

WHAT THE **UNITED KINGDOM** CAN DO TO ENSURE RESPECT FOR THE BEST INTERESTS OF UNACCOMPANIED AND SEPARATED CHILDREN

A UK briefing on the UNHCR/Unicef publication *Safe & Sound*
www.unicef.org/protection/files/5423da264.pdf



INTRODUCTION

Children who find themselves without parental protection are dependent on state authorities to uphold their rights.

In the European Union (EU), the number of unaccompanied children applying for asylum has increased sixfold over the past few years: from 11,700 in 2008 to 88,245 in 2015.¹ Here in the UK, there were 3,043 asylum applications from unaccompanied asylum seeking children in 2015, an increase of 56% from the previous year (1,945). These applications represented 9% of all main applications for asylum.²

Regardless of their circumstances, all unaccompanied and separated children³ share two fundamental characteristics:

1. **They are children and should first and foremost be treated as such, in line with the rights and entitlements set out in the UN Convention on the Rights of the Child, the 1951 Convention Relating to the Status of Refugees and other human rights instruments.**
2. **As children temporarily or permanently deprived of their supportive family environment, they are entitled to special protection and assistance.**

Of all refugees and migrants, unaccompanied and separated children are among the most vulnerable to violence, abuse and exploitation.⁴ These children have been separated from the people and places they know, and face an uncertain, risky future. They are often not identified by or included in child protection mechanisms along their route as they attempt to continue their journey.⁵ When unaccompanied and separated children reach their destination, immigration systems need to proactively work with child protection services to ensure that, once the child's immediate needs have been addressed, their longer-term development is supported.



In 2014, UNHCR and Unicef published *Safe & Sound*⁶ to support governments across Europe to develop their approach to assessing and determining the best interests of unaccompanied and separated children in accordance with international and regional legal standards and obligations. The rising number of unaccompanied and separated children in Europe, including in the UK, has now brought an increased urgency to ensuring governments are rigorous in their assessment of children's best interests.

This briefing considers how *Safe & Sound* should be put into practice in the UK.

THE BEST INTERESTS PRINCIPLE

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

Article 3 (1) of UN Convention on the Rights of the Child

The United Nations Committee on the Rights of the Child defines the best interests of the child as:

- 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.⁷

Best Interests: Assessment and Determination

A Best Interests Assessment (BIA) and a Best Interests Determination (BID) are both part of a process that should begin as soon as an unaccompanied or separated child is identified and end when a durable solution has been secured for the child.

“The purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognised in the CRC and to ensure the holistic development of the child.”

UN Committee on the Rights of the Child (2013), General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration

A **Best Interests Assessment** is an ongoing assessment to enable a child's best interests to be taken into account in decision-making by any professional involved with the child. BIAs should take place and recur at various points whenever an action is planned or taken which may affect the child or when circumstances change. BIAs should also inform the case review process on an ongoing basis. A BIA enables appropriate support packages to be developed for children across all their protection, immigration and social needs. Currently in the UK, BIAs occur, for example, when a UK Home Office staff member undertakes an initial “safeguarding interview” upon identification of an unaccompanied or separated child who would then normally be immediately referred to the local authority. The local authority, for its part, undertakes a BIA (or initial care planning assessment) with the “child in need”.

However, evidence suggests that BIAs are not routinely undertaken throughout the child's engagement with both immigration and protection systems, and that BIAs do not systematically inform decision-making (for example, in decisions around dispersal, or appropriate accommodation).⁸

The **Best Interests Determination** is a more formal procedure that takes place whenever significant decisions that have a fundamental impact on a child's future development are to be taken. A BID is a multi-agency process undertaken within a child protection framework, which collects in-depth information about the child and takes into account the views of all those working with the child (including immigration officials) as well as, importantly, the child him or herself. It identifies the most suitable durable solution for that child in a timely manner and, in doing so, directly addresses the issue of being unaccompanied

or separated. By way of example, a BID is required for all cases involving unaccompanied and separated children submitted for resettlement by UNHCR.

Currently, there is no BID process undertaken in the UK, and no consistent mechanism to ensure every child is safe and supported across the full range of their needs.

“ . . . the greater the impact a decision will have on the child and the child’s future development, the greater the procedural safeguards that need to be put in place when making that decision.

