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## Children's Best Interests 4

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This is the latest in ILPA's series of Information sheets on 'Children's Best Interests' and looks at General Comment No. 14 produced by the UN Committee on the Rights of the Child regarding Article 3 of the UN Convention on the Rights of the Child<sup>1</sup>.

Article 3, paragraph 1 of the 1989 UN Convention on the Rights of the Child gives a child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her. Article 3, paragraph 1 states:

*"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."*

Although, unlike the European Convention on Human Rights, the UN Convention on the Rights of the Child has not been made part of the United Kingdom's laws, the principles of the UN Convention on the Rights of the Child are often referred to by the courts when interpreting obligations imposed by human rights and other legislation. Since November 2008, when the UK removed its reservation to the Convention about children and young people subject to immigration control, the UK Government has accepted that all children irrespective of their immigration status, must enjoy all the rights and protections of the UN Convention on the Rights of the Child without discrimination, as specified under Article 2 of the Convention. The importance of giving due consideration to the needs of the child is set out in domestic legislation and both the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009 place a statutory duty on public authorities to safeguard children and promote their welfare. In the case of *ZH Tanzania v Secretary of State for the Home Department*<sup>2</sup>, Lord Kerr of Tonaghmore indicated that a child's best interests,

*"...is not merely one consideration that weights in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them [...] primacy of this consideration needs to be made clear in emphatic terms."*<sup>3</sup>

However, Home Office immigration and asylum policy and decision-making all too often fail to consider children's best interests as a primary consideration (or at all) and immigration concerns are too often given priority over the best interests of migrant children.

On 29 May 2013, the UN Committee on the Rights of the Child issued General Comment No.14<sup>4</sup>

<sup>1</sup> See ILPA Information Sheet here: <http://www.ilpa.org.uk/data/resources/4694/11.01.1152.pdf>

<sup>2</sup> [2011] UKSC 4. See ILPA Information Sheet here: <http://www.ilpa.org.uk/data/resources/4698/11.02.1156.pdf>

<sup>3</sup> Ibid paragraph 46

<sup>4</sup> <http://www2.ohchr.org/english/bodies/crc/docs/GC.14.pdf>

(2013) on the right of the child to have his or her best interests taken as primary consideration. The General Comment notes as follows:

- The concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies and indifferent and dismissive decision-making.
- The full application of the concept requires the development of a rights-based approach.
- The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations.
- The need for a degree of flexibility where there is a conflict with other interests or rights but bearing in mind that "the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have a high priority and not just one of several considerations...a larger weight must be attached to what serves the child best."

The UN Committee also elaborates on the 'process' of best interests', assessment and determination, as follows:

- The individual characteristics and specific circumstances of the individual child (age, level of maturity, gender, social and cultural context, disability, relationships with carers etc.) must be considered and to assist in the assessment of their best interest there needs to be a non-exhaustive list of things to consider, including:
  - Child's views
  - Child's identity
  - Preservation of family environment and unity and preventing family separation
  - Care, protection and safety of the child
  - Any particular vulnerability (e.g. disability, belonging to a minority group, victim of abuse)
  - Child's right to health
  - Child's right to education
- The various elements must be weighed and balanced in the best interests' assessment to ensure the full and effective enjoyment of the rights recognised in the Convention and the holistic development of the child.
- The best interests' assessment must facilitate meaningful child participation including seeking their views.
- There must be procedural safeguards to guarantee the implementation of the child's best interests (including mechanisms for evaluating the results). Procedural safeguards should include:
  - The facts relevant to an assessment of best interest should be established by well-trained professionals
  - The 'passage of time' is not perceived in the same way by children and therefore assessments should be undertaken as speedily as possible and subject to review at reasonable intervals as the child and their ability to express their views develops
  - Best interests can only adequately be assessed by professionals who have expertise in matters related to child and adolescent development
  - The child needs appropriate legal representation when his or her best interests are to be formally assessed
  - Any decision should be backed by (legal) reasoning
  - There should be mechanisms to review and revise assessments and decisions
  - Policy etc. should undergo a 'Child-rights impact assessment'

It is to be hoped that General Comment No. 14 will serve to inform child best interests' assessments, decisions and challenges to the many Home Office decisions that have failed properly to consider those interests.