

Refugee Children's Rights Project

and

IMMIGRATION LAW PRACTITIONERS' ASSOCIATION



Expert Roundtable on

The United Nations Convention on the Rights of the Child 1989 and its application to child refugee status determination and asylum processes

Held at Coram Children's Legal Centre, London, 1st December 2011

Co-chaired and hosted by Islington Law Centre, Coram Children's Legal Centre and ILPA, funded by the Diana Princess of Wales Memorial Fund

Summary

On 1st December 2011 a roundtable meeting was held to explore the relationship between children's rights and the international protection needs of asylum seeking children.

The objective of the roundtable was to provide a forum to foster an inter-professional, inter-agency debate, to identify areas of consensus and divergence rather than to formulate agreed positions or to issue recommendations and then to look at how to take forward the thinking from the event.

The roundtable was attended by around 40 participants (as listed in the attached annex to this summary) invited from across a wide spectrum of mainly U.K. professionals with experience and expertise working with children seeking asylum:- child social work professionals, lawyers, judges, decision-makers, N.G.O. children's advocates, academics, policy advisers, charitable funders, UN agencies and clinicians.

The meeting was held under the Chatham House rule – that is to say, that neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

The roundtable was divided broadly into two parts

1. A discussion about whether all the rights and needs of asylum seeking children are currently being met in the way that refugee and complementary protection law is currently interpreted and applied to children, by lawyers, decision-makers and judges, when preparing, presenting, considering and reviewing children's refugee status

determination and how (if at all) the current approach needs to be revised properly to address the international protection needs of children in their widest sense.

2. A discussion about how to design and implement a child-oriented asylum process at every stage, from arrival through to durable solution, where and when in such a process the formal assessment of the best interests of the child should be situated and in doing so: what information is needed; who should be involved and for what purpose, particularly in considering whether it is appropriate to return a child to their country of origin.

The first session was introduced by Professor Guy Goodwin-Gill putting forward the proposition that for the most effective protection of children, there needs to be a total re-alignment of refugee status determination, towards a welfare based approach, based on the Convention on the Rights of the Child as the starting point, requiring states to put into place structures, cultural approaches, and systems oriented towards the development of the child and the realisation of all their rights as set out in the UNCRC, rather than the more time-limited and narrow protection provided by the Refugee Convention.

The roundtable discussed the obstacles in the way of providing a “durable solution” for asylum seeking children, including, whether or not children should be required to submit to a formal asylum process at all; whether or not they should be required to show a well-founded fear; whether from a child’s point of view the Refugee Convention provides any better protection than the Convention on the Rights of the Child. In short, what is being missed in the way we do things now? What could and should be changed?

The discussion covered a wide range of concerns, including the situation of children who, whilst not meeting the criteria to be recognised under Refugee Convention and/or EU protection categories, were still in need of international protection and to what extent states should be required to provide more appropriate forms of complementary protection than the catch-all discretionary leave policy currently applied in the majority of decisions about separated asylum seeking children.

The question of how the UK best serves the interests of children from overseas was raised from a variety of perspectives, posing the question who should be in the driving seat and whether it should be a joint government departmental approach, and not just reside within the Home Office’s responsibilities.

Questions were asked and explored as to whether the present system, whereby the Home Office is currently responsible for both adult and child asylum claim processing and decision-making, through the UK Border Agency, might, if starting with a clean slate, be better placed within a new institution and overseen by an independent representative of children.

It was observed and generally agreed by all, that the identification of a child’s best interests was a challenge for all parties involved, including decision-makers, children’s advocates and representatives but that by default the UKBA had been left with the task of conducting best interests assessments in the current system. There was consensus around that comment and that this default position was inappropriate,

that the UKBA decision maker wasn't best qualified to do so and this needed to be addressed.

Thought was given to the competences needed by decision-makers to assess the fullest range of risks and who might be empowered to decide on the immediate and long term care and development of asylum seeking children, based on their best interests, not solely on persecution and risk on return and other, immigration control-based considerations.

Views were expressed by a number of participants about the possibility of the Immigration and Asylum Tribunals ceding jurisdiction to a special children and family proceedings court, rooted in the Family Division and its well established child welfare principles as a potentially more child-oriented judicial framework than provided at present.

