

**United Nations Committee on the Rights of the Child
Day of General Discussion**

“The Rights of All Children in the Context of International Migration”

Palais des Nations, Rooms XIX and XII Geneva, 28 September 2012

Access to justice is a fundamental necessity in promoting the rights of all migrant children

This submission is respectfully made to assist The Committee in its discussions and in particular, though not exclusively, in response to the particular questions posed for Working Group 2 (*national measures*) as follows :-

2. What special protection procedures and coordination mechanisms should be applied to children in the context of migration through national child protection systems, both in countries of transit and destination, to ensure that migration policies and practices abide by best interests determination procedures (in accordance with the CRC) and that children are not criminalized for illegal entry and ensured safe access to a State territory as well as first assistance? (What actors should be involved and how can best interests (in accordance with the CRC) determination procedures be put in place in this context?)

3. How can States parties guarantee in law and in practice that migrant children, including in relation to rescue at sea, have effective access to key procedural safeguards including free legal aid, and in case they are unaccompanied, to a guardian in migration procedures, and also ensure the rights of children to due process and to be heard in all migration procedures?

Coram Children's Legal Centre (CCLC) (<http://www.childrenslegalcentre.com/>) is a unique independent NGO concerned with law and policy affecting children. The Centre works in the United Kingdom and around the world to promote and protect the rights of children. Our work in the UK, focuses on promoting the implementation of children's rights, and as part of this work we have provided *amicus curiae* interventions in Supreme Court and Court of Appeal cases, where we have been able to provide assistance to the Court on matters of children's rights in the context of migration laws and policies and where international movement leads to the separation of children and their families contrary to the interests of the child.

The work of our International Policy and Programmes Department has focussed on juvenile justice over the last 15 years and we are recognised as international experts on this subject. The Centre has an in-depth knowledge of international child rights standards, national juvenile justice systems, juvenile polices and laws, and has worked with governments in more than 20 countries and also within States, with the judiciary, police, prosecution service, probation, social workers and prison

officers on reform of policy, law and practice to assist in the development of juvenile justice systems that meet international standards¹.

We provide expert legal representation, strategic intervention litigation and through our Migrant Children's Project, policy advocacy work, training, information services and legal support for those working with and for refugee and migrant children. Our Refugee Children's Rights Project work has been described as "*highly valued by lawyers, officials and NGO's alike*" and in our most recent intervention in a landmark ruling on the rights of the child in extradition cases *R (on the application of HH) (Appellant) v Deputy Prosecutor of the Italian Republic, Genoa (Respondent) and others [2012] UKSC 25* our submissions on the importance of the best interests of children were regarded as "*most persuasively expressed*" by the UK Supreme Court.

Access to Justice is an essential procedural safeguard of migrant children's rights

It is a prerequisite that for the implementation of children's rights to be effective, children need access to independent advocates, legal representation and guardianship to ensure that their rights are observed and promoted by those taking decisions which will affect their lives, not just when making decisions on an individual child's case but also in the formulation and interpretation of wider policy and legislative provisions, where these have an impact upon children and their rights. For migrant children, including refugees and all other internationally displaced children, these safeguards become all the more immediately necessary.

When children cross borders, with or without adult carers, often having witnessed and experienced physical and psychological harm in their countries of origin and en route, they are at their most vulnerable. Many barriers stand in the way of children's access to justice. Language and cultural differences, psychological trauma, developmental maturity and mental capacity all have to be understood and accommodated. Bureaucratic and institutional obstacles will often stand in the way of children's ability to obtain welfare and care, protection, redress and rehabilitation. Migrant and refugee children frequently experience discrimination directly and indirectly in immigration processes and judicial procedures, which are more often designed for adults and built more to protect the sovereign interests of the state in controlling its borders than to serve the interests of children. These barriers need to be identified and removed and replaced with child sensitive support and procedural provisions, to assist children to articulate their views, their wishes and their concerns, to enable decision-makers to understand and provide for their protection and developmental needs in a way that treats the best interests of each child as a primary consideration at all stages of these systems.

Expert advocacy and legal representation is needed to challenge and offset these multiple disadvantages not only in the individual child's circumstances but in ensuring that systems are developed in an holistic way at all stages, to give full voice to children and their right to be heard and to enable fair and equal treatment before the law, without discrimination and in a way that implements all the rights of the 1989 UNCRC.

