK Border Agency interview of the child (as they would not be the 'funded client' as defined).

Payment of legal aid funding for an asylum case for a child

Where the child falls within the definition of unaccompanied asylum seeking child the funding of the legal advice and representation (both legal help and Controlled Legal Representation) of the child is exempt from the system of fixed fees (the 'Graduated Fee Scheme' or 'GFS') that generally applies to asylum cases. Instead, the legal work carried out for the child will be remunerated on an hourly basis.²⁴ For that to apply, the child must meet the definition set out above (i.e. seeking asylum, being separated and being under 18 years) at the time the particular funding application is signed. So, for example, if the child turns 18 whilst waiting for a decision on their asylum claim the whole of the legal help case is hourly funded (unless they transfer to another representative which would involve them signing another legal help form). If after turning 18 the person has to apply for

²³ Para 3.50, the Civil Specification *ibid*.

²⁴ Para 8.83 (k), immigration chapter of the Civil Specification *ibid*.

Controlled Legal Representation to bring an appeal then the funded appeal work through to the First-Tier substantive appeal determination would *not* be an hourly paid matter.²⁵

If the child is not an unaccompanied asylum seeking child then the Graduated Fee Scheme will apply (unless the case has been excluded from that for some other reason such as it coming within the Early Legal Advice Project). As with all fixed fee schemes there is a tension between the interests of the client in receiving all the advice and assistance they require, and the legal representative wanting to keep the work to a minimum (to maximise profit or minimise loss on the case). It would be a breach of a professional conduct requirement, which is to act in the client's best interest, and a breach of the Legal Services Commission Contract, to fail to carry out work that was reasonably required in the case for that reason (for example refusing to take on a case because the likely fixed fee is insufficient, the Contract prohibits in its Standard Terms an adviser from being influenced by anything other than the client's best interests).²⁶ It may also amount to negligent conduct.

Legal help

In the first stages of an asylum claim, funding is through the legal help scheme. The only merits test that applies is the standard test of whether there is 'sufficient benefit' to the child in receiving the advice. In the case of a separated child it would be difficult to imagine a case where there was not sufficient benefit in providing legal help during the asylum claim as the test is merely that there must be 'sufficient benefit to the client, having regard to [all] the circumstances of the matter... to justify work or further work being carried out.'²⁷

²⁵ The Civil Specification is not specific on the point but this appears to be the intention (see for example immigration section of Civil Code Guidance and para 29.30.3, Decision-making guidance to the Funding Code *ibid.*) and is the interpretation applied by the Legal Services Commission.

²⁶ Para 3.67, Civil Specification and para 7.2, Standard Terms of the Contract.

²⁷ 5.2.1, Legal Services Commission Funding Code Criteria April 2010. Also para. 6.1 of the Civil Contracting Costs Assessment Guidance, November 2010 states that this applies to '...merits on a continuing basis (e.g. sufficient benefit of the legal help work), see: www.legalservices.gov.uk/docs/civil_contracting/ Costs_Assessment_Guidance_Nov_10.pdf

Even if the claim for asylum put forward by the child is not supported by any objective evidence or does not directly raise a Refugee Convention reason, there are still likely to be sufficient issues to meet this relatively low test about the safety of return (including return to located family members if there is a risk of the child having been trafficked or otherwise abused) and the application of the benefit of the doubt in the child's favour.

As the legal help case is remunerated on an hourly basis, financial limits apply²⁸ of £800 for profit costs and £400 for disbursements at April 2011.²⁹ Those funding limits are extendible on application in advance to the Legal Services Commission. These initial limits are not defined as being the costs expected to be sufficient and suppliers must not decline to do work or incur a disbursement that is reasonably required for the case in order to avoid applying for an extension of the costs and/or disbursement limits.

It must be noted though that there are three situations in which a smaller fixed funding limit of £100 for the combined advice costs and disbursements can apply to even an unaccompanied asylum seeking child asylum case. Those are if the child is provided with 'initial advice' about an asylum claim and either:

- i) that representative is not further instructed after the attendance at the Asylum Screening Unit,
- ii) the child does not return to provide further instructions at all after the initial advice, or
- iii) the child does not make an asylum claim.³⁰

It should be noted that there is no definition of 'initial advice' for these purposes. There is further use of the phrase in the definitions of what steps are covered by the stages in the Graduated Fee Scheme (e.g. paragraph 8.69.1), which make clear that it is limited to advice and does not, for example, include taking a statement from the client. It is not specified whether doing work for the child beyond 'initial advice' can take the legal representative outside this limitation. However, as the clauses do not refer to the client *only* having been given initial advice prior to making or deciding not to make the asylum claim,

²⁸ Para 8.86 (c) and 8.87 Civil Specification *ibid*.

²⁹ All figures are expressed as exclusive of VAT. See para 8.76 and 8.86, *ibid*.

³⁰ Para 8.86 (a) (i)–(ii), *ibid*.

it is unlikely that a claim for full remuneration would be accepted on that basis by the Legal Services Commission if the child does not instruct further after attending the Asylum Screening Unit or decides not to make an asylum claim at all. This limit cannot be extended for either profit costs or disbursements. Despite these limits, the legal representative must not limit the time spent on the child's case or any disbursements incurred before any asylum claim is made in order to try to keep within these limits.³¹

Submitting an asylum claim under legal help

Unless an asylum seeker has claimed asylum on arrival in the UK, there is often a tension at the start of the case between submitting the asylum claim as soon as possible (to avoid the delay undermining the credibility of their claim and bring any irregular status to an end) and wishing to prepare the claim as thoroughly as possible before starting the claim. Resolving this tension should not (as stated above) involve any consideration of the possible limitation on the remuneration claimable for the work. For a child, the factors in favour of claiming asylum quickly may be weaker in many cases than they are for an adult. In particular they cannot be excluded from social services assistance because of a late claim. The credibility of the claim is also less susceptible to damage by delay by a child in claiming asylum than by an adult.

If there is any significant risk of the child being assessed as being an adult and detained, then steps should be taken to deal with that dispute before the claim is made. ►See chapter 3. The risk of harm to the child and to their asylum claim of being wrongly placed in, say, the detained fast track must be considered. Even where age is disputed the risk of being placed in the fast track is small but the harm done to both claim and child is potentially very great.