Whatever the international legal framework, be it the Refugee Convention, Convention on the Rights of the Child or both, there is still the need for an overall decision-maker and to improve relationships between agencies so that they all have a common goal – the best interests of the child. Unless this is addressed, any new system would suffer from the problems that are perceived in the present one.

The discussions in the first session then developed more specifically around the predominant use of discretionary leave on the grounds of lack of reception arrangements and minimal use of humanitarian and Article 8- based leave; the impact of leave terminating at 17 ½ and increased likelihood of forced return to country of origin for those who had reached 18; the issue of guardianship (and absence thereof); the shortcomings of present corporate parental care and welfare duties towards separated children; and whether, and to what extent, the UNCRC's provisions can be interpreted as establishing a legal obligation on states to continue to provide for the development, rehabilitation and protection of children into adulthood.

Earlier discussions about the protection of trafficked children were mentioned and concerns aired about the similarity of debates about that cohort of children when discussing the establishment of the National Referral Mechanism, guardianship and the role of local social services. It was suggested by some voices at the time that the NRM duplicated the obligations of local authorities and that it created a gradient where the most competent in child protection referred to the least competent. Lessons could and should be learned from those experiences.

The issue of how and when formally to consider “best interests” in line with Article 3 of the UNCRC was discussed, including reference to the work being done internationally, around the development of guidelines on best interests, by UNHCR, UNICEF and others and the practical difficulties identified around carrying out best interests determinations in the context of current refugee protection and status determination processes, in the UK and around the EU.

There was broad agreement that children are already put through many stages in the asylum process, e.g. age dispute assessments, trafficking interviews, meetings with solicitors and attending asylum interviews and court and that this was damaging to children. In developing any new or improved system, great care is needed to ensure

that another stage is not simply added on to fit the “best interests” considerations into the existing system, but instead to look at how best interests and the UNCRC as a whole could be embedded within the whole framework and culture in a way that safeguarded the welfare of the child throughout the process.

Views were expressed that conducting a best interests assessment was not essentially different in principle to doing a good core welfare assessment, although in doing so the voice of the child, their wishes and feelings, had to be much more central to the decision-maker’s understanding of the child’s needs and that there are still large gaps in how this can be done, especially in the asylum context. It was appreciated that in the refugee child context, an absence of parent and family, and of information about the family, made such assessments all the more difficult.

Views were expressed that the current child asylum process was overly determined by the state’s assertion of its right to control its borders and that, as a result, protection decisions are made in the context of access to and remaining in the territory, rather than focussed exclusively on the primary task of protecting the child. Understanding this, much more work needs to be done at high-level around states’ acceptance of core child rights principles in order to shift the emphasis fully onto the best interests of the child and rather than the integrity of the border..

Children reaching the age of majority and those whose age is disputed were a focus of concern for many of the participants. The evaporation of children’s rights at 18 or the denial of those rights in age dispute cases makes it even harder to devise a best interests approach solely for those under 18. The vulnerability of young people is essentially no different on reaching 18 as when just under 18, yet the approach taken is totally different where these rights are considered by decision-makers no longer to apply.

Questions were posed as to whether a new child asylum system should specifically also protect the early years of adulthood in recognition that the needs of an asylum seeking child whilst a minor continue in many ways, particularly in terms of development and vulnerability, well into young adulthood .

This was felt to be consistent with “leaving care” duties, established to recognise and address the vulnerability of young adult care-leavers. The legal and academic view is that the UNCRC did not simply cease to be of application at the age of 18, but was arguably applicable to core assessments of what is needed to be put in place for the individual child in order to develop as a young adult and to be provided with as a young adult in order to reach the educational, developmental and rehabilitation goals demanded by the UNCRC.

Views were put forward that “best interests of the child” were for the whole life of the person not just whilst they remained a child; otherwise those interests were rendered very temporary and prone to being undermined. Similarly, there were felt to be risks in creating a special class of protected person – i.e. a child asylum seeker. There is a danger that the greater the difference between the treatment of children and adults, the more inclusion in the ‘privileged class of ‘children’ is policed, putting children at risk of exclusion. . The high incidence of age disputes was identified as an example of

how the perception that being considered a child brought with it advantages, and as a result could exclude and distort the approach to child protection.

