



PUTTING THE CHILD AT THE CENTRE

An Analysis of the Application of the Best Interests Principle for Unaccompanied and Separated Children in the UK



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ACRONYMS

AIU	Asylum Intake Unit
BIA	Best Interests Assessment
BID	Best Interests Determination
BIP	Best Interests Procedure
CRC	United Nations Convention on the Rights of the Child
DfE	Department for Education
HO	Home Office
ICIBI	Independent Chief Inspector for Borders and Immigration
IOM	International Organization for Migration
IRO	Independent Reviewing Officer
JCHR	Joint Committee on Human Rights
KIU	Kent Intake Unit
LA	Local Authority
LAC	Looked After Child
NTS	National Transfer Scheme
NRM	National Referral Mechanism
SOP	Standard Operating Procedures
STHF	Short Term Holding Facilities
UK	United Kingdom of Great Britain and Northern Ireland
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund

EXECUTIVE SUMMARY

When unaccompanied and separated children arrive in the UK, procedures need to be in place to ensure that the responsible child protection authorities are on hand to meet their immediate needs, and, in time, to plan for their futures. At every stage, actions taken on behalf of and with respect to these children must take into account their best interests as a primary consideration.¹

Article 3(1) of the Convention on the Rights of the Child (CRC)² gives every child the right to have his or her best interests assessed and taken into account as a primary consideration *in all actions or decisions* that concern him or her. Known as the best interests principle, it should inform both substantive decisions made about a child as well as the procedures and processes with which the child interacts. It should be understood and applied by all public or private institutions involved with children without discrimination.

In 2014, UNHCR and UNICEF published *Safe & Sound*,³ a report providing guidance to governments across Europe on strengthening their approach to assessing and determining the best interests of unaccompanied and separated children. Building upon *Safe & Sound*, this report aims to operationalise the principles it sets out, with a specific focus on the UK context. It was funded by the European Commission's Directorate General for Justice and Consumer Affairs and was undertaken by UNHCR, with support

from Unicef UK. The document provides concrete proposals for how the best interests principle for unaccompanied and separated children could be strengthened and implemented comprehensively within and across UK systems and procedures.

The UK context

In 2008, the UK Government lifted its reservation⁴ to the CRC, which it previously held with respect to children subject to immigration control. As a result, Section 55 of the Borders, Citizenship and Immigration Act 2009 was introduced, which places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to *“the need to safeguard and promote the welfare of children who are in the United Kingdom.”*

Despite this positive development, multiple research studies have indicated that the consideration of best interests for refugee and migrant children, who are within the immigration system at least, do not always take place, or where they do take place they do not always reflect a holistic consideration of the required elements.⁵ Furthermore, the UK lacks a systematic, formal and unifying approach to the collection, recording or sharing of information that is necessary and relevant to achieving a holistic, quality

¹ UNHCR and UNICEF *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, 2016 available at: <https://bit.ly/2NkXLJF>.

² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: www.unhcr.org/refworld/docid/3ae6b38f0.html.

³ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: www.refworld.org/docid/5423da264.html.

⁴ A reservation allows the state to be a party to the treaty, while excluding the legal effect of that specific provision in the treaty to which it objects.

⁵ See for example, *Greater Manchester Immigration Aid Unit; Children's best Interests a primary Consideration*, 2013, available at: <https://bit.ly/2xm2eki>; Kent Law Clinic; *How children become 'failed asylum-seekers'*, 2014 available at: <https://bit.ly/YysJiU>; Law Centres Network, *Put Yourself in our Shoes*, 2015, pp139-140 available at: <https://bit.ly/2XC0F0C>; The Children's Society, *Not just a temporary fix: The search for durable solutions for separated migrant children*, 2015 available at: <https://bit.ly/2NoRjkZ>; Coram Children's Legal Centre, *This is My Home*, 2017 available at: <http://www.childrenslegalcentre.com/this-is-my-home/>; Independent Chief Inspector of Borders and Immigration Report: *An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children*. August-December 2017 available at: <https://bit.ly/2IW1Xex>.

best interests assessment (BIA) or best interests determination (BID).^{vi}

In 2013, addressing similar concerns, an inquiry by the Joint Committee on Human Rights recommended that the UK Government evaluate the case for the establishment of a formal BID process.^{vii} In their response to the inquiry, the Government agreed to consider the case for a BID process through a consultation, however, this is yet to take place.^{viii}

Research objectives and methodology

This report maps the current approach to the consideration of the best interests of unaccompanied and separated children seeking asylum in the UK, with an analysis of the existing children's social care and asylum systems. This has been undertaken with a view to strengthening understanding of these systems and procedures and whether or not they are appropriate and accessible to children falling under UNHCR and Unicef UK's respective mandates. This work has predominantly involved desk-based research and observational visits. The current system for unaccompanied and separated children is set out in DIAGRAM 1 on page 20.

An advisory group of eight experts was also appointed to assist with the research and inform the development of the proposals to strengthen application of the best interests principle reflected in the report. Based on the research findings, a number of proposals were developed which aim to show how the existing system could be strengthened, to put children at the centre, and better determine and make decisions in accordance with their best interests.

Key findings

Strengths and existing safeguards

This research mapped the existing system of children's social care case management and best interest procedures within the UK. This found a number of existing frameworks and practices which help strengthen the assessment and application of the best interests principle. These notably include:

➤ Strong domestic statutory duty

In both the children's social care system and in immigration functions there is a statutory duty upon agencies to take account of a child's best interests in all decisions affecting them.

➤ Referrals into the children's social care system

On identification, unaccompanied and separated children are generally referred promptly into the children's social care system where they are accommodated under the care of the local authority.

➤ Children's asylum claims have specific procedural and evidentiary safeguards

Provision is made for a legal representative, a responsible adult, an interpreter and an interviewer specifically trained in handling children's cases to be present at the child's asylum interview.

➤ A comprehensive and multi-agency approach to care planning and safeguarding

Each child under the care of the local authority is given an individual care plan which exists to provide an assessment of a child's immediate needs and ensure that there is a long-term plan for the child to which all relevant parties are working. Statutory guidance also applies a multi-agency approach to the safeguarding of children which aims to put the child at the centre of the care system.

^{vi} UNHCR and UNICEF *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, 2016 available at: <https://bit.ly/2FJLfgy>.

^{vii} Joint Committee on Human Rights *Human Rights of unaccompanied migrant children and young people in the UK*, 2013 available at: <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>.

^{viii} *Government's response to the first report from the Joint Committee on Human Rights Session 2013-2014* available at: <https://bit.ly/2IZWSlx>.

Weaknesses and shortcomings

This report identified a number of areas which would benefit from further review or strengthening with regards to the application of the best interests principle in unaccompanied and separated children's cases. These include:

▶ **First contact with authorities requires strengthening**

At the point when unaccompanied and separated children first come into contact with the UK authorities, prior to referral to children's social care services, there appears to be few safeguards or child protection procedures in place. Children at this point, report being held for a period in police custody and may be subject to lengthy questioning.

▶ **Two parallel systems lack a child-centred approach**

Unlike British national or settled children, unaccompanied and separated children are required to access both the children's social care system and the immigration and asylum system, which have distinct objectives, timeframes and funding arrangements. The immigration, asylum and care planning systems are not aligned and this can undermine the application of the best interests principle.

▶ **Limits to effective multi-agency working and information sharing**

Mechanisms to encourage joint working and information sharing between different agencies such as local authorities and the Home Office appear to be limited in scope and occur predominantly as a review of paper documents with case review meetings occurring infrequently.

▶ **Lack of well-informed and impartial best interests considerations informing a grant of leave**

Best interest considerations relevant to a decision on the grant of leave to remain for unaccompanied and separated children are not benefitting from impartial, multi-disciplinary input. Home Office caseworkers alone do not have the required competence and capacity to holistically identify the relevant best interests considerations in coming to a final decision on leave.

▶ **No formal mechanism for arriving at a durable solution in the best interests of each child**

Following on from the above, there is no stage in the process of determining a grant of leave, in which all of the options available to the child are fully explored through a formal mechanism for determining a durable solution that is in the best interests of each child.

Proposed alternative approach to strengthen respect for children's best interests

Principally, UNHCR and Unicef UK recommend that greater multi-disciplinary and expert input is fed into actions and decisions taken at critical points. This would serve to ensure respect for the best interests principle, including by improving the support a child receives, informing immigration decision-making and identifying an appropriate durable solution in every case.

The proposals outlined in this report aim to provide a basis for discussion and collaboration between the Government and relevant stakeholders to better respect Article 3 of the CRC and its application in the UK.

An alternative proposal for how the existing UK system could be adapted and strengthened is outlined in Section 7 of this report.

Proposals for reform notably include:

- ➡ A series of **strict procedural safeguards** should be put in place throughout the process including the appointment of an independent legal guardian at the point of identification of the child, the provision of child friendly information and legal advice and representation, effective child participation and written, reasoned decisions at each stage.
- ➡ A **consistent, child friendly and humane approach should be taken when children arrive by all first points of contact** (which might include police, immigration enforcement and health workers) involving in-person training and development of standard operating procedures.
- ➡ A modified process where a claim for **asylum or other form of international protection can be indicated later, after legal advice** allowing the child the chance to recover to some extent, meet their guardian, receive full legal advice and access the necessary child friendly information before making any decisions about their future.
- ➡ **The introduction of a best interests planning meeting** which would replace and build upon the child's first existing Looked After Child (LAC) Review meeting.
- ➡ The outcome of this meeting would include the production of a **single integrated report with a detailed appraisal of the child's protection situation**. This report would be shared with the Home Office to support child specific/best interests considerations relevant to a child's application for international protection. This information sharing process would seek to enable good quality initial decision-making on a child's asylum application first time.
- ➡ After the asylum decision is made by the Home Office, the outcome of this decision would be communicated to a **multi-disciplinary independent BID Panel** made up of professionals with the necessary competence and expertise. This BID recommendation would be shared with the Home Office to inform a final immigration decision on leave to remain in cases where this is required.

Recommendations

Using the proposals in this report as a potential framework, the Government should develop strengthened mechanisms to ensure that all unaccompanied and separated children have an assessment and determination of their best interests, and that these:

- ➡ Are undertaken systematically and objectively in coordination with relevant government bodies responsible for child protection.
- ➡ Respect confidentiality and data protection arrangements.
- ➡ Ensure a sufficient amount of information is collected, which is relevant and specific to each individual child to enable analysis of each of the elements necessary when considering their best interests.
- ➡ Provide a formal mechanism for arriving at a BID, which should be undertaken using a multidisciplinary approach and which should inform the appropriate durable solution for each child.

This report recommends that work to fulfil the above commitment be undertaken by a **cross-governmental working group** (involving both central government and local authorities), with the benefit of input from independent experts, including UNHCR and Unicef UK.



1. INTRODUCTION

Of all refugees and migrants, unaccompanied and separated children¹ are among the most vulnerable to violence, abuse and exploitation.² These children have been separated from the people and places they know and face an uncertain future. When unaccompanied and separated children arrive in the UK, procedures need to be in place to ensure that the responsible child protection authorities are on hand to meet the immediate protection and care needs of the child, and, in time, to plan for their futures. At every stage, actions taken on behalf of these children should respect and uphold their best interests.³

Regardless of their circumstances, all unaccompanied and separated children should be treated in line with the rights and entitlements set out in the United Nations Convention on the Rights of the Child (CRC),⁴ and other human rights instruments.⁵ As children temporarily or permanently deprived of their family and support network, they are entitled to special protection and assistance.⁶

States are primarily responsible for the protection of all children and should promote the establishment and implementation of child protection systems,

¹ Unless specified otherwise, this refers to asylum-seeking, refugee and migrant children. UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: www.refworld.org/docid/42dd174b4.html (CRC General Comment No. 6).

² UNHCR, *High Commissioner's Dialogue on Protection Challenges: Children on the Move, Background Paper*, 28 November 2016, available at: www.unhcr.org/uk/583d8e597; UNICEF and International Organization for Migration (IOM), *Harrowing Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking and exploitation*, September 2017, available at: <https://uni.cf/2RLgmgh>; UNHCR, *Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders, January - December 2018, January 2019*, available at: <http://www.unhcr.org/desperatejourneys/>.

³ UNHCR and UNICEF, *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, 2016 available at: <https://bit.ly/2NkXLJF>.

⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: www.refworld.org/docid/3ae6b38f0.html.

⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: www.refworld.org/docid/3ae6b3b04.html; Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, available at: www.refworld.org/docid/43fded544.html.

⁶ See Art. 20 of the UN General Assembly, *Convention on the Rights of the Child*, note 4 above.

in accordance with their international obligations, ensuring access to all children under their jurisdiction.⁷ UNHCR and its partners should therefore seek to support national child protection systems in a spirit of partnership, rather than replace them, “by building on each actor’s comparative advantages to reinforce the beneficial impact on the protection of children.”⁸

In 2014, UNHCR and UNICEF published *Safe & Sound*,⁹ a report providing guidance to governments across Europe on strengthening their approach to assessing and determining the best interests of unaccompanied and separated children in accordance with international and regional legal standards and obligations. Building upon *Safe & Sound*, and other key materials,¹⁰ the aim of this report is to map the current approach to the consideration of the best interests of unaccompanied and separated children seeking asylum in the UK, with a view to highlighting existing strengths and weaknesses. The analysis is used to provide recommendations for strengthening the application of the “best interests principle” in the UK.

UNHCR, in partnership with Unicef UK, commissioned this review of the application of the best interests principle for unaccompanied and separated children in the UK immigration and child protection system (named in this report as the “children’s social care system”). This study is part of a wider UNHCR project to strengthen policies

and practices for unaccompanied and separated children in seven countries in Western Europe (Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and the UK).¹¹ Research for this report was carried out between November 2017 and April 2019 and funded by the European Commission’s Directorate-General for Justice and Consumers. This report has identified a number of gaps and weaknesses, as well as strengths and promising practices, in the approach to unaccompanied and separated asylum-seeking children’s cases in the UK.

Whilst earlier UNHCR and Unicef UK reports have addressed the application of best interests in certain contexts within the UK,¹² this is the first commissioned document by the agencies which provides concrete proposals for how the principle of best interests for unaccompanied and separated children could be strengthened and implemented comprehensively within and across the UK procedure.

The UK context

Matters concerning unaccompanied and separated children in the UK fall under the mandate of different government departments, with multiple public authorities and services involved in child protection. The HO is responsible for all immigration decisions in the UK. The DfE is responsible for the children’s social care system in England, and the devolved administrations are responsible for care and support in relation to unaccompanied and separated children.

⁷ UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, available at: www.refworld.org/docid/51a84b5e4.html (CRC General Comment No. 14).

⁸ UNHCR Executive Committee of the High Commissioner’s Programme, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, 5 October 2007, available at: <https://bit.ly/2LsIkMS>; also outlined in: UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, available at: www.refworld.org/docid/5c18d7254.html, p. 19; UNHCR, UNICEF and International Rescue Committee (IRC), *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, July 2017, Chapter 6, available at: www.refworld.org/docid/59633afc4.html.

⁹ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, available at: www.refworld.org/docid/5423da264.html.

¹⁰ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above; UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, August 2017, available at: www.refworld.org/docid/59d5dcb64.html; UNHCR and UNICEF, *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, note 3 above; UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above.

¹¹ This report is published together with two complementary reports on the protection of unaccompanied and separated refugee and asylum-seeking children in the UK; See UNHCR, “A refugee and then...”: *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, available at: <https://www.unhcr.org/uk/5d271c6a4>, which examines the early reception and integration experience of unaccompanied children. UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019, available at: <https://www.unhcr.org/uk/5d271d527>.

¹² UNHCR, *Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation*, note 10 above; UNHCR, *Untold Stories...Families in the Asylum Process*, June 2013, available at: www.refworld.org/docid/51c027b84.html and UNICEF, *Achieving a Durable Solution for Trafficked Children*, 2015, available at: www.unicef.org.uk/publications/durable-solutions-for-trafficked-children/.

In Northern Ireland, the Department of Health is responsible for child protection, the Scottish Government is responsible for child protection in Scotland via Child Protection Committees (CPCs) and in Wales, local level regional safeguarding children boards are the responsible body.¹³ Local authorities undertake assessments for children in need and are governed by statutory safeguarding guidance and care planning frameworks.¹⁴

UNHCR and Unicef UK previously published a briefing outlining what the UK can do to ensure respect for the best interests of unaccompanied and separated children in the UK.¹⁵ This highlighted that whilst the UK has a strong statutory framework and developing case law with regard to the promotion and protection of children's best interests, there remains no systematic, unifying approach to assessing and determining the best interests of unaccompanied and separated children. In particular it outlined research which shows that the application of the best interests principle is, for those within the immigration system at least, not being applied consistently and that there is no formal and systematic collection, recording or sharing of information that is necessary and relevant to a holistic quality best interests consideration. Furthermore, there is no formal mechanism for arriving at a best interests decision, which should in turn inform a durable solution for each child.

In 2013, responding to similar concerns, an inquiry by the Joint Committee on Human Rights (JCHR) recommended that the UK Government establish an independent advisory group, composed of experts from voluntary organisations, academia and practice, to provide guidance to Ministers on how to consider the best interests of unaccompanied and separated children most effectively.¹⁶ The committee

further recommended that the Government should evaluate the case for the establishment of a formal Best Interests Determination (BID) process. In their response,¹⁷ the Government agreed to consider the case for establishing a BID process in the context of the existing immigration and asylum process and confirmed that in doing so they would take into account the views of experts across the statutory and voluntary sector. However, despite Government agreement, this process is yet to take place.

The House of Lords European Union Committee report in 2016¹⁸ further recommended that "the UK Government should develop, apply and routinely monitor national guidance on how to conduct best interests assessments with regard to unaccompanied minors. We call on the Government to revisit its response to the JCHR's 2013 report, and in particular to review the extent to which it has fulfilled its promise to consider the case for establishing a "Best Interests Determination process." In its response to the above report the UK Government stated that it "believes the existing process continues to ensure that a child's best interests are taken into account at every stage and it is not clear what information might be provided through a dedicated determination process that is not already available to decision makers."¹⁹

This document therefore represents the continuation of focused collaborative work between UNHCR and Unicef UK, the UK Government and key stakeholders with the aim of improving respect for the best interests principle in all actions taken on behalf of asylum-seeking, refugee and migrant children.

¹³ NSPCC Learning, *The Child Protection System across the UK*, available at: <https://bit.ly/214L6bh>.

¹⁴ Department for Education (DfE), *The Children Act 1989 guidance and regulations: Volume 2: care planning, placement and case review*, June 2015, available at: <https://bit.ly/325u3vl>; DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, November 2017, available at: <https://bit.ly/2J3ww22>; DfE, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, July 2018, available at: <https://bit.ly/2GK6UHA>.

¹⁵ UNHCR and UNICEF, *What the United Kingdom can do to ensure respect for the best interests of unaccompanied and separated children*, note 3 above.

¹⁶ Joint Committee on Human Rights (JCHR), *Human Rights of unaccompanied migrant children and young people in the UK: First Report of Session 2013-14*, May 2013, available at: <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>.

¹⁷ Secretary of State for the Home Department, *The Government response to the first report from the Joint Committee on Human Rights Session 2013-2014*, February 2014, available at: <https://bit.ly/2IZWSlx>.

¹⁸ House of Lords, European Union Committee, *Children in crisis: unaccompanied migrant children in the EU*, July 2016, para. 112, Recommendation 20 and para. 263, Recommendation 21, available at: <https://bit.ly/2arfRXp>.

¹⁹ Secretary of State for the Home Department, *Government's response to the House of Lords European Union Committee report – Children in Crisis: unaccompanied migrant children in the EU*, 2016, page 9, available at: <https://bit.ly/2eCMgao>.

2. METHODOLOGY

UNHCR and other relevant agencies and partners are tasked with supporting States to supplement and strengthen existing national child protection systems to which all children under a State's jurisdiction should have non-discriminatory access.²⁰ UNHCR's Framework for the Protection of Children²¹ outlines an approach which provides a basis for collaboration with State actors, UNICEF and other partners and a framework for holistic programming. A sound child protection system is framed within a rights-based approach and ensures non-discriminatory access to support for all children.

For practical purposes, the analysis in this review predominantly focuses on the systems surrounding the care and support of unaccompanied and separated children who are seeking asylum. However, it is also acknowledged throughout the report that the proposals put forward should also apply to unaccompanied and separated migrant children who do not qualify for international protection.

With this scope and UNHCR's Framework for the Protection of Children in mind, this study began with a mapping exercise to examine the strengths and weaknesses of the two key existing systems which support unaccompanied and separated asylum seeking children in the UK – namely the asylum and children's social care systems. This approach is in line with the child protection systems approach which seeks to strengthen existing capacity within State and community-based child protection systems and mechanisms.²² While this mapping predominantly involved desk-based research, it also benefitted from the insight of members of the UNHCR Quality Protection Partnership,²³ and observational visits they carried out to two of the main National Asylum Intake Units in which children's cases are registered

and initially dealt with – the Kent Intake Unit and the Asylum Intake Unit in Croydon. The purpose of these visits was to learn more about the reception arrangements for children, space provided for unaccompanied and separated children to recover on arrival, and the application of the child welfare interview.

To give guidance on the current approach to applying the best interests principle in the UK and recommendations as to how it could be strengthened, an advisory group of eight experts was appointed to assist and inform this report. This included family, immigration and public law solicitors, barristers and judges; university research fellows; a social work expert/professional; a representative of the Refugee Council's Children's Panel and legal protection and policy staff from UNHCR and Unicef UK. This panel was designed with the aim of reflecting the opinions of key stakeholders with both an understanding of the current UK asylum and children's social care system as well as international best practice and standards. Expert opinions and comments were sought on the feasibility and suitability of recommendations and proposals. The advisory group was convened for a roundtable in May 2018 to discuss the review undertaken of the existing system as well as the proposals being put forward in the alternative. The experts provided further input on a bilateral basis with the research consultant to refine the proposals and recommendations. The HO and DfE also provided input on the final report. The final proposals and recommendations have been formulated by UNHCR and Unicef UK and do not necessarily reflect the views of the expert group members.

²⁰ UNHCR, *Summary of UNHCR's Executive Committee Conclusion on Children at Risk No. 107 (LVIII) – 2007*, 5 October 2007, available at: www.refworld.org/docid/496630b72.html.

²¹ UNHCR, *A Framework for the Protection of Children*, 2012, available at: <https://bit.ly/2RtRNoj>.

²² Ibid.

²³ The Quality Protection Partnership (formerly the Quality Integration Project) is a longstanding joint collaborative endeavour between UNHCR UK and the Home Office to strengthen the quality of first instance asylum decision making in the UK, as well as to improve the asylum system end to end. More information on the project and its published reports can be found at www.unhcr.org/uk/quality-initiative-and-integration.html.



