

## Best interests of the child in immigration and asylum law

This fact sheet provides information on how the best interests of the child are considered by the Home Office and others in the context of immigration and asylum law.

If you have any questions about the best interests of a child and how they relate to a refugee or migrant child, young person or family, you can call our Migrant Children's Project advice line on 0207 636 8505, or email [mcp@coramclc.org.uk](mailto:mcp@coramclc.org.uk).

### What is the concept of 'best interests'?

'Best interests of a child' is a guiding principle in matters relating to children. It must, for example, apply during a hearing for contact in a family court or be considered when deciding what accommodation is suitable for a care leaver. This fact sheet sets out how the concept of the 'best interests of a child' has developed and is currently interpreted in an immigration and asylum context.

Article 3(1) of the United Nations Convention on the Rights of the Child 1989 ('UNCRC') provides:

*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 [emphasis added]*

The best interests principle can be seen as the guiding principle of the entire Convention; it is an umbrella provision prescribing the approach to be taken in all actions concerning children.

The Convention does not offer a precise definition of best interests, or an explicit list of factors relevant to best interests. A child's best interests are likely to change depending on the situation. However, the UNCRC does state that 'best interests', broadly speaking, refer to a child's general well-being, which takes into consideration a wide range of factors. These factors include the views of the child, the need

for a safe environment, family and close relationships, and development and identity needs. [1] States that have ratified the Convention must always make decisions which treat the best interests of the child as a primary consideration. [2]

### UNCRC and UK Law

As with all international conventions, the rights and duties in the Convention must be set out in domestic law in order to be legally binding in UK Courts. As such, a child cannot challenge a decision in court by relying or referring only to the UNCRC. The applicability of the UNCRC in UK law, policy and practice is indirect via treaty obligations, domestic case law, domestic policies that expressly contain Convention duties, and case law of the European Court of Human Rights which refers to children's rights.

Although the Convention has not been made part of our domestic law, as international law it is meant to be referred to by law-makers, courts and tribunals when making decisions that affect children. Public bodies, or private organisations with a public function, should also comply with it.

Some laws, for example the Children Act 1989, and the Borders, Citizenship and Immigration Act 2009, make explicit reference to the best interests of children and therefore require decision-makers, tribunals and courts to consider this when reaching decisions.

### Section 55 of the Borders, Citizenship and Immigration Act 2009

The UK government previously maintained a reservation to the UNCRC with respect to children subject to immigration control. This meant that the Convention applied to other children in the UK but not to foreign national children when regarding matters of immigration control. However, as of November 2008 this reservation no longer applies.

Section 55 of the Borders, Citizenship and Immigration Act 2009 contains a mandatory duty on the Home Office and others making immigration decisions to safeguard and promote the welfare of children in the UK as they carry out their functions. The scope of the duty is broad, meaning that any immigration decision taken within the UK should include a consideration of this duty. [3]

The section 55 duty concerning the need to safeguard and promote the welfare of children is a separate duty to the UK's obligation under the UNCRC to ensure the best interests of the child are a primary consideration.

All asylum and immigration policies and practices at every stage of the process must comply with the duty to treat a child's best interests as a primary consideration. The duty applies to all Home Office functions and to all agencies working with children, irrespective of the child's immigration status. The same duty applies to both separated children and children in families. The duty applies to how claims are considered and decisions are made, as well as to procedures and processes. For example, the Home Office would need to consider the child's best interests when conducting interviews, providing accommodation and support, setting timescales, and considering evidence.

Failure to comply with section 55 or to address the child's best interests in accordance with the Home Office guidance on best interests may make a decision unlawful. A decision can be appealed to the tribunal on the basis that the Home Office has failed to consider the child's best interests. Consideration of best interests must be meaningful; merely reciting that best interests have been considered does not fulfil the Home Office's duties.

### Home Office guidance on safeguarding and promoting the welfare of children

The Home Office has issued statutory guidance to accompany the duty under section 55. [4] The guidance sets out what the Home Office considers in relation to safeguarding and promoting the welfare of children through: inter-agency cooperation, training, responsibility, and information sharing.

The Home Office also makes clear in its guidance that although the section 55 duty does not encompass children outside of the UK, overseas staff must 'adhere to the spirit of the duty and make enquiries if a child may be in need of protection or presents welfare needs that require attention. Further, overseas staff dealing with entry clearance and visas should be trained on the importance of the need to safeguard and promote a child's welfare.' [5]

The Home Office will normally include a section in most of its guidance and instructions outlining the need for staff to comply with section 55. In its guidance, the Home Office considers the best interests duty to be synonymous with the requirement to safeguard and promote the welfare of children. For example, there is detailed guidance on the best interests of the child in the family and private life guidance [6] and asylum policy instruction on discretionary leave. [7]

### How are best interests relevant to my work with migrant children?

If you are a social worker, key worker, or other professional working with migrant children, then you may be under a duty to act in a child's best interests under the Children Act 1989. It is important to be aware of the obligations of the Home Office in relation to a child's best interests in all immigration and asylum decisions that are made. If the Home Office does not consider a child's best interests, or fails to have regard to the need to safeguard and promote the welfare of the child, its actions may be unlawful and subject to legal challenge.