Where there is an age-disputed child, the UK Border Agency deem the child will be suitable to be detained and processed through the detained fast track (or detained non-suspensive appeal process) if any one of the following apply:³²

³¹ Para 7.2, Standard Terms of the Contract *ibid*.

³² 'Detained fast track and detained non-suspensive appeal- intake selection' UK Border Agency website, asylum process guidance.

- Those for whom there is credible and clear documentary evidence that they are 18 years of age or over;
- Those in respect of whom Social Services provide *written confirmation* stating that a full 'Merton-compliant' age assessment has been undertaken, which also states that the subject is 18 years of age or over;
- Those whose physical appearance/demeanour *very strongly* indicates that they are *significantly* over 18 years of age and no other credible evidence exists to the contrary.

Both the age dispute and preparation of the substantive claim should be addressed prior to attending the Asylum Screening Unit if there is a real risk of detention. Leaving a child at risk of entering the detained fast track and with their asylum claim unprepared (given the tight timescales of the fast track) is unjustifiable.

Legal aid funding concessions

There are important concessions within the Legal Services Commission Civil Specification on providing an appropriate service to children. Attendance by the legal representative at asylum interviews is normally excluded from funding under legal help. Any child who is a 'client'³³ can be accompanied by their legal representative to the Asylum Screening Unit to submit their claim and subsequently to their substantive interview.³⁴ The representative must be accredited as a Level 2 Senior Caseworker (with a current enhanced criminal records check) if the child is an unaccompanied asylum seeking child.³⁵ Where the child is not an unaccompanied minor, the representative must be an accredited level 2 senior caseworker, but it is not required to have an enhanced criminal records check.

³³ Regulation 2 of the Financial Regulations 2000 *ibid* defines a client as 'an individual who applies for or receives funded services' so this rule allows for a child who is not separated to be accompanied by their legal representative if they are claiming asylum in their own name and are receiving legal help themselves. Confirmed in question B3 Immigration FAQ's November 2011 *ibid*.

³⁴ Para 8.53 (f) and 8.54, s8 of the Immigration Civil Specification *ibid*.

³⁵ Para 8.16, Civil Specification *ibid*.

It is important to emphasise that all work dealing with minors or unaccompanied minors must be carried out by a Level 2 Senior caseworker or above.³⁶

Interpreters

An independent interpreter must be engaged to assist the legal representative at both interviews if the child is not a fluent English speaker. The interpreter cannot attend in place of the representative.³⁷ Reliance must not be placed on the UK Border Agency appointed interpreter. They will not be bound to maintain the confidentiality of any private instructions taken and are unlikely to be made available for the representative to take instructions or give private advice. An independent interpreter is also necessary to check the interpretation of the UK Border Agency appointed interpreter.

Responsible/appropriate adult

A responsible adult must attend an interview of any child. That role is separate from that of the legal representative and of the interpreter and neither of them can assume that role. This chapter previously discussed the different roles an adult may take in a child's asylum matter and a responsible (or appropriate) adult in this context is one who safeguards the child's welfare in the asylum process and does not have a contrary interest in the matter themselves.

Attending interviews

The additional profit costs incurred for attending any substantive interview (but not one at the Asylum Screening Unit) are outside the general financial limit set on costs for the case. They are reported as a separate item and are not subject to any financial limit. The additional disbursements incurred are subject to the disbursements limit.³⁸

³⁶ Para 3, Immigration and Asylum Accreditation Scheme, Work restrictions, November 2010, see: <http://tiny.cc/f8vj>

³⁷ Question C7 Immigration and Asylum Frequently Asked Questions *ibid*.

³⁸ 8.89 Civil Specification *ibid* which only refers to 'substantive interviews' so suppliers would do well not to rely on verbal assurances.

The National Immigration and Asylum Team of the Legal Services Commission appear to operate on the basis that attendance at the Screening Unit is similarly outside the financial limit but have not confirmed this is writing as a general principle.

If the child turns 18 before the asylum interview takes place, the child exception to the prohibition on claiming for attendance at interviews ends and the attendance cannot be claimed unless another exception applies. It may in that situation be appropriate to invite the responsible Social Services department to pay privately for the representative to attend.

Disbursements

The Civil Specification authorises that disbursements may be incurred on behalf of any client under the legal help and Controlled Legal Representation schemes where:

- a) it is in the best interests of the client to do so;
- b) it is reasonable for you to incur the disbursement for the purpose of providing Controlled Work to the client;
- c) the amount of the disbursement is reasonable; and
- d) incurring the disbursement is not prohibited by this section or the applicable part of sections 10 to 16 of this specification'³⁹

The Civil Specification does not require the legal representative to incur disbursements that meet these criteria. However, where the criteria are met, professional conduct rules and the contract requirement to act only in the best interests of the client would prevent a representative from refusing to incur a disbursement because of the expense to them, for example if they bear the expense of a disbursement under legal help or Controlled Legal Representation but may not claim payment for these by the Legal Services Commission more than once every six months and under specific criteria.⁴⁰

³⁹ Para 4.16, Civil Specification *ibid*. In public funding certificate cases there are listed allowable and non-allowable expenses and the general guidance that a disbursement can be claimed under the certificate if it would be allowable on assessment between a client and their solicitor (para 2.5.6, Funding Code decision-making guidance *ibid*). None of the disbursements likely to arise in an asylum case are non-allowable.

⁴⁰ Para 8.110, Session 8, Civil Immigration Specification *ibid*.

Of particular relevance to asylum seeking or refugee children are the following disbursement issues:

- For an unaccompanied asylum seeking child who is being financially supported by Social Services, their travel expenses to attend an appointment with their legal representative can be authorised as a disbursement.⁴¹ However, the travel fares of any other child client can only be reimbursed if they are in receipt of asylum support payments (which they could only be indirectly by being a dependent family member of someone in receipt of the payments; if alone they are the financial responsibility of Social Services).
- Whereas previously there was express guidance that prohibited a representative from obtaining a report from a country expert before a decision on the asylum application had been taken by the UK Border Agency, there is no such current guidance. A representative will, however, be expected to have clear and detailed recorded justification why a report is needed pre-decision (whether to justify an extension to the disbursement limit or on subsequent assessment or audit) but if there is a need for such objective evidence at that stage, a report should be sought. It may be more likely that an early report can be justified in the case of a child whose experiences may not be covered by the general objective evidence or who may be less able to articulate the reasons for their need for asylum.⁴²
- There is also no longer current guidance that prevents translations of statements prepared for an asylum seeker where the statement has been read to them by an interpreter to approve.⁴³ As a matter of good practice (and to avoid unlawful discrimination against a client whose first language is not English) all clients and particularly children should have their statement in a language that they can read again for themselves (or easily have read to them if they cannot read) other than just in an appointment with an interpreter.