3. IMPLEMENTING THE BEST INTERESTS PRINCIPLE

Article 3(1) of the CRC²⁴ gives every child the right to have his or her best interests assessed and taken into account as a primary consideration *in all actions or decisions* that concern him or her. Known as the best interests principle, it broadly describes the well-being of a child and this concept is both a key principle of the Convention and a separate article. The CRC applies to all children without discrimination so that they are able to attain the full and effective enjoyment of all rights recognised in the CRC.²⁵ The CRC is the most widely accepted UN human rights instrument and was ratified by the UK in 1991.

The Committee on the Rights of the Child General Comment No. 14²⁶ importantly defines the best interests of the child as a threefold principle:

- A substantive right: the right of the child to have his or her best interests assessed and taken as a primary consideration.
- A legal principle: meaning that if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen.
- A rule of procedure: whenever a decision is made that will affect a specific child, group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child concerned.

²⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, note 4 above.

²⁵ *Ibid.*, Art. 2.

²⁶ CRC General Comment No. 14, note 7 above, para. 6.

The Committee has identified two important concepts – a Best Interests Assessment (BIA) and a Best Interests Determination (BID).²⁷ A BIA describes a simple, ongoing procedure for making decisions about what immediate actions are in an individual child’s best interests, e.g. protection and care interventions. BIAs can take place at various points whenever an action is planned or taken which may affect the child. A BID describes a more formal procedure for making significant decisions that will have a fundamental impact on a child’s future development. Due to the magnitude of the decision, BIDs require in-depth information accumulated in the course of the best interests process about the child, and involve higher degrees of scrutiny and independence. The assessment of what would be in the child’s best interests is thus a prerequisite for making a decision of importance with or in relation to the child.²⁸ National child protection systems usually include strict procedural safeguards to identify the best interests of the child before taking certain major decisions. These include separation of a child from her or his parents against their will and determination of parental and custody rights in the case of separation and adoptions. Such decisions can normally only be taken by competent national authorities, such as the judiciary, and are subject to procedural safeguards found in law (see procedural safeguards required for BIDs below).

In order to bridge the divide between the doctrinal policy outlined in the CRC and the everyday practice of the management of children’s cases in situations of forced displacement, UNHCR developed guidance on operationalizing the best interests principle in displacement contexts. That guidance was recently updated and is provided in the 2018 *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR Best Interests Guidelines).²⁹

The UNHCR Best Interests Guidelines describe how the case management of children of concern to UNHCR can be approached with their best interests in mind. UNHCR defines this “Best Interests

Procedure” (BIP) as a child protection tool and a multi-step process that begins with identification, and ends with case closure, giving details on when and where explicit consideration of the best interests of the child is required throughout. In many cases, the procedures established by governments to case manage unaccompanied and separated children are not referred to as a best interests procedure but can consist of specific steps in a decision-making process which require explicit consideration for the child’s best interests.³⁰ Examples in the UK context include social work assessments, the development of a care plan, the appointment of child advocates in particularly vulnerable cases or the judicial determination of custody for a child. UNHCR’s Best Interest Guidelines can therefore help ensure that the individual needs of the child and the child’s caregivers are met through a systematic and coordinated process.

The BIP requires a holistic approach to clearly and comprehensively understand the child’s background, as well as to discover as much as possible about her/his needs and protection risks, affective ties, capabilities, interests, and also the capacity of adults willing to care for the child. The process needs to be child-centered, gender-sensitive, guarantee the child’s participation as well as those close to her/him, and have a forward-looking approach.³¹

3.1 Elements to be taken into account when assessing the best interests of the child

The UN Committee on the Rights of the Child has drawn up a non-exhaustive and non-hierarchical list of elements that could be included when assessing and determining a child’s best interests.³² These include:

- ➡ The child’s views – a critical factor in assessing best interests;
- ➡ The child’s identity – includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality;

²⁷ Ibid., para. 47.

²⁸ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above, p 9.

²⁹ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above.

³⁰ Ibid., p. 56.

³¹ Ibid.

³² CRC General Comment No. 14, note 7 above, paras. 52-79.

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

The weight, relevance and content of each element "will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment."³³ There may be cases where different factors point to different outcomes. In such cases, decision-makers must assess and balance any conflicting factors to decide what is in the child's best interests. UNHCR's Best Interests Guidelines set out guidance on how to give weight to the various factors in issue.³⁴

3.2 Procedural safeguards

The obligation of States to duly consider the child's best interests is a comprehensive one and all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children must be familiar with the principle and equipped to apply it.³⁵ States are primarily responsible to establish appropriate procedures that facilitate the assessment and determination of a child's best interests within the framework of national child protection systems.³⁶ Such procedures will require safeguards that promote children's voices and which ensure legal guarantees of due process and fairness.³⁷ These must include:³⁸

➤ **Effective child participation**

A vital element of the process of identifying the best interests of a child involves facilitating the meaningful participation of the child, allowing the child to express her/his views, and clearly documenting the child's views.

➤ **Appropriate interpretation**

In order to fully understand and have the opportunity to cooperate, the child needs to have interpretation in her/his mother tongue or a language he/she understands.

➤ **Child-friendly approach**

Information on the purpose and implications of a BIP need to be conveyed to the child in an age-appropriate manner in a language understood by the child. The interviews should be conducted in a child-friendly manner. Interpreters who are engaged in interviews with children also need to be trained in communication with children.

➤ **Provision of an independent guardian where required**

Children whose best interests are considered as part of the BIP, who are not cared for by their parents or other legal guardian, may benefit from having a support person to accompany them throughout the process. This could be a person appointed by an organisation or a trusted adult chosen by the child.

➤ **Legal advice/representation**

The child has a right to independent legal advice and representation especially in respect to decisions which have a fundamental impact on his/her future.

³³ Ibid., para. 80.

³⁴ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above, pp. 97-102.

³⁵ CRC General Comment No. 14, note 7 above, para. 25.

³⁶ Ibid., paras. 85-98; UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, p. 21.

³⁷ CRC General Comment No. 14, note 7 above, para. 87.

³⁸ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above; UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above, p. 19.



▶ Involvement of staff with relevant expertise

The assessment process needs to be carried out by staff who have relevant child protection expertise and experience in working with children and adolescents. Involvement of a multi-disciplinary team of professionals (e.g. child protection/protection, social work, psychologist) provides additional guarantees that any recommendations made are objective and consider a wide range of aspects relevant to the case.³⁹

▶ Written, reasoned decision

The recommendations and decisions made as part of a BIP need to be justified and explained. In addition to stating the factual circumstances, the elements and factors considered also need to be documented, indicating what weight each factor was accorded in the process. If the decision is not in line with the views of the child, the reasons need to be clearly explained.

IN ADDITION TO THESE PROCEDURAL SAFEGUARDS, BEST INTEREST DETERMINATIONS MUST INCLUDE:

- **Review of BID decisions:** A BID can be re-opened if there are changes in circumstances (e.g. successful tracing of family members). A case can also be reviewed upon a request by the child's parent or legal guardian or by the child in the case of an unaccompanied child on the basis of new facts, evidence or other considerations which affect the initial decisions.

3.3 Best interests informing the asylum and immigration process and decisions

The best interests principle should inform both the immigration and asylum decisions and procedure. The CRC does not discriminate – it applies to all children regardless of their immigration status. Procedures in place for national children should therefore be extended to children of concern to UNHCR and UNICEF.⁴⁰

A BIP starts in principle as soon as an unaccompanied or separated child is identified and ends when the

³⁹ CRC General Comment No. 14, note 7 above, para. 94.

⁴⁰ This consists of refugee, asylum-seeking, internally displaced, trafficked children, stateless children and other migrant children.

child has obtained a durable solution to his or her situation of separation and displacement from country of origin or place of habitual residence. Article 22 of the CRC specifies the rights of refugee children in particular to protection and assistance, and necessarily entails the responsibility to set up a functioning national asylum system that is child friendly.⁴¹ This can manifest itself in several ways, such as by promptly registering and documenting unaccompanied and separated children, making available support persons to child asylum applicants, ensuring the appointment of a legal representative, prioritising their asylum or other immigration claims and ensuring child friendly information is available on how to apply for status including what their rights are and what to expect.⁴²

Importantly, a child's best interests are also relevant to the substantive determination as to whether a child is eligible for international protection. In particular, the best interest principle demands an age-sensitive and inclusive interpretation of a State's protection obligations under the Convention Relating to the Status of Refugees (1951 Convention).⁴³ Accordingly, applying the best interests principle requires taking into account indicators of child related and specific manifestations of persecution or harm that would be relevant for the assessment of a refugee claim.⁴⁴

Furthermore, the CRC General Comment No. 6 states "[n]on-rights based arguments such as those relating to general migration control, cannot override best interests considerations."⁴⁵ If a child is refused international protection, the HO decision-maker should be looking at the best interests of the child as a primary consideration asking whether the force of any other consideration outweighs it. Immigration control alone will not be sufficient to outweigh best interests. The strength of the factors pointing to a particular best interests outcome may be relevant to

this final consideration and how easily the identified factors can be outweighed.

3.4 A durable solution

Ensuring that migrant, asylum-seeking children and refugee children benefit from the best interests principle whilst subject to or going through immigration and asylum procedures, will in turn require tailored durable solutions to be provided for those children, including family reunion, integration, relocation or return.

The Committee on the Rights of the Child, in its General Comment No. 6, states "[t]he ultimate aim in addressing the fate of unaccompanied or separated children is to *identify a durable solution* that addresses all their protection needs, takes into account the child's view and, wherever possible, leads to overcoming the situation of a child being unaccompanied or separated. Efforts to find durable solutions for unaccompanied or separated children should be initiated and implemented without undue delay and, wherever possible, immediately upon the assessment of a child being unaccompanied or separated."⁴⁶ However, in reality, seeking a durable solution will depend on the child's individual circumstances and in this context on the outcome of their application for international protection or immigration status.

Therefore, decisions taken on best interests, while considering what is in the child's immediate best interests, should also take into account the implications once the child reaches adulthood. Proposed support and follow-up should not automatically cease upon the child reaching the age of 18 years, but should instead be provided until the young person reaches sufficient self-reliance.⁴⁷

⁴¹ CRC General Comment No. 6, note 1 above, paras. 64-65.

⁴² Further detailed information on child-friendly procedure can be found at UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: www.refworld.org/docid/4b2f4f6d2.html.

⁴³ Pobjoy, J., 2017, *The Child in International Refugee Law* (Cambridge Asylum and Migration Studies), Cambridge: Cambridge University Press.; UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: www.refworld.org/docid/3be01b964.html.

⁴⁴ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, Box 12, p. 42.

⁴⁵ CRC General Comment No. 6, note 1 above.

⁴⁶ *Ibid.*, paras. 79-80.

⁴⁷ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above, p. 53.



4. CURRENT UK SYSTEM FOR UNACCOMPANIED AND SEPARATED ASYLUM-SEEKING CHILDREN

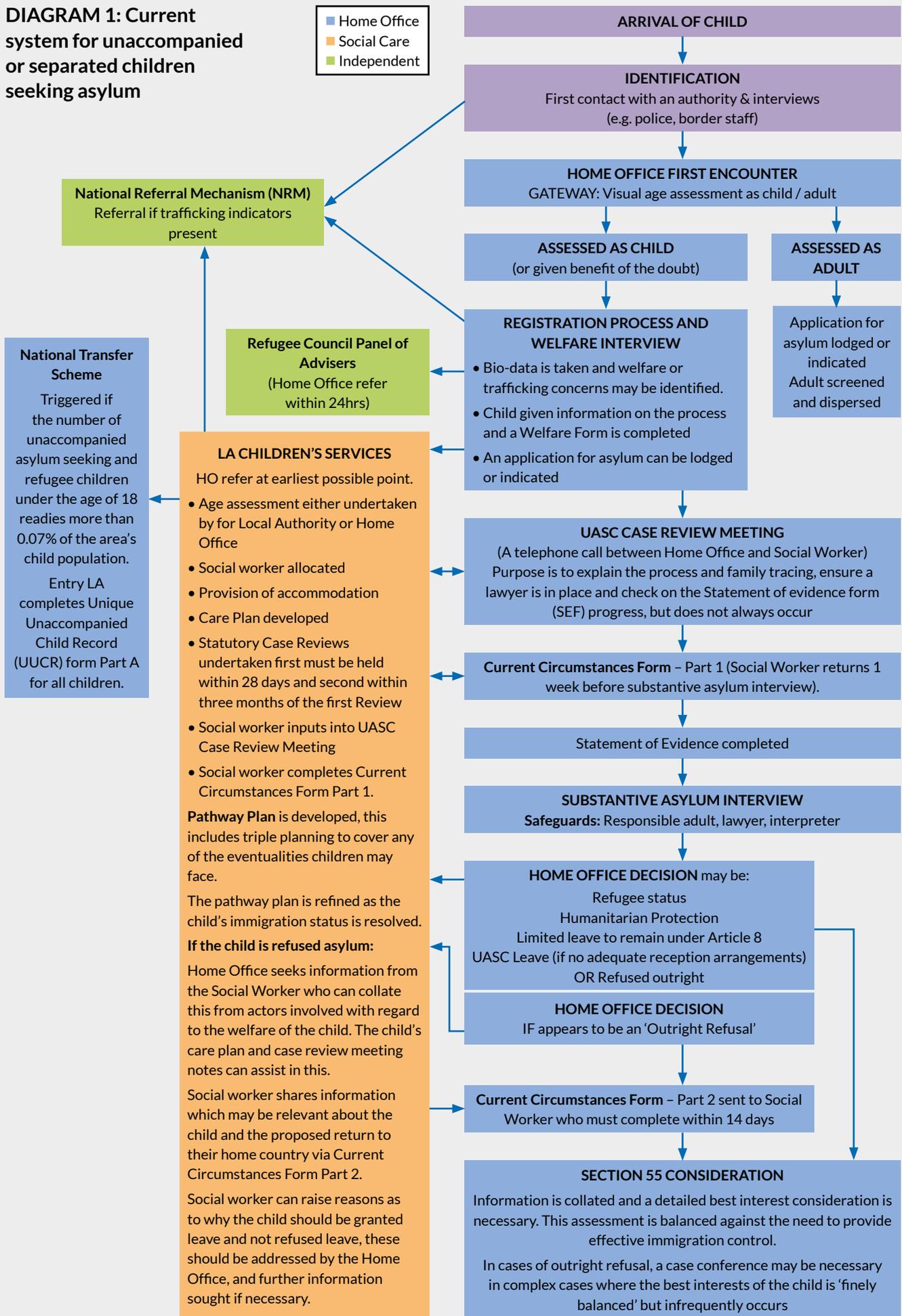
The project began by mapping the existing system of child protection case management and best interest procedures within the UK national systems. This is the first step in understanding if these systems and procedures are appropriate, and whether they are accessible to children of concern. The current system is set out in DIAGRAM 1. This section briefly describes each part of the process in turn.

4.1 Identification

When a child arrives at the border or is found within a State's territory alone or accompanied by someone who is not the child's caregiver by law or by custom, there will need to be a very rapid assessment of whether the child is at risk.⁴⁸ The unaccompanied or separated child who is considered at risk needs first and foremost to be given access to the procedures established for having their best interests assessed.

⁴⁸ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, p. 25.

DIAGRAM 1: Current system for unaccompanied or separated children seeking asylum



Unaccompanied and separated children can arrive in the UK by many means, including aeroplane, boat, lorry or train. Some children arrive after relatively short journeys, others after journeys of months or years. Almost all experience various forms of hardship, which can include abuse (physical and sexual), violence, and exploitation, the deprivation of food and water, forced labour and arbitrary detention.⁴⁹ For many children, their first point of contact with UK authorities upon arrival is the police, or an immigration officer if encountered at a sea or airport or during an enforcement raid, who may appear the same as the police to a child. This in itself is significant given that the child may have a fear or mistrust of the police or uniformed officials based on past experiences, including those experienced during their journey to the UK. Some children will be identified immediately upon arrival, others may only come to the attention of the authorities after months or years in the UK.

As soon as an unaccompanied child is identified, a referral should be made to the relevant local authority (LA) so that they can attend and respond to the child's needs. As soon as child is identified in a local area, children's services must act to safeguard and promote wellbeing of that child in accordance with Children Act 1989.

4.2 Registration process with Home Office

After identification, a child will be registered at one of the National Asylum Intake Units (NAIU). The child may be brought to a NAIU either by immigration enforcement or police, or, particularly in the case of Croydon, a child may walk-in by themselves, in the company of other children or adults they know, or in the presence of a social worker if they have already been referred to the LA.

Teams based at Kent Intake Unit (KIU) undertake "mobile screening" for children. UNHCR was informed that the HO is looking to increase capacity to screen children's claims elsewhere in the country. The main aim of this is the child being registered locally, as close to their entry point as possible.

Immediately upon identification of an unaccompanied and separated child, if it has not already happened, the LA should be notified and a referral made to their care if the child is not already known to them. In some cases, such as at Croydon Intake Unit, a duty social worker may be co-located alongside the immigration team so that a prompt referral to the LA can take place. In other cases, there may be local agreements in place which specify a timeframe within which the LA will attend. For instance, at KIU, there is a service level agreement that Kent LA will be notified within 90 minutes of the arrival of an unaccompanied child.

At this stage, the initial book-in takes place. This involves taking basic biometrics (including fingerprints and a photo) which are then checked against a number of databases including Eurodac, the intra-Europe database used for logging whether someone has made an asylum claim or has previously been encountered within Europe. Collecting biometric information is of particular importance in cases where a child goes missing. Unaccompanied children are at particular risk of this due to trafficking.⁵⁰

⁴⁹ UNHCR, *Desperate Journeys: Refugees and migrants arriving in Europe and at Europe's borders, January – December 2018*, note 2 above; UNICEF and IOM, *Harrowing Journeys: Children and youth on the move across the Mediterranean Sea, at risk of trafficking and exploitation*, note 2 above; UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above; UNHCR, *High Commissioner's Dialogue on Protection Challenges: Children on the Move, Background Paper*, note 2 above.

⁵⁰ Every Child Protected Against Trafficking (ECPAT) and Missing People, *Still in Harm's Way: An update report on trafficked and unaccompanied children going missing from care in the UK*, December 2018, available at: <https://bit.ly/2Fn1AYu>.

4.3 Age assessment

At the registration stage there may be an assessment of age by an immigration officer. There are three possible outcomes to this:

Outcome 1: Decision made to treat the claimant as an adult

According to current guidance, a decision should only be made to treat the claimant as an adult if either:

- two HO members of staff⁵¹ have independently assessed that the claimant is an adult because their physical appearance and demeanour very strongly suggests that they are significantly over 25 years of age. In this case, the applicant is dispersed into the adult system;⁵²
- a Merton compliant⁵³ age assessment has been completed by a LA finding the claimant to be 18 or over, which the HO has agreed with; or
- there is credible and clear documentary evidence that they are 18 years of age or over.

Outcome 2: Decision made to treat the claimant as a child

A decision should be made to treat the claimant as a child if either:

- an immigration officer doubts the claimant's claimed age but after a careful consideration of the specifics of the case they are given the benefit of the doubt and their claimed age is accepted; or
- a LA Merton compliant age assessment has been completed and found the claimant to be under 18, which the HO has agreed with.

Outcome 3: Decision made to treat the claimant as a child until further assessment of their age has been completed

If the immigration officer cannot be sure that the individual is an adult and the claimed age has not been accepted, the individual is given the "benefit of the doubt" and processed as a child until a further LA Merton compliant age assessment has been completed. The HO makes a referral to the LA "immediately"⁵⁴ (by telephone but followed up in writing) explaining in as much detail as possible its concerns about the claimed age. The HO must provide all the information it has, including what the child has said. The child must be told about information sharing.

4.4 Welfare Interview

At this stage, children do not have the same screening interviews as adults but must undergo a "welfare interview" during which a welfare form is completed. This process is undertaken by a HO staff member and, in some circumstances, a responsible adult may also be present, whose role is not to answer questions on behalf of the child, but may intervene if they consider that the child is becoming distressed or tired and a break is required. The welfare interview was a new process introduced in 2016 which replaced the screening interview. The purpose of the welfare interview is to ensure a child understands what is happening and why, to ensure necessary information about the child's welfare is obtained and for the HO to identify welfare and/or trafficking concerns. The interview cannot be used to examine the basis of the claim for asylum.⁵⁵ Children are no longer asked about the substance of their claim and have time to "recuperate" and seek legal and other advice.⁵⁶

⁵¹ One at least of Chief Immigration Officer or Higher Executive Officer grade.

⁵² Home Office, *Assessing Age, Version 3.0*, 23 May 2019, available at: <https://bit.ly/2JeXtP1>; DfE and Home Office, 2018, *National Transfer Scheme Protocol for Unaccompanied Asylum Seeking Children, Version 2.0*, available at: <https://bit.ly/2xdDcDP>. At p. 7, the Protocol states: "The entry LA will liaise with the HO as appropriate, and if requested, provide its observations regarding the age of anyone claiming to be a child, to help inform the Home Office's initial decision on whether they are significantly over 18". This social worker "assessment" will not be case law compliant. In 2018, there were 872 age disputed asylum applications but this does not include those persons claiming to be children but who have been assessed as adults (by the 'significantly over' test) and routed away from child services; see Refugee Council, *Children in the Asylum System*, February 2019, available at: <https://bit.ly/2xiFVfx>.

⁵³ This means an age assessment carried out in accordance with the Merton guidelines. The guidelines were devised by Judge Stanley Burnton in the case of *B v Merton LBC*.

⁵⁴ Home Office, *Assessing Age*, note 52 above.

⁵⁵ Home Office, *Children's asylum claims*, Version 3.0, August 2019, page 32, available at: <https://bit.ly/2WTcH1d>.

⁵⁶ *Ibid.*, p. 25.

Nevertheless, this is also an opportunity for the child to lodge an asylum claim if the child wishes to do so. The welfare form asks: "Why have you left your country? (brief details only do not expand or question anything said)." From this the interviewer can record whether a claim for asylum has been made or not. At this stage if they have lodged an asylum claim, the child is given a **Statement of Evidence Form (SEF)** which they fill in to explain why they are asking for asylum.

