

A decorative graphic consisting of two overlapping brushstrokes, one in blue and one in green, forming a curved shape that frames the text.

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CHILDREN'S  
BEST INTERESTS:  
**A PRIMARY  
CONSIDERATION?**

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JUNE 2013

# CHILDREN'S BEST INTERESTS: A PRIMARY CONSIDERATION?

## Acknowledgements

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## Introduction

This report will examine to what extent the UK Border Agency treats the best interests of children as a primary consideration in unaccompanied children's asylum cases. In particular, we assess whether the current policy to grant discretionary leave to remain to unaccompanied children who are refused asylum serves children's best interests, and whether or not the grant of a temporary period of discretionary leave to remain amounts to a durable solution for these children.

Through analysis of a sample of case files, we examine whether or not UK Border Agency has correctly implemented its duty to safeguard and promote the welfare of children in unaccompanied children's asylum claims. Through interviews with professionals working with unaccompanied children, we assess the impact of the grant of a temporary period of discretionary leave to remain on these children.

## Executive summary

The headline finding from this research is that in 24 of the 34 cases analysed, UK Border Agency failed to carry out any determination of the child's best interests. This suggests that UK Border Agency's legal duty to treat the best interests of children as a primary consideration has been simply ignored in a large proportion of cases.

In the 10 cases where there was a determination of the child's best interests, some themes emerge. The most striking is that UK Border Agency concluded that return to the country of origin was in the child's best interests in 9 of the 10 cases. There was a failure to seek and consider the views of professionals involved with the children, or of the children themselves. There was patchy and inconsistent application of UK Border Agency's own guidance as to how best interests should be determined. There was muddled thinking, in that children whose best interests are determined to favour return, are granted discretionary leave to remain. There was no real engagement with the issue of best interests, with the determination of best interests having no apparent effect upon the outcome in any of the cases.

Real concerns emerged about the impact on children of a grant of a temporary period of discretionary leave to remain. The findings from this research were that this temporary status has a negative impact on children's health, education, and life chances, and was not in their best interests. However, the analysis of the research sample leads to the conclusion that UK Border Agency views the grant of discretionary leave to remain to the age of 17½ as being a complete answer to the issue of children's best interests.

UK Border Agency also failed to take any steps to carry out family tracing in 29 of the 34 cases, despite this being an important element of best interests determination. In 4 cases, family tracing was limited to informing the child of the availability of the tracing service provided by the Red Cross. In only one case were active steps taken to trace the family.

Significant shortcomings were found in the way in which UK Border Agency considered the claims of unaccompanied children seeking asylum, in particular in the way in which credibility was assessed.

## Recommendations

In the light of the research findings, we make the following recommendations:

- UK Border Agency should ensure that it complies with its legal duty to treat the best interests of children as a primary consideration in all children's asylum cases
- Best interests should be determined in a holistic manner, taking into account the views of professionals working with the child, the views of the child, and all relevant factors
- UK Border Agency should ensure that once a child's best interests have been determined, they contribute in a meaningful way to the outcome of the case
- UK Border Agency should consider whether or not its current policy of granting discretionary leave to remain to the age of 17½ serves children's best interests

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## 1.1 Background and legal context

The United Kingdom is a signatory to the 1989 Convention on the Rights of the Child. Article 3(1) of this Convention provides:

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

Until November 2008, the UK Government maintained a reservation to the Convention in relation to children who were subject to immigration control. The then Home Secretary, Jacqui Smith, announced the lifting of the reservation at the Labour Party Conference in autumn 2008. On 2nd November 2009, s55 of the Borders, Immigration and Citizenship Act 2009 came into force. S55 provides:

“55 Duty regarding the welfare of children  
(1)The Secretary of State must make arrangements for ensuring that—  
(a)the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and  
(b)any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.  
(2)The functions referred to in subsection (1) are—  
(a)any function of the Secretary of State in relation to immigration, asylum or nationality;  
(b)any function conferred by or by virtue of the Immigration Acts on an immigration officer;  
(c)any general customs function of the Secretary of State;  
(d)any customs function conferred on a designated customs official”

Subsequent caselaw has confirmed that complying with the s55 duty to safeguard and promote the welfare of children will involve treating those children's best interests as a primary consideration<sup>1</sup>, as required by Article 3(1) of the Convention on the Rights of the Child.

The UK is a destination country for unaccompanied children seeking asylum, with several thousand applications for asylum from unaccompanied children each year since 2006<sup>2</sup>. In 2009, the year of the introduction of the s55 duty, there were 3,174 asylum applications from unaccompanied children<sup>3</sup>. UK immigration law recognises the particular vulnerability of these children, with the immigration rules providing that asylum applications from unaccompanied children should be processed “with particular priority and care”<sup>4</sup>. The rules go on to say:

“A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of his situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand his situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.”<sup>5</sup>

Despite these provisions, an analysis of the publicly available statistics suggests that unaccompanied children are less likely to be granted asylum than adults, as a significantly lower proportion of children are recognised as refugees or granted humanitarian protection. This was the case in each of the years from 2006 to 2011, as is demonstrated by the following table:

Year	Percentage of unaccompanied children granted asylum or humanitarian protection	Percentage of adults granted asylum or humanitarian protection
2006	6.8	10.9
2007	13.1	16.9
2008	9.9	21.2
2009	9.2	18.5
2010	13.9	17.7
2011	17.6	25.2

Source: Home Office Asylum Statistics

While there is a general upward trend for both adults and children and the gap has narrowed somewhat, a significant gap remains. It is still the case that unaccompanied children claiming asylum in the UK are much more likely to be refused asylum and humanitarian protection than they are to be granted. As a matter of UK Government policy, unaccompanied children who are refused asylum and humanitarian protection cannot be returned to their country of origin unless there are adequate reception arrangements there. This means that these children are normally granted discretionary leave to remain in the UK until the age of 17 1/5, with an expectation of return to the country of origin shortly after the age of 18. It is this group of children, those who are refused, with which this study is primarily concerned.