⁴¹ Para 8.50, Civil Specification *ibid*.

⁴² See for example archived document Immigration FAQs, first issue under the General Civil Contract – Solicitors 2004 www.legalservices.gov.uk/FAQs1stIssue.pdf
All old guidance can be found at: www.legalservices.gov.uk/archive/9787.asp

⁴³ See for example question E40 on the archived document on the Legal Services Commission website 'Immigration and Asylum FAQ's March 2008 which considered whether justification could be made for the translation for an unaccompanied asylum seeking child. <http://tiny.cc/2y1st>

Ideally a statement should be translated before being approved (so they can take time away from the representative's office to consider it) and any final amendments translated as well (so that they have a copy of the final version). Where the credibility of the child's asylum claim is doubted, consideration should also be given to having the substantive interview record translated.

Appeals

If an asylum claim is refused, the child will have to lodge an appeal to the First-Tier Tribunal which will require the granting of funding under Controlled Legal Representation.

Controlled Legal Representation can only be granted to an appellant where they meet the means and the merits tests. Controlled Legal Representation will normally be refused on the basis of merits if the prospects of achieving a successful outcome for the client are unclear or borderline (save for cases that have significant public interest or human rights issues or is of overwhelming importance to the client) or poor in so much as the prospects of success are clearly below 50% and the claim is likely to fail.⁴⁴ This Controlled Legal Representation merits test applies to both children and adults, there is no separate test for children. Regrettably the Legal Services Commission has declined to amend the rule to provide that all children are deemed to meet the Controlled Legal Representation merits test. There is therefore no guarantee that a child appellant can have a legal representative at their appeal.

Guidance has been issued by the Legal Services Commission setting out their view of the application of the Controlled Legal Representation merits test in certain circumstances for children. It states that the merits test would be satisfied in an asylum appeal for an unaccompanied asylum seeking child in a case where 'a representative is able clearly to identify the 1951 Refugee Convention reason'. It is stated 'This is because the applicant's age (having been accepted by the Secretary of State for the Home Department) may be a contributory and weighty factor in determining refugee status and is likely to satisfy the merits test (i.e. the case will have at least a borderline prospect of success).'⁴⁵

⁴⁴ Para 13.4, Funding Code *ibid*.

⁴⁵ Para 29.9.5, chapter 29, Decision-making guidance to the Funding Code, November 2010 *ibid*.

Further, an asylum claim, particularly one from a child, will always be of overwhelming importance to the client, so the merits test will be met when the chance of success is only borderline or unclear.

That interpretation of the merits test reinforces the position that, where a child has a valid claim for asylum but has been refused refugee status or humanitarian protection and granted only discretionary leave to remain (usually on the basis of age and lack of safe reception arrangements in the country of origin), the interests of the child are in pursuing the appeal against the refusal part of the decision not to grant asylum or humanitarian protection. The grant of refugee status or humanitarian protection is always a significant advantage to the child and so should be pursued if possible. The chances of the child succeeding in an appeal are generally going to be highest at the earliest opportunity, when the events the child fled are most recent and the child is entitled to greater benefit of the doubt due to their age. The representative must advise the child of that and may not stop the case at that stage of their own volition without instructions from the child (or responsible adult if the child does not have capacity) to do so. The funded 'matter' does not conclude just because some form of leave has been granted. A representative who stopped work on the case just because some leave had been granted would therefore breach both the Legal Services Commission contract and professional conduct rules as contrary to the child's interests.

The same guidance declines to reach any general conclusion on the application of the Controlled Legal Representation merits test for former unaccompanied asylum seeking children who have turned 18 by the date of the application for Controlled Legal Representation. However, in the assessment of merits, the factor of the age of the client is not one that ceases to have any relevance on the day the child turns 18. So a child who has an appeal shortly after turning 18 (and therefore who is likely to be relying on events in their country of origin whilst a child) must come very close to the presumption that funding should be awarded. Age has a particular relevance for assessing credibility. It may therefore be very rare that Controlled Legal Representation funding should be refused on the merits to a former child asylum seeker who has been refused asylum for credibility reasons.

The guidance also declines to reach any general conclusion on the application of the merits test to a child with a disputed age

(where the UK Border Agency maintains the child is over 18). The aim of the representative dealing with an age dispute should generally be to resolve the dispute (through High Court proceedings) before the appeal is heard. This ensures that the safeguards for children in the appeal process are afforded to the disputed child. If the dispute has not been resolved (either way) then, assuming the child is considered to have sufficient merits to have legal aid funding for the dispute, this should mean that the merits for Controlled Legal Representation should be assessed as if they are a child of their claimed age. To do otherwise would be irrational. So in effect this child should also be within the rationale of the presumption of funding for an unaccompanied asylum seeking child.

Refusing funding under Controlled Legal Representation

If Controlled Legal Representation is refused to a child on the merits, then that child has the right to appeal against the decision to an Independent Funding Adjudicator using a CW4 appeal form, which is completed by both the representative and the child. The representative must fill in their sections of the CW4 appeal form against the refusal of funding and should offer to assist the child and responsible adult to complete the other sections and submit it on the child's behalf unless the child declines the assistance.⁴⁶ The deadline for this is stated by the Legal Services Commission to be five days but this is actually the deadline for the representative to give the CW4 appeal form to the client.⁴⁷ The imposition of the deadline for appeal has no statutory basis and is just a matter of Funding Code guidance. The specification requires only that the representative help the client if instructed by them to do so, but good practice requires a more proactive approach with a child and they should be afforded assistance in such an appeal if it is required. A provider can claim up to a maximum of 30 minutes for the completion of the CW4 form.⁴⁸

⁴⁶ Para 8.42, Civil Specification *ibid*. See also para 29.22, Immigration Funding Code, November 2010.

