

Refugee & Migrant Children's Consortium

Immigration and Social Security Co-ordination (EU Withdrawal) Bill Committee Stage, House of Commons

Best Interests Assessment Safeguard for Removals Amendment Briefing

Summary

Over 900,000 children and young people will be affected by the changes to the immigration system as the UK leaves the European Union.¹ These children and young people will be from a range of backgrounds - many of them will be in vulnerable positions and will struggle to secure 'settled' or 'pre-settled' status under the EU settlement scheme or will be dependent on those who are not able to do so. If only 15% of the 727,000 non-Irish EU citizen children in the UK² are not able to regularise their status, we will have an additional 100,000 undocumented EU children in the UK following Brexit, which will effectively double the undocumented migrant child population in the UK³. Children who do not regularize their status, or whose parents do not, or whose applications are refused may face removal from the UK or separation from their family. Thousands of non-European national children, including those who are British citizens, are already at risk of being separated from their parents or being removed from the UK without adequate consideration of the impact on children because children's best interests are not systematically and comprehensively assessed within immigration decision-making.

Best interests of the child in immigration decisions

The UN Convention on the Rights of the Child 1989 (UNCRC), states that children should not be discriminated against on the basis of their race, nationality, status or their parents' status (Article 2) and that their *'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). The Home Secretary has a duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of children with respect to its immigration, asylum and enforcement functions. The Supreme Court has held that, through Section 55, "the spirit, if not the precise language"⁴ of the best interests principle has been translated into our national law. Before decisions are made in all matters relating to children, across family courts, immigration decisions, accommodation decisions for looked after children there needs to be a determination as to whether that decision is in the best interests of the child. This should take into account the child's view, identity, their safety and protection, health and education and the preservation of their family environment, among other factors.⁵

However, in its latest observations on the UK in 2016, the UN Committee on the Rights of the Child expressed regret 'that the rights of the child to have his or her best interests taken as a primary consideration is still not reflected in all legislative and policy matters'. It called on the government to 'ensure that this right is appropriately integrated and...applied in all legislative, administrative and judicial

¹ Sumption, M., & Kone, Z. (2018). Unsettled Status? Which EU Citizens are at Risk of Failing to Secure their Rights after Brexit?. *Migration Observatory, COMPAS University of Oxford*. www.migrationobservatory.ox.ac.uk/resources/reports/unsettled-status-which-eu-citizens-are-at-risk-of-failing-to-secure-their-rights-after-brexit

² This is based on 2017 data and leaves out the 239,000 children whose EU parents report they are British citizens

³ In 2012, a report by Compas estimated that there were 120,000 undocumented migrant children living in the UK, over half of whom were born here from Sigona, N., & Hughes, V. (2012). No way out, no way in: Irregular migrant children and families in the UK, ESRC Centre on Migration, Policy and Society, University of Oxford.

⁴ *ZH (Tanzania) v Secretary of State for the Home Department* – Lady Hale at Para 23

⁵ See UN Committee on the Rights of the Child General Comment , General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), at <https://www.refworld.org/docid/51a84b5e4.html>

proceedings and decisions as well as in all policies, programmes and projects that are relevant to and have an impact on children'.⁶

The RMCC has, for many years, highlighted that the best interests of the child must be a major factor in all decisions relating to child refugees and migrants in the UK.⁷ While we have seen some progress in terms of the language used in Home Office guidance, this does not always equate to good practice and Home Office processes still lack a fundamental, comprehensive best interests assessment.

For example, recent research by Coram Children's Legal Centre looked at decision-making in family cases, and in their sample, 40% of decisions had not engaged with the child's best interests, and 20% devoted just a couple of sentences to the child's best interests.⁸ Research by RMCC members has also highlighted that where children are separated from their parents and have no-one with legal parental responsibility looking out for them, children's best interests particularly their long term interests and life chances, are not systematically and comprehensively assessed within immigration decision-making⁹ or with respect to their care needs. This is reflected in case law also. For example, Kenneth Oranyendu¹⁰ was detained upon reporting to the Home Office, despite the fact his wife was abroad at the time and no one was there to care for their four children. His children were subsequently taken into care until her return. His children were reported to have been "shattered" by the separation¹¹ and that they were now "scared every time [he goes] out"¹².