Age dispute was seen as undermining the child's ability to have confidence in the process at precisely the time that trust needed to be most engaged. Whilst the use of age assessment measures was at one level seen as a safeguarding response, necessary to protect children from adults entering the child welfare system, experts described how children experienced such challenges as fundamental attacks on their identity and integrity and as a result such challenges are more likely to have a detrimental effect on children psychologically and developmentally as well as in terms of their willingness to engage with decision-makers seeking to make the best possible decision about children's protection needs. Overcoming these issues of trust and confidence was seen as critical to developing a child-focussed system. Getting the balance right was about ensuring that protection of the individual child and support was ensured whilst making sure that children generally remained protected by a robust but always child sensitive system? There was a general feeling that the current age assessment process was used as an entry barrier not a safety filter.

'Gate-keeping' was a recurrent issue of debate at the roundtable, both in the border control sense and in terms of access to services and legal rights. The agencies and individuals with responsibilities to maintain immigration controls have a complicated role, which required balancing the safety of individuals on the one hand with "policing" duties on the other. The protection of borders versus the protection of children was seen as a fundamental tension and even conflict and needed to be addressed when framing any new system and where this should be located within the responsibilities of the state.

Similarly, access to justice for children was seen as another gate-keeping issue, through the scope and eligibility tests for legal aid, limitations on rights of appeal, lack of availability of specialist legal representation.

Children who do not have fair access to refugee status determination procedures, because the process is not geared to the needs of the child, or able to listen to them appropriately, children who cannot access good legal representation and are unable to challenge decisions on appeal are all denied access to proper protection and to the rights attached to child and refugee protection. Discretionary leave provides only a temporary stay rather than a durable solution, and acts to discriminate within classes of children in need of protection, because of the way in which asylum legislation and policy has been devised – an unintended consequence perhaps but a real one nonetheless, of exclusion rather than inclusion, from appeal rights, from higher education, travel, family reunion etc.

Devising a new system of protective leave for children was considered, including the terminology of leave – views were expressed that discretion as a term was not appropriate as it gave the impression that a grant of leave was not an obligation where a child had wider non-refugee based protection needs. Refugee protection is not a permanent status entitling indefinite leave and settlement but meeting the best interests of children as a UNCRC obligation may require a different categorisation and more lasting form of leave. Some time was spent exploring whether a new

category of leave should be introduced: “child protection leave” for example was mooted.

The present lack of an independent system of legal guardianship and the lack of an identified person to exercise parental responsibility for the care of asylum seeking children was discussed at length. Views were expressed about the elements of the asylum process where guardianship could be beneficial, for example an *ad litem* guardian to report formally into decision-making and appeal processes, on the best interests of the child and their wishes and feelings, and elements of the asylum process where a child rights advocate and befriending role would be appropriate. Lack of legal parental responsibility in the current “corporate parent” model was identified.

Examples of good practice in the guardianship pilot project in Scotland were discussed. Initial feedback from the project showed that there was significant positive value from children’s perspectives in having a guardian. By contrast, existing welfare agencies and decision makers were more sceptical of the value of having another welfare professional added to the number of people with whom the child needed to engage with as part of the decision-making process. Ironing out conflicts between agencies and ensuring that children were clear about the role of a guardian was necessary to its success.

It was felt by most participants if not all, that a lot more work is needed to be done on providing a guardianship service for children as part of a revised asylum process and any formal best interests determination process. Although there were contrasting views aired about not adding to the number of professionals and agencies already surrounding a child, overall the view was that an independent guardian should be seen as an essential role across all elements of the system to assist decision-makers to address the welfare, development and international protection needs of the child, from the child’s point of arrival in the UK onwards..

Suggestions were made about assimilating asylum seeking children’s care into a more mainstream care proceedings process whereby a parental responsibility is then vested in the local authority and a guardian is appointed for the child by the family proceedings courts. Such appointments would need to be extended or mirrored to enable appointment of guardians to have a formal role in asylum appeals before the Tribunals or even a new asylum seeking children’s proceedings court.