⁴⁷ Para 8.43, Immigration Civil Specification *ibid* c.f. para 29.22.7, Decision-making guidance to the Funding Code *ibid*.

⁴⁸ E-mail correspondence from John Facey, Legal Services Commission 28/7/2010.

Research by Devon Law Centre⁴⁹ indicates that there may be a significant problem with clients finding representation for their appeal after Controlled Legal Representation funding has been granted following a successful appeal to an Independent Funding Adjudicator. To safeguard the best interests of the child we would recommend that where possible the representative should seek to maintain the confidence of the child and responsible adult by the way they phrase the refusal of funding. This could be by stressing to the child that they do have a chance of success with the judge on appeal but that the chance is not strong enough for funding to be granted. This is more positive than the representative saying they think the child will lose. Although the representative must make judgments about the case in order to assess merits, it should be made clear to the child that the representative is not judging the child or their claim. The representative should particularly avoid statements to the child that suggest they do not believe them.

If funding is granted on appeal and the child loses confidence in their legal representative due to their refusal of funding or if the representative cannot continue to represent them because they are professionally embarrassed, then the representative should offer to assist the child and responsible adult in finding a new representative. The mere fact that the representative had assessed the merits as less than 50% and that the funding refusal decision has been overturned on appeal by the funding adjudicator is not, without more, sufficient to amount to professional embarrassment. The client will have sufficient reason to consider the relationship between them and their representative has lost the necessary trust and confidence and cease instructions⁵⁰ on account of funding being refused, but the representative cannot cease acting simply because their opinion was that the appeal was likely to fail.⁵¹ The representative's duty to the client to act in their best interests continues and they should present the case to the best of their abilities providing this does not cause them to mislead the court or argue the unarguable (a high test).

⁴⁹ Asylum Appellate Project; Final Report, Jean-Benoit Louveaux, Devon Law Centre, March 2010.

⁵⁰ Para 29.22.5 immigration section of the Decision-making guidance to the Funding Code 2010 *ibid*.

⁵¹ A representative can only end a matter in accordance with para 3.82 of the Civil Specification.

If the initial refusal of funding is known to the tribunal, the sitting judge will not take judicial notice of this fact and will assess the case on its facts.

The appeal to the funding adjudicator is not the final assessment of the merits test for Controlled Legal Representation in the case. The legal representative is under a continuing obligation to keep the merits test under review.⁵² This can present a difficulty to a representative who had initially assessed the merits as being poor. There is no guidance from the Legal Services Commission on how to approach this potential dilemma. Arguably, the only rational way to approach it is for the adjudicator's assessment to stand as findings that bind the representative on matters as they were before the adjudicator at the time of their determination. The representative may not go behind those findings unless there is new material that, taken together with the findings made by the adjudicator, is sufficient that the adjudicator would have come to a different view. This might be particularly the case where the adjudicator had assessed that the merits were unclear, for example because an expert report was needed. Once the further evidence is obtained that might show the merits are now clearly less than 50%.

If the representative has closed the case and claimed their fees on taking the decision to refuse funding this will be considered premature and they should carry out the remaining work as part of the same matter and notify the correction to the amount of their remuneration claim to the Legal Services Commission following the substantive appeal.⁵³

It is possible, in limited circumstances, for another supplier to take on the client and carry out a merits assessment for themselves and to carry out urgent work where there is a need for it, regardless of whether an appeal has been made to the Independent Funding Adjudicator. The Legal Services Commission sets tight criteria on when this can be done in paragraph 29.22 of the decision-making guidance on the Funding Code, meaning it is only for urgent work and only where the merits are unclear. Otherwise the decision must be referred to a funding adjudicator.

⁵² Para 15.4, Funding Code and para 29.22.3, Decision-making guidance to the Funding Code *ibid*.

⁵³ Para 3.49, Civil Specification *ibid*.

Representation at appeals

Consideration must be given to whether the child should be represented at the hearing by counsel or by the caseworker with conduct of the case. Conduct and contract best interests requirements mean that the decision can be based only on the best interests of the child. The financial interests of the supplier cannot be taken into account. That assessment of best interests will vary depending on, for example, the needs and wishes of the child and the advocacy experience of the caseworker. It may be preferable for the child to have the continuity of being represented by their caseworker and so that fewer people are involved in representing them.

If the child is to be represented by someone other than their usual caseworker, funding under the Controlled Legal Representation scheme will be justified to cover a conference with counsel for those final preparations. It would be wholly inappropriate for a child to meet their advocate for the first time at hearing.

Further appeals

If the appeal is unsuccessful, consideration must be given to an application for permission to appeal to the Upper Tribunal. Time spent considering the merits of the application can be claimed as part of the substantive appeal funding (if the child is still represented by the same representatives) and is still within the financial limit for that part of the case.

Applications for permission to appeal by the appellant are still subject to the same Controlled Legal Representation merits test and funding must be refused if the prospects of success are poor. As an appeal can only be brought if there is an error of law, there cannot at this stage be a presumption of funding a child's application for permission to appeal in an asylum case. The presumption that continuing an asylum appeal for a child is 'of overwhelming importance' to the child still applies so funding must be granted if the prospects are not poor (i.e. not clearly likely to fail).

Funding for an appeal by a child is, like all appellant appeals, remunerated at hourly rates but is 'at risk'.

No costs (and only limited disbursements⁵⁴) can be claimed unless permission to appeal is granted. If Controlled Legal Representation is refused by the representative at this stage there is no right for the child to appeal to a funding adjudicator.

A second representative can be instructed by an appellant who has been refused Controlled Legal Representation if the representative assesses that there are sufficient merits in the appeal continuing subject to the normal rules on transferring to a new representative.⁵⁵ However that does not mean the appellant has the right to seek a second opinion funded by Controlled Legal Representation. The second representative must have assessed that there were sufficient merits to justify a new matter start before any application for funding (legal help or Controlled Legal Representation) can be granted.