<sup>1</sup> ZH (Tanzania) v SSHD [2011] UKSC 4

<sup>2</sup> The greatest number of applications was 4,285 in 2008; by 2011 the number had fallen to 1,277 – UK Border Agency asylum statistics 2006 – 2011

<sup>3</sup> UK Border Agency Asylum statistics minors 2006 – 2011

<sup>4</sup> paragraph 350 Immigration Rules HC 395

<sup>5</sup> paragraph 351 immigration rules HC 395

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## 1.2 The research sample and methodology

Three strands to the research were planned. Firstly, the analysis of a sample of case files of 34 unaccompanied asylum seeking children. Secondly, interviews with social workers and other professionals working with unaccompanied asylum seeking children. Thirdly, interviews with the children themselves. Unfortunately, this third strand of the research was not successful and had to be abandoned. This was because most of the children approached were reluctant to be interviewed. Two reasons were generally given for this: not wishing to relive the experiences they had been through while going through the asylum system, and being concerned that taking part in the interview could somehow impact upon their status in the UK, despite being reassured about confidentiality. Given these reasons and the acknowledged harmful effect of repeatedly interviewing children and young people about traumatic experiences, the researcher did not seek to press the children to become involved. In the event, only two interviews were carried out, and the findings were not included as this was such a small sample.

## 1.3 Interviews with social workers and other professionals

Seven structured interviews were carried out by the researcher. The interviewees came from a variety of backgrounds: two were social workers working in Local Authority Children's Services, one was a support worker in a Local Authority Leaving Care Team, one was a social worker in a Child and Adolescent Mental Health Team, one was an independent social worker with a Local Authority background, and two worked in voluntary sector agencies. All had significant experience in working with unaccompanied asylum seeking children.

## 1.4 Analysis of case files

The research sample consisted of 34 children who had applied for asylum in the UK as unaccompanied children. Almost all of these children had been represented at some stage by GMIAU, although not necessarily at the initial stage of their asylum claim. In order to be selected for the research sample, the children needed to meet the following criteria:

- They had applied for asylum in the United Kingdom in their own right while under the age of 18
- They had arrived in the UK unaccompanied and were separated from both parents (some were later reunited with relatives in the UK but not with their parents)
- They had been refused asylum and humanitarian protection by UK Border Agency (some of the children were later recognised as refugees or granted humanitarian protection following a successful appeal)
- They had received a decision from UK Border Agency after 2nd November 2009, the date s55 came into force. Some of these decisions were initial decisions on asylum claims, and some were decisions on applications for further leave to remain following a previous grant of discretionary leave to remain. Some of the cases in the research sample had both types of decision.

The rationale for these parameters was that the sample would consist of children who had had a decision in which a "best interests consideration" should have been carried out by UK Border Agency, because a decision had been made after 2nd November 2009. Children who were refused asylum and humanitarian protection were chosen because it is this group of children with which this study is concerned: by definition those who are granted asylum and humanitarian protection have received a status which is likely to lead to settlement after 5 years, so these children have a secure future in the United Kingdom.

## 1.5 Characteristics of the research sample

31 of the research sample were male and 3 (9%) were female. This broadly reflects the population of unaccompanied asylum seeking children in the UK: between 2006 and 2011, only 17% were female. The children in the sample came from 13 different countries, with Afghanistan (26%), Iran (15%) and Pakistan (15%) the top three countries. The other countries were India, Iraq, Morocco (Western Sahara), Malaysia, South Africa, Eritrea, Occupied Palestinian Territories, Nigeria, Syria and Albania. Children from Pakistan were over represented in the sample compared to the general population of unaccompanied asylum seeking children: just 2 % of asylum claims for unaccompanied children made between 2006 and 2011 were made by nationals of Pakistan. This over representation of Pakistani children is perhaps because most of the research sample were resident in the North West of England, a region with strong links to Pakistan and a large population of Pakistani origin.

The children in the research sample were aged between 12 and 17 at the date when they claimed asylum, although almost half of them fell into the upper age band of 16-17.

Age at date of application for asylum	Number of Children	Percentage of sample
12	2	6%
13	5	15%
14	6	18%
15	5	15%
16	10	29%
17	6	18%
<b>Total</b>	<b>34</b>	<b>100</b>

## 1.6 Methodology

The case files were analysed using a questionnaire. The researcher had access to the key documents in the asylum case which were contained in the case file: the asylum statement, the screening interview, the interview record, and the reasons for refusal letter. Confidentiality of the research participants was protected at all times: care has been taken to ensure that no information in this report could identify any of the children in the research sample.