4.5 Home Office Referrals

If someone claiming to be a child is found to be significantly over the age of 18, they are issued with a proforma confirming the same and then dispersed into the adult asylum system and the below referrals are not made. If the applicant is assessed to be a child, including where the benefit of the doubt is being applied, the following referrals, should be made:

1. To the **Local Authority children's services** at the earliest possible point⁵⁷
2. To the **Refugee Council Children's Advice Project Service**⁵⁸ which offers advice and support to unaccompanied children seeking asylum. Referrals should be made by the HO within 24 hours of first encounter. In Scotland and Northern Ireland support is provided via a Guardianship Service. Currently Wales has no access to the Refugee Council Children's Advice Project or a guardianship scheme.
3. To the **National Referral Mechanism (NRM)**⁵⁹ if trafficking indicators are present. This is the framework through which potential victims of trafficking in the UK are identified, so that they can be provided with support and protection.

4.6 Child's social care system

Section 17 of the Children Act 1989⁶⁰ imposes a general duty on LAs to safeguard and promote the welfare of all children "in need" within their area. Section 20 requires them to "accommodate" any child where there is no parent or suitable adult to care for them. After a child has been accommodated by the LA under section 20 for 24 hours they become "looked after" by the authority.⁶¹ Similar duties are placed on Local Authorities in Scotland under sections 22 and 25 of the Children (Scotland) Act 1995.⁶² The equivalent duties of Welsh Local Authorities are set out in parts 3, 4 and 6 of the Social Services and Well-being (Wales) Act 2014.⁶³ The duties of Health and Social Care Trusts in Northern Ireland are set out in articles 18 and 21 of the Children (Northern Ireland) Order 1995.⁶⁴ A section 47 child protection investigation may be initiated if the child suspected to have experienced/ be at risk of experiencing significant harm, under the Children Act 1989.

A social worker is appointed and explains their role to the child. Initially, a temporary placement is usually found for the child. Once a more in depth assessment has been carried of the child's needs, the LA can make a better informed decision about the most suitable placement for the child longer term.⁶⁵ Types of accommodation should include trained foster placements, supported lodgings or supported accommodation.⁶⁶

The care planning process begins with identifying a child's needs, any risks they may face and involving the child in the process to help them understand what is happening and ensure their feelings and wishes can be given due consideration.

⁵⁷ Ibid., p. 27.

⁵⁸ Refugee Council, *Children's Advice Project*, available at: www.refugeecouncil.org.uk/latest/projects/childrens-advice-project/.

⁵⁹ Home Office, *National Referral Mechanism: guidance for child first responders, Version 2*, 21 March 2016, available at: <https://bit.ly/2RLkUDu>.

⁶⁰ Section 17, Children's Act 1989, available at: www.legislation.gov.uk/ukpga/1989/41/section/17.

⁶¹ Section 20, Children's Act 1989, available at: www.legislation.gov.uk/ukpga/1989/41/section/20.

⁶² Children (Scotland) Act 1995, available at: www.legislation.gov.uk/ukpga/1995/36/contents.

⁶³ Social Services and Well-being (Wales) Act 2014, available at: www.legislation.gov.uk/anaw/2014/4/contents/enacted.

⁶⁴ The Children (Northern Ireland) Order 1995, available at: <http://www.legislation.gov.uk/nisi/1995/755/contents/made>.

⁶⁵ Section 22C, Children's Act 1989, available at: www.legislation.gov.uk/ukpga/1989/41/section/22C.

⁶⁶ DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, November 2017, pages 9-12, available at: <https://bit.ly/2RrsS1>.

This includes:

- A permanence plan for the child's upbringing and provides an underpinning framework for all social work with children. The objective of planning for permanence is to give children a sense of security, continuity, commitment, identity and belonging.⁶⁷ Each child must have a plan for permanence by the time of their second review, as set out in the statutory guidance to the 2002 Adoption and Children Act;⁶⁸
- A health plan (following health assessment – which should ascertain any particular physical, psychological or emotional impact of experiences as an unaccompanied child and set out objectives, actions, timescales and responsibilities);
- A personal education plan (PEP) – to establish that appropriate education provision for the child is arranged at the same time as a placement;
- How child's needs will be met regarding behavioural and emotional development, identity (religious, racial, cultural and linguistic background), family and social relationships, social presentation and self-care skills; and
- Specialist legal support if required and how it will be provided.

An Independent Reviewing Officer (IRO) is appointed for the child as a statutory requirement.⁶⁹ As a matter of good practice, this appointment should take place within the first five working days of the child becoming looked after.⁷⁰ An IRO must be registered as a social worker and should have at least five years post qualifying experience. The IRO should be an authoritative professional with at least equivalent status to an experienced children's social work team manager.⁷¹ LAC reviews are chaired by an IRO and are designed to bring together children who are looked after with the professionals working with them, in order to plan for the care of the child and

to review that plan on a regular basis. All relevant practitioners are encouraged to be involved in assessments involving the child and to provide further information.⁷² The information gathered during this consultation should contribute to the full assessment of the child's needs. Further, statutory guidance⁷³ requires that the child's views as expressed should always be discussed, recorded and given due consideration at every review meeting and at case conferences. The possibilities and options identified should be explained, discussed and, if necessary, reassessed in the light of the child's views.

The child's first LAC Review must be held within 28 days of the child first becoming Looked After, and the second review within three months of the first review. Subsequent reviews must be held at least every six months. Attendees may include the child, IRO, foster carer/residential worker, social worker, social work team manager, health professional, education professional, any other agencies involved.

4.7 National Transfer Scheme (NTS)

The NTS is a new voluntary transfer arrangement between LAs for the care of unaccompanied children who arrive in the UK and claim asylum, to facilitate a more even distribution of caring responsibilities across the country.⁷⁴ The NTS is a voluntary scheme whereby LAs choose to take part. The scheme is triggered when the number of unaccompanied asylum seeking children under the age of 18 reaches more than 0.07% of the area's child population. It initially began in England and is now extended to whole of the UK. The Unique Unaccompanied Child Record (UUCR) form, is filled in by the social workers and is used to initiate and support the transfer process. The purpose of this form is to outline the specific needs of the child for example, including considerations such as location of any family members, access to legal

⁶⁷ DfE, *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review*, note 14 above.

⁶⁸ Adoption and Children Act 2002, available at: www.legislation.gov.uk/ukpga/2002/38/contents.

⁶⁹ Section 26, Children Act 1989 as amended by the 2002 Act, available at: www.legislation.gov.uk/ukpga/1989/41/section/26.

⁷⁰ Section 25A(2), Children Act 1989, available at: www.legislation.gov.uk/ukpga/1989/41/section/25A.

⁷¹ Department for Children, Schools and Families, *IRO Handbook: Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children*, March 2010, available at: <https://bit.ly/2Jjsd1m>.

⁷² DfE, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, note 14 above, p. 36.

⁷³ DfE, *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review*, note 14 above, Section 1.13.

⁷⁴ DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, note 66 above.



representatives or a suitable place of worship. The Central Administrative Team decides which region to transfer to and the regional lead decides which authority to transfer to.

4.8 Asylum system

The **UASC case review** should take place before the substantive asylum interview. It is intended to take place between the social worker and the HO and is part of the asylum process.⁷⁵ The meeting should happen at a reasonable time before the substantive asylum interview and guidance states that its purpose is to explain the asylum process and family tracing process, ensure the child has legal representation, check on SEF progress, and reiterate the purpose of the Current Circumstances Form.

The HO decision-making team then sends a form called “**Current Circumstance Form Part 1**” to the child’s social worker to be returned one week prior to substantive asylum interview, giving information that the HO should take into account before a decision on the asylum claim is made.

In most cases, it is considered appropriate for an asylum interview to take place for children over 12 years old. The following are possible outcomes from a child’s asylum claim:

- A child who fulfils the 1951 Convention criteria is a refugee and should be granted refugee status under paragraph 334 of the Immigration Rules unless the exclusion criteria apply.
- When a child does not qualify for refugee status, decision makers must next consider whether they qualify for a grant of humanitarian protection (HP)⁷⁶ – granted in cases where the refugee criteria

⁷⁵ Home Office, *Children’s asylum claims*, Version 3.0, August 2019, page 35, note 55 above.

⁷⁶ As per European Union: Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: www.refworld.org/docid/4157e75e4.html.

is not met but the child still requires international protection owing to a “real risk of serious harm”. A grant of HP results in five years’ leave to remain. In practice HP is rarely granted to children.

- A child may be granted limited leave to remain in the UK under the Immigration Rules or on the basis of the right to respect for private and family life under Article 8 of the European Convention on Human Rights.⁷⁷ For example, where children and young people have been in the UK for many years, and developed significant ties to the country so that they would struggle to adjust abroad, leave may be granted on the basis that it is fair and right that the child or young person is allowed to stay. This form of leave is granted up to a maximum of 30 months at any one time.⁷⁸
- During the course of 2018 new forms of leave to remain were introduced by the HO, so that if the child was either transferred to the UK under Section 67 of the 2016 Act,⁷⁹ or as part of the UK-France joint operation ahead of the Calais camp clearance,⁸⁰ and not found to be in need of international protection, they may alternatively be granted Section 67⁸¹ or “Calais leave”.⁸² Both provide the child with five years leave to remain. At the end of the five year period, if the person’s leave has been renewed, they will be issued with leave valid for a further period of five years. A person may apply for Indefinite Leave to Remain (“ILR”) after a period of 10 years’ continuous leave in the UK.
- If the child does not qualify for refugee status, HP, family or private life leave or discretionary leave on any other basis, the decision maker must consider whether there are safe, adequate and sustainable reception arrangements in the child’s home country. If safe, adequate and sustainable reception arrangements cannot be verified, and there is no current prospect of them being made,

and but for this, it would be reasonable for the child to return, decision makers must consider granting limited leave, referred to as “UASC Leave”.⁸³ In the vast majority of cases, this is for a period of 30 months or until the child is 17.5 years old, whichever is shorter.

- If these arrangements can be made successfully for a child to their country of origin, the application will be refused “outright” with no leave granted, and in some cases the decision may be “certified” so that the right of appeal can only be exercised once the individual has left the UK.

In the event the child’s claim for asylum is refused outright and the HO is considering whether the child can be expected to return to their country of origin while they remain under 18 years of age, the “**Current circumstances Form part 2**” must be sent to the social worker who will be advised that they have 14 calendar days to complete the form. This form provides the social worker with an opportunity to contribute any information that may be relevant about the child and the proposed return to their home country. Section 55 of the Borders, Citizenship and Immigration Act 2009 places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to “the need to safeguard and promote the welfare of children who are in the United Kingdom”. Decision-making when processing a child’s asylum claim therefore requires that this duty is taken into account.⁸⁴

⁷⁷ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: www.refworld.org/docid/3ae6b3b04.html.

⁷⁸ Leave under Appendix FM (family life) and paras 276ADE (1) to 276DH (private life) of the Immigration Rules, see available at: <https://bit.ly/2bAiG9r>; <https://bit.ly/2xpNGjy>.

⁷⁹ Section 67 of Immigration Act 2016. See www.legislation.gov.uk/ukpga/2016/19/section/67/enacted.

⁸⁰ Those people who were transferred to the UK between 17 October 2016 and 13 July 2017, in connection with the clearance of the Calais camp, for the purpose of being reunited with family.

⁸¹ Home Office, *Section 67 of the Immigration Act 2016 leave, Version 1.0*, 6 July 2018, available at: <https://bit.ly/2u3v5bL>.

⁸² Home Office, *Calais Leave, Version 1.0*, 30 November 2018, available at: <https://bit.ly/2Ulczag>.

⁸³ The relevant provisions are contained in Immigration Rules 352ZC to 352ZF, available at: <https://bit.ly/2x7PQEI>.

⁸⁴ Home Office, *Children’s asylum claims, Version 3.0*, August 2019, page 60, note 55 above.



5. STRENGTHS AND EXISTING SAFEGUARDS

The UK has a number of frameworks, practices and progressive developments which help strengthen the assessment and application of the best interest's principle for children in the immigration and child protection procedures. The list that follows represents good practices which merit being highlighted, although this is not to state that all aspects are perfectly applied or without need of being strengthened.

OVERVIEW OF STRENGTHS AND EXISTING SAFEGUARDS IN THE UK SYSTEM

- Strong domestic statutory duty**
In both the child's social care system and in immigration functions, there is a statutory duty upon agencies to take account of a child's best interests in all decisions affecting them.
- Referrals into the children's social care system**
On identification, unaccompanied and separated children are generally referred promptly into the Children's social care system where they

- are accommodated by the local authority and become a 'looked after' child to that authority.
- A multi-agency approach to safeguarding**
Statutory guidance applies a multi-agency approach to safeguarding of children which puts the child at the centre of a system where everyone who comes into contact with the child has a role to play in identifying concerns, sharing information and taking prompt action.
- A comprehensive framework for care planning**
Each child is given an individual care plan which exists to provide an assessment of a child's immediate needs as well as ensuring there is a long-term plan for the child to which all relevant parties are working. As far as possible the LA needs to obtain and give due consideration to a child's feelings and wishes about their care arrangements, taking into account the child's age and level of understanding. This plan is developed through the use of an Assessment Framework Triangle which examines how different aspects of the child's life and context interact and impact on the child.

Support for a young person leaving the care system

Care leaving provisions ensure accommodation and support is made available until a former unaccompanied or separated child is 21 years old, or up until the age of 25, if they remain in education or training.

Children's asylum claims have specific procedural and evidentiary safeguards

Provision is made for legal assistance for a child while completing the Statement of Evidence (SEF) form prior to an asylum interview and for a legal representative to attend a child's asylum interview. The asylum interview must also be attended by a responsible adult, an interpreter and an interviewer specifically trained in handling children's cases. This compares favorably to adult asylum cases which are more restrictively funded.

5.1 Strong domestic statutory duty

There is a strong statutory duty and legal framework with regard to the promotion and protection of the child's best interests in both the children's social care system and in immigration functions.

Children's social care system

Local authorities do not have a specific duty in national legislation to make decisions in terms of a child's best interests. Instead, local authorities have the duty to safeguard and promote a child's welfare, a duty which inherently requires local authorities to take account of a child's best interests. The Children's Act 1989 which largely applies to England and Wales⁸⁵ provides a comprehensive framework for the care and protection of children and makes explicit reference to their best interests. The Act sets out that the Courts must have the child's welfare as

their "paramount consideration" when making any decision about a child.⁸⁶ Importantly, it introduced a "welfare checklist" of the elements to be considered in determining the child's best interests. Further, section 22(4) of the 1989 Act, consistent with Article 12 of the CRC, provides that, before making any decision with respect to a child, the LA must ascertain the wishes and feelings of the child. Section 22(5) provides that, in making any decision in relation to the child, it should give due consideration to those wishes and feelings, having regard to the child's age and understanding.⁸⁷ Section 11 of the Children Act 2004, as amended by the Children and Social Work Act 2017, supplemented the 1989 Act and places a duty on a wide range of bodies providing public services to carry out their functions "having regard to the need to safeguard and promote the welfare of children".⁸⁸ Section 20 of the Children Act 1989 requires a LA to accommodate any child where there is no one with parental responsibility for them, because they are lost or have been abandoned, or because the person who has been caring for them is prevented from providing them with care.⁸⁹ The Children Act 1989 requires that local authorities perform these duties for all children up to 18 years old, regardless of their immigration status, nationality or documentation. This means that unaccompanied and separated children are entitled to the same LA provision as any other looked after child. This is irrespective of whether an application (e.g. an asylum claim) has been submitted to the HO.

To supplement this legislation, statutory guidance exists which recognises the unique challenges and issues facing this group of children, in particular children's vulnerability, and risk of going missing due to trafficking and exploitation.⁹⁰ It sets out the steps LAs should take to plan for the provision of support for these children and accepts that unaccompanied and separated children are "highly vulnerable children" with "complex needs in addition to those faced by looked after children more

⁸⁵ As of April 2016, Part 3 of the Act (which refers to support for children and families provided by local authorities) has been replaced by Part 6 of the Social Services and Well-being (Wales) Act 2014. See www.legislation.gov.uk/anaw/2014/4/contents.

⁸⁶ Subsection 1(1), Children's Act 1989, available at: www.legislation.gov.uk/ukpga/1989/41/section/1.

⁸⁷ Legislation in Scotland and Northern Ireland is broadly in line with the Children Act 1989 via Section 3 of the Children (Northern Ireland) Order 1995 and Section 17 of the Children (Scotland) Act 1995.

⁸⁸ For example, Section 10 requires the promotion of cooperation between agencies to safeguard and promote the well-being of children and Section 11 places a duty on key persons and bodies to make sure they have regard to the need to safeguard and promote the welfare of children. See www.legislation.gov.uk/ukpga/2004/31/section/10; www.legislation.gov.uk/ukpga/2004/31/section/11.

⁸⁹ Section 20, Children's Act 1989 note 61 above.

⁹⁰ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above.

generally”.⁹¹ Care Planning statutory guidance also highlights the importance of a child’s participation in the care planning and review process, including consulting with a child and ascertaining their feelings and wishes.⁹² A safeguarding strategy sets out a commitment by the UK Government to ensure children and young people have the information, support and help they need to be safe, and to implement effective local and national systems to ensure that children are properly safeguarded.⁹³ Further reference is made in national guidance on child protection to separated children in Scotland⁹⁴ and exists also in Northern Ireland⁹⁵ and Wales.⁹⁶

Immigration functions

The UK government previously maintained a reservation to the CRC with respect to children subject to immigration control. This meant that the UK’s obligations under the CRC did not apply to foreign national children in relation to matters of immigration control. However, in 2008, the Government lifted this reservation to the CRC. As a result, Section 55 of the Borders, Citizenship and Immigration Act 2009 was introduced, which places a duty on the Secretary of State to make arrangements for ensuring that immigration, asylum, nationality and customs functions are discharged having regard to “the need to safeguard and promote the welfare of children who are in the United Kingdom.” The government’s “Every Child Matters” statutory guidance now clearly states that “every child matters even if they are someone subject to immigration control.”⁹⁷

Since the Section 55 duty came into force, a number of important cases have taken place that have interpreted its meaning in light of international law. In the landmark UK Supreme Court case of *ZH Tanzania v Secretary of State for the Home Department*, Lady Hale observed that the “spirit if not the precise language”⁹⁸ of Article 3(1) of the CRC – that in all actions concerning children, their best interests must be considered as a primary consideration – had been translated into English law via section 55 of the Borders, Citizenship and Immigration Act 2009 and section 11 of the Children Act 2004. Lady Hale further explained that identifying children’s best interests does not “lead inexorably to a decision in conformity with those interests.”⁹⁹ Provided that the Tribunal did not treat any other consideration as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them.¹⁰⁰ The decision-maker should therefore be looking at the best interests of the child as a primary consideration, before asking themselves whether the force of any other consideration outweighs it. Children’s participation was central in this case; it was held that when deciding what is in the best interests of the child, ascertaining the child’s own views was an important part of the process.¹⁰¹ Also of note is the judgement of the Supreme Court in *HH v Deputy Prosecutor of the Italian Republic, Genoa*¹⁰² which concerns extradition from the UK where it was held that the extradition would have a severe effect on the two youngest children, and that the interference with the children’s Article 8 rights outweighed the public interest in extradition.

⁹¹ Ibid.

⁹² DfE, *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review*, note 14 above, Section 2.16.

⁹³ DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, note 66 above, Section 5.

⁹⁴ Scottish Government, *National guidance for child protection in Scotland*, 19 May 2014, para 607, available at: www.gov.scot/publications/national-guidance-child-protection-scotland/.

⁹⁵ Department for Health, *Cooperating to Safeguard Young People and Children in Northern Ireland*, 29 August 2017, available at: <https://bit.ly/2XHe4Es>.

⁹⁶ Children in Wales, *Safeguarding and Promoting the Welfare of Unaccompanied Asylum Seeking Children and Young People All Wales Practice Guidance*, 20 July 2015, available at: <https://bit.ly/2RNSn01>.

⁹⁷ UK Border Agency and Department for Children, Schools and Families, *Every Child Matters, Change for Children: Statutory guidance to the UK Border Agency*, November 2009, available at: <https://bit.ly/2RLmqpi>.

⁹⁸ *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*, [2011] UKSC 4, United Kingdom: Supreme Court, 1 February 2011, para. 23, available at: www.supremecourt.uk/cases/docs/uksc-2010-0002-judgment.pdf.

⁹⁹ Ibid., para. 26.

¹⁰⁰ Ibid., para. 24.

¹⁰¹ Ibid., para. 37.

¹⁰² *HH (Appellant) v. Deputy Prosecutor of the Italian Republic, Genoa (Respondent); PH (Appellant) v. Deputy Prosecutor of the Italian Republic, Genoa (Respondent); and F-K (FC) (Appellant) v. Polish Judicial Authority (Respondent)*, [2012] UKSC 25, United Kingdom: Supreme Court, 20 June 2012, available at: www.bailii.org/uk/cases/UKSC/2012/25.html.

5.2 Referral processes into the child's social care system

States have an obligation to refer unaccompanied and separated children into relevant national child protection procedures.¹⁰³ This is required in order to meet their needs relating to care, safety, education and health. It is also critical to planning the rest of the process.¹⁰⁴ UNHCR's research¹⁰⁵ indicates that, although there are exceptions, unaccompanied and separated children are referred to social services relatively quickly on arrival, and (unless age disputed) are almost always accommodated by authorities under Section 20 of the Children Act.¹⁰⁶ Research by the Independent Chief Inspector of Borders and Immigration (ICIBI) also suggests that HO staff receiving unaccompanied and separated children at the KIU regularly refer all children who arrived at the unit to the LA within their internal target time of 90 minutes.¹⁰⁷ In Northern Ireland, however, the default position is that unaccompanied and separated children are made the subject of care orders.¹⁰⁸ UNHCR's research identified that children's initial encounter with social services was seen as positive, expressing a sense of relief at being in a safe place, out of police custody, and in the care of professionals who were focused on providing them with basic needs, care and accommodation.¹⁰⁹

5.3 Multi-agency approach

Statutory guidance in England applies a multi-agency approach to the safeguarding of children which puts the child at the centre of a system where every individual and agency is expected to play their full part. Last updated in 2018 and entitled *Working Together*,¹¹⁰ that guidance explains how three key safeguarding partners: LAs, clinical commissioning groups, and chief officers of police will work together within their locality to safeguard and protect children and have equal responsibility for fulfilling the role. It is recognised that no single practitioner can have a full picture of a child's needs and circumstances and, everyone who comes into contact with them has a role to play in identifying concerns, sharing information and taking prompt action. Guidance based on similar principles exists in Scotland,¹¹¹ Wales,¹¹² and Northern Ireland.¹¹³

This multi-agency approach is underpinned by care planning, a core element of the assessment, planning, intervention and review cycle for social work with children and families. The cycle is guided by a conceptual "Assessment Framework"¹¹⁴ which provides a structure for the assessment of need across three domains – the child's developmental needs, parenting capacity and family and environmental factors. These elements feature prominently in care planning, placement and review and underpin the care plan with planned outcomes to be specified in each domain. Through the work of the NSPCC Child Trafficking Advice Centre (CTAC), the "International Multi Agency Assessment Framework"

¹⁰³ CRC General Comment No. 6, note 1 above, para. 32 and 67.