The existence of risk fees often raises a potential conflict of interest between an appellant and their representative. The representative must not let the possibility of not being paid for work carried out influence their assessment of the merits and must continue with the case if there are sufficient merits (if the chance of succeeding are above 50%).⁵⁶

Appeals to the Court of Appeal

Following an appeal within the Upper Tier Tribunal, the losing side can make an application for permission to appeal to the Court of Appeal. The permission application is made first to the Upper Tier itself (under Controlled Legal Representation) and if refused the application can be made again to the Court of Appeal itself.

If the child is bringing the appeal to the Court of Appeal then funding will be by a public funding certificate (subject to the relevant means and merits test⁵⁷) from the stage of the application to the Court of Appeal.

⁵⁴ Para 102, Session 8, Immigration Specification *ibid* which allows only interpreters and experts to be claimed for if permission is refused.

⁵⁵ Paras 3.47–3.57, Civil Specification *ibid*.

⁵⁶ The matter cannot end at this point unless it is no longer justified continuing with the case having regard to the funding code (para 3.82 Civil Specification).

⁵⁷ The same test as for Controlled Legal Representation funding para 13.4, Funding Code *ibid*.

If it is the UK Border Agency bringing the appeal the client should consider applying for a funding certificate once the UK Border Agency have applied to the Court of Appeal as all work from that stage relates to the proceedings in the Court.⁵⁸

Litigation friends

A child under the age of 18 must have a 'litigation friend' in order to conduct proceedings in a court, including the Court of Appeal,⁵⁹ unless the Court orders that they may conduct the proceedings without one.⁶⁰ It can sometimes be difficult to persuade a foster carer or social worker to act as litigation friend. The solicitor acting in the case (or a member of their organisation) cannot take on the role of litigation friend. That would leave them effectively acting without a client and would leave the child without the protections that a litigation friend is intended to give. The only requirements for the litigation friend are that they are able to sign a certificate of suitability that confirms that:

- they can fairly and competently conduct proceedings on behalf of the child and have no interest adverse to that of the child, and
- where the child is a claimant,⁶¹ they will undertake to pay any costs which the child may be ordered to pay in relation to the proceedings, subject to any right the litigation friend may have to be repaid from the assets of the child.

These conditions and the role of a litigation friend are described more fully in Part 21 of the Civil Procedure Rules and the corresponding practice direction.

A solicitor must not put forward someone as a litigation friend who they do not believe to be suitable as to do so would be unprofessional conduct.

The requirement to pay any costs awarded against a child who is bringing the appeal can be a matter of concern to a potential litigation friend (especially one acting in a professional capacity such as a social worker).

⁵⁸ Just reading the application for permission is not a step within proceedings so could in theory be undertaken on a preceding legal help or Controlled Legal Representation funding.

⁵⁹ Rule 21.2 of Civil Procedure Rules.

⁶⁰ Rule 21.2 (3) Civil Procedure Rules *ibid.*

⁶¹ CPR 21.4.3.

Even if the litigation friend is appointed by the court, the requirement to be willing to pay the costs order still applies. It must be noted that this requirement only applies where the child is a 'claimant' and it is unclear whether a child bringing a statutory appeal is a 'claimant' as such. A claimant is defined as a 'person who makes a claim'⁶² whilst a 'claim' is not defined. It would be possible in, say, an appeal in a general civil claim, for the 'appellant' to be the defendant. There is no adaptation of the rule or forms for statutory appeals.

Guidance on the operation of this rule is very limited. Where the child has the benefit of a public funding certificate then costs protection afforded by section 11(1) of the Access to Justice Act 1999 still applies. When the child has that costs protection, it is only the resources of the child and not those of the litigation friend that are considered when assessing how much the other party is entitled to receive in costs.⁶³ The right of the litigation friend to be reimbursed for costs awarded against the child from the child's assets is likely to be refused only where the litigation friend's conduct in the proceedings has been questionable or contrary to the child's best interests. If the child has no assets then it is unlikely any costs would have been awarded against them (and therefore not awarded against the litigation friend). So for a child bringing an appeal in the Court of Appeal, the litigation friend generally faces little costs risk.

The conditions and the role of a litigation friend are described more fully in Part 21 of the Civil Procedure Rules and the corresponding practice direction.

The application for a funding certificate for a child for the proceedings must be made by an adult who is or is proposed to be the litigation friend for the proceedings.⁶⁴ The need for the litigation friend to apply for funding is dispensed with if the court has ordered that the proceedings may be conducted without a litigation friend, in which case the solicitor may make the application for the funding for the child. This obviously has practical problems as the funding certificate would be needed to commence the court application to dispense with the litigation friend.

⁶² Rule 2.3 Civil Procedure Rules.

⁶³ Regulation 7(6) The Community Legal Services (Costs) Regulations 2000 as amended.

⁶⁴ Para C9, Funding Code Procedures *ibid*.

Alternatively there is the possibility of the Legal Services Commission Director dispensing with any of these requirements where that is desirable. There is no form for such an application and there is no guidance on when that discretion is likely to be exercised. The request should be made by covering letter.

We suggest that where possible a litigation friend should be appointed for a child (even if they are 16 or 17 years old) because potentially difficult issues may arise in proceedings. For an older child with sufficient understanding the litigation friend should take the same role that the responsible adult has done previously.

For an older child capable of giving instructions, if there is no one suitable willing to undertake the obligations of a litigation friend then dispensation from the need for one, both for the proceedings and the funding, should be sought. For a younger child, an approach may have to be made to the Official Solicitor.

As mentioned above, for a funding certificate the means assessed are only those of the child.⁶⁵ If the child is under 16 and has no means, the financial assessment form is much simplified.⁶⁶ For a child aged 16 or 18, a much more detailed form is required.⁶⁷ Children are otherwise subject to the same financial eligibility criteria as an adult (and the same rules concerning financial contribution apply if they

⁶⁵ Regulation 11 (3) and 2(A) of the Financial Regulations 2000 as amended.

⁶⁶ Form CLS MEANS 4 – Legal Services Commission Website, used if the child has no regular income and low savings. This form confusingly states on the front that it must be signed by the litigation friend or guardian ad litem or by the child's solicitor where the child does not need either. However the declaration refers to signature only a person acting for the child in a non-professional capacity. The guidance leaflet further only says a guardian ad litem can sign and not a litigation friend. The declaration and guidance are clearly wrong and the declaration should be amended by hand if the declaration is signed by say a social worker (who is acting in a professional capacity). Also see para. 10.1.3, Guide to assessing Funding Eligibility, special groups, non business, children, Legal Services Commission manual: 'In cases where an application is submitted by a professional it is reasonable to allow some additional flexibility in relation to the time given for the production of necessary information (because enquiries will have to be made and the professional may have difficulty in obtaining the information without delay). Care should also be taken in closing applications/certificates on the basis of non-co-operation.'