The questionnaire was designed to collect information in the following main areas:

- The outcomes of the cases, including the basis for any grant of discretionary leave to remain
- The procedure followed for making a decision, including information gathering and assessment of credibility
- Whether or not a "best interests consideration" was carried out and the factors considered in determining what would be in the child's best interests
- Whether the best interests consideration had any effect on the outcome of the case

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## 2. Findings from the research

### 2.1 Case outcomes

We looked at both the initial outcome of the asylum application/ application for further leave to remain, and the long term outcome for the child – ie what was their status at the time that the research was carried out, which in some cases was some time after the decision being analysed. The outcomes are summarised below:

Initial outcome	Number of Children	Percentage of sample
Grant of discretionary leave to remain – under UASC policy	19	56%
Grant of discretionary leave to remain under the general policy – Article 8 family and private life	1	3%
Outright refusal – child over 17 ½	13	38%
Outright refusal – 3rd country decision	1	3%
<b>Total</b>	<b>34</b>	<b>100</b>

Long term outcome	Number of Children	Percentage of sample
Refugee status	6	18%
Humanitarian protection	1	3%
Still has discretionary leave to remain	6	18%
Still in the appeals process	3	9%
Awaiting further decision from UK Border Agency	5	15%
Appeal rights exhausted and subject to removal	9	26%
Not known	4	12%
<b>Total</b>	<b>34</b>	<b>100</b>

Therefore, although 56% of the sample were granted discretionary leave to remain at the initial stages, at the time that the research was carried out only 21% of the children had achieved any kind of permanent status. The others were either still in the process or were facing removal from the UK.

UK Border Agency policy, set out in the Asylum Process Guidance document “Processing an asylum application from a child”, is to first consider whether an unaccompanied asylum seeking child qualifies for refugee status or humanitarian protection, and if not to then consider whether or not the child qualifies for discretionary leave to remain under the general discretionary leave to remain policy. The general discretionary leave to remain policy which was in force at the time that the decisions analysed in this research were made provided for discretionary leave to remain to be granted on Article 3 (medical) grounds or Article 8 (family and private lives grounds)<sup>6</sup>. The assessment of whether or not a child qualifies for leave to remain on private or family life grounds must take into account the child’s best interests and treat those best interests as a primary consideration.

Children granted under the general discretionary leave to remain policy would be given 3 years leave to remain. After 3 years their case would be subject to an active review, and they would be given a further 3 years if they continued to qualify. After 6 years, they would qualify for settlement<sup>7</sup>. Discretionary leave to remain under the general policy is fundamentally different from discretionary leave to remain under the UASC policy, because it is a route to settlement. Discretionary leave to remain under the UASC policy is temporary in nature: it is granted solely on the basis of age, and so does not lead to settlement.

It is therefore noteworthy that grants of discretionary leave to remain to unaccompanied asylum seeking children under the general discretionary leave policy appear to be rare. Only one case in the research sample received this type of decision. The circumstances are set out in the case study below.

<sup>6</sup> There were substantial changes to the discretionary leave to remain policy on 9th July 2012, but all of the decisions were made earlier than this

<sup>7</sup> Since July 2012, the period to qualify for settlement has been increased to 10 years, but Discretionary Leave to Remain is still a route to settlement

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Mary was from Nigeria. She and her elder sister had been brought to the UK by their mother in 2005, when Mary was just 9 years old. Later, Mary and her sister were abandoned by their mother, who went back to Nigeria. Mary lost contact with her mother. In 2010, Mary applied for asylum, because she was afraid that if she went back to Nigeria she would be vulnerable as a young girl with no family to look after her. In June 2012, after a long delay, Mary was refused asylum and granted 3 years discretionary leave to remain in the UK. The reasons for refusal letter states that this is "because of your family and private life". At the time of the decision, Mary was almost 16 years old and had been living in the UK for 7 years.

Curiously, the reasons for refusal letter makes no mention of best interests, and in this case no best interests determination was carried out, despite the importance of best interests to carrying out a lawful Article 8 assessment.

In all of the other cases, discretionary leave to remain under the general discretionary leave policy was refused. This was the case even where the child had applied for asylum at a young age and had accrued several years residence in the UK at the time of the decision, or it was foreseeable that they would accrue a significant length of residence before the age of 18, giving rise to a strong private life claim.

### Case Study

Faisal had come to the UK with his family, when he was 9 years old. His father had a student visa, and the family spent 6 years in the UK while Faisal's father did his masters and his Phd. When Faisal was 16, the family started to prepare to return to their home country. Faisal did not want to return, because while he was in the UK he had realised that he was gay, and his home country had the death penalty for homosexuality. On the day they were supposed to fly home, Faisal ran away from his family and did not get on the flight. He applied for asylum. Faisal's asylum claim was refused. Despite his more than 6 years residence in the UK, Faisal was not granted discretionary leave to remain under the general policy

## 2.2 Grants of discretionary leave to remain under the UASC policy - Family tracing and reception conditions

UK Border Agency's policy is to grant discretionary leave to remain until the age of 17 ½ where they are not satisfied that adequate and safe reception arrangements exist in the country of origin. The guidance states:

"in considering the grant of discretionary leave under the UASC policy the starting point should be whether the child can be returned to his/her family. Family reunification should generally be regarded as being in the best interests of the child"

The UK Border Agency also has a positive duty to trace the family of an unaccompanied asylum seeking child, as set out in Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005. Therefore, in both UK Border Agency guidance and the legislation there is an emphasis placed on tracing the child's family and the importance of this to the child's best interests, and of that the consideration of reception conditions should take place on a case-by-case basis. We examined the case files in the research sample to see whether or not there was any case specific consideration of reception conditions, and to see whether UK Border Agency had fulfilled its duty to trace the child's family.