¹⁰⁴ European Parliament, *Report on the situation of unaccompanied minors in the EU (2012/2263(INI))*, 26 August 2013, available at: <http://goo.gl/1Ukqmj>.

¹⁰⁵ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹⁰⁶ Unless the needs assessment results in another response being considered more appropriate; for example, if a trafficked child is at risk it may be more appropriate to initiate care proceedings under section 31 of the Act; although this is rare.

¹⁰⁷ Independent Chief Inspector of Borders and Immigration (ICIBI), *An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children*, 28 March 2018, page 24, available at: <https://bit.ly/2J29j0d>.

¹⁰⁸ In Northern Ireland, unaccompanied and separated children are the responsibility of Health and Social Care Trusts and are recognised as "children in need" under the Children (Northern Ireland) Order 1995.

¹⁰⁹ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹¹⁰ DfE, *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, note 14 above.

¹¹¹ Scottish Government, *National guidance for child protection in Scotland*, note 94 above.

¹¹² Welsh Government, *Social Services and Well-being (Wales) Act 2014: Working Together to Safeguard People Volume 1 – Introduction and Overview*, available at: <https://gweddil.gov.wales/docs/phhs/publications/160404part7guidevol1en.pdf>.

¹¹³ Department of Health, *Co-operating to Safeguard Children and Young People in Northern Ireland*, 29 August 2017, available at: <https://bit.ly/2XHe4Es>.

¹¹⁴ DfE, *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review*, note 14 above, Section 2.16.

(IMAAF) has been developed. This is a supplemental framework aiming “to help professional’s thinking when working with a child moving or moved across a border to examine the child’s present situation, consider past experiences and future plans.”¹¹⁵

5.4 Pathway planning and leaving care provisions

The children’s social care system is designed to capture the actions and support necessary for a child to make a successful transition from care as they approach and enter adulthood. This is in line with UNHCR Best Interest guidelines which state that whilst the BIP is carried out for children at risk under the age of 18, there may be instances where other young persons (up to age 21) are in need of additional support and safeguards, such as in the identification of durable solutions.¹¹⁶

The Children Act 1989 requires that a pathway plan must be prepared for all children eligible for leaving care services from the age of 16, regardless of their immigration status, nationality or documentation.¹¹⁷ The LA should record the pathway plan in writing and review it at least every six months.¹¹⁸ For young people with complexities around their immigration status, their pathway plans will need to address and plan for this. Triple pathway planning can be used to consider different potential outcomes of an asylum claim.

A young person who was “looked after” for at least 13 weeks since the age of 14 is eligible for leaving care services¹¹⁹ on turning 18 years old. Leaving care

support should include a personal adviser, a pathway plan (reviewed at least every 6 months), support to remain with their former foster carer in a Staying Put arrangement (if both the young person and carer wishes), a setting up home allowance and financial support to remain in education/ training. These forms of support may continue beyond 21, up until the age of 25, if the young person is continuing in education or training. In 2017, the Children and Social Work Act extended personal advisor support for all care leavers who would like it to 25.¹²⁰ Similar leaving care provisions exist in Scotland,¹²¹ Wales,¹²² and Northern Ireland.¹²³

5.5 Statement of Evidence Form (SEF)

After a child has made an asylum claim they are asked to fill in a SEF which explains why they are asking for asylum. The legal representative will prepare the application on behalf of the separated child, take down the child’s instructions by filling in the SEF and, in almost all cases, prepare with the child a separate statement to support the application. If the child is 12 or over they may be interviewed about the substance of their asylum claim. The issuing of a SEF allows the child to set-out the material aspects of their claim in advance of a substantive asylum interview with the support of a legal aid funded legal representative. The SEF allows the decision-maker in advance of the substantive asylum interview to better understand the education, maturity and general background of the child, which will indicate what is reasonable to ask and expect at interview.¹²⁴ This helps to avoid repetition and allows the decision-maker to better probe on key areas of the child’s claim.

¹¹⁵ NSPCC, *Free to Move, invisible to care: coordination and accountability towards Romanian unaccompanied minors’ safety*, October 2015, pages 63-65, available at: <https://bit.ly/2YxIPdz>.

¹¹⁶ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above, Section 3.4.

¹¹⁷ DfE, *The Children Act 1989 guidance and regulations, Volume 2: care planning, placement and case review*, note 14 above; DfE, *The Children Act 1989 guidance and regulations, Volume 3: planning transition to adulthood for care leavers*, October 2010, available at: <https://bit.ly/2RNS05D>.

¹¹⁸ The care planning and pathway (leaving care) planning processes under sections 31A (care plans) and 23E (pathway plans) of the Children Act 1989 and associated guidance and regulations, see <https://bit.ly/2LwczlX> and <https://bit.ly/321Zc2Q>.

¹¹⁹ Children (Leaving Care) Act 2000, available at: www.legislation.gov.uk/ukpga/2000/35/contents.

¹²⁰ DfE, *Extending Personal Adviser support to all care leavers age 25: Statutory guidance for local authorities*, February 2018, available at: <https://bit.ly/2XgtMII>.

¹²¹ The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003, available at: <https://bit.ly/2XjLPaP>.

¹²² Sections 105-115, Social Services and Well-being (Wales) Act 2014, available at: www.legislation.gov.uk/anaw/2014/4/contents.

¹²³ The Children (Northern Ireland) Order 1995 – Guidance and regulations – Volume Eight – Leaving and After Care. Department of Health, Social Services and Public Safety, *Leaving and After Care: Guidance and Regulations, Volume 8*, May 2005, available at: <https://bit.ly/2xopApC>.

¹²⁴ Home Office, *Children’s asylum claims*, Version 3.0, August 2019, *Section on Actions to take to prepare for a child’s substantive asylum interview*, page 39, note 55 above.

5.6 Asylum Interview and appeal

The best interests principle should be applied throughout the asylum procedure. The UK has introduced Immigration Rules to this effect which mean children, including unaccompanied and separated children are entitled to specific procedural and evidentiary safeguards as well as welfare protections with regard to the consideration of asylum claims, set out in Part 11 of the Immigration Rules¹²⁵ and in specific guidance.¹²⁶ The rules ensure a number of independent safeguards are in place, which are essential to facilitate the effective participation of the child. These include:

- Children invited to attend an asylum interview must be interviewed by a specially trained member of staff and must be accompanied by a responsible adult. In policy, if needed, an interpreter is funded and must be present.
- When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. It will usually be a social worker, or another member of staff of a LA or voluntary sector organisation, a legal guardian or a foster carer. Their role is primarily to ensure that the welfare of the child is paramount in the process.

- Children making an asylum claim in their own right are eligible for assistance in the form of legal aid and the Legal Aid Agency (LAA) will fund a legal representative's attendance at the substantive interview.¹²⁷ This legal advice and representation can help to ensure that all aspects of the child's experiences are taken into account in the decision making process and that relevant medical and other evidence is made available to the decision maker.
- HO guidance sets out interviewing principles including the time and location of an interview suitable for a child; conduct of interviews; welfare during the interview¹²⁸ and whether it is appropriate to interview a child.¹²⁹
- Specific guidance exists for judges deciding immigration appeals by those under 18. In particular, it requires that children must be protected from improper or aggressive cross-examination.¹³⁰

¹²⁵ Immigration Rules, part 11: asylum, paragraphs 350-352ZF.

¹²⁶ Home Office, *Children's asylum claims, Version 2.0*, note 55 above.

¹²⁷ *Ibid.*, p. 23 and 46.

¹²⁸ *Ibid.*, pp. 43-45.

¹²⁹ *Ibid.*, p. 39.

¹³⁰ Tribunals Judiciary, *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*, 30 October 2008, available at: <https://bit.ly/2RKH2xG>; Tribunals Judiciary, *Practice Direction First Tier and Upper Tribunal: Child, Vulnerable Adult and Sensitive Witnesses*, 30 October 2008, available at: <https://bit.ly/31YAy3j>.



6. WEAKNESSES AND SHORTCOMINGS

Despite the above-mentioned strengths in the systems applicable to unaccompanied and separated children, the research for this report identified a number of areas which would benefit from further review or strengthening with regards to the assessment and application of the best interests principle. Key findings are outlined below.

OVERVIEW OF WEAKNESSES AND SHORTCOMINGS IN THE UK SYSTEM

Lack of child-friendly and accessible information

The UK asylum system and its related procedures are complex and can be confusing for asylum-seekers, especially children. Unaccompanied and separated children report having limited access to child friendly information leaving them feeling powerless and poorly informed about the complex systems they are part of. This adversely affects children's effective participation in the decisions made about their lives.

Not all children have access to an independent guardian

Systems of guardianship exist in Scotland and Northern Ireland, but not the rest of the UK. Therefore the majority of unaccompanied and separated children do not have access to a guardian. Guardians are necessary to promote and protect children's best interests across all settings, to safeguard against a conflict of interest and to support them to navigate through incredibly complex systems and processes.

First contact with authorities requires strengthening

At the point when unaccompanied and separated children first come into contact with the UK authorities, prior to referral to child protection services, there appears to be few safeguards or child protection procedures in place. Children at this point, report being held for a period in police custody and may be subject to lengthy questioning.

Children are predominantly directed into the asylum system

There is no mechanism or support early on to ensure the child has all the information they need to decide whether to pursue an asylum claim. Further, there are limited alternative procedures to support a child to regularise their immigration status or otherwise resolve their case if they are not in need of asylum.

Lack of quality legal advice and representation

Stakeholders report huge difficulty in finding legal advice for unaccompanied and separated children with both asylum and immigration claims due to the significant reduction in legal aid and the presence of advice “deserts”.

Implementation of the National Transfer scheme (NTS)

There are concerns with how the NTS has been implemented in practice because referrals through the NTS can be slow and very disruptive to a child’s experience, and do not always give sufficient consideration to the child’s best interests.

Current age assessment procedures leave a child vulnerable

The current policy, which allows Home Office staff to make an initial age assessment if physical appearance and demeanour “very strongly suggests that an individual is significantly over 25 years of age”, is problematic. An incorrect assessment may deny a child access to child specific rights and benefits, including access to education, reception and accommodation.

Children are required to access two distinct parallel systems

Unaccompanied and separated children are required to access both the children’s social care system and the immigration system which each have distinct objectives, timeframes and funding arrangements. The asylum and care planning systems are not aligned and this can undermine the application of the best interests principle.

Delays throughout the asylum process for children’s cases

Delays in the asylum process, sometimes for many years, are experienced by children at various points along the route. Significantly, if a child turns 18 years old by the time of their asylum interview, child specific procedural safeguards no longer exist.

For those who are finally granted refugee status after a lengthy delay, there is a risk of undermining their ability to successfully integrate in the UK.

Limits to effective multi-agency working

Mechanisms to encourage multi-agency working and information sharing in unaccompanied and separated children’s cases appear to be limited in scope and occur predominantly only as a review of paper documents with review meetings occurring infrequently.

Home Office guidance remains limited

Guidance for caseworkers on best interests and decision-making in children’s asylum cases does not adequately take into account the primacy of a child’s best interests. It requires review and amendment to reflect the guidance provided in Committee on the Rights of the Child General Comment 6 and 14, in particular noting that the best interests principle means that the child’s interests have priority and are not just one of several considerations.

Shortfalls in the process of family tracing

Family tracing is a challenging and complex task. In the current system, provision of information to the child about the purpose of family tracing, the risks, the benefits and the possible outcomes could be strengthened. Multi-disciplinary input about how or if to go about family tracing could be further facilitated.

Lack of well-informed and impartial best interest considerations as part of decision on leave

Best interest considerations relevant to a decision on the grant of leave to remain for unaccompanied and separated children are not benefitting from impartial, multi-disciplinary input. Home Office caseworkers alone do not have the required competence and capacity to holistically identify the relevant best interests considerations in coming to a final decision on leave.

No formal mechanism for arriving at a durable solution in the best interests of each child

There is no stage in the process of determining a grant of leave, in which all of the options available to the child are fully explored through a formal mechanism for determining a durable solution that is in the best interests of each child.

6.1 Lack of child-friendly and accessible information

A prerequisite for a child's effective participation in any decision affecting him or her includes support in the form of child-friendly information and procedures. Children must be informed at every stage of the process about the next steps and their options. They must be consulted on all matters concerning their case with both child protection and asylum authorities.

Research, including that undertaken by UNHCR, has found evidence that children subject to immigration control perceive the immigration system as adversarial, confusing and stressful.¹³¹ Children report being given little to no guidance about the asylum process, and felt left to fend for themselves. Without proper guidance or support, children were found to be unable to understand the basics of the immigration system, much less navigate it effectively, which served to undermine their access to legal protection.¹³² This often left them feeling powerless to influence the outcomes of decision making. UNHCR has also found that young people, on their reception into child protection services, described having little understanding of where they were and what was happening to them or why. They described being abandoned to their own devices, with no orientation, information or support provided.¹³³

UNHCR and Unicef UK acknowledge two recent positive steps taken by the government to begin to address this issue through the development of child-friendly information. The HO is developing a child-friendly point-of-claim leaflet on the UK asylum process in collaboration with Coram Children's Legal Centre and Refugee Council which includes

outlining the roles and responsibilities of the different actors. Furthermore, as part of the Government's safeguarding strategy for unaccompanied and separated asylum seeking children, the DfE is developing information for LAs to share with unaccompanied children to explain what it means to be looked after, with the specific aim of reducing the risk of children going missing. Consultation on this material is currently being undertaken with stakeholders. Research by UNHCR¹³⁴ suggests that to build on this provision of written child-friendly information, there may be benefits to enrolling a child straight into a structured, orientation and education programme as a matter of priority soon after their arrival. This would create a setting where children can learn important information about life in the UK, can build social networks and start to learn English.

6.2 Not all children have access to an independent guardian

There is a body of evidence to suggest that children in the asylum process in the UK find it hard to understand the roles and responsibilities of the different actors they meet, let alone the administrative processes they encounter and this contributes to a sense of matters directly affecting them being out of their hands.¹³⁵ Every step of the response for an unaccompanied or separated child greatly depends on the existence or ability to build a trust relationship with the child.¹³⁶ Furthermore, repetitive interviewing with numerous different actors and different bodies can confuse and re-traumatise children.

General Comment No. 6 calls for "the appointment of a competent guardian as expeditiously as possible"

¹³¹ Children's Voices, *A review of evidence on the subjective wellbeing of children subject to immigration control in England*, November 2017, available at: <https://bit.ly/2x8Zmr0>; UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019 <https://www.unhcr.org/uk/5d271d527>.

¹³² Office of the Children's Commissioner, "What's going to happen tomorrow?" *Unaccompanied children refused asylum*, April 2014, available at: https://dera.ioe.ac.uk/20002/1/ARE_FINAL_for_Web.pdf; Chase, E. *Agency and silence: Young People Seeking Asylum Alone in the UK*, October 2010, *British Journal of Social Work*, 40(7), 2050–2068, available at: <https://doi.org/10.1093/bjsw/bcp103>.

¹³³ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹³⁴ *Ibid.*

¹³⁵ Law Centres Network, *Put Yourself in Our Shoes: Considering Children's Best Interests in the Asylum System*, November 2015, available at: <https://bit.ly/1lic4M0>; Office of the Children's Commissioner, "What's going to happen tomorrow?" *Unaccompanied children refused asylum*, April 2014, available at: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Whats-going-to-happen-tomorrow.pdf>; The Children's Society, *Into the Unknown: Children's journey through the asylum process*, 2012, available at: <https://bit.ly/2KO3Egg>.

¹³⁶ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above.

which it states “serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian.”¹³⁷ In 2013, the JCHR also recommended the introduction of a guardianship programme in the UK.¹³⁸

A guardian would act as a voice for the child, an advocate and an independent safeguard. They would stay involved with the child throughout the process appointed shortly after identification, acting as guardian *ad litem* through any court proceedings, until a durable solution is fully implemented.

The guardian should:

- be appointed to every “separated migrant child” (including potential victims of trafficking) at the point of identification;
- be enshrined in statute;
- be independent from the state;
- have legal authority and adequate legal powers to represent the child’s best interests; and
- be inspected by an existing regulatory body.

Law and policy setting out the provision of guardianship services across the UK is varied. The service is most developed in Scotland, where the Scottish Government has fully funded the Scottish Guardianship Service for unaccompanied asylum-seeking children and child victims of trafficking since 2013, managed and delivered by the Scottish Refugee Council and Aberlour Child Care Trust.

In 2015 the Scottish Parliament legislated to place guardianship on a statutory footing under the

Human Trafficking and Exploitation (Scotland) Act 2015. Section 11 of the Act places an obligation on Scottish Ministers to provide a guardian not just to children and young people who have been identified as victims of trafficking but who may be or who are vulnerable to becoming victims of trafficking and where no person in the UK has “parental rights and responsibilities” towards that child. As noted by the Scottish Government Minister during the final debate on the Bill, Section 11 (2) “will have the effect of widening the eligibility criteria to include children who are unaccompanied and may be vulnerable to being trafficked.”¹³⁹ Regulations giving effect to s.11 have yet to be laid, including the duty on authorities to refer (s.11 (3)). In the meantime, the Scottish Government continues to fund the Scottish Guardianship Service until the new statutory arrangements are in place.¹⁴⁰ Similarly, in 2015, Northern Ireland passed legislation requiring the appointment for a guardian for all trafficked and separated children.¹⁴¹

In England and Wales, in contrast, there is no formal scheme, nor any legal obligation to provide a guardian. Instead, it is considered that the requirement that a child is supported by a responsible adult, or special representative, can be satisfied by assigning the child a social worker.¹⁴² However, in 2015, provision was made for Independent Child Trafficking Advocates (ICTAs) in England and Wales to provide specialist, independent support for identified trafficked children.¹⁴³ An evaluation of an initial pilot of the ICTA scheme in England revealed the important role that independent advocates or guardians can play in supporting such children to access a range of integration services and recommended broadening the scheme to ensure all children and young people who are believed to have been victims of human trafficking, and all other forms of modern slavery are

¹³⁷ CRC General Comment No. 6, note 1 above, paras. 21 and 33; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: www.refworld.org/docid/5a12942a2b.html.

¹³⁸ JCHR, *Human Rights of unaccompanied migrant children and young people in the UK: First Report of Session 2013-14*, note 16 above.

¹³⁹ The Scottish Parliament, Meeting of the Parliament – 1 October 2015, available at: <https://bit.ly/2LtM9SV>.

¹⁴⁰ The Scottish Parliament, *Parliamentary statement by Cabinet Secretary for Justice Michael Matheson*, 14 June 2018, available at: <https://www.gov.scot/publications/human-trafficking-annual-progress-report/>.

¹⁴¹ Section 21, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, available at: <https://bit.ly/2yOkaBB> and written evidence from Law Centre (NI).

¹⁴² House of Lords, European Union Committee, 2nd Report of Session 2016-17, *Children in crisis: unaccompanied migrant children in the EU*, 26 July 2016, available at: <https://bit.ly/2Xj80SD>.

¹⁴³ Via Section 48, Modern Slavery Act 2015, available at: www.legislation.gov.uk/ukpga/2015/30/section/48/enacted.

eligible.¹⁴⁴ The National Assembly for Wales: Equality, Local Government and Communities Committee¹⁴⁵ recommended that the Welsh Government should establish a Guardianship service for Wales.

UNHCR's research¹⁴⁶ has concurred with evidence from the ICTA evaluation, indicating that where advocates or guardians exist they provide an integral role in facilitating children's integration, particularly in cases where relationships with other authorities and providers have broken down. Guardians were also notably found to play an important role in supporting children to navigate complex immigration, asylum and welfare processes: helping them to understand how different systems worked, and their rights and entitlements to support. Young people appeared to view advocates as trustworthy and knowledgeable people, who were understanding of the issues affecting them and able to provide accurate information and advice. Guardians can also mitigate against the influence of traffickers, smugglers other criminal networks or even peers, encourage the child's cooperation and participation in procedures, and support in family tracing where pursued.¹⁴⁷

Although there is some overlap with the coordinating role of social workers, a core and important principal of independent guardianship is that the service is *truly* independent of any public authority, body or agency. This is necessary to avoid the obvious conflict of interest that arises when those responsible for advocating for a child, also have statutory duties to provide, manage and gate-keep services, of notable concern in the contexts of age assessment and the NTS where children may become in direct conflict with the LA, including in extreme cases through a litigation procedure. Whilst many young people interviewed in UNHCR's research¹⁴⁸ had built strong

and trusting bonds with the social workers supporting them, others had not. There were examples of children feeling that social workers were lying or withholding information from them about their rights, or discriminating against them due to their background, nationality or immigration status.

6.3 First contact with authorities requires strengthening

Although the UK has made a commitment to ending child detention, at this point a child may nonetheless be temporarily detained in Short Term Holding Facilities (STHF). Children can be held in STHF for up to 24 hours until released into LA care. Further, if a child is first encountered by the police, which is the case for many, they may be held at a police station whilst waiting for an LA to come and collect them or be held in STHF if arriving at airports. A report by ICIBI reported that it was unclear how "responsible adults" providing support to unaccompanied and separated children detained at Heathrow T4 were recruited or trained, if at all, and that they might not have an understanding of the role and might not be suitable for this task.¹⁴⁹

UNHCR's research¹⁵⁰ found that it was common for children picked up by the police to describe being held for a period in police custody: typically up to 24 hours (and even longer in cases where children were age disputed). During this time, children reported being subject to lengthy questioning (via phone interpretation), as well as being provided food, and sometimes a place to sleep. In addition to being held at the station many children described being subject to a fairly lengthy period of questioning (around one to two hours). It is not always clear from children's

¹⁴⁴ The Independent Anti-Slavery Commissioner, *First interim report: Independent Review of the Modern Slavery Act 2015*, 17 December 2018, available at: <https://bit.ly/2FIISKL>.

¹⁴⁵ The National Assembly for Wales: Equality, Local Government and Communities Committee, *"I used to be someone" Refugees and asylum seekers in Wales*, April 2017, Recommendation 16, pp. 51-55, available at: www.assembly.wales/laid%20documents/cr-ld11012/cr-ld11012-e.pdf.

¹⁴⁶ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹⁴⁷ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above, p. 17.

¹⁴⁸ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹⁴⁹ ICIBI, *Report on an unannounced inspection of the short-term holding facility at Heathrow Airport Terminal 4 by HM Chief Inspector of Prisons*, 29 October 2018, available at: <https://bit.ly/2ZV20Nt>.