⁶⁷ Form CLS MEANS 1 – Legal Services Commission Website. This form requires financial information only about the child. This form has a more straightforward declaration than the MEANS 4 above. It is signed by the adult making the application for the child.

have sufficient income or savings according to the rules). A child does not sign any of the forms themselves.

If the child turns 18 during the course of the proceedings notice should be given confirming their age and that they intend to continue with the litigation without a litigation friend.⁶⁸ This should also be notified as an amendment to the Legal Services Commission but there are no other steps required at that stage.

In an appeal in either the First- or Upper Tier Tribunal there is no costs regime (i.e. the losing party cannot be required to pay the legal costs of the winning party). In the Court of Appeal (and the High Court or Supreme Court) costs may be awarded in favour of the winning party against the losing party. These rules apply to proceedings brought by or against a child. There are additional rules that provide some costs protection to any person who has a public funding certificate. However, it must be remembered that if a child brings or defends such proceedings they may, if they lose, find themselves being ordered to pay the legal costs of the UK Border Agency in the case. The litigation friend is also liable to pay any award of costs against the child where the child is the 'claimant', subject to the right to have those costs refunded to them by the child, as described above, and having signed a certificate of suitability agreeing to this obligation.

Although costs can be awarded against the losing party at any stage, costs will not normally be awarded against a party that is refused permission to appeal in the Court of Appeal (as the respondent to the appeal is not generally required to take any part in the proceedings at that stage).⁶⁹

The costs protection from having a funding certificate means that a child who loses can only be ordered to pay the legal costs to the amount the court considers reasonable having regard to all the circumstances and enforcement of the payment of those costs can only be with the leave of the court.⁷⁰ A child who is supported by Social Services would have a good argument that it would not be reasonable to require them to pay anything towards the costs of the UK Border Agency (or nothing more than a nominal sum).

⁶⁸ Para 21.9, Civil Procedure Rules *ibid*.

⁶⁹ Para 4.23, practice direction to Part 53 Civil Procedure Rules *ibid*.

⁷⁰ s11 Access to Justice Act 1999 and procedures set out in para 22, Costs practice direction to Part 43 of the Civil Procedure Rules.

Age disputes

► See chapter 3.

Although the issue of a child's age is an important one in their asylum or immigration case, it is likely to be a much wider issue than that, particularly if the child is separated from her or his family. As the age assessment will generally have been made by social workers and will often determine what services their social services and education departments must provide to the child, those issues are likely to come to the fore first.

To the extent that it affects the asylum or immigration case of the child, legal advice and assistance about challenging the decision can be funded under the Legal Services Commission's Immigration Category by a supplier with an immigration contract. That can include bringing a judicial review.

However, particularly where the most pressing issue is safeguarding the welfare of a child who has been assessed as older than claimed, it is likely to be preferred that the challenge is conducted by either a community care or family public law⁷¹ specialist under those contract categories.⁷²

Whoever conducts the challenge, there will be overlaps with the other areas of law (e.g. a community care challenge will still need to address how the UK Border Agency deals with the child and possibly whether an asylum appeal should be adjourned). That overlap of categories is permissible by Legal Services Commission rules and there is no need to bring separate challenges under each category affected.

⁷¹ See Legal Services Commission 'Category Definitions 2010' www.legalservices.gov.uk/docs/civil_contracting/CategoryDefinitions.pdf

⁷² Para 8.8 of the Immigration Specification *ibid* requires that 'where a client who is an unaccompanied asylum seeking child experiences problems relating to the exercise of the local authority's duty under the Children Act 1989 you must ensure that the Client receives advice in relation to Public Law Children Act proceedings. You may either continue to act for the Client (if you are permitted by this Contract to provide legal advice in the Family Category of Law) or make a referral at the earliest possible opportunity to an alternative Provider who is permitted to provide legal advice in the Family Category of Law.' This suggests the Legal Services Commission prefer the matter to be conducted under the family public law category despite the fact that many of the community care specialists will have greater experience of bringing such challenges. A referral to a competent community care specialist in these circumstances is a professionally competent decision and we suggest is unlikely to bring any contract sanction from the Legal Services Commission.

Funding other work for a child or former child

This chapter now addresses some other possible circumstances when work may be carried out under the legal aid schemes.

After a successful asylum application

If refugee status or some other status has been granted (so 'successful' in this context) the following may be relevant in terms of further work which may need to be carried out and whether or not such work can be funded. In general, any further work under Controlled Legal Representation or legal help should relate to matters that contain legal issues on which the client requires advice and assistance in order for those issues to be addressed.

- If there is delay in the issuing of status papers after a successful appeal the Controlled Legal Representation case file may be closed (so that the costs can be claimed) and a new legal help matter opened for all pre-action steps for judicial review proceedings over the delay.⁷³
- The Legal Services Commission take the view there are generally no legal issues involved in making an application for a refugee travel document and so advice and assistance in completing the application will not be remunerated.⁷⁴ An application for a Home Office Certificate of Identity (for a child given discretionary leave to remain or humanitarian protection) is more likely to involve legal issues and where it does advice and (possibly) assistance may be given.⁷⁵ As part of the concluding advice at the end of the case the child should be given information about the possibility of a travel document or Certificate of Travel.⁷⁶

⁷³ Question C2 Immigration & Asylum Frequently Asked Questions – November 2010 *ibid*.

⁷⁴ Para 8.56, Immigration chapter Civil Specification *ibid*.

⁷⁵ The prohibition in the specification on remuneration for simple 'form filling' does not contain an exhaustive list of what could be excluded so a straightforward application for a Certificate of Travel could on assessment be found to be excluded.

⁷⁶ This will be in the original substantive asylum matter if it will take no more than an extra 30 minutes. If it will take longer than that then that amounts to a separate matter (para 3.43 Civil Specification). As this is advice in relation to form-filling in the Legal Services Commission definitions, this time is hourly remunerated and is in addition to the fixed fees if on a GFS case.