In only two cases in the sample had there been any case-specific consideration of reception conditions. In all of the other cases, the Reasons for Refusal Letter simply included a standard paragraph stating that the UK Border Agency was not satisfied that adequate reception arrangements were 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.

In only one case of the 34 cases in the sample had the UK Border Agency made any attempt to trace the child's family. They had done this by making enquiries via British Embassy staff and the police force in the child's country of origin. The attempt to trace was unsuccessful. In all of the other cases, UK Border Agency failed in their duty to trace. Not only did they fail to take any action themselves to trace the child's family, but in 29 of the cases they failed to inform the child of the Family Tracing Service provided by the Red Cross. In 5 cases the child made their own attempt to trace their family through the Red Cross, but none of these children had been successful in making contact at the time the research was carried out.

This suggests that the grant of discretionary leave to remain under the UASC policy is applied in a blanket manner, without a case-specific consideration of the reception conditions that are available, or any attempt to trace the family of the unaccompanied child.

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### 2.3 Asylum procedure, including assessment of credibility

That the normal procedure for gathering evidence and assessing credibility needs to be adapted for children is explicitly recognised by the UK Border Agency in the Asylum Process Guidance "Processing an Asylum Application from a Child". Caseowners are given detailed guidance in how to interview children, and on additional factors that should be taken into account in assessing the credibility of a child. We analysed the cases in the research sample to see to what extent this guidance was implemented by UK Border Agency Caseowners.

### 2.4 Children's Asylum Interviews

The social workers interviewed for this research consistently expressed concern about the impact of asylum interviews on children. For example, one social worker commented

"the venue where asylum interviews is carried out is a real problem. When children arrive at the Home Office in Liverpool they have to go through heavy security to get into the building, and the staff working on security and at reception are often hostile and intimidating.... Children are frightened about going to their interview"<sup>8</sup>

Another social worker also had concerns about whether or not the venue was suitable

"Children should be interviewed in a more child friendly place, for example where they are living or in a Social Services office. Somewhere which is familiar and doesn't involve the child travelling a long way and going through security and seeing people in uniforms.... in the waiting area of the Asylum Screening Unit in Liverpool, they used to show videos about the asylum process which included images of people in handcuffs and being put on aeroplanes. This was very frightening for children"<sup>9</sup>

Other social workers noted that it would be much better for the child to only give one interview:

"UK Border Agency should do away with at least one of the interviews. I can't see any reason why the child should have to go to the Home Office twice, for both screening and substantive interviews. In fact the old system where children applied for asylum by post, (so the only interview they had to give was to their solicitor) was better"<sup>10</sup>

"One holistic interview should be enough, and the interview should be carried out by a professional who has had a chance to build a relationship of trust with the young person before the interview takes place. I attended an interview with a young person who I work with recently, who is 15. As soon as we came out of the interview, she told me that she had not told the truth, because she had been too scared. She could disclose things to me, because we had built up a relationship. But she could not disclose her full story to a UK Border Agency official"<sup>11</sup>

Another concern was that some children were interviewed too soon after they had arrived in the country:

"When children first arrive, they are traumatised and reluctant to speak to officials. When they are interviewed they don't tell the whole story. They need to be given time to reflect and also a proper explanation of the purpose of the interview, so that they can reflect about how much they want to share"<sup>12</sup>

"Children are disorientated when they arrive. As soon as they arrive they are carted off to UK Border Agency to claim asylum and to answer a load of questions...there needs to be more time between children arriving in the UK and them being interviewed about their asylum claim, to allow them to settle in and give some time for reflection"<sup>13</sup>

Against this background of concern, we looked at the length of interviews, whether or not children were given breaks, and whether actual or perceived inconsistencies in the child's evidence were put to them to give them a chance to explain. 30 of the children in the sample were interviewed about their asylum claim; 4 were not, either because they were too young or not fit for interview.

Caseowners are directed by the guidance to the need to be alert to the child's welfare during the interview, and in particular to ensure that the child is not tired, hungry, thirsty or distressed. Children should also be accompanied by a responsible adult. We noted some good practice in that all of the children who were interviewed were accompanied by a responsible adult, and all of the children were given at least one break during the course of the interview. In general, caseowners proactively ensured that a break was taken, rather than leaving it up to the child to decide.