The Home Office decision maker will need to assess a child's best interests at all stages of decision-making. It is important to note that the duty under section 55 covers all decisions made by the Home Office, whether this is a decision on adequate housing and support, interviews, or obtaining information.

The Home Office policy 'Processing an Asylum Application from a Child' contains a best interests 'pro forma' for local authorities to complete and send to the Home Office. However, it is not always best used in practice and the Home Office should gather

information from other agencies and practitioners working with the child. [8]

In order to come to a view the decision maker may need to draw on information from other sources such as the local authority or school. Social workers, teachers and other professionals need to be aware of their possible involvement in the decision-making process. It is also important for key workers, support workers, teachers and others who work with a child to provide information and supporting evidence of what they feel is in the child's best interests.

### Best interests principles in case law – *ZH (Tanzania)*

Since the section 55 duty came into force, there have been a number of important cases that have considered how section 55 should be considered and the importance of this consideration compared to others that the Home Office takes into account, such as the right to control UK borders.

In the landmark case *ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4*, [9] the UK Supreme Court considered the best interests of the child in a mother's appeal to the Supreme Court against her removal from the United Kingdom.

The main issue was the weight to be given to the best interests of children who are affected by a decision to remove or deport one or both of their parents from the UK.

In the Supreme Court decision, Lady Hale held that the best interests of a child must be considered first before going on to consider whether other factors might act as differing considerations – such as the need to maintain immigration control or the parent's poor immigration history. She further observed that the 'spirit if not the precise language' of Article 3(1) had been translated into English law.

Lord Kerr further held that the best interests of a child should be looked at first before considering whether there was a reason to displace what was in the child's best interests.

There were a number of other important points held throughout the judgment regarding best interests, including,

- the 'best interests of the child' broadly means the well-being of the child;
- An important part of discovering the best interests of the child is to discover the child's own views;
- While a child's interests may be the same as their parents', this should not be taken for granted in every case; and
- Although nationality is not a 'trump card' it is of 'particular importance' in assessing the best interests of a child (the children involved in this case were British citizens).

For further information, please see the Migrant Children's Project's information note on this case at: [www.coramchildrenslegalcentre.com/resources](http://www.coramchildrenslegalcentre.com/resources).

### Case Law and Principles after *ZH (Tanzania)*

There have been a number of cases since the Supreme Court's decision in *ZH (Tanzania)* that have developed how the courts consider best interests.

It has been confirmed that the public interest in removal and deportation is not as high as in extradition cases and that children's rights are an important public interest. [10]

The Supreme Court has confirmed the benefit of a child having British citizenship is important when assessing whether it is reasonable to expect a child to live in another country. [11] It was also noted that the legal principles in 'best interests' cases were as follows:

*(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;*

*(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary*

*consideration; and the child's best interests do not of themselves have the status of the paramount consideration;*

*(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;*

*(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;*

*(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;*

*(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and*

*(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent. [emphasis added]*

The Upper Tribunal have further clarified the seventh principle of *Zoumbas* – that there may be cases where the best interests of a child may be overcome by the public interest argument; the best interests assessment should be carried out in isolation from other factors and should be done at the beginning; and that assessing what “little weight” means in this context depends on the facts of the case. [12]

The President of the Upper Tribunal found that a *decision maker should be properly informed and must conduct a careful examination of all relevant information and factors*, and noted that the question of whether the duties imposed by section 55 have been duly performed in any given case will invariably be intensely fact-sensitive and contextual. [13]

The President has further clarified in case law that; the onus is on the appellant to prove that the Home

Office's section 55 was breached; it is not necessary for the decision letter to make specific reference to the statutory guidance; and the statutory guidance prescribes a series of factors and principles which caseworkers and decision-makers must consider. [14]

The case law and guidance continues to develop and there will likely be further case law on how the best interests of the child should be obtained and considered in practice. In any event, all decisions made in relation to a child should include the best interests of the child as a primary consideration.

### Best interests in applications for leave to remain and indefinite leave to remain

The power of the Home Office to grant a person leave to remain in the UK is contained in section 3(1)(b) of the Immigration Act 1971 and includes a discretion to grant leave or indefinite leave to remain. [15]

The case of *SM and TM and JD and Others v SSHD* [16], involved five children aged between six and ten who were all born in the UK to parents who did not have leave to remain. They had eventually been granted Discretionary Leave to Remain for three years (under pre-2012 rules) on the basis of article 8.

The decision was challenged on the basis that Home Office policy failed to consider the wellbeing of children under section 55 and the children should have been granted indefinite leave to remain, in line with their best interests - it was noted that short periods of leave could be detrimental to a child's welfare. Coram Children's Legal Centre intervened in this case.