- Assistance can be given for an application for refugee family reunion. This is defined as non-asylum work and funded generally under the graduated fee scheme.
- An application for indefinite leave to remain after a time-limited grant of leave to remain as a refugee or with humanitarian protection may not always automatically attract funding. An application for indefinite leave to remain on the grounds that the individual still requires the protection of the UK for a Refugee Convention or under Article 3 of the European Convention on Human Rights reason may not be eligible for legal assistance funded by legal help if, on the individual facts of the case, there is 'no legal issue' and there will be no active review of the application.⁷⁷

Possible legal issues which could justify funding include advice in relation to criminal convictions or other 'bad character' problems which could affect the grant of further leave, or the possibility the person has lost their refugee status or humanitarian protection, for example due to obtaining a passport from their country of origin or having visited the country since the grant of leave. The fact that the applicant was a child when they obtained their status (but is now over 18) or even that they are still a child does not, of itself, give rise to a legal issue sufficient to justify legal help funding. A child may therefore have to proceed with the application without legal advice unless they (or the local authority) can fund the advice privately.

- Further leave applications at the end of a period of Discretionary Leave to Remain are always liable to an active review by the UK Border Agency so legal help funding is available for these cases whether the applicant is still a child or not. These are always counted as asylum cases for legal help purposes⁷⁸ so if the applicant is a child they should

⁷⁷ The Legal Services Commission stated in correspondence with ILPA in August 2010 that they considered advice and assistance with such an application to be prohibited form-filling which the Legal Services Commission would not pay for. Even if there were an issue the applicant may only be eligible for advice and should complete and submit the application form to the UKBA themselves. If the applicant was later notified by the UKBA that their case was to be subject to active review by the UKBA then funding through legal help was justified.

⁷⁸ Assuming the applicant's original application was an 'asylum' claim. para 8.7(b), immigration chapter of the Civil Specification *ibid*.

be eligible to be funded under the more generous hourly paid scheme as an unaccompanied asylum seeking child again.⁷⁹

- The Legal Services Commission consider that British citizenship applications do not generally require legal advice (although legal issues surrounding, for example, bad character or excessive absences from the UK could potentially arise which may justify funding). If the applicant is still a child however the application to register as a British citizen is likely to be decided on a discretionary basis.⁸⁰ Whether the child is likely to be successful in such an application and the factors to be advanced on the child's behalf in support of the application are likely to be considered to raise sufficient legal issues for the child to have legal help advice (subject to considerations set out above as to whether the local authority's means should be assessed as making the child financially ineligible).⁸¹

After an unsuccessful asylum application

If a child has been refused any leave (or has turned 18 and been refused any leave) and all appeal rights have been exhausted, the only option remains of a fresh asylum or human rights claim.⁸²

⁷⁹ The specification in defining unaccompanied asylum seeking child refers to the child 'applying' for asylum rather than the case being an asylum case (an asylum case can include one in which the client previously made an asylum claim but there is no such claim being pursued at this point). There are unlikely to be many circumstances where, in an extension application by a child, there is no Article 3 or Refugee Convention claim advanced. That would have the effect of bringing the funding within the unaccompanied asylum seeking child arrangements.

⁸⁰ Most refugee or former asylum seeking children would end up applying under section 3(1) British Nationality Act 1981.

⁸¹ Note though that the specification only allows for advice about the application to be claimed for. The completion of the citizenship application form is still considered as 'form-filling' for which no costs can be claimed; para 8.57, Immigration Specification *ibid* refers only to 'advice regarding the completion' of the form. This means the representative must either complete the form without charging the Legal Services Commission for that work or advise the applicant about how they themselves should complete the form and then advise whether they have completed the form correctly (likely overall to take longer than the representative just completing the form correctly in the first place).

⁸² It is in theory possible that a child aged 17 ½ or more could be refused without any leave to remain, in practice appeal rights are unlikely to be exhausted until after the child has turned 18.

Funding of this under the legal help scheme can only be provided if the criteria for a fresh claim set out in rule 353⁸³ of the Immigration Rules are met. Should there be a change of circumstances in the client's position which may give rise to a further application for leave or challenge the lawfulness of any detention or removal action, a new matter may be opened subject to the funding requirements being met. If the client has no ongoing asylum or immigration issue then matters should be closed promptly once the appropriate client care steps have been taken.

Other issues

The following other points are of note:

Key performance indicators

The Legal Services Commission Civil Specification sets a number of key performance indicators (KPIs) for suppliers to meet. Two of these are stated to relate to quality in immigration and asylum cases:

2.81 KPI 1A:

You must achieve a Substantive Benefit for the Client in at least the following proportion of cases:

Immigration 15%.

For appeals the 'quality' KPI is:

2.84 KPI 1B:

You must achieve a Substantive Benefit for the Client in at least the following proportion of cases:

Immigration [and asylum] CLR 40%

'Substantive benefit' has a very particular meaning (by defining which types of outcome are counted and which are not) different from the normal meaning of the words.

Only detained fast track Controlled Legal Representation cases are excluded from this measure. The appeals of children are included.

⁸³ HC395 Immigration Rules.

ILPA has long lobbied for these indicators (particularly the appeal indicator) to be dropped or changed. There is no statistical basis for the rates set in the indicators. There is no evidence to show that a supplier diligently and conscientiously applying the merits test and preparing and presenting their appeals will achieve these results. The merits test itself introduces unpredictability as it includes cases where the merits are 'unclear'. There are also too many variables outside the control of the representatives (such as the identity of the particular immigration judge that hears the appeal). The indicators are very poor measures of quality of the correct application of the merits test.

The concern is that the existence of these measures and the fact that failing to meet them constitutes a breach of contract⁸⁴ creates perverse incentives for suppliers, worried that they may fail to achieve their targets, to refuse Controlled Legal Representation in cases that meet the merits test, but are only borderline, to reduce the number of unsuccessful appeals that they conduct.