<sup>8</sup> Extract from Interview 5, social worker in Local Authority leaving care team

<sup>9</sup> Extract from interview 3, former Local Authority social worker. He is referring to the situation a few years ago: the Asylum Screening Unit in Liverpool closed in 2009; new asylum claims must now be registered at the Asylum Screening Unit in Croydon

<sup>10</sup> Extract from Interview 3, former Local Authority social worker

<sup>11</sup> Extract from Interview 2, anti-trafficking project officer at Barnardo's

<sup>12</sup> Extract from Interview 7, social worker in Local Authority children's services

<sup>13</sup> Extract from Interview 3, former Local Authority social worker

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There was a mixed picture in relation to whether or not inconsistencies were put to the child. In just over half of the cases the caseowner did put important inconsistencies to the child. For example, in one case a child was asked to comment on information held by UK Border Agency which suggested that her mother (who she had claimed not to be in touch with) had made a visa application to come to the UK to visit the child. In this case, the child's explanation was accepted. In another case, a child was asked to explain the fact that UK Border Agency had a record of him having had his fingerprints taken in Greece, on a date when he had said that he was still in his home country. In this case, the child's explanation was not accepted, and the discrepancy formed the basis of the refusal. However, in other cases inconsistencies were not explored at all or were only dealt with in part. For example, in one case a child was found not to be credible because he had not mentioned the main basis of his asylum claim in his screening interview. He was not asked to explain this at the asylum interview: instead the issue was raised in the reasons for refusal letter. The reliance on the screening interview was justified by the fact that the interview had been carried out in the presence of the child's social worker and legal representative.

The length of some of the interviews was a concern. In the 26 cases where this information was recorded on the file, 22 of the interviews lasted more than 2 hours, and 8 interviews lasted more than 3 hours. The longest interview was 3 hrs 30 mins. This is a long period of time for a child to concentrate. The interviews judged to be the best and most "child friendly", that is, carried out with close attention to the child's welfare and which were successful in eliciting the most information from the child, were those which were tape recorded and then transcribed rather than written out in long hand during the interview. The tape recorded interviews allowed many more questions to be asked in a much shorter length of time, and meant that the conversation flowed much more easily and the child was able to respond in a more natural manner.

### 2.5 Assessment of credibility

Most of the children in the research sample were found not to be telling the truth by UK Border Agency. Of the 34 children, in 19 cases either nothing at all was accepted or only the child's age and nationality was accepted. In a further 6 cases, the child's account was accepted only in part. In only 8 cases was the child's account accepted in full.

The social workers interviewed for the research identified a reluctance to believe that children were telling the truth as a real cause of unfairness in the process. One support worker said:

"There is an assumption that people claiming asylum are coming here to abuse the system, to lie and to try to deceive. Young people are not given the benefit of the doubt and are too often disbelieved"<sup>14</sup>

Another experienced social worker, with 11 years experience working with unaccompanied children, commented:

"There is a presumption that children are lying, they are not given the benefit of the doubt. The way in which the Home Office approaches the case is that they are trying to catch people out and find a reason to disbelieve them"<sup>15</sup>

Another social worker, asked for her suggestions for any changes or improvements to the asylum process for children, said

"Change the culture of disbelief and the way that stories are listened to – at the moment it is like children are 'guilty until proven innocent' ie they are assumed not to be telling the truth"<sup>16</sup>

Against this background, we examined the way in which credibility had been assessed in the cases in the research sample, to see whether or not UK Border Agency had followed its own guidance. In particular, we looked at whether the collection of evidence and the assessment of the claim complied with the following principles, taken from the Asylum Process Guidance "Processing an Asylum application from a Child":

- Show awareness that children do not often provide as much detail as adults in recalling abusive experiences, and may manifest their fears differently from adults
- Assess evidence in the light of the child's age and degree of mental development and maturity
- Allow for a different degree of understanding compared to what one would expect from an adult claimant
- Apply the benefit of the doubt more generously when dealing with a child, particularly where a child is unable to provide detail on a particular element of their claim

<sup>14</sup> Extract Interview 2, anti-trafficking project officer at Barnardo's

<sup>15</sup> Extract from Interview 5, social worker in Local Authority leaving care team

<sup>16</sup> Extract from Interview 1, social worker at the Children's Society

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We found little evidence that the assessment of credibility was approached in accordance with these principles. For example, in one case a child was not believed because he was unable to provide the source of some information that his uncle had given to him. Another child, aged 13, had his account rejected due to lack of detail, which he was expected to provide because he was “an educated boy from a well off family”<sup>17</sup>

In another case a child (aged 13 or 14 at the time) was disbelieved because the caseowner thought that he would not have given information to his friends that would be likely to put him in danger. This shows an expectation on the part of the caseowner that a young child will have a high level of maturity and awareness of risk. This decision was later overturned at appeal and the child was given refugee status.

Another child, who was from Iraq and who had lost both of his parents at the age of 7, was disbelieved as a result of a minor inconsistency about what had happened when his parents disappeared, and for not being able to remember anything about what had happened to him before the age of 7.

Lack of detail and understanding were behind negative credibility findings in many cases. For example, one child was disbelieved because he could not give the exact position his uncle held in the Afghan Government, and because he could not name the countries which border Afghanistan. He was later found to be telling the truth by an Immigration Judge, who specifically rejected the concerns having regard to his age.

There were some examples of good practice. One refusal letter, in accepting the child's account, specifically referred to the benefit of the doubt being given more generously.

### 2.6 Best interests determination

In the Asylum Process Guidance, “Processing an Asylum Application from a Child”, UK Border Agency emphasises the importance of a child's best interests to determining a child's asylum claim:

“Article 3 of the UNCRC obligates the UKBA to ensure that the best interests of the child are a primary consideration in all actions concerning the child. This guidance must be read with this principle clearly in mind and the understanding that Best Interests is a continuous assessment that starts from the moment the child is encountered and continues until such time as a durable solution has been reached”

The guidance makes it explicit that best interests are not only a consideration in relation to the procedure for processing the claim, but are also an important consideration in relation to the substance of the decision as to whether or not a child should be returned to their home country. Set out in the guidance is a list of factors which are likely to be relevant to best interests, including the child's physical and mental health, family circumstances, level of integration into the UK, and the child's circumstances if returned to their home country. Caseowners are directed to send a “best interests pro-forma” to the child's social worker, which asks for information relevant to the assessment of these factors.