Safe & Sound, page 20

The aim in addressing the future of an unaccompanied or separated child in this way is to identify an appropriate **durable** solution - one that meets all the child’s protection needs, takes into account the child’s views, and leads to a longer-term sustainable arrangement for the child rather than a short-term resolution.⁹ There are three forms of durable solution – a return to the child’s country of origin; settlement and integration into the host country; or relocation to a third country (including family reunion or resettlement). An appropriate durable solution can most effectively be identified by determining what would be in the child’s best interests through a formal procedure with additional safeguards.

What the UK has done so far to ensure the best interests of the child

Matters concerning unaccompanied and separated children fall under the mandate of different government departments, with multiple public authorities and services involved in their implementation. In the UK, the Home Office and Department for Education¹⁰ are responsible for immigration decisions and the child protection system respectively. Local authorities undertake assessments for children in need and are governed by statutory safeguarding guidance and care planning frameworks.

In the UK the Home Office is responsible for all immigration decisions while the Department for Education is responsible for the child protection system in England. In Northern Ireland, Scotland and Wales, the devolved administrations are responsible for care and support in relation to unaccompanied and separated children. This includes:

- The welfare checklist within Section 1 of the Children Act 1989; Section 3 of the Children (Northern Ireland) Order 1995.
- Children in need assessments under Section 17 of the Children Act 1989.
- Decision-making about looked after children within Section 17 of the Children (Scotland) Act 1995.
- 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 regulations¹¹; and the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (regulation 7 and 8).
- The ratification of the UN Convention on the Rights of the Child by the UK in 1991.
- The removal of the immigration reservation to the UN Convention on the Rights of the Child in 2008, which had limited the application of rights to unaccompanied and separated migrant children.
- Local authorities, education, health and criminal justice agencies having a duty to co-operate to safeguard and promote the well-being of children in Section 10 of the Children Act 2004.
- A duty on the Secretary of State to safeguard and promote the welfare of all children who are in the UK, regardless of their immigration status, in Section 55 of the Borders, Citizenship and Immigration Act 2009, supported by statutory guidance.¹²

- Statutory guidance for local authorities on the care of unaccompanied and trafficked children in 2014¹³; and national guidance on child protection in Scotland.¹⁴
- Statutory guidance in England to encourage a multi-agency approach to safeguarding children, updated in 2015.¹⁵
- The trial of independent advocates for children in England and Wales who may be victims of human trafficking. Advocates must “promote the child’s well-being and act in the child’s best interests.”¹⁶
- Independent guardians for unaccompanied and separated children in Scotland and Northern Ireland.¹⁷

Scope for further improvement: key areas of concern

There is undeniably a strong legal framework and positive case law in the UK with regard to the promotion and protection of children’s best interests. In 2013, Lord Hodge stated in the Supreme Court that, “[a]lthough the best interests of the child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.”¹⁸ This includes immigration considerations. However, there remains no systematic unifying approach to assessing and determining the best interests of unaccompanied and separated children, and research shows that such assessments are, within the immigration system at least, not taking place consistently.¹⁹



UNHCR and Unicef UK have identified several specific areas of concern in the assessment and determination of the best interests of unaccompanied and separated children in the UK:

- The best interests of the child are considered through an immigration prism, rather than as a process where the decision-maker is required to weigh and balance all the relevant factors of a child’s case. This undermines clear guidance from the Committee on the Rights of the Child that the elements that should be considered in order to determine a child’s best interests are those that reflect the rights enshrined in the UN Convention on the Rights of the Child itself.²⁰
- Immigration officials tend to consider a child’s best interests only as part of a pro forma exercise, rather than a substantive determination. Best interests are often only considered at the returns stage, rather than throughout a child’s case.²¹
- A review of case files of unaccompanied and separated children who had been supported by one local authority demonstrated that the best interests of the child were not systematically considered other than through the insertion of standard text in the documentation.²²
- Decision-makers are often unclear about where and how the consideration of a child’s best interests should fit and be factored into their wider decision-making.²³
- In the absence of a full best interests determination that incorporates the consideration of the child’s protection needs and resulting immigration decision, a potential conflict of interest arises whereby the same government official whose role it is to protect borders is also making the last decision on what durable solution is in the child’s best interests.²⁴