¹⁵⁰ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.



accounts whether this questioning was conducted by the police as part of an initial welfare/ safeguarding screening processes or by HO staff (or even potentially social services), called to stations to initially assess a child's age, and perhaps to establish whether they intend to claim asylum. Stakeholders interviewed also expressed concerns about the purpose of these initial screening questions: including whether information gathered might later be used as evidence towards a young person's asylum claim. Further, key informants interviewed expressed concerns that in some cases, HO staff and social workers are performing on-the-spot visual assessments of a young person's age upon immediate arrival, and whilst they are still in police detention (see section on age assessment).

The research highlighted that it was unclear why the interviews should be lasting for the periods of time as described by children. It highlights that this environment may compromise the potential value of an interview for establishing accurate information, whilst young people reported finding this initial questioning exhausting, confusing and distressing and for some it triggered difficult memories of traumatic episodes during their journeys.

The 2017 Safeguarding Strategy contains reference to developing consistent welfare processes across all Police Forces and HO Departments for first responders who encounter arriving unaccompanied or separated children.¹⁵¹ For the purposes of this report, the HO updated on this initiative which is called Operation Innerste aimed at standardising the police response to the initial encounter of unaccompanied and separated children. This initiative introduces a new welfare form (alongside basic guidance) to be completed with the child by the police and aims to "maximise the initial encounter to develop early rapport with the child, ensuring they are safe and aware of the services to which they are entitled in the UK."¹⁵² The HO reports that this process was successfully piloted in Hertfordshire in August 2017 and it is in the process of a phased national rollout. Currently there are 13 police forces signed up to the operation. The pilot welfare form being used for Operation Innerste is very similar to the welfare form currently used by asylum intake units (referred to in DIAGRAM 1). It is understood that the new welfare form used in Operation Innerste will replace both welfare forms so that all forms used are the same.

¹⁵¹ DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, note 66 above.

¹⁵² Email from Home Office official to UNHCR received on 14 May 2019 in which this new form and guidance was shared.

The introduction of the welfare interview is a positive development because it focuses on the child's immediate welfare. The expansion of the use of this welfare form is also welcome to ensure the response on first encounter for children is consistent. Given the concerns raised by UNHCR's recent research in this area, the provision of basic guidance and tools for police when encountering children is a minimum vital safeguard.

However, at the welfare interview, children may not have anyone to advise them, guidance states that a responsible adult will only attend "where possible".¹⁵³ There is no specific provision for a legal representative to be present. From UNHCR's visit to NAIU's it is understood that, in practice, sometimes Refugee Council staff act as a responsible adult or a LA social worker attends but this is only in cases where the child is considered to be under 16 and if there is a concern such as trafficking. Therefore, in most cases, the child will not have support during the interview.

6.4 Lack of quality legal advice and representation

DfE's statutory guidance identifies ensuring a child can access specialist immigration or asylum legal advice to fully present their claim as crucial,¹⁵⁴ but in practice this is difficult. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed state-funded legal aid from most immigration cases. In July 2018 the government, following a judicial review, announced its intention to lay an amendment to LASPO to bring immigration matters for unaccompanied and separated children back into the scope of legal aid.¹⁵⁵ In the meantime however, limited

legal aid is available via the Exceptional Case Funding (ECF) scheme, which is intended to ensure legal aid is accessible in cases where there is a risk of breach of human rights. In practice however, not all lawyers are aware of ECF, or are reluctant to undertake the work as funding is not guaranteed.¹⁵⁶

In both immigration and asylum claims, stakeholders report huge difficulty in finding advice with legal aid providers reducing by over 50% in the areas of asylum and immigration between 2005 and 2018¹⁵⁷ and the presence of advice deserts outside of London and the South East.¹⁵⁸ Findings indicate the "fixed fees" available for most asylum work is inadequate and pays for less work than is needed to do the required work for each stage of the case, meaning high-quality providers lose money on the cases they undertake.¹⁵⁹

6.5 Children predominantly directed into the asylum system

At the welfare interview, the child is directed by officials towards the asylum procedure as the primary route through which an application can be made. The child is given information on obtaining a lawyer, as well as information on the Statement of Evidence Form (SEF), case management review and substantive interview. The child is then entered onto the HO case information database, flagged and referred to the National Asylum Allocation Unit (which allocate the case to a decision team).

There are a number of structural design issues within the system which perpetuate the approach in which children are channeled into the asylum system. Firstly, funding to cover the child's care is allocated to the LA by the HO *only* if the child has claimed asylum. They

¹⁵³ Home Office, *Children's asylum claims, Version 3.0*, p. 21, note 55 above.

¹⁵⁴ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above; DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, note 66 above, para. 18.

¹⁵⁵ Parliament Written Statement by Lucy Frazer MP (Parliamentary Under Secretary of State for Justice), 12 July 2018, available at: <https://bit.ly/2Nkaps9>.

¹⁵⁶ House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, 4 March 2015, available at: <https://bit.ly/2xmSnuY>; Law Society, *Access denied? LASPO 4 years on: a Law Society review*, 29 June 2017, available at: <https://bit.ly/2syTuaJ>.

¹⁵⁷ NACCOM and Refugee Action, *Tipping the Scales: Access to Justice in the asylum system*, July 2018, available at: <https://bit.ly/320C6d1>; Solicitors Regulation Authority, *Quality of legal services for asylum seekers*, January 2016, available at: <https://bit.ly/2Yo2awh>.

¹⁵⁸ The Children's Society, *An update to: Cut off from Justice: The impact of excluding separated and migrant children from legal aid*, August 2017, available at: <https://bit.ly/2xnWY9D>.

¹⁵⁹ Wilding, J., *Droughts and Deserts: A report on the Immigration legal aid market*, April 2019, available at: <https://bit.ly/2NkafB3>.

do not currently receive funding to look after children who make other immigration claims.¹⁶⁰ Secondly, as highlighted previously, there are limitations on legal aid funding if there is no asylum application. Finally, a range of other services for young people on turning 18 years old, are only equipped to support those who have made an asylum application. Most schools and colleges, health practices, and banks in practice require proof of identity to access services. For almost all unaccompanied and separated children, especially after turning 18 years old, the ARC (Application Registration Card)¹⁶¹ is the only accepted form of identity to prove entitlement. Without this, children and young people would find it extremely difficult to access vital services.¹⁶²

In the UK, there is no mechanism or support early on to ensure the child has all the information they need to decide whether to pursue an asylum claim. This practice reflects a clear trend in Europe which is “to examine the child’s protection needs only through an asylum procedure, when seeking asylum may not be in the best interests of the child.”¹⁶³ Asylum is not appropriate for all children – nor are asylum procedures designed to ascertain the child’s best interests.¹⁶⁴ It should not be assumed that asylum is automatically in the best interests of a child. In cases where the child does not wish to seek international protection, but where return of a child would not be in their best interests UNHCR and Unicef UK are of the view that other options should be considered for the child.¹⁶⁵

Where requirements for granting refugee status under the 1951 Convention are not met, complementary forms of protection may be available to particular unaccompanied and separated children where required and in accordance with their best interests. There are already some – albeit limited – provisions available to this effect. During the course of 2018, new forms of leave to remain were introduced by the HO, so that if the child was either transferred under Section 67 of the 2016 Act (the Dubs amendment),¹⁶⁶ or as part of the UK-France joint operation ahead of the Calais camp clearance as a protection measure,¹⁶⁷ and not ultimately found to be in need of international protection, they may alternatively be granted Section 67¹⁶⁸ or Calais Leave¹⁶⁹ respectively. Furthermore, where a child is looked after by a LA, published HO policy allows for the child to be granted four years limited leave to remain, followed by ILR. Guidance states that “[i]f there is a realistic possibility of the child returning to his parent(s) and/or country of origin in the future, the child may be granted limited leave for periods of 12 months... Where there is no prospect of the child leaving, the child may be granted leave to remain for 4 years... In both cases, after 4 years of limited leave to remain, if there is no prospect of removal, indefinite leave to remain may be granted.”¹⁷⁰ Indeed, DfE Statutory Guidance also makes reference to the possibility that the child may become legally resident in the UK long term.¹⁷¹ However, there is no child-focused HO guidance for non-asylum applications despite the section 55 duty also applying to those applications.¹⁷²

¹⁶⁰ This might, for example, include applications based on Article 8 of the European Convention on Human Rights protecting a person’s right to respect for their private and family life or for example an application for stateless leave under Paragraph 14 of the UK Immigration Rules.

¹⁶¹ Home Office, *Application Registration Card, Version 4.0*, 13 April 2018, available at: <https://bit.ly/2LtQxQW>.

¹⁶² Views of Refugee Council as part of expert advisory group.

¹⁶³ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above.

¹⁶⁴ There are forms of leave which can be granted under the National Referral Mechanism (no more than 30 months renewable): Home Office, *Discretionary leave considerations for victims of modern slavery, Version 2.0*, 10 September 2018, page 10, available at: <https://bit.ly/2L3wOaB>; and if recognized as stateless under the Stateless Determination Procedure: Home Office, *Asylum Policy Instruction: Statelessness and applications for leave to remain, Version 2.0*, 18 February 2016, available at: <https://bit.ly/2XcgvdS>.

¹⁶⁵ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above, p. 102; UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above.

¹⁶⁶ Those transferred to the UK under Section 67 of the Immigration Act 2016.

¹⁶⁷ Those people who were transferred to the UK between 17 October 2016 and 13 July 2017, in connection with the clearance of the Calais camp, for the purpose of being reunited with family.

¹⁶⁸ Home Office, *Section 67 of the Immigration Act 2016 leave, Version 1.0*, note 81 above.

¹⁶⁹ Home Office, *Calais Leave, Version 1.0*, note 82 above.

¹⁷⁰ Home Office, *Immigration Directorate Instructions, Chapter 8 Section 5A, Annex M: Children*, July 2012, available at: <https://bit.ly/2KMSHM7>.

¹⁷¹ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above.

¹⁷² The Children’s Society, *Not just a temporary fix: Durable solutions for separated migrant children*, August 2015, available at: <https://bit.ly/1VfUJmw>.

In Scotland, alternative practice is observed where there is a bigger gap between first encounter and the welfare interview and it is standard practice followed by all parties that children are first referred to a lawyer who then initiates the asylum or other immigration application before the welfare interview.¹⁷³ This provides more time for recovery, and a higher chance that the child will fully understand their options, and by the same token, that relevant professionals will understand their vulnerabilities and needs.

6.6 Implementation of the National Transfer Scheme (NTS)

Stakeholders have highlighted that the Unique Unaccompanied Child Record (UUCR) form, used to initiate and support the transfer process, does not give sufficient consideration to the child's best interests and that the child's "voice" is absent from the form.¹⁷⁴ Any best interests assessments that had been carried out are not attached, nor is the UUCR maintained as a "live" document or reviewed if a transfer was delayed, failing to recognise that a decision in the best interests of a child might change. The ICIBI has recommended keeping requests under review and best interest assessments dynamic and current.¹⁷⁵ Problems can also arise due to age disputes, confusion over who should accept and assess the child as well as challenges with access to services in the receiving LA (in particular, the lack of legal advice in potential receiving authorities can present difficulties).

The NTS protocol has since been strengthened and updated to specify that a child must not be referred

if it is not in their best interests¹⁷⁶ and includes factors that may suggest a decision to refer a child for transfer should be withdrawn.¹⁷⁷ However, findings from UNHCR's study on the reception and integration of children¹⁷⁸ indicated that in many cases this principle is not adhered to in practice. It found in particular, in its current form, a referral through the NTS can be highly disruptive for children. Interviews with young people and social workers revealed numerous cases where children had been removed from their placements against their wishes, in a manner that was clearly disruptive to their wellbeing.

6.7 Current age assessment procedures leave children vulnerable

Age assessments have a significant impact in determining how an individual is treated both in the immigration and asylum process and also in the care and support they receive. There are a number of serious practical consequences of age assessment. Those treated as adults are excluded from the safeguards and child-specific considerations that would apply if their asylum claim were processed as a child. The length of time that challenging an age assessment can take means young people may have to wait months or years for a decision on their asylum claim while their age is still in question. This can lead to them "ageing out" and as a result not being granted refugee status or being denied a grant of limited leave where they would have received one had their age not been disputed.¹⁷⁹ Furthermore, a child who is otherwise considered an adult may find themselves subject to detention¹⁸⁰ and is not referred to child protection services or to the Refugee Council Children's Advice Project Service.

¹⁷³ Information provided by Scotland expert on project advisory panel.

¹⁷⁴ Refugee and Migrant Children's Consortium, *Briefing on the National Transfer Scheme*, August 2017, available at: <https://bit.ly/2DBT2Nv>.

¹⁷⁵ ICIBI, *An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children*, note 107 above, p. 6, 7 and 10.

¹⁷⁶ This is in line with existing legislation and guidance in which all transfer decisions the welfare of the child is paramount pursuant to section 1(3) of the Children's Act 1989 and the decision must take into account the child's own views, the availability of suitable care, medical treatment, family ties, education, ethnic group and religion. It must take into account the LAs' statutory duty to ensure that they safeguard and promote the welfare of all children, including that the best interests of the child are a paramount consideration.

¹⁷⁷ DfE and Home Office, 2018, *National Transfer Scheme Protocol for Unaccompanied Asylum Seeking Children, Version 2.0*, note 52 above.

¹⁷⁸ UNHCR, "A refugee and then...": *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

¹⁷⁹ Elder Rahimi Solicitors, *Systemic delays in the processing of the claims for asylum made in the UK by Unaccompanied Asylum Seeking Children*, March 2018, available at: <https://bit.ly/2Xlwtk8>; Coram Children's Legal Centre, *Happy birthday? Disputing the age of children in the immigration system*, May 2013, available at: <https://bit.ly/2ZCi6eF>.

¹⁸⁰ There is substantial literature on this; see UNHCR's submission to the Joint Committee on Human Rights' call for evidence on the United Kingdom's record on Children's Rights, October 2016, available at: <https://bit.ly/2lRnGdX>.

The HO has issued “interim guidance”¹⁸¹ on age assessment following the UK Court of Appeal’s decision in *BF (Eritrea) v Secretary of State*¹⁸² which found unlawful the Government’s age assessment policy which had previously provided that an individual must be treated as an adult if two HO members of staff of appropriate seniority assessed that the individual’s “physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age [...]”. The interim guidance specifies that an individual claiming to be a child must be treated as an adult “if their physical appearance and demeanour very strongly suggests that they are 25 years of age or over.”¹⁸³ These decisions made based on young people’s “demeanour and physical appearance” are widely recognised as being a (culturally) subjective and unreliable means of establishing age.¹⁸⁴ Statistics are not published on the number of individuals affected by this procedure, so the extent of the problem is unknown. Data on those dispersed into the adult system is also not published.

Meanwhile, HO guidance recognises the importance of applying the “benefit of the doubt” principle in circumstances where there is uncertainty about whether the individual is an adult or a child.¹⁸⁵ In these cases, the individual should be treated as a child and referred to a LA for a Merton compliant age assessment to be carried out. However, despite these protection requirements, UNHCR’s research¹⁸⁶ identified a number of cases where asylum seekers, initially judged to be adults, were later determined to be children and were detained as part of this process. This had a re-traumatising effect in reminding children of past experiences of detention either in the country of origin or en route to the UK. The Refugee Council reported that, in 2017/18, 88% of cases referred to their age dispute project were assessed to be children.¹⁸⁷

6.8 Operation of two distinct parallel systems

The UK child protection and immigration systems operate in parallel with differing objectives, timeframes and funding arrangements. This results in a fractured approach to the care and support of these children and therefore, the consideration of their best interests.

The children’s social care system is designed to provide continuing assessments of the best interests of the child and outcomes consistent with the best interests principle. However, in practice, the asylum and care systems are designed in isolation from each other with conflicting objectives and timeframes, undermining the care system from working to best effect in unaccompanied and separated children’s cases. The HO and DfE Safeguarding Strategy¹⁸⁸ states that “Triple pathway planning” covers any of the eventualities faced by children who: (1) may be returned home when they reach 18; (2) stay in the UK pending a further decision; or (3) stay after being granted leave. The DfE Statutory Guidance¹⁸⁹ regarding pathway planning states that “initial planning may have to be based around short-term achievable goals whilst entitlement to remain in the UK is being determined...transition planning should reflect all the relevant potential outcomes of the immigration process and which, over time, should be refined as the child or young adult’s immigration status is resolved.”

If done effectively as part of a multi-agency assessment, pathway planning should contribute to best interests assessments for unaccompanied and separated children. Presently, however, the immigration system can adversely impact upon the care planning process. This can be a result

¹⁸¹ Home Office, *Assessing age, Version 3.0*, note 52 above.

¹⁸² *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 (23 May 2019), available at: <https://bit.ly/2W0XbTS>.

¹⁸³ Home Office, *Assessing age, Version 3.0*, note 52 above.

¹⁸⁴ See UNHCR’s submission to the Joint Committee on Human Rights’ call for evidence on the United Kingdom’s record on Children’s Rights, note 183 above, and UK Case Law: *AA, R (on the application of) v Secretary of State for the Home Department & Anor* [2016] EWHC 1453 (admin), 20 June 2016, available at: www.bailii.org/ew/cases/EWHC/Admin/2016/1453.html.

¹⁸⁵ Home Office, *Assessing age, Version 3.0*, note 54 above.

¹⁸⁶ UNHCR, “A refugee and then...”: A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK, June 2019, note 11 above ; UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019 <https://www.unhcr.org/uk/5d271d527>.

¹⁸⁷ Refugee Council, *Age Disputes Project: End of Year Report 2017/18*, available at: <https://bit.ly/306y696>.

¹⁸⁸ DfE and Home Office, *Safeguarding Strategy: Unaccompanied asylum seeking and refugee children*, note 66 above, p. 14.

¹⁸⁹ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above, para. 89.



of incompatible decision-making timescales. For example, the creation of a pathway plan or the review of a care plan takes three months, but a decision on a child's immigration status can take significantly longer and occur without notice. The delay and uncertainty can have significant consequences for steps set out in a child's care or pathway plan.¹⁹⁰ Research has illustrated the difficulties faced in practice with making effective pathway plans for unaccompanied and separated children. Social workers have highlighted that permanence planning is "interrupted by the immigration system"¹⁹¹ and that triple planning "contradicts the concept of permanence in the care planning process. Until there is a final immigration decision, it is hard for social workers to plan with young people."¹⁹²

For national children, the department responsible for the children's social care system and therefore the safeguarding and welfare of children is the DfE, however, the lead agency for unaccompanied and separated children is the HO which provides the funding for unaccompanied asylum-seeking child's care, setting them apart from other children in care. Local authorities claim not enough funding is provided to meet the cost of their support, generating a shortfall.¹⁹³ UNHCR and Unicef UK however, welcome the recent announcement made by the HO to increase the current daily rate paid to LAs for the care of unaccompanied asylum-seeking children.¹⁹⁴ LAs are calling for this change in funding to be followed through so that care leaving costs, which are equal to or greater than those of national children, are fully funded.¹⁹⁵ Recognising the risk for unaccompanied

¹⁹⁰ The Children's Society, *Not just a temporary fix: Durable solutions for separated migrant children*, note 172 above.

¹⁹¹ *Ibid.*

¹⁹² UNICEF, *Achieving a Durable Solution for Trafficked Children*, note 12 above, p. 21.

¹⁹³ Local Government Association briefing, *Local authority support for child refugees*, 2 November 2017, available at: <https://bit.ly/2FN2ldc>.

¹⁹⁴ Home Office, *Funding boost for councils looking after asylum seeking children*, 8 May 2019, available at: <https://bit.ly/2XqOnb8>.

¹⁹⁵ Local Government Association, *LGA responds to UASC funding announcement*, 8 May 2019, available at: <https://bit.ly/2LyFhCM>.

and separated children, the JCHR¹⁹⁶ has urged the Government to examine whether there should be a greater role for the DfE as the department responsible for safeguarding children and young people, in overseeing support for these children as well. At a minimum, funding levels for unaccompanied and separated children should be on par with those for all other looked after children, regardless of the government department responsible.

6.9 Delays throughout the asylum process

Delays in the asylum process, sometimes for many years, are experienced by children.¹⁹⁷ Delays are incurred in waiting for the substantive interview, in receiving a result on the asylum decision, in waiting for an appeal and in waiting for the results of fresh claims, to name a few. Evidence shows that delays can have a significant negative impact on children's mental health, causing stress and anxiety,¹⁹⁸ compounding the effects of existing trauma, and even contributing to incidents of suicide and self-harm.¹⁹⁹

Significantly, if a child turns 18 years old by the time of their interview, child specific procedural safeguards no longer exist. They must attend the asylum interview on their own without a solicitor or responsible adult present. This delay can also increase the risk of inadequate consideration being given to forms of persecution specific to children and young people in the assessment of the substantive asylum claim. This could impact the likelihood of a grant of international protection.²⁰⁰

For those who are finally granted refugee status after a lengthy delay, there is a risk of undermining their

ability to successfully integrate in the UK. This can be due to a range of factors, including the insecurity and uncertainty experienced awaiting a critical decision and the inability to take full advantage of educational and other opportunities in the interim.

6.10 Limits to multi-agency working and information sharing

In considering the best interests of the child, all relevant factors pertaining to the specific situation of the child must be carefully weighed.²⁰¹ Any best interest procedure undertaken to determine a durable solution needs to draw upon a variety of expertise. This ensures a holistic approach to addressing the child's situation, his/her wide range of needs and broad spectrum of rights. Furthermore, information sharing is essential for effective BIPs, especially where several agencies are involved in different aspects of a best interest consideration.²⁰² Ensuring this holistic approach requires that all relevant information is collected and made available while respecting the principles of data protection. Mechanisms for collecting information in the UK are limited, in the most part, to those that exist as part of the asylum process, a procedure that focuses primarily on obtaining evidence relevant to the asylum claim.

Previous work by UNHCR's Quality Integration Project has found that while there was evidence of some HO decision-makers attempting to be proactive by pursuing information about a child, it was apparent that the existing processes curtailed their ability to know when, where, and from whom they could and should solicit information as well as what sort of

¹⁹⁶ JCHR, *Human Rights of unaccompanied migrant children and young people in the UK*, 12 June 2013, Recommendation 4, available at: www.publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf.

¹⁹⁷ Melzak, S., *Acting in the best interests of unaccompanied asylum seeking children*, 2019, Seen and Heard, 29(1), pp. 43-58.

¹⁹⁸ UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019 <https://www.unhcr.org/uk/5d271d527>; Elder Rahimi Solicitors, *Systemic delays in the processing of the claims for asylum made in the UK by Unaccompanied Asylum Seeking Children*, note 179 above; The Association of Directors of Children's Services Ltd (ADCS), *Safeguarding Pressures Phase 5 – Special Thematic Report on Unaccompanied Asylum Seeking and Refugee Children*, November 2016, available at: <https://bit.ly/2fiJ4G>.