As well as this guidance, legal developments have made it clear that treating the best interests of a child as a primary consideration involves first determining what course of action would be in the child's best interests, and then considering whether those best interests would be outweighed by any countervailing considerations (for example, the maintenance of effective immigration control). The countervailing considerations would need to be of significant weight to displace the best interests of a child<sup>19</sup>.

Despite this guidance, the analysis of the research sample showed that there was very little evidence that UK Border Agency is carrying out a proper determination of best interests, including a case specific consideration of all of the relevant factors.

<sup>17</sup> Extract from Reasons for Refusal letter, research participant 2  
<sup>19</sup> ZH (Tanzania) v SSHD [2011] UKSC 4

### 2.7 Does UK Border Agency carry out best interests determinations?

In 24 of the 34 files analysed, there was no mention of best interests in the reasons for refusal letter. This suggests that in those cases, UK Border Agency had not carried out a best interests determination. In these 24 cases where there was no best interests determination, 13 children were granted discretionary leave to remain under the UASC policy, and 1 child was granted discretionary leave to remain on family life grounds. The remaining 10 children were refused outright, because they were aged over 17 ½ at the date of the decision, and were thus facing return to their country of origin. This included some children who had been resident in the UK for a long time, and had presumably integrated to a large extent in UK society. It is disturbing that UK Border Agency contemplated returning these children to their country of origin without having carried out a formal determination of their best interests, or taking into account the significance of a long period of residence in the UK while under the age of 18. This is demonstrated by the case study below.

Abdul had arrived in the UK from Afghanistan in 2006, aged 13. He applied for asylum but his asylum claim was refused. When he arrived in the UK, he was too traumatised to talk about what had happened to him in Afghanistan or to be interviewed about his asylum claim. Both of his parents had been killed and he was an orphan. He was granted 3 years discretionary leave to remain under the UASC policy. During the 3 years Abdul went to school and lived with a foster family. He received support from Social Services and medical professionals to cope with his mental health problems. He started to rebuild his life, making lots of friends at college to try and replace the family he had lost. In June 2010 he applied for further leave to remain. In January 2011, 3 days after Abdul's 18th birthday, UK Border Agency refused his application and said he would have to return to Afghanistan. Because Abdul was over 18, UK Border Agency said that his best interests were not relevant any more, because he was no longer a child.

In the 10 cases in which the child's best interests were considered, 6 were granted discretionary leave to remain under the UASC policy, and 4 were refused outright.

### 2.8 What conclusions were reached on best interests, and what factors were taken into account?

In 9 of the 10 cases, UK Border Agency determined that it would be in the child's best interests to return to their country of origin. In the remaining case, it was unclear what UK Border Agency believed to be in the child's best interests, although the decision was that the child should be returned to Italy on third country grounds<sup>20</sup>.

Curiously, in 6 of the cases where UK Border Agency determined that it would be in the child's best interests to return to their home country, the child was nevertheless granted discretionary leave to remain until the age of 17½. This included children who were in touch with their families, had been in the UK for a relatively short time, and who did not have protection needs in their own country.

#### Case Study

Mohamed is from Morocco. He was nearly 16 when he arrived in the UK and applied for asylum. He told the UK Border Agency that he was not afraid of returning to Morocco, he had come to the UK for the prospect of a better education. He was in regular telephone contact with his family in Morocco. UK Border Agency concluded that it would be in his best interests for him to return to his family in Morocco. Despite this, they granted Mohamed discretionary leave to remain for a period of 1½ years, and made no attempt to reunite him with his family in Morocco. No justification was given for departing from the course of action that had been identified as being in Mohamed's best interests.

There were no cases where UK Border Agency explicitly said that it would be in the child's best interests to remain in the UK, or where this was given as a reason for the grant of discretionary leave to remain.

In the cases where a best interests determination was carried out, there was in general consideration of some but not all of the factors identified as being relevant in the guidance. Given that in all of the cases analysed it was determined that it was in the child's best interests to return to their home country, it is not surprising that more weight was placed upon factors which pointed in favour of return.

In several cases, the opportunities that the child had had to access education while living in the UK were relied upon as justification for returning the child, as their prospects in their home country would be better. For example:

"Were you to return to Morocco, any education that you have received while in the UK would form a strong basis for future education in Morocco and would put you in a good position to seek meaningful employment once you become an adult"<sup>21</sup>

<sup>20</sup> A child who has already claimed asylum in a "safe third country" on the way to the UK, can be returned to that country for their asylum claim to be considered, under an agreement between the European countries known as the Dublin Convention

<sup>21</sup> Extract from Reasons for Refusal letter, research participant 29

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And

"It is noted that you have studied EDEXEL Level 2 courses in Healthy Lifestyles and Basic Culinary Skills and therefore must have some self care skills. These skills will help you to re-settle on return to Afghanistan"<sup>22</sup>

It was not explained how these skills would be useful in the very different context of Afghanistan, for a child who had been living in the UK for more than four years and who had lost touch with his family in Afghanistan. On the other hand, little consideration was given to the disruption to this child's education which would be caused by removal from the UK. The same refusal letter said:

"You are currently attending [...] College and are studying Level 1 English, Maths and ICT. Your proposed removal from the UK is therefore not thought to cause major disruption to your academic studies"

In some of the cases there was some attempt to consider whether or not the child would be able to access education, health care, work and training opportunities, but this consideration was not carried out in all of the cases.