Experiences from other jurisdictions in the UK, particularly Scotland, but also guardianship schemes in other EU states should be closely examined in further work on this issue. Independence was seen as critical, and consistent with the views of the UN Committee on the Rights of the Child.

The value of an independent person who the child could trust to act and advise on their best interests was of fundamental importance, to ensure that all welfare functions and stages of the asylum process were working in the interests of the particular child and helping to identify safe processes as well as to enable the child to disclose serious concerns such as trafficking and other abuse. Any system adopted in the UK should reflect recast EU directives (e.g. on reception and procedures) in equivalent proceedings, whether the UK opts in or not.

Whilst the roundtable was primarily about asylum seeking children, it was recognised that many children do not claim asylum and do not fit easily into current protection systems. These children too need an effective guardian and safeguarding in the immigration system.

A “Children’s Protection Unit” for children in need of international protection of all forms was mooted as a potential overarching responsible agency/department worth exploring further. Visibly naming protection as its purpose was seen as a potentially helpful way of re-framing the emphasis on what the task should be about.

The second part of the discussion was introduced by Manjit Singh Gill Q.C. counsel for the appellant in the Supreme Court case of ZH (Tanzania v SSHD) [2011] UKSC 4 delivered in February 2011, starting with a reflection on developments on the best interests of children and the right to be heard since that judgment..

This section of the discussion was aimed at looking more in detail at what a child-centred process might look like and how to create a model that enabled the child to be heard.

The Supreme Court’s guidance that best interests is a factor that “must rank higher than any other”, that “no factor is more important than best interests” and that those interests “should only be outweighed by countervailing factors of considerable force” were stated at the outset of the discussion as the benchmarks for such a model.

Another developing consideration – that promoting children’s best interests has its own public interest value – was raised, putting forward the idea that rights of child development, social integration, family unity etc all had positive, wider societal values which should be seen as an accepted and important matter of public interest and not just a set of individual rights to weigh on one side of the scales of an Article 8 European Convention on Human Rights proportionality assessment.

It was highlighted that ZH Tanzania made it clear that there should be some early warning system to indicate to decision-makers that best interests issues are likely to arise and that new structures are needed to put in to place advocacy arrangements for the child to give voice to their wishes and feelings and their interests.

It was felt that whilst we speak of durable solutions, it is difficult at any particular point in time or process, to focus on these because children’s needs are forever changing. However, protection is needed immediately and to be kept at the forefront of the decision-makers attention, whilst enquiries and best interests assessments are made. Protection must not be delayed because a formal decision-making process may not be able to arrive at a final decision at that stage.

What is vital in this is that the child must not be left feeling in a position of instability or of threat of removal whilst their needs are being assessed. If granting status into adulthood is required to achieve this, then serious consideration should be given to new forms of leave arrangements.

The burden of proof was discussed. Under UNCRC provisions it was argued that the best interests determination is the responsibility of the state and not the child and as such it was felt that it is not for the child (through their advocate or lawyer) to be required to make enquiries to produce information about what would be in place should they be required to return to country of origin – for example for family tracing and country conditions – even if refugee law places the burden on the claimant, the Convention on the Rights of the Child does not.

There was discussion about whether or not children should be given the right to participate directly or via a guardian in decisions. At present children's participation is not a requisite. Views were expressed that children should not be forced to attend panels or court if this was not what the child wanted, or not in their best interests, but this should be a matter for the child, their representative and guardian to consider, bearing in mind issues of age and capacity.

Whether the Tribunal needed to make more proactive arrangements for children was discussed in this context. Comparison was made again to care proceedings, and there was a general consensus that we should look at carrying forward similar arrangements into the asylum tribunals, with a presumption of a guardian and legal representation.