¹⁹⁹ The Children's Society, *Distress signals: Unaccompanied young people's struggle for mental health care*, June 2018, available at: <https://bit.ly/2XnzHdK>.

²⁰⁰ Elder Rahimi Solicitors, *Systemic delays in the processing of the claims for asylum made in the UK by Unaccompanied Asylum Seeking Children*, note 179 above.

²⁰¹ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, see Box 12, "Non-exhaustive list of best interest elements" and Box 13, "Weighing best interest elements".

²⁰² Detailed guidance on information management and sharing in a Best Interests Procedure can be found in UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, note 8 above.

information they should pursue. This meant that the amount of relevant information gathered was minimal and was typically only available later in the process. Instances of eliciting and collecting information relevant to the child prior to interview were rare.

There are a number of existing procedures in the current system which attempt to encourage multi-agency working and information sharing. In practice, however, evidence suggests these are not functioning effectively, are limited in scope and where they do take place, they occur predominantly as a review of paper documents only.

UASC Case Review Meeting

The current UASC Case Review Meeting is intended to take place between the social worker and the HO and is part of the asylum process. It is not a meeting where a decision takes place but appears to simply be to facilitate contact between the social worker and HO.²⁰³ HO policy on children's asylum claims states that this meeting will normally take place via a phone call, and will only take place in person in cases where there are serious concerns about the child's safety or welfare. Only in exceptional circumstances will the child attend.²⁰⁴ This presents a barrier to the participation of the child. There is, also, little published data on these meetings, including the circumstances, how often they take place and whether or not the child is present.

Furthermore, despite this meeting being set out in policy, an inspection by the ICIBI from an examination of 47 asylum case records for unaccompanied children found that in 31 of these cases a UASC case review meeting had not happened at all.²⁰⁵ This was found to be due to the lack of time because of other casework demands, the difficulty in locating the child's social worker where the child had moved location via the NTS, or because social workers did

not attend arranged events. There was no evidence that this situation was being addressed, either nationally or locally. The ICIBI recommended that the HO should:

“review the way Asylum Intake and Casework manages claims from unaccompanied asylum seeking children to ensure that decision-makers have the time, information and expertise necessary to make fully considered decisions that are in the child's 'best interests', and that the rationale for decisions is evidenced – ensuring case reviews take place and that the views of the child and of all the relevant 'actors' have been sought and recorded.”²⁰⁶

This recommendation was “accepted” by the HO.²⁰⁷ For the purposes of this report, the HO reported that the occurrence of these meetings are not published in national statistics or aggregated in national reporting systems and that it is likely they happen “very infrequently”.²⁰⁸

Current Circumstances Forms

The current circumstances forms are designed to help ensure that the HO's immigration and asylum functions take in to account the child's individual circumstances, by providing LAs with the opportunity to provide information relevant to these functions for unaccompanied and separated children in their care. Part 1

The HO decision-making team sends the 'Current Circumstance Form – Part 1' to the child's social worker to be returned one week prior to the substantive asylum interview, giving information that the HO should take into account before a decision on the asylum claim.²⁰⁹ The form requests some information to help the HO communicate with the child in an appropriate manner by asking for information about a child's current level of emotional

²⁰³ Home Office, *Children's asylum claims*, Version 3.0, p. 35, note 55 above.

²⁰⁴ Ibid.

²⁰⁵ ICIBI, *An inspection of how the Home Office considers the 'best interests' of unaccompanied asylum seeking children*, note 107 above, p. 52.

²⁰⁶ Ibid., p. 11.

²⁰⁷ Home Office, *The Home Office response to the Independent Chief Inspector of Borders and Immigration's report: An Inspection of how the Home Office considers the 'Best interests' of Unaccompanied Asylum Seeking Children*, August – December 2017, available at: <https://bit.ly/2X9quRm>, para. 2.25.

²⁰⁸ Email received by UNHCR from Home Office on 14 May 2019.

²⁰⁹ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above, para. 22.

and behavioural development. It also asks for information about family tracing including whether the child is still in contact with their family and whether there are reasons that tracing would not be appropriate, as well as any information regarding risks of serious harm or persecution on return for the child and information about documentation they hold.

Part 2

HO guidance on children's asylum claims²¹⁰ sets out the process for the return of an unaccompanied child. If the HO is considering return while the child remains under 18 years of age, a Current Circumstances Form – Part 2 must be sent by the HO to the social worker. Form 2 is issued to unaccompanied and separated children under 18 years of age who have been refused protection, in the event there is a real likelihood that adequate reception arrangements could be present in the country of return. It requests information to inform the HO's decisions on the suitability of reception arrangements. This form provides the social worker with an opportunity to contribute any information that may be relevant about the child and the proposed return to their home country, what arrangements need to be put in place to meet the child's care and reintegration needs, and whether it is in the best interests of the child to return.²¹¹

HO guidance states that at this point, decision makers must gather information from the child's social worker to enable "a full and rounded best interest consideration to be made in the full knowledge of all the relevant facts."²¹² The HO must seek the information previously contained in the Current Circumstances Form – Part 1, the care plan and IRO's notes from the most recent LAC review. Guidance states that "in more complex cases, or where there are particular doubts as to a child's circumstances, decision makers may need to discuss with the social worker whether a case conference with all the relevant agencies or parties would be helpful to understand fully the best interests of an

individual child. Such meetings will be necessary in complex cases or cases where the best interests are likely to be finely balanced." The guidance, however, offers no more information on the nature of this case conference including on the criteria required to initiate this procedure, who instigates it, and how decisions are determined. This mechanism is welcomed in principle, because it suggests a procedure which is multidisciplinary and draws on relevant expertise to make a decision which should inform a durable solution for the child as per UNHCR guidance outlined in section 3. There are concerns however, as to how both these forms are functioning in practice and in the case of Part 2, the scope of its application.

Evidence suggests that social workers are frequently not contributing to the process of information gathering in the asylum decision-making process. In an assessment of 34 cases by the Greater Manchester Immigration Aid Unit,²¹³ in only 10 cases had the child's best interests been considered. Of these cases there was little evidence of anyone other than the HO decision maker having input. Evidence had only been sought from the social worker in one case, and even in this case it was not clear what information was provided by the social worker and how it informed the decision. Supplementary interviews with social workers found that all felt they had information which was useful and relevant to the HO decision. Only one had been regularly asked by the HO for information, and in this case, social services had difficulty complying with these requests because it would involve revealing confidential information for which informed consent would be needed. Further, providing information required funding for the time required for the extra work involved, which is currently not available.

The ICIBI examined 13 case records where the HO had refused the child's asylum claim. In 12 of these asylum was refused, but there was no evidence that the HO had gathered information from the social worker as required by the guidance, and in all 12 the case records contained little evidence that the

²¹⁰ Home Office, *Children's asylum claims*, Version 3.0, p. 78, note 55 above.

²¹¹ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above, para. 22.

²¹² Home Office, *Children's asylum claims*, Version 3.0, p. 68, note 55 above.

²¹³ Greater Manchester Immigration Aid Unit, *Children's Best Interests: A primary consideration?*, June 2013, available at: <https://bit.ly/2xm2eki>.

decision makers had made a “full and rounded best interests consideration” as required in policy.²¹⁴ Research²¹⁵ further indicates that despite the availability of the Current Circumstances Form Part 2, there appears to be a barrier to information sharing between agencies, because there is an overwhelming culture of mistrust between service providers and voluntary sector organisations involved in the child’s life, and the HO. This is based on the view that there is a lack of consideration of the best interests of the child by the HO when it comes to planning outcomes for the child.

The requirement to send Part 2 of the form *only* applies to a child in the context of return, where the decision appears to be an “outright refusal”, meaning no form of leave to remain is granted because it is considered that there are adequate reception arrangements in the country of return.²¹⁶ For cases where UASC Leave is granted, which was 24% of cases in 2018,²¹⁷ it would therefore appear that there is no equivalent process in which social workers or other agencies can provide information which informs the grant of temporary leave being made.²¹⁸ In the study by the Greater Manchester Immigration Aid Unit,²¹⁹ in only two of ten cases where a best interests consideration had taken place was there any case-specific consideration of reception conditions. In all the other cases, the reason for refusal letter simply included a standard paragraph stating that adequate reception arrangements were not available. This was despite the fact that some of the children in the sample were in regular contact with their families and had been found not to be in need of international protection.

Despite the best intentions of the Circumstances 2 Form, and the relevant paragraphs of the Home Office Guidance on processing children’s asylum claims, there is no stage in the process for all children refused international protection (including those currently otherwise granted UASC Leave) in which the alternative durable solutions, including return, family reunification or third country settlement, can be fully explored. This would require a formal mechanism and should include the ability to recommend a settled residence status, should alternative durable solutions, be found *not* to be in the child’s best interests.

6.11 Shortfalls in the family tracing process

An unaccompanied or separated child may not have lost contact with her/his parents/customary caregivers and may be in a position to communicate with family members. One aspect of determining what is in the best interests of a child is the child’s right to preserve their family environment and to maintain or restore a relationship with their family. Tracing may not necessarily always lead to family reunification but the process serves to inform the broader decision about what the child wants, if this is in their best interests and if reuniting children with their families is even possible.²²⁰ Family tracing should be given priority as soon as the unaccompanied or separated child is identified, and international agencies with a presence in countries where family members reside should be involved to better facilitate an assessment of the family’s situation.²²¹ HO decision makers dealing with a claim for asylum from an unaccompanied child have a responsibility under regulation 6 of the *Asylum Seekers (Reception Conditions) Regulations 2005* to try to trace the child’s family at every stage of the process.²²² Case law has emphasised that tracing should only take place where

²¹⁴ ICIBI, *An inspection of how the Home Office considers the ‘best interests’ of unaccompanied asylum seeking children*, note 107 above, p. 54.

²¹⁵ UNICEF, *Achieving a Durable Solution for Trafficked Children*, note 12 above.

²¹⁶ Home Office, *Children’s asylum claims*, Version 3.0, p. 61, note 55 above.

²¹⁷ Home Office, *Immigration Statistics Year Ending December 2018, Asylum data tables, Volume 5*, 28 February 2019, available at: <https://bit.ly/2Y0zzNB>.

²¹⁸ For the purposes of this research, the Home Office confirmed to UNHCR that this is the case unless it had been considered that adequate reception arrangements could be present in the country of return at some point before or after a grant of UASC Leave.

²¹⁹ Greater Manchester Immigration Aid Unit, *Children’s Best Interests: A primary consideration?*, note 213 above.

²²⁰ The Children’s Society, *Not just a temporary fix: Durable solutions for separated migrant children*, note 172 above.

²²¹ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above.

²²² The Asylum Seekers (Reception Conditions) Regulations 2005, available at: <https://bit.ly/1L52LsU>.



it is in the child's best interests and the child has been properly consulted about his or her wishes.²²³

The HO has published guidance on Family Tracing²²⁴ which states that “[t]he responsibility begins once an asylum claim has been made and is designed to protect the best interests of the child.” Children are informed of the availability of assistance from the British Red Cross within the Point of Claim leaflet, which contains important information on the UK asylum process, and is issued by the HO shortly after a claim for asylum is made.

The HO Guidance on Family Tracing sets out the purposes of attempting to trace the child's family as restoring family links where they have been broken, maintaining established family links and obtaining information as to the family's current circumstances to assist in the identification of a durable solution. It also states that “[a]n assessment that family tracing is in accordance with section 55 may in some cases not be possible until you, after a careful assessment, understand the basis of the asylum claim and are

able to carefully assess any risk to the child and their family. In some cases, you will be able to assess risk using information in the child's statement of evidence form, or information from other involved parties, while in other cases the risks cannot be assessed until after the asylum interview (if one is to be conducted).²²⁵ This family tracing guidance further highlights that: “Social workers are well placed to seek relevant information from the child, foster carers and others involved with the welfare of the child, and to make sure that this information is provided to you.” Similarly, statutory guidance to LAs states that planning for permanence should include consideration of reunification with the child's birth family. If the child has made an application for international protection it might compromise safety if social workers were to initiate contact with anyone in their country of origin. Social workers must first discuss the situation with the child's immigration legal representative. The guidance also states that “[c]hildren should also be informed of the family tracing services which they may be able to access through the British Red Cross.”²²⁶

²²³ *TN and MA (Afghanistan) v Secretary of State for the Home Department; AA (Afghanistan) v same* [2015] UKSC 40, United Kingdom: Supreme Court, 24 June 2015, available at: https://www.refworld.org/cases,UK_SC,5593b1884.html, para. 69.

²²⁴ Home Office, *Family Tracing, Version 2.0*, 28 July 2017, available at: <https://bit.ly/2RFF1CY>.

²²⁵ *Ibid.*, p. 13.

²²⁶ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above, paras 54-59.

An inspection by ICIBI in 2017 found that, despite being an explicit requirement and clearly relevant to any assessment of best interests, family tracing was “routinely considered, but rarely conducted.”²²⁷ HO caseworkers attributed this to the lack of information about family members provided by the child and the limited options available to them to try to locate family members. Research has indicated that when social workers had explored family tracing they expressed a lack of confidence in general about taking this forward. There were concerns that it can be carried out without a child’s permission – and even with the child’s permission, the evidence could be used as part of their asylum case – so practitioners were wary about whether or not they should instigate or even mention it as an option to children.²²⁸ In a similar vein, other research has highlighted that social workers and practitioners view the issue of family tracing as being used by the HO to discredit the young person’s asylum claim whereby for example, young people ‘declining assistance’ with tracing had this turned against them, stating that they had failed to provide enough information about their family. Alternatively, by attempting to contact their family the HO has used this to argue that children can be reunited with them on return.²²⁹

Family tracing can often be a complex and challenging task which is resource and time intensive. UNHCR’s research²³⁰ found that a common reoccurring theme amongst this cohort of children is a lack of willingness to engage on the subject of family tracing. There may be a number of reasons for this. For many young people, speaking about their families may simply be too painful and emotionally challenging. For some, the fear of disappointment if they are unable to find their families may deter them from even attempting to do so. However, there were children interviewed during this research who expressed a desperate desire to locate and re-establish contact with their families; meanwhile, it appeared that little was being done to facilitate this process. In all cases where children had

managed to re-establish contact with their families, they had done so at their own initiative, usually through social media, and/or with the help of friends and other contacts.

Providing counselling and engaging with the child may help in understanding the child’s background, protection needs and motivations for leaving their country of origin – and in turn, the influences behind and the dynamics involved in the child’s resistance to family tracing. Such an understanding would in turn be instrumental in providing the child with relevant support to adequately establish the child’s best interests, and would support the child in providing his or her input. A transparent process would include steps to ensure the child is informed in a child-friendly manner and in a language he or she understands about the purpose of tracing.²³¹ Gaining the trust of the child may be a long and sometimes difficult process, but it is critical to a full understanding of the circumstances surrounding the child’s separation and to supporting the child in reestablishing contact with her/his family. A guardian can encourage the child’s cooperation and participation and when family tracing is assessed to be in the child’s best interests, yet the child refuses to agree to it, a representative or guardian could give consent to tracing.²³² This needs to go hand in hand with careful communication between the child and representative in order not to jeopardize the relationship of trust between them.

The importance of including a stage in the process which involves a more proactive provision of information to the child, including on the purpose of tracing, the risks, the benefits and the possible outcomes, should be stressed. To this end, a transparent process includes steps to ensure the child is informed in a child-friendly manner and in a language he or she understands about the purpose of tracing. Such information would assist the child in making an informed decision and should help facilitate the cooperation and engagement of the

²²⁷ ICIBI, *An inspection of how the Home Office considers the ‘best interests’ of unaccompanied asylum seeking children*, note 107 above, available at: <https://bit.ly/2lW1Xex>. Inspectors examined 52 case records in which family tracing should have been undertaken and 40 contained no evidence of family tracing having been undertaken.

²²⁸ UNICEF, *Achieving a Durable Solution for Trafficked Children*, note 12 above.

²²⁹ The Children’s Society, *Not just a temporary fix: Durable solutions for separated migrant children*, note 172 above.

²³⁰ UNHCR, “A refugee and then...”: *A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK*, June 2019, note 11 above.

²³¹ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, p. 32.

²³² *Ibid.*



child in family tracing activities. The HO can seek the view of the child's social worker and social workers must discuss the situation with the child's lawyer to consider whether tracing is in an individual child's best interests.

6.12 Gaps in decision making relating to durable solutions

A durable solution should address all a child's protection needs, take into account the child's view and, wherever possible, lead to overcoming the situation of a child being unaccompanied or separated.²³³ When identifying a durable solution, this must adequately consider the child's best interests.

There will be a range of possible outcomes:

- ➔ Long-term settlement and integration in the UK (with the most appropriate form of leave considered on a case-by-case basis). This may also

include reunification with family joining the child in the UK;²³⁴

- ➔ Relocation to a third country (whether via family reunion or resettlement);
- ➔ Voluntary repatriation.

UNHCR guidelines state that "[t]he institutions or representatives determining the best interests of the child when identifying a durable solution would ideally be independent and impartial, staffed by people with necessary experience in child protection and no potential conflicts of interest with the protection of the child's rights."²³⁵

The HO currently determines the immigration status, corresponding leave and ultimately the durable solution of children. The above-mentioned limitations on information collection and sharing through the use of Current Circumstances forms or otherwise, mean that best interest considerations relevant to a decision on the grant of leave for unaccompanied and separated children are currently not benefitting from sufficient and impartial multi-disciplinary input. HO caseworkers alone do not have the required competence nor capacity to holistically identify all the relevant best interests considerations needed to make such a decision.

A number of previous research reports have highlighted the shortcomings with best interests considerations undertaken by HO caseworkers. Some of these are detailed below:

- ➔ The Greater Manchester Immigration Aid Unit²³⁶ found that in 24 of 34 unaccompanied children's asylum cases reviewed, there was no evidence of best interests considerations informing the decision on a grant of leave. That study found that in those 10 cases where there was evidence of best interests considerations, the factors identified were selective, with more weight given to factors pointing to return than those pointing to a grant of leave to remain. In only one of the cases identified for return was there any evidence that a social worker had been consulted. This may point to potential bias in favour

²³³ CRC General Comment No. 6, note 1 above, paras. 79 and 80.

²³⁴ However, it should be noted that a child who has been granted refugee status or humanitarian protection in the UK does not have a right to be a sponsor for family reunification purposes within the UK Immigration Rules: See: Home Office, *Family reunion: for refugees and those with humanitarian protection*, Version 3.0, 19 March 2019, available at: www.gov.uk/government/publications/family-reunion-instruction.

²³⁵ Ibid., p. 45.

²³⁶ Greater Manchester Immigration Aid Unit, *Children's Best Interests: A primary consideration?*, note 219 above.

of a particular durable solution (return), which can undermine the quality of the best interests considerations put forward.

- ➔ The Law Centres Network²³⁷ examined 60 unaccompanied children's asylum claims. The report noted that of the 26 decisions refused international protection, only 14 refusal decisions explicitly referred to the Section 55 duty, largely by way of a generic paragraph (in identical terms) cited at the beginning or the end of the refusal letter. There was little additional evidence of caseworkers having regard to or undertaking a child specific analysis of the facts or issues in the reasons advanced for their refusal.
- ➔ Coram Children's Legal Centre looked at 10 decisions in family cases.²³⁸ In the sample, 40% of decisions had not engaged with the child's best interests, and 20% of decision letters devoted just a couple of sentences to the child's best interests.

The above concerns are exacerbated by the lack of dedicated HO guidance on the determination of a durable solution, except a mention in the context of missing children.²³⁹ Although statutory guidance for LAs²⁴⁰ states that "pathway plans should always seek to identify a durable solution", as mentioned previously, these pathway plans may be adversely impacted upon or not align with the immigration decision made for the child.

HO guidance on processing a child's asylum claim, however, does state that "[a] detailed best interests consideration is an important and necessary process when a decision is being made that may lead to an adverse impact on the child such as requiring the child to leave the UK."²⁴¹ It also states that

“a decision to grant permission to remain in the UK can be understood to be one that has taken into account the need to safeguard and promote that child's welfare. ...”²⁴²

THE HOME OFFICE GUIDANCE ON PROCESSING A CHILD'S ASYLUM CLAIMS SETS OUT SIX QUESTIONS²⁴³ TO DETERMINE A CHILD'S BEST INTERESTS:

1. Is it reasonable to expect the child to live in another country?
2. What is the level of the child's integration into this country?
3. How long has the child been away from the country of the parents?
4. Where and with whom will the child live if compelled to live overseas?
5. What will the arrangements be for the child in that other country?
6. What is the strength of the child's relationship with a parent or other family members that would be severed if the child moves away?

The process for utilising these questions is then set out.²⁴⁴ Best interests may be met by return to the child's country of origin where the family is traced and return arrangement to parents can be made if no factors make this unsuitable.

“In other cases, the decision on whether to return when this is the consequence of having no basis of stay will be a matter of making a careful assessment of the child's best interests and balancing those interests against the wider public interests involved.... If it is concluded that the need to uphold the immigration control is greater, reference must be made to a senior manager prior to a final decision being made.”²⁴⁵

Whilst recognising the utility of these questions listed in the guidance and the significance of the references to *ZH (Tanzania)*, the guidance does not adequately take into account the primacy of a child's best interests. This section should be reviewed

²³⁷ Law Centres Network, *Put Yourself in Our Shoes: Considering Children's Best Interests in the Asylum System*, note 135 above.

²³⁸ Coram Children's Legal Centre, *This is My Home: Securing Permanent Status for Long-Term Resident Children and Young People in the UK*, June 2017, page 16, available at: www.childrenslegalcentre.com/this%20is%20my%20home/.

²³⁹ Home Office, *Children's asylum claims*, Version 3.0, p. 70, note 55 above.

²⁴⁰ DfE, *Care of unaccompanied migrant children and child victims of modern slavery: Statutory guidance for local authorities*, note 14 above.

²⁴¹ Home Office, *Children's asylum claims*, Version 3.0, p. 69, note 55 above.

²⁴² *Ibid.*, p. 57.

²⁴³ *Ibid.*, p. 63.

²⁴⁴ *Ibid.*, p. 65.

²⁴⁵ Home Office, *Children's asylum claims*, Version 3.0, p. 69, note 55 above.

and amended to reflect the guidance provided in General Comment 6 and 14, as well as *Safe and Sound*,²⁴⁶ in particular noting that the best interests principle means that the child's interests have high priority and are not one of several considerations. For example, where children have been refused international protection, larger weight must be given to what serves the child's best interests, and non-rights based arguments, such as those relating to general migration control, cannot override best interests considerations.