One of the factors which is identified as being relevant in the guidance is "the duration of [the child's] absence from the home country and level of integration in the UK". The way in which this factor was considered was inconsistent. It was only given explicit consideration in 4 of the 10 cases. 3 of those 4 cases involved children who had been in the UK for a period of 2 years or less. The other 6 cases, where this factor was not considered, included 3 children who had been living in the UK for 3 years or more. It is surprising that the length of residence of these children in the UK and their level of integration was not considered to be significant, given that UK Border Agency considers a length of residence of 3 years following an unsuccessful asylum claim to be significant in the case of adult asylum seekers with children.<sup>23</sup>

A further factor identified as relevant in the guidance is "the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background". This factor was referred to either explicitly or implicitly in 9 of the 10 Reasons for Refusal letters, and always as a factor in favour of returning the child to their country of origin. A quote from one of the letters is representative:

"It is a general principle that children should grow up in their own cultural environment wherever possible"<sup>24</sup>

### 2.9 Who should have input into best interests determinations?

The best interests determinations were carried out by the UK Border Agency case owner alone, generally without taking into account information from other sources. In only one of the cases was there any evidence that the case owner had sought input from the child's social worker, and it was not clear what information was provided by the social worker and how it informed the decision.

We recognised, however, that there could well have been discussions with other professionals involved in the child's care which were not apparent from the key asylum case documents which the researcher had access to. Therefore, in order to examine the UK Border Agency's engagement with other professionals in best interests determinations more thoroughly, we asked the social workers that we interviewed for their views about how best interests should be determined and their level of involvement in best interests determinations.

6 of the 7 interviewees were aware that there had been a change of the law in 2009, and were aware that from November 2009 UK Border Agency had a duty to safeguard and promote the welfare of children. However, 6 of the 7 interviewees did not think that the new legal duty had made any difference to the outcomes for unaccompanied asylum seeking children<sup>25</sup>. Two interviewees did comment that they had seen some improvements in procedure, giving the example of better training for UK Border Agency officials in dealing with children and more child friendly interviews.

Only two of the interviewees had been asked by UK Border Agency to provide information about children who they were working with for the purposes of a best interests determination, and one of the interviewees said that this had only happened once. Three of the interviewees said that they had regularly provided unsolicited information to UK Border Agency which they considered to be relevant. All of the interviewees felt that there was useful and relevant information that they could have provided to UK Border Agency, because they knew the children involved well.

<sup>22</sup> Extract from Reasons for Refusal letter, research participant 23

<sup>23</sup> Chapter 53 of the Enforcement Instructions and Guidance, which gives guidance on the application of paragraph 353 of the immigration rules, setting out the exceptional circumstances in which UK Border Agency may consider allowing failed asylum seekers to remain in the UK

<sup>24</sup> Extract from Reasons for Refusal Letter, research participant 29

<sup>25</sup> The seventh interviewee said that she didn't know if it had made any difference

The one interviewee who had regularly been contacted by UK Border Agency, a former Local Authority social worker, said that from around mid 2010 UK Border Agency had started to send him a best interests pro-forma in most of the cases he was dealing with. He explained that Social Services had some difficulty complying with this request, because it might involve revealing confidential information about the child and there were difficulties in getting informed consent to reveal the information. Further, providing all of the information would be extremely time-consuming, and there was no funding available for doing this extra work.

None of the interviewees felt that the information that had been provided to UK Border Agency had been taken into account. One commented:

"I can't say for sure, but I got the impression that it was purely a bureaucratic process – ie that UK Border Agency was seeking this information from Social Services because they thought that they should comply with their duty, but without any intention of it making a difference to the decision that they would make"

When asked how the best interests of children should be determined, all of the interviewees gave similar responses. They said that all of the professionals working with the child should be consulted – the social worker, the foster carer, workers in supported housing projects, medical professionals, teachers and tutors at school or college, and any other professional. All of the interviewees also said that the child should be consulted as part of the process. One interviewee suggested that UK Border Agency should commission an independent social worker to carry out an assessment, because the Local Authority social worker was not sufficiently independent. One commented that UK Border Agency case owners should have more contact with the children they were dealing with; that often they were making decisions about children they had only met once or not at all.

These findings suggest that UK Border Agency and Social Services can do more to work together to determine children's best interests, and that child welfare professionals believe that a more holistic assessment is needed to determine unaccompanied asylum seeking children's best interests.