- Unaccompanied and separated children do not have access to an independent guardian to promote and protect their best interests across all settings, and to support them to navigate through incredibly complex systems and processes they find themselves engaged with.
- Each public authority or service with a mandate concerning unaccompanied and separated children assesses the best interests of the child from the perspective of the legal and practice framework within which they operate. At present, this leads to variation in the understanding and implementation of the best interests principle.
- There is no formal and systematic collection, recording or sharing of information that is necessary and relevant to a quality best interests consideration. This includes a lack of an appropriate mechanism to obtain the views of the child and give those views weight in line with age and maturity.²⁵
- There is no formal BID mechanism for arriving at a durable solution in the best interests of each child. The importance of a BID in pursuit of this has been recognised by the Joint Committee on Human Rights, which recommended in 2013 that the Government evaluate the case for an independent formal BID process in the UK.²⁶
- At present, unaccompanied and separated children in the UK who are found not to be in need of international protection but who cannot be returned to their country of origin due to 'inadequate reception arrangements' are granted limited and temporary leave for a period of 30 months or until the child turns 17.5 years old, whichever is shorter (unaccompanied asylum-seeking child [UASC] leave). The table above shows how many children fall into this category. While regularising immigration status, this temporary leave does not constitute a durable solution for the child but instead leads to an uncertain future. Evidence suggests it also can create barriers for local authorities in undertaking any meaningful long-term planning with the child.²⁷ After a court judgment, Home Office policy on discretionary leave now makes clear that the best interests of the child must inform the length of leave granted.²⁸ Whether this is happening in practice requires further examination.

LEAVE DECISIONS FOR UNACCOMPANIED AND SEPARATED ASYLUM-SEEKING CHILDREN IN 2015

In 2015, of a total of 1,932 asylum decisions made on claims from unaccompanied and separated children, the outcomes were as follows:

Status*	<18	≥18
Refugee	356	63
Humanitarian protection	18	1
Discretionary leave	37	3
UASC leave	805	0
Refused any kind of status	343	306

*age at the date of decision

Data on returns is not included here as it does not differentiate between unaccompanied and accompanied children (i.e. children in families), nor does it disaggregate returns where the application was made as a child but the individual was returned as an adult.



RECOMMENDATIONS

The recommendations that follow are directed at all government departments and agencies at both central and local levels that hold statutory duties towards unaccompanied and separated children:

1. Commit to exploring and establishing a BID procedure for children, using *Safe & Sound* as a framework for development:
 - a. Establish an independent expert group to provide advice to Government about the design and operation of a BID procedure.
 - b. Involve local authorities, potentially through Multi-Agency Safeguarding Hubs, in the development of a multi-agency procedure.²⁹
 - c. Align lead responsibility for the determination of an individual child's best interests with the agency responsible for the child's overall welfare.
2. Strengthen procedural safeguards for assessing and determining a child's best interests, including by:
 - a. 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.
 - b. Providing child-friendly and accessible information.
 - c. Ensuring high quality legal representation and advice for unaccompanied and separated children.
 - d. Providing training and capacity building for those working with and making decisions about the child.
 - e. Ensuring information relevant to the assessment and determination of the child's best interests is available by developing, within the limits of data protection legislation and respecting confidentiality, protocols for the collection and sharing of such information. These protocols should facilitate the ongoing collection and consideration of relevant information from the child, social workers, foster carers, immigration decision-makers and any other professional working with the child.
 - f. 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.
 - g. Ensuring a right to re-open and re-examine the BID where appropriate.
3. Review the content and implementation of Home Office and Department for Education³⁰ statutory guidance and operational policies, and the functioning of existing mechanisms and safeguards, to ensure that children's best interests are being proactively assessed by all professionals involved with the child as they move through asylum and immigration procedures.
4. Strengthen procedures to ensure that all relevant durable solutions are considered for unaccompanied and separated children – long-term settlement and integration in the UK (with the most appropriate form of leave considered on a case-by-case basis), relocation to a third country (whether via family reunion or resettlement) or return to their country of origin. This should include supporting local authorities to plan with a child for the longer-term regardless of the outcome of the immigration decision in order to make sure the child's rights are protected.

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The Office of the United Nations High Commissioner for Refugees was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and, together with governments, resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, and ultimately, to find durable solutions that allow them to rebuild their lives in dignity and peace. Durable solutions include voluntary repatriation, local integration or resettlement in a third country. UNHCR also has a mandate to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people.



Unicef, the United Nations Children's Fund, is mandated by the UN General Assembly to uphold the Convention on the Rights of the Child and promote the rights and well-being of every child. Together with partners, Unicef works in over 190 countries and territories to translate that commitment into practical action, focusing special effort on reaching the most vulnerable and excluded children, to the benefit of all children, everywhere. Unicef UK is one of 36 National Committees. Unicef has a specific role in providing advice and assistance to governments around the world in matters relating to children's rights.



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