As highlighted earlier in this report, there is no stage in the process in which all options available for the child are fully explored through a formal mechanism. This approach would help to identify a durable solution in the child's best interests. Despite the aforementioned HO Section 55 duty, in the absence of a full BID that incorporates the consideration of the child's protection needs and resulting decision on international protection, the ultimate decision made about a child's durable solution by the HO may not be in their best interests.

Furthermore, there is no reference in the HO guidance as to how best interests should be used to inform decisions on a grant of leave when there is no current prospect of return – including for how long. The abovementioned historical study by Great Manchester Immigration Aid Unit found that in six of the cases where it was determined that return would be in the best interests of the child, these children were nevertheless granted UASC leave until they turned 17.5,²⁴⁷ and in no cases where a grant of leave was made, including discretionary leave, was it explicitly said that this was in the best interests of the child.

UASC Leave

Currently, unaccompanied and separated children who are unsuccessful in obtaining asylum or HP may be granted UASC Leave. This is granted if safe, adequate and sustainable reception arrangements cannot be made, and there is no current prospect of them being made, and but for this it would be reasonable for the child to return. In the vast majority of cases this is for a period of 30 months or until the child is 17.5 years old, whichever is shorter. General Comment No.6 states with regard to unaccompanied children that “[m]any such children are granted only temporary status which ends when they turn 18”, and identifies this as one of the protection gaps in their treatment.²⁴⁸

A grant of UASC Leave does not represent a durable solution. A best interests assessment requires a forward-looking examination, whereby decision-makers should consider the long-term effects that a decision or action may have on a child's welfare and development including those effects that may be felt after a child has reached eighteen.²⁴⁹ UASC Leave is a temporary form of leave which is a less secure form of leave than refugee status and HP, and has a huge impact on a child's future immigration applications and entitlements to services. A child granted UASC Leave can appeal their refusal of asylum, or make an application to vary their leave before they turn 18, meaning that if successful, they can continue to remain lawfully in the UK. This leaves social workers and other children's practitioners uncertain over how long the child might be in their care. Practitioners and children report that the uncertainty this process creates for a child leads to anxiety and depression, leaving them in a legal and social limbo.²⁵⁰

²⁴⁶ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, as per 42-44 and UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, note 7 above.

²⁴⁷ Greater Manchester Immigration Aid Unit, *Children's Best Interests: A primary consideration?*, note 213.

²⁴⁸ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, note 1 above, para. 3.

²⁴⁹ Goodwin-Gill, G S, *The United Nations Convention on the Rights of the Child and its Application to Child Refugee Status Determination and Asylum Processes: Introduction* (2012), 26(3) *Journal of Immigration Asylum and Nationality Law* 226 in Pobjoy, J. (2017), *The Child in International Refugee Law* (Cambridge Asylum and Migration Studies), Cambridge: Cambridge University Press, doi:10.1017/9781316798430.

²⁵⁰ Melzak, Sheila; *Acting in the best interests of unaccompanied asylum seeking children*, Seen and Heard, 29(1), 2019, pp.43-58; UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019 <https://www.unhcr.org/uk/5d271d527>.

UASC leave also has an impact on the ability for social workers to make and implement plans in the long term for children, with research suggesting that temporary or uncertain forms of immigration status, such as UASC Leave, undermine their ability to achieve this. It has been stated that “[e]ven where the plans are of good quality and are based on an assessment of the child’s best interests, they are focused on the ‘day to day’ needs of the child rather than long term plans that provide the child with stability and a route to fulfil their potential.”²⁵¹

Further, although the immigration status of an unaccompanied child does not affect their entitlements while they are accommodated by the LA as a child, a young person’s entitlements after 18 years old will depend on their immigration status. For those granted UASC Leave, their access to accommodation and support can be removed.²⁵² This process can drive young people to disengage from their LA and remain in the UK with undetermined legal status, exposing them to further exploitation and re-victimisation.²⁵³ Many former unaccompanied children can face barriers preventing return to their country of origin including a failure of the country to cooperate or provide travel documents as well as a fear of what awaits them in their country of origin.²⁵⁴ Some have reportedly been threatened or targeted as a result of issues connected to their original asylum claims made in the UK.²⁵⁵

Decisions on grants of leave to remain appear to currently be made in isolation of any best interests consideration, and in the case of children granted UASC leave, without any consideration of the implications of removal when a child turns 18.

Section 67 and Calais leave

Whilst unaccompanied and separated children across all categories share many of the same needs and vulnerabilities, there are currently a number of different long term leave options provided to these children depending on their manner of arrival. Contrary to children who arrive spontaneously or under Dublin III and who are refused asylum, those who fail in their asylum claim but who arrived under the UK Dubs scheme or by transfer from Calais during the Calais camp clearance will nevertheless now benefit from a form of leave to remain (Dubs Leave and Calais Leave). While welcomed, these types of leave emerged late and in a reactive manner. Further, research by UNHCR²⁵⁶ indicates that the considerable differences and inequities in the support made available to children depending on mode of arrival – such as the difference in support provided to a resettled child versus one transferred under Dublin III versus one who arrives spontaneously, for example, is causing confusion amongst stakeholders, including young people, caregivers, and social workers. These stakeholders found the current arrangements to be somewhat arbitrary and unjust in their differentiation between different categories of children. In general there was a view that different support, rights and leave entitlements should not be determined based on the method by which unaccompanied or separated children arrive in the country, but should be decided on a case by case basis after an assessment of the child’s best interests, a finding on their need for international protection and a determination of a durable solution.

²⁵¹ UNICEF, *Achieving a Durable Solution for Trafficked Children*, note 12 above.

²⁵² Schedule 3: Withholding and Withdrawal of Support of the Nationality, Immigration and Asylum Act 2002 establishes certain categories of people who are excluded from statutory support on the basis of their immigration status.

²⁵³ UNHCR, *Destination anywhere: Study mapping the profile and protection situation of unaccompanied and separated children and the circumstances which lead them to seek refuge in the UK*, June 2019 <https://www.unhcr.org/uk/5d271d527>; British Red Cross, *Can't Stay. Can't Go. Refused asylum seekers who cannot be returned*, 2017, available at: <https://bit.ly/2Z9umUI>; The Children's Society, *I don't feel human: Experiences of destitution among young refugees and migrants*, 2012, available at: <https://bit.ly/2XGa5rY>; Coram Children's Legal Centre, *Growing up in a hostile environment: the rights of undocumented migrant children in the UK*, 2013, available at: <https://bit.ly/2J3Hvll>; UNICEF, *Achieving a Durable Solution for Trafficked Children*, note 12 above, section 3.9; Office of the Children's Commission, *What's going to happen tomorrow?* 2014, available at: <https://bit.ly/2Gn55P4>.

²⁵⁴ Refugee Council, *Between a rock and a hard place: the dilemma facing refused asylum seekers*, December 2012, available at: <https://bit.ly/2KT02JT>.

²⁵⁵ Refugee Support Network, *After Return: documenting the experiences of young people forcibly removed to Afghanistan*, April 2016, available at: <https://bit.ly/2J3GGQ8>.

²⁵⁶ UNHCR, “A refugee and then...”: A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK, June 2019, note 11 above.

6.13 Children failing to appeal a refusal of refugee status

General Comment No.14 states “[t]here should always be the possibility to request a review or to appeal such a decision at the national level.”²⁵⁷ The UK system is designed such that a child will normally receive a right of appeal against a refusal of refugee status and they may be able to pursue that appeal, arguing that they are entitled to refugee status or HP. However, a problem encountered by practitioners is that unaccompanied and separated children do not always appeal against their initial refusal of asylum.²⁵⁸ Kent Law Clinic²⁵⁹ examined the formal papers of over 25 young people who had arrived as unaccompanied and separated children but had subsequently become “appeal rights exhausted” after turning 18 years old. This study crucially found that most had not appealed against the initial refusal of asylum. Then, in all those cases, their application for further leave was refused largely based on the applicant’s alleged implicit acceptance of the allegations in the first refusal.

This suggests that there is a lack of understanding of the options available to children by solicitors, social workers and others working with them, in particular to ensure an appeal is lodged at the time of the refusal of asylum whilst they are still children, rather than waiting to make a further application to vary the leave before limited leave expires at age 17.5 years old.²⁶⁰ Further, the right to free representation on appeal against refusal of asylum is subject to a “merits test” administered by the legal representative. Research has found that²⁶¹ where children are declined further representation on merits grounds they lack access to information that would entitle them to a review of the merits decision.²⁶² It is noted that as part of the 2017 Safeguarding Strategy, the DfE is developing training resources for social workers around the asylum system to ensure they have the necessary understanding to effectively support children through the process.

²⁵⁷ UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, note 7 above.

²⁵⁸ The Children’s Society, *Not just a temporary fix: Durable solutions for separated migrant children*, note 172 above, pg. 25.

²⁵⁹ Warren, R. and York, S., *How children become failed asylum-seekers*, Kent Law Clinic, 2014, available at: <https://bit.ly/2YtesUf>.

²⁶⁰ Refugee Children’s Consortium response to the Independent Chief Inspector of Borders and Immigration (ICIBI) call for evidence: *The Home Office’s consideration of children’s best interests*, October 2017, available at: <https://bit.ly/2Jbvz6F>.

²⁶¹ Matthews, A., *What’s Going to Happen Tomorrow? Unaccompanied Children Refused Asylum*, Office of the Children’s Commissioner for England, April 2014, available at: <https://bit.ly/2RPxlsC>.

²⁶² Literature review on how the Home Office ensures it acts in the best interests of the child. Prepared for the Independent Chief Inspector of Borders and Immigration, Matthews, A., July 2017, p. 25, available at: <https://bit.ly/2XdNoM4>.



7. PROPOSED ALTERNATIVE APPROACH TO STRENGTHEN RESPECT FOR BEST INTERESTS

This report has discussed the considerable strengths of the UK system regarding the treatment of unaccompanied and separated asylum seeking children – including their prompt entry into the national children’s social care system, comprehensive case management and support given on leaving care. However, the findings also outline some of the shortcomings which hinder the task of giving primary consideration to the best interests of the child. In particular it outlines how the current framework tends to view the child through an immigration prism rather than reflecting a framework in which the holistic consideration of the elements required to determine best interests can be undertaken.

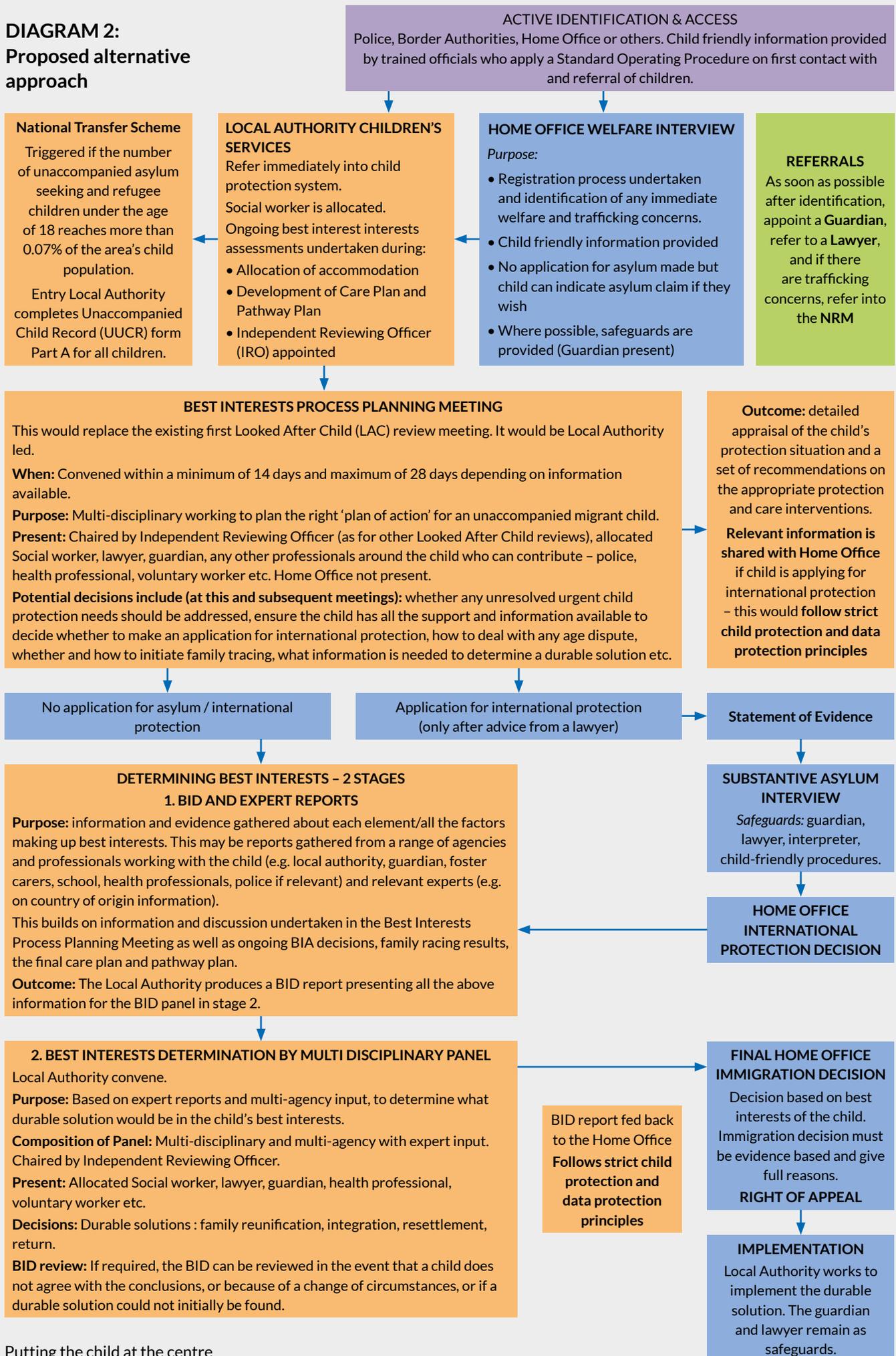
Based on these findings, this section outlines a number of proposals for how the existing system could be strengthened to better determine and make decisions in accordance with the child’s best interests throughout the process, putting the child at the centre. Principally, UNHCR and Unicef UK recommend that greater multi-disciplinary and expert input is fed into actions and decisions taken at critical points, which would also serve to improve the support

a child receives, inform immigration decision-making, and find a tailored durable solution in every case. In addition to the model described in this section, there was a desire expressed by some members within the expert group for a model which involved greater reliance on the use of the court system. Whilst this is not the prime focus of the alternative approach outlined in this section, the involvement of the courts would merit further discussion by the independent expert group recommended in Section 8, to provide further advice to Government about how this would work in practice.

The proposals made below could lend themselves to a phased approach. With this in mind, the proposals put forward are not exhaustive, nor intended to be prescriptive, but aim to provide a basis for discussion and collaboration between the Government and relevant stakeholders to better respect Article 3 of the CRC and its application in the UK.

DIAGRAM 2 sets out each stage of the proposed model and these are each explained in detail in this section.

DIAGRAM 2:
Proposed alternative approach



7.1 Applying Strict Procedural Safeguards

For the integrity of any BIP, it is essential to adhere to procedural safeguards (as already outlined in Section 3 “**Implementing the Best Interests Principle**”) to support the meaningful participation of the child through the use of age appropriate materials and interview techniques; the involvement of staff with relevant expertise and the systematic documentation of each step of the procedure in order to effectively understand a child’s needs and desires, with relevant checks upon decisions made on their behalf.

This proposal therefore *requires* the following safeguards to be in place throughout the process of finding a durable solution:

- ➔ Effective child participation
- ➔ Appropriate interpretation
- ➔ Child-friendly approach
- ➔ Provision of an independent guardian
- ➔ Access to legal advice and representation
- ➔ Involvement of staff with relevant expertise
- ➔ Reasoned recommendations and decisions

IN ADDITION TO THESE PROCEDURAL SAFEGUARDS, BEST INTEREST DETERMINATIONS MUST INCLUDE:

- **Review of BID panel Decision:** A BID can be re-opened if there are changes in circumstances (e.g. successful tracing of family members). A case can also be reviewed upon a request by the child on the basis of new facts, evidence or other considerations which affect the initial decisions.

7.2 First Contact with any authority

This report has highlighted that, according to children’s accounts, the point of initial contact for an unaccompanied or separated child with an authority figure in the UK needs strengthening. When an unaccompanied child is identified, the LA in which the child is situated has a legal duty to respond to their needs and safeguard and promote their welfare. However, other authorities such as police or immigration will likely be the first point of contact. They should as soon as possible contact the relevant children’s services so that a duty social worker can attend. However UNHCR research, as previously highlighted, indicates that in the intervening period, children are potentially exposed to lengthy stays in police cells, being held in short-term holding facilities, and subjected to long interviews.

The introduction of Operation Innerste, as noted previously, is one method through which the HO is beginning to address this. Given that it appears to be limited to the introduction of a form and written guidance, UNHCR and Unicef UK believe this approach can be further strengthened and streamlined.

Ideally in these scenarios, prior to the arrival of a social worker, the first point of contact – namely border enforcement and police officers – should be trained to undertake an initial “on the spot” welfare assessment, using the existing welfare form currently being piloted. The nature of the assessment should be explained to the child, and child-friendly information should be provided, in a manner and language which the child understands. Training should include information on children’s likely journeys and experiences and on how to talk to unaccompanied and separated children. Standard Operating Procedures (SOP) should be developed to ensure a consistent approach for first contact in all cases, and guidance on making referrals. This training could be developed with psychologists and former unaccompanied and separated children who have been through the process. The SOP for this stage of the procedure should be developed in consultation with relevant actors, in particular national child protection authorities and children themselves.²⁶³

²⁶³ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above p. 41.

This process could follow a similar model to that created for the NRM pilots, where members of staff in statutory agencies were designated as Slavery Safeguarding Leads (SSL) by their organisations.²⁶⁴ SSLs were drawn from a range of public authorities who are likely to encounter potential victims of modern slavery and trained and provided with guidance to make Reasonable Grounds decisions about whether an individual is a potential victim of slavery or human trafficking. They also advised others on how to identify victims and support and encourage NRM referrals.

7.3 Registration: First Contact with the Home Office

Upon initial identification, an unaccompanied and separated child should be referred as soon as possible into the UK child's social care system, and to the HO for initial registration. That registration should continue to take place within the current HO welfare interview and is discussed below. In addition to a wealth of studies including those undertaken by UNHCR,²⁶⁵ this report has highlighted the benefits of guardianship, for unaccompanied and separated children, for safeguarding and integration purposes, as well as to ensure their smooth navigation of asylum, welfare or other administrative procedures towards achieving a durable solution. For these reasons, this model proposes that unaccompanied and separated children are assigned a guardian who can act in their best interests, support others to do so, and who is independent from the state, at the earliest available opportunity.

Welfare Interview

At this stage, the initial registration should still take place as is currently the case, including taking basic biometrics for checks against a number of HO databases. All HO staff responsible for undertaking the welfare interview should carry out necessary child protection training including in-person training on how to identify potential victims of trafficking. SOPs should similarly be developed to ensure a

consistent approach in all cases. Where possible and assigned, the child's guardian should attend.

Children have often endured significant stress during their journeys, which can impact on their arrival and reception experience in the UK. They are typically hungry, exhausted and confused. Many are dealing with grave loss, whilst arriving in a new, and totally unfamiliar environment, with no knowledge or understanding of from whom or where to seek support.²⁶⁶ Given this context and the significance of the decision, the child should be given time to consider and understand the options available to them, and to make a decision as to whether to pursue an asylum claim or not. This report has outlined that there is currently no mechanism or support at this early stage to allow a child the opportunity to consider the options available to them based on their individual circumstances. This is compounded by a lack of provision of good quality legal representatives, and a lack of realistic alternatives to receiving comprehensive support in order to achieve case resolution, outside of claiming asylum.

In response, this model proposes a modified process where a claim for asylum or international protection would normally be indicated *later*, after legal advice. This will avoid the unaccompanied and separated children being automatically and immediately channeled into the asylum process, which is current practice. Instead of the current arrangements, children will have the chance to meet their guardian, receive full legal advice and recover to some extent, before making any asylum or other international protection claim. At the welfare interview, children should *not* be asked, nor expected to lodge a claim for asylum. Instead the claim will be something for discussion at the subsequent "Best Interests Process Planning Meeting".

In some circumstances, however, it is recognised that some children will want to lodge a claim for asylum at this point and should still have the opportunity to do so. This could be with the safeguard that legal advice must be sought *prior* to completing the SEF later in the process. The child will have a right to withdraw

²⁶⁴ Home Office, *National Referral Mechanism Pilots: Slavery Safeguarding Lead guidance*, October 2015, available at: <https://bit.ly/2ZYNdKc>; Home Office, *An Evaluation of the NRM Pilots*, October 2017, p. 9, available at: <https://bit.ly/2Nk5xDz>.

²⁶⁵ UNHCR, "A refugee and then...": A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK, June 2019, note 11 above.

²⁶⁶ Ibid.



their asylum claim at a later point, and clear guidance should be given to ensure that this withdrawal does not impact on any future decision making with respect to the child's case.

This approach relies on the proposition that the legal pathway being pursued by the child should not determine whether or not they receive funding support, nor how much. It should be carried out for all unaccompanied and separated children, regardless of their status. In order to achieve this, a change in funding arrangements would need to be implemented for unaccompanied and separated children's cases, because currently funding for a child's care is dependent on the child making an asylum claim.

Age Assessment

Any procedure which acts as a gateway into a child specific asylum process must also respect a child's best interests. International best practice includes specifications that age assessment procedures should be undertaken when age is in doubt only, and not as a routine measure. Only professionals who are independent and have appropriate expertise

and familiarity with the child's ethnic and cultural background should undertake the assessment using a multi-disciplinary approach (and in no cases should it be conducted by professionals for whom there is a potential conflict of interest, for example, financial interest). Age assessment should also not be carried out immediately upon arrival since "time is crucial in building trust and allows for proper recollection and sharing of information."²⁶⁷ This report highlights that significant changes in UK policy and practice are required to bring age assessment processes in line with these principles.

In the immediate term, the HO should record and publish data of those claiming to be children although considered to be over 25 years of age (and those previously categorised as "significantly over 18 years old" as per previous guidance).²⁶⁸ The HO should revise guidance on age assessment, to withdraw the power given to HO staff to make an initial age assessment if physical appearance and demeanour "very strongly suggests that an individual is significantly over 25 years of age" and instead ensure that:

²⁶⁷ UNHCR, *Observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, June 2015, available at: www.refworld.org/pdfid/55759d2d4.pdf; Separated Children in Europe (SCEP) Position Paper on Age Assessment in the context of separated children in Europe, 2012, available at: www.scepnetwork.org/images/16/163.pdf; European Asylum Support Office (EASO) Practical Guide on age assessment Second edition, 2018, available at: <https://bit.ly/324x537>.