### **2.10 The wishes and feelings of the child**

Finally, we examined the case files to see whether or not any consideration was given to the wishes and feelings of the child. We looked at this because Article 12 of the UN Convention on the Rights of the Child requires the UK Border Agency to give due weight to the wishes and feelings of the child when making decisions concerning that child. This is an important issue in determining best interests. We found that there were no cases in the research sample where there was any consideration of the wishes and feelings of the child. While it may be thought to be obvious that a child who has applied for asylum in the UK wishes to remain in the UK, the reality is often much more complicated. All of the children in the research sample were over the age of 13 when a decision was made on their asylum claim; most were 16 or 17. This suggests that these children were old enough and of sufficient maturity to have their own views about what they wanted. Some may have been happy to return home if they could be reunited with their families. We do not know – because they were never asked.

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### 2.11 Impact of discretionary leave to remain on unaccompanied children

Given that so many unaccompanied children are granted discretionary leave to remain until the age of 17 ½, with the expectation that they will return to their country of origin at the age of 18, we wished to examine the impact of this temporary status on these children. This was explored in the interviews that we carried out with social workers.

The interviewees were asked for their views on the current discretionary leave to remain policy. 6 of the 7 viewed the policy negatively<sup>26</sup>. Some had quite strong feelings, although they did acknowledge that granting discretionary leave to remain was better than returning the child straight away if there were no reception arrangements. These were some of their comments:

"It a barbaric policy, to send them back. It makes me feel ashamed to be British. It is awful that we send young people who have just turned 18 and who may have been in the UK for 5 or 6 years back to countries that they sometimes have no knowledge of and nothing to go back to"<sup>27</sup>

"It is not good. For all of the young people that I work with, when they come to the age of 17 ½ and have to apply again to UK Border Agency, it completely disrupts their life.... The policy is not in the best interests of the child. It is terrible to think of returning young people when they have just turned 18. Would they do that to their own child?"<sup>28</sup>

"The grant of discretionary leave to remain doesn't support long term goals for the child. Protecting children's best interests involves empowering them to achieve and move successfully into adulthood. Granting discretionary leave doesn't do this"<sup>29</sup>

When asked how the situation could be improved for separated children claiming asylum, several of the interviewees commented that there should be more emphasis on trying to trace the child's family. A grant of permanent status or reunification with family were thought to be the best outcomes for the child, and some of the interviewees commented that the grant of temporary status meant that neither of these outcomes were achieved:

"Instead of granting discretionary leave to remain, it would be better if they were granted permanent status at the outset. Alternatively, UK Border Agency could put more effort into trying to find the child's family. As it stands, because their status is insecure, children do not want to cooperate with family tracing, as they are afraid it will harm their case"<sup>30</sup>

The interviewees were asked to assess the impact of being granted discretionary leave to remain on the young people they had worked with. They were asked to comment on the impact on children's health, education, emotional well-being, development/life chances, and support and accommodation. Again, of the 6 interviewees who responded to this question, their perceptions were that the impact on young people was overwhelmingly negative.

In relation to health, interviewees identified mental health problems related to anxiety and uncertainty about the future as being a real concern. One interviewee commented that the constant uncertainty could lead to real paranoia on the part of the children she worked with. Another said that the anxiety about the future could result in more dangerous lifestyles, for example risky behaviour such as alcohol and drug use.

In relation to education, both practical and motivational problems were reported. Practical problems in that children with discretionary leave to remain were not entitled to some educational courses, or there was confusion about their entitlements, and motivational problems in that some children would see little point in trying to achieve educationally if they were not going to be allowed to stay in the UK. Some children were reported to be too anxious about the future to concentrate properly on their education. However, some interviewees commented that this was not always the case: some children were really motivated to take the opportunity to get some skills and education while they were in the UK; others would rely heavily on school or college as a lifeline, as the only aspect of their lives that they felt was positive.

In relation to emotional well-being, anger was identified as an issue. Some young people were so angry that they did not make rational choices. Other young people had a false sense of security, in that they did not really believe that they would have to return at the age of 18. One interviewee commented:

<sup>26</sup> The seventh interviewee had not been aware that children granted discretionary leave to remain would be expected to return to their country of origin at the age of 18

<sup>27</sup> Extract from interview 5, senior practitioner in a Local Authority Leaving Care Team

<sup>28</sup> Extract from interview 2, anti-trafficking project worker in a voluntary sector agency

<sup>29</sup> Extract from interview 1, social worker at the Children's Society

<sup>30</sup> Extract from interview 3, independent social worker with Local Authority background

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“Uncertainty about status encourages children to conceal things – eg where their parents are and whether they are in contact with them. Maintaining this level of deceit places extra stress on children. It also prevents them from having good contact with their parents, which social services would have a duty to promote, and which would contribute to improving their emotional well-being”<sup>31</sup>

All of the interviewees felt that the grant of temporary status hindered the chances of children successfully entering adulthood:

“Poor mental health and disruption to education has a real impact on future life chances. Granting temporary status does not give these children the skills to enter adulthood. If we wanted to support them properly, we should give them permanent status immediately and then assist them to integrate into UK society”<sup>32</sup>

The findings from these interviews demonstrate that professionals working with unaccompanied asylum seeking children have real concerns about the detrimental impact that the discretionary leave to remain policy has on these children.

<sup>31</sup> Extract from interview 3, independent social worker with Local Authority background

<sup>32</sup> Extract from interview 1, social worker at Children's Society



**G R E A T E R M A N C H E S T E R**  
**I M M I G R A T I O N A I D U N I T**

**1 Delaunays Road  
Crumpsall Green  
Manchester M8 4QS  
0161 740 7722**