Amendment 27 refers to a best interests assessment being undertaken prior to any EEA and Swiss national child being removed from the UK. In the future, the RMCC would like to see the introduction of a comprehensive system of a best interests determination process for all children who are affected by any immigration decision, including, for example, the removal of their parents or carers¹³. This will ensure that immigration decisions, particularly where children, their close family members or people on whom they are dependent are at risk of detention or removal from the UK, always expressly and fully consider children's best interests first.

Case study:

Sarah came to the UK 16 years ago to escape forced marriage. After an agent stole her documents, she lived under the radar and had three children, now aged 11, seven and two. She made an application for leave to remain on Article 8 grounds two years ago, which was refused, on the basis that the whole family could be returned together to the mother's country of origin. The children only speak English and the elder two are doing very well at school, and well integrated into the borough where they have lived all their lives. The eldest child is eligible to register as British. Coram Children's Legal Centre helped the family with their appeal on a pro bono basis and they were subsequently granted permission to stay in the UK. Had the Home Office undertaken a thorough best interests assessment of the impact of possible removal on all of the children in that family there may have been no need for an expensive and lengthy appeal.

⁶ <http://www.crae.org.uk/publications-resources/un-crc-committees-concluding-observations-2016/>

⁷ See, for example, RMCC's evidence to the Independent Chief Inspector of Borders and Immigration at <http://refugeechildrensconsortium.org.uk/icibi-childrens-best-interests/>

⁸ Coram Children's Legal Centre, *This is My Home*, 2017, p16 at <http://www.childrenslegalcentre.com/this-is-my-home/>

⁹ The Children's Society, *Not Just a Temporary Fix: Durable solutions for separated migrant children*, 2015

¹⁰ <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

¹¹ <https://news.sky.com/story/children-and-parents-are-separated-by-immigration-in-the-uk-11418129>

¹² <https://www.independent.co.uk/news/uk/home-news/immigration-child-separation-parents-uk-home-office-kenneth-oranyendu-family-a8431731.html>

¹³ <https://www.refworld.org/pdfid/5423da264.pdf>

Amendment 27: Best Interests Assessment Safeguard for Removals

Clause 4, page 3, line 10, at end insert—

“(5A) Any regulations issued under subsection (1) which enable children of EEA or Swiss nationals to be removed from the United Kingdom must include—

(a) a requirement to obtain an individual Best Interests Assessment before a decision is made to remove the child; and

(b) a requirement to obtain a Best Interest Assessment in relation to any child whose human rights may be breached by a decision to remove.

(5B) The assessment under subsection (5A) must cover, but is not limited to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his or her age and understanding);
- (b) the child’s physical, emotional and educational needs;
- (c) the likely effects, including psychological effects, on the child of the removal;
- (d) the child’s age, sex, background and any characteristics of the child the assessor considers relevant;
- (e) any harm which the child is at risk of suffering if the removal takes place;
- (f) how capable the parent facing removal with the child, and any other person in relation to whom the assessor considers the question to be relevant, is of meeting his or her needs;
- (g) the citizenship rights of the child including whether they may be stateless and have rights to British citizenship.

(5C) The assessment must be carried out by a suitably qualified and independent professional.

(5D) Psychological or psychiatric assessments must be obtained in appropriate cases.

(5E) The results of the assessment must be recorded in a written plan for the child.”

Member’s explanatory statement

This amendment would ensure that before a decision is taken to remove an EEA or Swiss national child from the UK a comprehensive best interest assessment is obtained.

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