As already highlighted, it is both professional misconduct and a breach of contract to take anything other than the best interests of the client into account when undertaking legal aid work. Representatives may take note of their key performance indicators and use them as one minor tool in monitoring the work carried out. If they are failing to meet the indicators, or in danger of doing so, representatives should collate and review for themselves cases which have failed in order to assess whether there was a problem with their application of the merits test or whether the 'success or failure' rate is explained by factors other than poor quality. This might include appeals that have been unsuccessful as far as the Upper Tier Tribunal but were subsequently successful in the Court of Appeal. It may also include cases where there was a change in case law or country conditions that meant an appeal failed despite it being right to grant funding initially. Children's cases may also be a particular factor as more of them will be upgrade appeals (appeals where a child has been granted discretionary leave to remain until the age of 17½ but wishes to appeal the refusal of refugee status) and may be cases where the merits are unclear or borderline largely because of the child's age.

Sanctions from the Legal Services Commission may be avoided with such a case by case repost of the implications of wrong application of the merits test or poor quality.

⁸⁴ Notwithstanding the assurances in section 11 the Standard Terms of the Contract *ibid* about the measured way in which contract sanctions would be applied.

Future funding changes

On 15 November 2010 the Ministry of Justice (MOJ) issued its consultation paper 'Proposals for the Reform of Legal Aid in England and Wales'.⁸⁵ The consultation closed on 14 February 2011 with around 5000 responses. ILPA submitted a response⁸⁶ raising serious concerns about most of the proposals affecting its members and their clients. The response of the Ministry of Justice had not been published at the time of writing. The proposals involve massive cuts in the scope of legal aid and tightening of the financial eligibility criteria.

The issues from the proposals that may affect refugee and asylum seeking children (whether separated from their families or with them in the UK) are:

- Asylum will remain within the scope of legal aid schemes but all non-asylum immigration work (apart from challenging detention) will be out of scope. Most applications for further leave to remain for refugee or former asylum seekers will still be covered (as it is within the Legal Services Commission definition of 'asylum' as we have seen above) but advice on family reunion, citizenship or eligibility for a Home Office Certificate of Travel would be excluded.
- A single compulsory access route to a legal aid funded representative is proposed via a telephone service and for most people Legal Services Commission funded legal advice will only be available from the telephone service and not face-to-face. Currently the proposals have asylum advice and assistance included in this arrangement so children and those assisting them (whether Refugee Children's Panel or social workers) will be required to seek initial legal advice about asylum on the telephone and seem not be able to continue with their existing referral arrangements.⁸⁷

⁸⁵ Available on the Ministry of Justice website consultation section.

⁸⁶ Available on the ILPA website in its submissions section.

⁸⁷ The proposals for the telephone gateway were particularly lacking in detail and appeared to have had little thought. ILPA and others raised significant objections to the exclusive gateway both generally and in specific situations (ILPA have said a compulsory telephone service is inappropriate in any asylum case and in any case for a child).

- Asylum support will be taken out of scope. This will affect children in asylum seeking families and potentially some separated children expected to move on to asylum support at 18 or older. Community Care and Public Law (Children) cases remain in scope which will cover most cases for separated asylum seeking children. Families that lose asylum support may find social services departments offering or threatening to take the children into care so as to meet their Children Act obligations to them. They would have access to legal aid to fight care proceedings but not to get their support reinstated.
- Children who are separately represented in family private law cases (such as cases about which adult a child should be resident with or have contact with) will still be able to have a legal aid lawyer but the case will be out of scope for the adults (meaning they will be unrepresented in the proceedings or have to pay privately).
- Some trafficked children have been assisted with claims to the Criminal Injuries Compensation Authority to obtain financial compensation for the harm done to them, but it is proposed that this will be out of scope for legal aid funding, and they will have to make any claim without legal assistance.
- As refugee children and their families (if they are with them) are frequently amongst the most vulnerable and disadvantaged in our society the cuts to all other areas are likely to impact disproportionately on them, for example, welfare benefits and housing are to be excluded from funding.

Lack of skilled and experienced legal representatives

The number of contracts for legal aid immigration and asylum work held by organisations has decreased in recent years, from 604 in March 2004 to 223 in March 2010.⁸⁸ There are numerous pressures on these suppliers that have driven many to stop legal aid work entirely or reduce the amount carried out. The majority of cases are conducted on legal help and Controlled Legal Representation in these categories and those are poorly remunerated even relative to the public funding certificate rates, and do not even begin to compare with private rates.

⁸⁸ See statistic information to Legal Services Commission Annual Reports 2004/05 and 2009/10.

There were some limited increases (5%) to some of the fees paid and some rates in July 2008 but there have been no increases since and none are planned. Instead a 10% reduction is proposed by the Ministry of Justice as part of its latest consultation.

Asylum and immigration cases are often slow to resolve (being dependent on the unresponsive UK Border Agency for a decision) and payment can only be claimed when a decision is taken and, later, when the appeal is determined. Disbursements, such as for interpreters and experts, are relatively high and cannot be immediately reclaimed from the Legal Services Commission. Suppliers therefore can carry a great deal of work in progress and disbursement expenditure for the Legal Services Commission. In June 2010 this cash flow 'perfect storm' pushed the not-for-profit supplier, Refugee and Migrant Justice, into administration. Amongst the clients left without representation were approximately 900 child asylum seekers.

Despite the poor remuneration the schemes place very significant bureaucratic burdens on suppliers, through rules, reporting regimes and audits, which are a substantial overhead for suppliers.

All this puts pressure on suppliers that makes it increasingly difficult or impossible to maintain the quality of their service. The move to more work being covered by fixed fees only adds to that pressure.

At the same time the only audit system that the Legal Services Commission has that comes close to assessing quality, peer review of individual case files by experienced practitioners, is being scaled back by the Legal Services Commission due to its cost. This further impacts on the quality of legal advice in this field.

In general the trend will be for fewer suppliers to be involved in providing legal aid funded advice and that quality advice will remain under increased and perhaps irresistible pressure. It is to be hoped that the Legal Services Commission will protect the best interests of children and advice to refugee and asylum seeking children and continue to remain an hourly paid scheme with the additional safeguards and arrangements set out in this chapter. It is crucial to the promotion and safeguarding of children's rights that good quality advice is available on a public funded basis.

Resources

Internet links checked 29 April 2011

International law and conventions

African Charter on the Rights and Welfare of the Child, 1990

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