

ILPA information sheet

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Family Tracing

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The European Directive (2003/9/EC) of 27 January 2003 laying down minimum standards for the reception of asylum seekers (often referred to as “the Reception Directive”) includes the following provision at Article 19:

“3. Member States, protecting the unaccompanied minor’s best interests, shall endeavour to trace the members of his or her family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardising their safety.”

This provision (referred here as “the family tracing provision”) has been considered by the courts, particularly over recent months. This information sheet provides information about the family tracing provision and its considerations by the courts.

General

The family tracing provision applies in the cases of separated child asylum-seekers. It emphasises the child’s best interests. That emphasis is appropriate, particularly given the importance given to the child’s best interests under the UN Convention on the Rights of the Child 1989 (see the January 2011 “Children’s Best Interests” information sheet [<http://tinyurl.com/cmkt55>]). It also emphasises the care that is necessary to ensure that any steps taken to trace a child’s family do not put the child or the family at risk.

The family tracing provision emphasises the need to try and trace the family of the child “*as soon as possible*”. However, having regard to the emphasis on best interests and risks to children and their families, this should not be read as meaning that family tracing is always possible or should always be attempted. The UK authorities, on whom the family tracing provision places a duty, must be careful to ensure that what they do (or do not do) is based upon a careful assessment of the child’s best interests and any risks that tracing may involve.

Decisions of the courts

The family tracing provision has been considered by the Court of Appeal in *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 and *HK (Afghanistan) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 315. From these judgments, the following principles may be drawn:

- The duty to try to trace a child's family is independent of the child's asylum claim and is not to wait for the outcome of the asylum claim (*DS (Afghanistan)*, paragraph 67).
- The duty may, however, be relevant to the asylum claim, because information obtained in any attempt to trace may cast light on whether the child will or will not be at risk if returned to his or her country of origin or, in any case, what may be in the best interests of the child (*HK (Afghanistan)*, paragraphs 40 & 46).
- The duty is upon the Secretary of State (and it may be exercised by the UK Border Agency), whatever steps may or may not be taken by the child to trace his or her family (*DS (Afghanistan)*, paragraph 68).
- That a child has not made efforts to trace his or her family may be relevant to consideration of his or her asylum claim, but it does not follow that simply because a child has not made such efforts that this should be held against him or her (*HK (Afghanistan)*, paragraph 35).
- The child's best interests and his or her welfare must be a primary consideration in any decision or action relating to family tracing and whether permission should be given to the child to remain in the UK. No other consideration is to be treated as inherently more significant (*DS (Afghanistan)*, paragraph 76).
- These considerations will be relevant to an immigration judge considering an appeal of the child against a refusal of asylum (*DS (Afghanistan)*, paragraph 71; *HK (Afghanistan)*, paragraph 49 & 50).
- Any failure by the Secretary of State (or UK Border Agency) to have made appropriate efforts to trace a child's family may justify an immigration judge in allowing an asylum appeal, particularly if there is evidence to suggest that the failure was intended to delay a decision on the asylum claim until the child had reached 18 years of age (*HK (Afghanistan)*, paragraph 49).

UK Border Agency practice

UK Border Agency practice in tracing children's families is inconsistent, but in some cases has been very poor.

In February 2009, ILPA set out anonymised details of a particularly bad example. The child had given a telephone number, saying this to be the number of his or her parents. The UK Border Agency had not discussed with the child using the number to try to trace the child's family, still less obtained the child's consent. Consular officials in the child's home country rang the telephone number, at the request of the UK Border Agency. The records indicated that the person who picked up the telephone initially confirmed he or she was the parent, but spoke of being frightened and then hung up. On the strength of this, the UK Border Agency argued that there were adequate reception arrangements in the child's home country and refused asylum. All of this took place despite very serious concerns that the child had been trafficked; and the child's social worker's experience of persistent attempts by people in the UK trying to make contact with the child, whom the social worker considered were likely to be traffickers.

More information about the importance of adequate reception arrangements in children's cases is provided by the "Discretionary Leave and Separated Children" information sheet [<http://tinyurl.com/c8vmaq9>]. The example given above is available at Appendix A to ILPA's April 2012 submission to the All-Party Parliamentary Groups' joint inquiry into children who go missing from care. That submission is available at: <http://www.ilpa.org.uk/data/resources/14615/12.04.23-ILPA-submission-to-APPG-inquiry-on-missing-children.pdf>

The UK Border Agency continues to explore the possibility of returning children to countries, such as Afghanistan, even in cases where the child's family cannot be traced. In those circumstances, inadequacies in the UK Border Agency's consideration of children's best interests and in attempts to trace family members are an even greater cause for concern.