²⁶⁸ Home Office, *Assessing Age*, note 52 above.

- a. age assessments are only carried out as a measure of last resort i.e. where there are serious doubts as to the individual's age and where other approaches have failed to establish that person's age;
- b. all age disputed individuals must be given an age assessment; and
- c. prior to this age assessment, all age-disputed individuals should be given the benefit of the doubt and treated as a child "unless this would be clearly unreasonable".²⁶⁹

When an age assessment is conducted, it must entail a process that allows for a holistic, impartial multi-agency approach, conducted over an adequate period of time, drawing on the expertise of those who play a role in the child's life, including health professionals, psychologists, teachers, foster parents, youth workers, advocates and social workers. A holistic assessment of capacity, vulnerability and needs that reflect the actual situation of the young person is preferred to reliance on age assessment procedures aimed at estimating chronological age. A BIA may be used to conduct this assessment for (presumed) children at risk.²⁷⁰ Child friendly information about next steps, procedures and appeal mechanisms, should be given to *everyone* claiming to be a child in a language they understand.

Referrals

At the welfare interview, the HO should continue to refer children to LA children's services where not already done so.

The guardian should refer the child to an immigration lawyer at the welfare interview stage. As mentioned, the legal representation must be provided *prior* to the child being expected to make any claim for international protection.

7.4 Local Authority Children's Services

At present, and as outlined in guidance, the LA currently has the duty to assess, provide accommodation and commence care and pathway planning for the child. A care plan (which incorporates the best interests of the child) should therefore be undertaken for each child within a multidisciplinary setting, so that the assessment process is carried out by staff who have relevant child protection expertise and so that any recommendations made consider a wide range of aspects relevant to the case.²⁷¹ In the UK, social workers have knowledge about child protection and safeguarding legislation, guidance and procedures. They are the professionals with training in child development and skills in talking to and assessing children, their families and their wider environment. As part of this model, this care plan should continue to be made by a child's social worker together with the child (where appropriate) as per statutory guidance²⁷² and should be supported by an independent guardian. This plan should then be reviewed on a regular basis as is the statutory responsibility of children's social service departments with an IRO appointed to the child to oversee the care plan, together with other professionals involved in the child's life.

7.5 Best Interests Process Planning Meeting

This model proposes a planning meeting which would replace and build upon the child's first LAC review meeting. This alternative approach would be led by the LA, but its ambit would be wider. It would ideally be convened within a short period of time from the point at which the child enters into LA care – for example, between 14 and 28 days. This is in order to provide enough time to gather the necessary information to develop a comprehensive plan on the best interests of the child and to ensure that the meeting is meaningful. Prior to this meeting, the child must have: received legal advice, had their reception arrangements put in place, and had any immediate or urgent health and protection concerns addressed.

²⁶⁹ Submission by UNHCR in the case of *M.S. v. Slovakia and Ukraine* (Appl. No 17189/11) before the European Court of Human Rights, 1 June 2016, Application No 17189/11, available at: <https://bit.ly/2SnyBJh>.

²⁷⁰ UNHCR, Guidelines on Assessing and Determining the Best Interests of the Child, November 2018, note 8 above, pp. 54 -55.

²⁷¹ UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC/C/GC/14, note 7 above, para. 94.

²⁷² Department for Education, *The Children Act 1989 guidance and regulations Volume 2: care planning, placement and case review*, note 14 above Section 1.13.

This meeting becomes a significant point in orienting the child within the immigration and children's social care system. Its purpose would be to bring relevant and informed multi-disciplinary actors together, to propose the right "plan of action" for an unaccompanied or separated child in the UK. The HO would not be present. An IRO would chair the meeting. As guidance for the looked after system currently dictates, the meeting should consult and take into consideration the views of the child. The child will be encouraged to attend the meeting and/or have the option for the guardian to speak on their behalf.

The following expertise and officials should be present at this meeting: the allocated social worker, immigration lawyer, guardian, foster carer/residential worker and any other professionals around the child who can contribute. This might include the police, a health professional, a voluntary worker, a teacher and any other agencies involved in the child's life.

POTENTIAL POINTS FOR DISCUSSION AND/OR DECISIONS (AT THIS AND SUBSEQUENT MEETINGS) INCLUDE:

- whether any child protection action should be taken, including in relation to developments since the child's earlier identification and referral;
- ensuring the child has the necessary information to consider whether they wish to apply for asylum if a decision on this has not already been made;
- how any age dispute could be resolved and which actors should be involved;
- whether and how to initiate family tracing
- collation of information which is available or has come to light which would support an asylum claim and/or determine a durable solution for the specific child.
For example: expert assessment, medical assessment or family assessment.

Under the proposed alternative approach, the **existing Current Circumstances Form – Part 1 would be replaced with a much more comprehensive written report** recording the outcomes of the Best Interests Process Planning Meeting. This is undertaken to ensure a much more detailed appraisal of the child's protection situation and a set of recommendations on the appropriate protection and care interventions. This would be a single integrated report, expressing the shared view and combined, up-to-date understanding of the team around the child, crucially involving input from multiple actors.²⁷³

In accordance with age and capacity, the child would have the opportunity to read the recommendations in the report and to be consulted on any conclusions. The views of child should be reported, particularly where they differ from those of other members of that group. Children will have the ability to provide a separate, written report of their views, wishes and intentions and should be encouraged to exercise them if they wish to do so.

As necessary and relevant, information from this report would be shared with the HO to support child specific/best interests considerations relevant to a child's application for international protection. It would serve to strengthen the ability of the HO to discharge their duties under Section 55 of the Borders, Citizenship and Immigration Act 2009 at this stage.

The process of information sharing with the HO will involve the capture and analysis of highly sensitive personal information. Appropriate data protection standards should be followed. The Government has recently published advice for frontline practitioners, taking into account new GDPR regulations.²⁷⁴ This sets out standards broadly in line with UNHCR's guiding principles for case management²⁷⁵ including do no harm, prioritise the best interests of the child, seek informed consent, respect confidentiality and ensure accountability.

²⁷³ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above, p 48.

²⁷⁴ HM Government, *Information sharing. Advice for practitioners providing safeguarding services to children, young people, parents and carers*, 2018, available at: <https://bit.ly/2OeqDCD>.

²⁷⁵ UNHCR, *A Framework for the Protection of Children*, 2012, note 21 above, pp. 15-16; Inter-Agency Guidelines for Case Management and Child Protection, 2014, pp. 16-22, available at: <https://bit.ly/2Xdmlvl>.

This information sharing process would seek to enable good initial decision-making on an asylum application **first time**. The principle of best interests means that children and young people who are subject to immigration control need a timely resolution of their case. A correct decision first time is also in the interests of the asylum system more generally, because it enables, both the child and the LA responsible for supporting and looking after that child to plan properly for the future.

7.6 Application for international protection

Following the Best Interests Planning meeting, in consultation with his or her lawyer and guardian, a child can make an application for asylum. If he or she does so, the child will complete a SEF and provide any statement or other evidence in support of their application.

Substantive Asylum Interview

The HO will conduct a substantive asylum interview. The lawyer and guardian will be present at the interview as procedural safeguards. The interview will be conducted in a child friendly manner.

Home Office International Protection Decision

A decision, with a right of appeal, will be issued. Asylum claims should be processed efficiently within a set time frame (e.g. six months) allowing for an extension only in exceptional cases.

The HO will make a decision on the international protection application under the 1951 Convention as interpreted through the UK Immigration Rules.²⁷⁶ In accordance with General Comment number 6, “the refugee definition of the 1951 Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.”²⁷⁷ The HO is further required to consider Section 55 of the Borders, Citizenship and Immigration Act 2009 having regard to “the need to

safeguard and promote the welfare of children who are in the United Kingdom.”

The international protection decision will be communicated to the LA and experts, who will use it to finalise their durable solution recommendation (see “Determining a Durable Solution in the Child’s Best Interests” below).

If the child does not make an application for asylum or other form of international protection, following legal advice and discussion at the Best Interests Process Planning meeting, they will continue to flow through the BIP process. The LA and experts will still make a recommendation regarding the appropriate durable solution as part of the Determining Best Interests stages (see DIAGRAM 2 and below).

7.7 Determining a durable solution in the child’s best interests

A child’s best interests will then be determined through a 2-stage process. This will build upon the child’s subsequent LAC review meeting. It will enable the HO to discharge its duty under Section 55 in a principled manner utilizing appropriate information, skills and expertise. It would not aim to introduce an additional process but become part of an expanded care and future planning process.

²⁷⁶ UK Immigration Rules part 11: Asylum, Paragraphs 326A to 352H, available at: <https://bit.ly/2x7PQEI>.

²⁷⁷ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, note 1 above, para. 74; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, available at: www.refworld.org/docid/4b2f4f6d2.html.

Stage 1 – information must be gathered to build upon the outcomes of the “best interests planning meeting”, to ensure all the elements and factors required to determine “best interests” are available.

Stage 2 – these elements must be carefully evaluated and balanced to decide what is in an individual child’s best interests.²⁷⁸ The decision should ensure the full and effective enjoyment of all the rights recognized in the CRC. Best interests are rarely determined by a single factor but must take account of the full range of rights. A written report with a recommendation will be produced which would replace the existing Current Circumstances Form – Part 2.

This process should be initiated as soon as possible, however, it must come *after* the decision on the international protection application, with the outcome of that procedure informing the availability of the durable solution, but not overturning the asylum decision.²⁷⁹

There may be cases where a reasonable lapse of time must be allowed for gathering additional information not previously available. For example, how long to wait for family tracing results will depend in each case on a variety of factors, such as the age of the child, previous tracing experience for similar profiles, the urgency of the case, the quality of information available on the family, and access to areas of origin.

SOPs should be developed for this stage which will include a set of written instructions to ensure that guiding principles, approaches and best practice are upheld in responding to the protection needs of individual children at risk which would build upon existing statutory guidance for the care planning process. These can be developed and agreed upon by all stakeholders and would define roles, responsibilities and relationships between the different people involved and how to handle different types of child protection cases.²⁸⁰

BID and Expert Reports

Stage 1

At this stage, the elements relevant to assessing and determining a child’s best interests must be taken into account.²⁸¹ These include:

- ➊ The child’s views – a critical factor in assessing best interests;
- ➋ The child’s identity – includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality;
- ➌ Preservation of the family environment and maintaining relations;
- ➍ Care, protection and safety of the child;
- ➎ Situation of vulnerability;
- ➏ The child’s right to health; and
- ➐ The child’s right to education.

Information would be provided by professionals with the necessary competence and expertise rather than a pro-forma exercise added to an asylum interview.

The weight, relevance, and content of each of these elements will vary. This will build on information and discussion undertaken in the Best Interests Process Planning Meeting and the written report produced from this, as well as ongoing BIA decisions, family tracing results and the final care plan and pathway plan. In line with this plan and ongoing BIA work – evidence, reports and results will have been gathered from a range of agencies and professionals working with the child (for example, the LA, guardian, foster carers, school, health professionals, police if relevant). Further information may include psychological, medical, educational reports regarding the child and child-specific and gender-specific country-of-origin information. The LA will produce a BID report presenting all the above information.

²⁷⁸ Ibid.

²⁷⁹ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, p. 44.

²⁸⁰ Ibid.

²⁸¹ UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have her or his best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC/C/GC/14, note 7 above, paras. 52-79.

BID by Multi-Disciplinary Panel

Stage 2

It is proposed that this information is fed into a multi-disciplinary independent BID Panel. This panel of experts will then carefully evaluate and balance these elements to decide what is in an individual child's best interests. The decision should ensure the full and effective enjoyment of all the rights recognised in the CRC. Best interests are rarely determined by a single factor but must take account of the full range of rights. The BID Panel will determine what durable solution is in the individual child's best interests. When considering the best interests of the child, the panel should ideally be able to consider a variety of opportunities simultaneously. A comprehensive solutions package in which various options are examined is preferable, while recognising the fact that one or more of the durable solutions pathways may not be available.²⁸²

The BID should be led by the LA and not by the asylum body. This will help ensure that child protection expertise is leading the process and will help mitigate against possible immigration bias in the durable solution taken.²⁸³ The child's voice is heard at this panel meeting, with the child able to be present and participate in decisions made about their future. In cases where the child is in conflict with the LA due to an age dispute for example, the child's independent guardian would act as an additional safeguard. The BID becomes a substantive assessment by professionals with expertise rather than a pro-forma exercise.

A written report will be produced which will build upon and replace the existing **Current Circumstances Form – Part 2**. Recommendations and decisions will be justified and explained. The factual circumstances, and elements and factors considered need to be documented, indicating what weight each factor was accorded in the process.

As with the Best Interests Planning meeting, the child would have the opportunity to read the recommendations of the BID panel and to be consulted on any conclusions. The views of child should be reported, particularly where they differ from those of other members of the panel.

This BID recommendation will be fed back to the HO. This report would serve to strengthen the requirement in the HO guidance on processing a child's asylum claim which states that "[a] detailed best interests consideration is an important and necessary process when a decision is being made that may lead to an adverse impact on the child such as requiring the child to leave the UK."²⁸⁴

If, when undertaking the BID, it is not possible to determine which durable solution is in the best interests of the child, and the child has been integrated into her or his community, the temporary care arrangements should be maintained and the case reviewed by the BID panel in the event of a change of circumstances, or within one year at the latest.²⁸⁵ This may be the case where, for example, there are currently no options for durable solutions available for a child, and no concrete developments with regards to the availability of solutions are likely to occur in the foreseeable future. In such cases, the BID can consider whether the formalisation of the child's care arrangement on a long-term basis, as is currently foreseen in UK immigration law, is in her or his best interests.

7.8 Final Home Office Immigration Decision

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements for ensuring that immigration, asylum and nationality functions are discharged having regard to "the need to safeguard and promote the welfare of children who are in the United Kingdom".

²⁸² UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above, Section 4(1).

²⁸³ UNHCR, UNICEF and IRC, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe*, note 8 above, p. 34.

²⁸⁴ Home Office, *Children's asylum claims, Version 2.0*, note 55, p. 65.

²⁸⁵ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above, section 4.1.



Under this duty, the HO would discharge their immigration functions. The best interests of the child must be a *primary*, but not sole, consideration. They must consider whether the force of any other consideration outweighs the best interests. Further, as per General Comment 14,

“*[i]f, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child’s best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations.*”

The immigration decision must be evidence based and give full reasons. Decision-making would avoid both applying any policy or form of leave in a *blanket* manner, and a child’s best interests will be considered and applied on a case-by-case basis.

7.9 Right of Appeal

The child will have a right of appeal on the final immigration decision.

7.10 Implementation of a durable solution

During the implementation of the durable solution the guardian and lawyer will remain involved as safeguards and the LA will deal predominantly with implementing the durable solution. Durable solutions identified by the BID panel could involve any of the following options listed in this section, although this is not an exhaustive list. Family reunification could feature in leading to any of these durable solutions decided upon, and whenever feasible, should generally be regarded as being in the best interests of the child. However, prior to supporting family reunification, an assessment will have been made as to whether it exposes or is likely to expose the child to abuse or neglect.²⁸⁶

²⁸⁶ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above.

Local Integration in the UK

Local integration may be the preferred durable solution for some unaccompanied and separated children. A secure legal status and residence permit allows children to progressively enjoy the same rights as nationals, including equal access to institutions, facilities, services, and to family reunification in the country of asylum.²⁸⁷ This process should also include an assessment of possible additional support needed for the safety and well-being of the child and to facilitate successful local integration. This issue is addressed in UNHCR's recent report on early reception and integration.²⁸⁸

Relocation to a third country

Complementary pathways are safe and regulated avenues by which refugees are provided with lawful stay in a third country. These pathways may include opportunities for family reunification for refugees who are eligible under a State's family reunification criteria, education opportunities such as private, community or institution-based visas, scholarships, traineeship and apprenticeship programmes; and labour mobility schemes.

Voluntary repatriation

Voluntary repatriation has serious consequences for children.²⁸⁹ Voluntary repatriation for refugees should be free and voluntary, and permit return to a country of origin in safety and dignity. For unaccompanied and separated children, it must be considered in each case whether voluntary repatriation is the most appropriate durable solution and in the best interests of the child. It should be recalled that the non-refoulement principle applies to refugee children as well as to adults. For unaccompanied children, and separated children with an additional significant risk factor or protection concern, the absence of the child's parents means that the additional safeguards of the BID are needed before a decision related to voluntary repatriation is taken. These include to:

- Ensure that a guardian or caregiver for the child is identified with the competent child protection authorities in the country of origin;
- Prior to her/his voluntary repatriation, develop an individual care plan for child's sustainable reintegration, drawn up in collaboration with the child and her/his pre-identified guardian or child protection service provider in the country of origin;
- It is also important to confirm access to food, housing, health service, education and reintegration services to avoid increasing the vulnerability of the child, and to ensure family tracing continues where necessary.

²⁸⁷ However as already noted, a child who has been granted refugee status or humanitarian protection in the UK does not have a right to be a sponsor for family reunification purposes within the UK Immigration Rules: See: Home Office, *Family Reunion Guidance*, March 2019, available at: <https://bit.ly/2xgyYeX>.

²⁸⁸ UNHCR, "A refugee and then...": A participatory assessment into the reception and early integration of unaccompanied refugee children in the UK, June 2019, note 11 above.

²⁸⁹ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, note 8 above, section 4.1.8.

8. RECOMMENDATIONS

Using the proposals in this report as a potential framework, relevant Government agencies should commit to developing strengthened mechanisms to ensure that all unaccompanied and separated children have an assessment and determination of their best interests, and that these:

- are undertaken systematically, objectively and in coordination with relevant government bodies responsible for child protection;
- respect confidentiality and data protection arrangements;
- ensure the collection of a sufficient amount of information relevant and specific to each individual child is provided to enable the fullest consideration of each of the elements necessary to a best interests consideration; and
- provide a formal mechanism for arriving at a BID, which should be undertaken using a multidisciplinary approach and should inform the appropriate durable solution for each child.

To achieve this, a cross-governmental working group, including, the Home Office, the Department for Education, the Ministry of Justice, Local Authorities and the Association of Directors of Children's Services should be set up. This group will have the following objectives:

- Develop a terms of reference to set the scope and direction of an independent expert group;
- Oversee the expert group to develop advice to Government about the detailed design, cost and operation of these strengthened mechanisms; and
- Involve local authorities in the development of a multi-agency mechanism for determining the child's best interests and feeding that information into decisions taken on behalf of the child.

Any new procedure developed, requires the strengthening of procedural safeguards for assessing and determining a child's best interests, including by:

- Introducing child protection focal points who undertake the welfare interview with unaccompanied and separated children. These focal points should be trained on child protection procedures, child-friendly communication and use well established SOPs for onward referral to child protection authorities.
- Introducing independent guardians for all unaccompanied and separated children, who must work in the best interests of the child and have sufficient legal authority to hold relevant agencies to account and instruct solicitors on behalf of a child.
- Providing the unaccompanied and separated child with a "rest period" to allow time for the child to recover, for a comprehensive and multidisciplinary care plan to be undertaken by their assigned social worker and an informed counselling session with their legal representative.
- Providing child-friendly and accessible information to unaccompanied and separated children at all stages throughout the process as well as the ability to participate in decisions affecting them where appropriate.
- Ensuring high quality legal representation, advice and interpretation is provided to unaccompanied and separated children prior to the child making an asylum or other international protection claim. Legal representatives and interpreters should be trained in child friendly communication and where possible interviews should happen in child friendly spaces.

- Providing training and capacity building on the new strengthened procedures for those working with and making decisions about the child. This would include training on how to capture information on the best interests of unaccompanied and separated children, what information to share and how to ensure the voice of the child is adequately represented in plans and subsequent assessments.
- Requiring written records of what has been assessed or determined to be in a child's best interests and what action has been taken as a result.
- Ensuring a right to re-open and re-examine the BID where appropriate.

9. ANNEX: DEFINITIONS

Unaccompanied children: Any person under the age of 18 who is outside his or her country of origin or habitual residence and who has been separated from both parents and other relatives and who is not being cared for by an adult who, by law or custom, is responsible for doing so.²⁹⁰

Separated children: Individuals under 18 years old who may be separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. This may include children accompanied by other adult family members.²⁹¹

A durable solution: in the context of the unaccompanied or separated child, this is a sustainable solution that ensures that the unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm. Because the durable solution will have fundamental long-term consequences for the unaccompanied or separated child, it will be subject to a BID. A durable solution also ultimately allows the child to acquire, or to re-acquire, the full protection of a state.²⁹²

Unaccompanied asylum-seeking children: Children who are unaccompanied and have claimed asylum are often referred to as “unaccompanied asylum-seeking children” (UASCs). The HO is responsible for making the initial decisions on their asylum applications, but local authorities are responsible for their care, including accommodation and financial assistance.²⁹³

Leave to remain: The permission given by the HO to enter or remain in the UK. Leave to remain can be limited in time and may contain various prohibitions (on working or claiming “public funds”). Time limited leave to remain may also explicitly allow the recipient to work or claim benefits, as is the case for children refused asylum and granted a limited form of leave known as UASC leave.

Recognised refugee: A person who has claimed asylum is recognised as a refugee when the government in the country of their claim decides that they meet the definition of refugee under the United Nations Convention Relating to the Status of Refugees.²⁹⁴

“Looked after”: A provision made under the Children’s Act 1989 whereby a LA has obligations to provide for, or share, the care of a child under 18 years, where the parent(s) or guardian(s) are prevented from providing them with a suitable accommodation or care. A child is “looked after” if he or she is provided with accommodation under Section 20 of the Act or taken into care through a care order (Section 31, which applies to children who have suffered, or who are suffering significant harm).²⁹⁵

Care-leaver: A person who has been looked after by a LA for a period of, or periods amounting to, at least 13 weeks since the age of 14 and who was in care on their 16th birthday and is either an eligible, relevant or former relevant child as defined by the Children Act 1989.²⁹⁶

²⁹⁰ UNHCR and UNICEF, *Safe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, note 9 above, p. 22.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Home Office, *Children’s asylum claims*, Version 3.0, note 55 above.

²⁹⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951. note 43 above.

²⁹⁵ Children’s Act, 1989, Section 20, note 63 above; Children’s Act, 1989, Section 31. www.legislation.gov.uk/ukpga/1989/41/section/31.

²⁹⁶ The Care Leavers (England) Regulations 2010, available at: www.legislation.gov.uk/uksi/2010/2571/made.