The court held that the previous Home Office policy was unlawful and the best interests of the child should be considered before deciding the period of time for which leave should be granted to a child. The policy has now been changed. The Home Office's guidance on discretionary leave and leave to remain under article 8 do now contain sections on the circumstances in which granting longer periods of leave to remain, or indefinite leave to remain, would be appropriate, with specific reference to the duty under section 55. [17]

In the recent case of *NS & Others v SSHD* [18] the lawfulness of the Home Office's new policy was considered in the context of the Home Office's grant of limited leave to remain rather than indefinite leave to remain to a parent of four British children. The new policy was held to be lawful and in the circumstances the leave granted was considered correct.

The granting of limited leave to remain rather than indefinite leave to remain to children specifically has been considered in two decisions since *SM and TM and JD and Others v SSHD*, and both were unsuccessful. [19] However, it is clear now that, when considering the length of leave to remain for either parents or children, the Home Office must consider its duty under section 55. If it is considered that it would be in a child's best interests for a longer period of leave or indefinite leave to remain to be granted, this should be made clear when applying for leave and evidence or submissions provided should outline the reasons why. The Home Office should then make a decision on the length of leave, taking into account the best interests of the child as a primary consideration.

## NOTES

[1] Page 14, 15 & 97, UNHCR, Guidelines on Determining the Best Interests of the Child

<http://www.refworld.org/docid/48480c342.html>

[2] United Nations Convention on the Rights of the Child, General Comment No. 14,

<http://www.refworld.org/docid/51a84b5e4.html>

[3] Section 55, Borders, Citizenship and Immigration Act 2009

<http://www.legislation.gov.uk/ukpga/2009/11/section/55>

[4] Home Office, Every Child Matters: Change For Children [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257876/change-for-children.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf)

[5] para 2.34-2.36, *ibid*

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257876/change-for-children.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf)

[6] Section 11, Home Office, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/452912/Family\\_Life\\_as\\_a\\_Partner\\_or\\_Parent\\_and\\_Private\\_Life\\_-\\_10-year\\_routes\\_guidance\\_August\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10-year_routes_guidance_August_2015.pdf)

[7] Section 1.4, Home Office, Asylum Policy Instruction: Discretionary Leave

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460712/Discretionary\\_Leave\\_2\\_v7\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460712/Discretionary\\_Leave\\_2\\_v7\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf)

[8] Home Office, Processing an asylum application for a child,

<https://www.gov.uk/government/publications/processing-an-asylum-application-from-a-child-instruction>

[9] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

<https://www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf>

[10] *HH v Deputy Prosecutor of The Italian Republic, Genoa* [2012] UKSC 25

<https://www.supremecourt.uk/cases/docs/uksc-2011-0128-judgment.pdf>

[11] *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74

<http://www.bailii.org/uk/cases/UKSC/2013/74.html>

[12] *Kaur (children's best interests/public interest interface)* [2017] UKUT 14 (IAC)

<http://www.bailii.org/uk/cases/UKUT/IAC/2017/14.html>

[13] *JO and Others (section 55 duty) Nigeria* [2014] UKUT 517 (IAC)

[http://www.bailii.org/uk/cases/UKUT/IAC/2014/%5B2014%5D\\_UKUT\\_517\\_iac.html](http://www.bailii.org/uk/cases/UKUT/IAC/2014/%5B2014%5D_UKUT_517_iac.html)

[14] *MK (section 55 – Tribunal options)* [2015] UKUT (223) (IAC)

<https://tribunalsdecisions.service.gov.uk/utiac/2015-ukut-223>

[15] Section 3(1), Immigration Act 1971

<http://www.legislation.gov.uk/ukpga/1971/77/section/3>

[16] *SM and TM and JD and Others v SSHD* [2013] EWHC 1144 (Admin)

<http://www.bailii.org/ew/cases/EWHC/Admin/2013/1144.html>

[17] Section 5.3, Home Office, Asylum Policy Instruction: Discretionary Leave

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460712/Discretionary\\_Leave\\_2\\_v7\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf)

Section 11.3.1, Home Office, Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/452912/Family\\_Life\\_as\\_a\\_Partner\\_or\\_Parent\\_and\\_Private\\_Life\\_-\\_10-year\\_routes\\_guidance\\_August\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/452912/Family_Life_as_a_Partner_or_Parent_and_Private_Life_-_10-year_routes_guidance_August_2015.pdf)

[18] *NS & Ors, R (On the Application Of) v Secretary of State for Home Department* [2014] EWHC 1971 (Admin) (20 June 2014)

[http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2014/1971.html&query=R+\(on+the+application+of+NS+&+others\)&method=all](http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2014/1971.html&query=R+(on+the+application+of+NS+&+others)&method=all)

[19] *Alladin v SSHD* [2014] EWCA Civ 1334 & *Bibi v SSHD* [2014] EWHC 3685 (Admin)

<http://www.refworld.org/docid/54b90bf74.html> and <http://www.bailii.org/cgi->

[bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2014/3685.html&query=bibi&method=boolean](http://bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2014/3685.html&query=bibi&method=boolean)

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