Despite the wide range of experts involved in the roundtable, some government departments were not represented and views were expressed that they should be part of the discussion. The Department for Education should be part of such discussions especially as they have areas of responsibility for other court proceedings and guardianship such as that provided by CAFCASS in family courts. The fragmented nature of government and local government responsibility for children was noted and the need for a more joined-up approach. The lack of independence and lack of clarity about roles such as the Office of the Children's Champion in safeguarding children was raised alongside issues such as Dublin Regulation transfers and where the responsibility for upholding the s.55 safeguarding duties lies within UK Border Agency.

In looking at who should be involved in best interests assessments, the roundtable was reminded that best interests was not just a stand-alone stage of the process but had to be integral to thinking about the child from the moment of arrival.

We were reminded too that the Supreme Court was silent on how to obtain the views of the child. This is a challenge to everyone, especially, but not only, decision-makers. What is a reliable model? Is there an effective process? The Tribunal was mooted as one possible vehicle for developing such a model, as to when and how those views should be heard. Other views expressed the need for an independent social work report and to learn from the family courts experience, and through better training across jurisdictions for experts, lawyers and for judges. Should best interests be considered by the tribunal or is this a conflict with their role to adjudicate on status decisions?

Legal representatives were challenged to think in a much more child focussed way. The quality of representation of children in court was aired as a concern and the need for legal advocates to prepare cases from a child-law not adult law perspective.

In terms of the model of a best interests assessment, experiences from the refugee field internationally were given as positive examples – where best interests determination focussed on safety, family reunification, child development, access to education and healthcare. A best interests assessment should also include a full in depth analysis with expert evidence about the receiving country, family tracing and family assessments etc. International fieldwork practice is not too different from a full “welfare checklist” type approach as used by the UK family courts.

As to who should carry out a best interests assessment, it was generally agreed that the decision-maker should not wear two hats – i.e. assessing the best interests and then also concluding how to promote those interests in the formal status decision. An independent person should conclude the process of identifying best interests with access to all relevant persons and experts for advice, such as teachers, foster carers, health and mental health workers and children’s advocates.

Interpreters trained and skilled in speaking to and reflecting the views of children accurately were as important as any other professionals involved in the assessment process.

The journey to the country of refuge and the trauma of that journey should not be left out of the equation. Whilst risks in the country of origin were the primary focus of protection, too often the child’s journey and its impact are overlooked. Children find it very hard to talk about their journeys. Consideration of the journey must also form part of the assessment of risk, their needs and longer term best interests

It was important to hold in mind that any process should not be a one size fits all approach. Each child is different and has had a different experience and has different needs. Social workers do understand this and do good social work but need to be empowered and resourced to put good social work practice back at the centre of their work with asylum seeking children, not be a gateway protector or adjunct to the status decision-making process. A child must be able to see that the social worker is there for them, and not for other interests.

Some thought was given to the adversarial nature of proceedings in the Tribunal and whether or not a more inquisitorial model, more equated with the family proceedings courts’ welfare approach should be proposed. Whilst the Tribunal was a long way from being a child-oriented judicial arena it was felt by some participants to be premature to graft on an inquisitorial system and that strong legal advocacy was needed on behalf of the asylum seeking child to be able to challenge evidence and decisions robustly rather than concede responsibility for the task to an examining judge. It was suggested that more work looking at the form of court proceedings for child asylum appeals would be helpful.

The overall conclusion was that the child should be “protected first, then make enquiries” Stop the risk, and then enquire about the broader picture, including a durable solution.

In a final summing up session, the roundtable discussed proposals for future work and agreed to:-

- take forward the main elements of these discussions at the ILPA Children's Conference in May 2012
- continue an inter-agency, multi-disciplinary discussion on how to embed best interests in all aspects of the child asylum process
- Write an in depth article for the Immigration, Asylum and Nationality Law Journal to be published after the ILPA conference, alongside Professor Goodwin-Gill's written up introduction.

Note compiled by Syd Bolton RCRP/Coram Children's Legal Centre, with assistance from Baljeet Sandhu, RCRP/Islington Law Centre and Alison Harvey at ILPA, from a very thorough, verbatim minute of the meeting prepared by Holly Buick.

Many thanks to everyone who helped to organise and who participated so fully in the roundtable discussions and particularly to Lisa Woodall of the Refugee Children's Project at ILPA who co-chaired and summarised the event but has since left ILPA.

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