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Appeals and Children

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This information sheet provides information about the way appeals should be conducted where there are children involved. A child may be a party to an appeal (e.g. where the appeal is brought by a child). A child may be involved as a witness or a potential witness. In other cases, even though the child is not a party or a witness, the issues to be decided on an appeal may have a real impact on a child (e.g. where the appeal concerns whether a child's parent should be required to leave the UK or permitted to stay in the UK).

UN Convention on the Rights of the Child

The 1989 UN Convention on the Rights of the Child includes provisions that are important in relation to appeals involving children. Article 3 of the Convention includes:

1. 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 12 of the Convention states:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Considerations at an appeal hearing

Article 3 (see above) applies to both the decision that the tribunal reaches and the way in which the tribunal conducts the appeal. The child's best interests must be a primary consideration throughout. Article 12 (see above) emphasises the importance of ensuring that a child, who wishes to be heard, is heard in the tribunal proceedings. However, to ensure a child is heard and his or her best interests are a primary consideration, it will be necessary for the immigration judge and all representatives (including those for the UK Border Agency) to carefully consider how any evidence of the child is taken – whether in writing, or orally; whether there needs to be any cross-examination (questions by the UK Border Agency disputing the child's evidence) and if so, how this should be conducted.

Senior judges, with particular expertise in dealing with children's cases, have stressed the harm that may be caused to a child if required to give evidence or if cross-examined – e.g. Lady Hale in *W (Children)* [2010] UKSC 12 (paragraph 17) and Wall LJ in *Re W* [2009] EWCA Civ 644 (paragraph 55). Nonetheless, a child may want to give evidence and it may be important for him or her to do

so to enable the tribunal to reach a decision which properly has regard to the child's safety and welfare – including as to the risk of harm to the child if he or she returns to his or her home country. Lady Hale concluded in *W (Children)* (paragraph 24):

“When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.”

This means it is especially important that judges and representatives consider carefully what evidence is already available, what issues are both relevant and properly still disputed and what options are available by which any further evidence from the child may be given. Options may include evidence in writing (e.g. a witness statement), expert evidence provided by an independent social worker (e.g. on a child's family, social and welfare circumstances in the UK) and agreeing questions to be answered by a child in writing before the hearing. These matters should be considered at an initial hearing (called a pre-hearing review) where the tribunal may issue instructions in preparation for the full hearing of the appeal.

Those representing children must also ensure children are able to consider these matters for themselves, and to say what they would prefer. In some cases, e.g. where a child is dependent on his or her parent's appeal, it may be necessary to consider separate representation for the child because there is a real or potential inconsistency between the interests of the child and the parent.

UK Border Agency's statutory duty – section 55

Section 55 of the Borders, Citizenship and Immigration Act 2009 places a duty on the UK Border Agency to have regard to the safety and welfare of children. The duty applies to all the work of the UK Border Agency including how it presents its case at an appeal hearing. More information on this duty is available from the August 2009 “Children – New Statutory Duty” information sheet.

This duty has particular importance to whether and if so how the UK Border Agency may conduct any cross-examination of a child at any appeal. The UK Border Agency must not conduct (or be allowed to conduct) a ‘fishing expedition’ (i.e. to ask questions simply on the basis that something may come up in the child's answer even though there is nothing in the available evidence to show the question needs to be asked).

Guidance to immigration judges

Guidance relating to appeals involving children includes:

- Joint Presidential Guidance Note No. 2 of 2010:
<http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>
- Practice Direction of the Senior President of Tribunals of October 2008:
<http://www.tribunals.gov.uk/Tribunals/Documents/Rules/Childvulnerableadultandsensitivewitnesses.pdf>

More detailed information

ILPA's “Working with refugee children: Current issues in best practice” was published in May 2011. It includes a chapter on representing children at appeals before the immigration tribunal. That chapter includes details of further available guidance on taking evidence from children in legal proceedings. The publication is available free online at:
<http://www.ilpa.org.uk/pages/publications.html>