Whilst the required standards for the treatment of separated children outside their countries of origin have already been authoritatively articulated by this Committee's own experts² (and these do not need to be repeated at length here), it is still worth emphasising in the context of the child's right to be heard and their international protection that it is an essential procedural safeguard that:-

*"The unaccompanied or separated child should also, in all cases, be given access, free of charge, to a qualified legal representative"*³

¹ See http://www.childrenslegalcentre.com/index.php?page=international_research_analysis_publications for all recent major publications from CCLC International Team.

² Especially General Comment Number 6 of 2005 – Treatment of Unaccompanied and Separated Children Outside Their Country of Origin - <http://www2.ohchr.org/english/bodies/crc/comments.htm>

³ Ibid at paragraph 69

Other international guidelines and minimum standards also assist in the understanding of how to achieve best evidence from children and measures to be put in place to give children an effective voice. Additionally the 2010 UN Guidelines for the Alternative Care of Children (Res A/64/434) 64/142 requires that when determining the most appropriate form of care,⁴:-

“Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians.”

Such provisions (consistent with the non-discrimination provisions of Article 2 UNCRC) should **include** “...unaccompanied and separated children, internally displaced and refugee children, children of migrant workers, children of asylum-seekers...”⁵

It is this Committee’s General Comment Number 12⁶ of 2009, on the Right of the Child to Be Heard which provides the clearest interpretation and guidance on arrangements states need to make for children to be enabled to participate in decisions taken about their lives.

As the Committee’s own analysis of the wording of Article 12 UNCRC makes clear, “*Shall assure*” is a legal term of special strength, which leaves no leeway for State parties’ discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. This obligation contains two elements in order to ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.

However, it is Coram Children’s Legal Centre’s view that whilst General Comments Number 6 and 12 (and others) provide comprehensive guidance on the principles and standards required to ensure that every child is heard⁷, there would be some additional benefit in providing a more detailed annex or appendix, either under the auspices of the Committee’s existing comments or by a separate document which can provide practical assistance to representatives, guardians, decision-makers and the judiciary about how these standards can best be put into practice by states globally.

The Immigration Law Practitioners Association (ILPA), The Refugee Children’s Rights Project, the UK judiciary and others have produced their own materials and practice directions for procedures involving migrant children. Internationally the UNHCR, UNICEF, International Association of Refugee Law Judges (IARLJ) have been working on more globally applicable standards consistent with the guidance of this Committee. UNHCR and UNICEF are currently finalising new guidelines on the determination of best interests for migrant and asylum seeking children and the IARLJ has in draft form, judicial guidelines on “procedural accommodations for vulnerable persons” which includes children in refugee processes. A bibliography of all these documents is provided and may serve as a useful starting point for drafting Procedural Standards guidance.

The Courts in the UK have made positive progress on these issues since the UK lifted its immigration control reservations to the UNCRC in 2008, both in setting procedural standards and guidance and in their jurisprudence. This submission highlights the way in which NGO’s and lawyers can use strategic

⁴ at paragraph 57 see <http://www.crin.org/docs/Guidelines-English.pdf>

⁵ Ibid at paragraph 9 (b)

⁶ CRC/C/GC/1220 July 2009 The Right of the Child to be Heard

<http://www2.ohchr.org/english/bodies/crc/comments.htm>

⁷ See GC12 at chapter 9 paragraphs 123 and 124

litigation to assist in the implementation of UNCRC rights for migrant children and how courts (at least in the UK) are becoming willing to consider and to accept the expertise of the UN Committee on the Rights of the Child in developing jurisprudence .

In the landmark Supreme Court judgment *ZH (Tanzania) v SSHD 2011 UKSC 04* on the deportation of families, the primary importance of the best interests of the child was held to be “... a factor, however, that must rank higher than any other. It is not merely one consideration that weighs 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. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child’s best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.”⁸

Most significantly in terms of the UK’s developing jurisprudence on the child’s right to be heard, the Supreme Court, citing UNCRC Article 12 and General Comment No. 12 said that “Acknowledging that the best interests of the child must be a primary consideration in these cases immediately raises the question of how these are to be discovered. An important part of this is discovering the child’s own views.”⁹

This was further developed in the judgments of the Supreme Court, this time involving the extradition of parents in which the Coram Children’s Legal Centre intervened to promote the interests of children¹⁰. The court again cited General Comment Number 12 in observing that:-

“...there can be no correct application of article 3 if the components of article 12 are not respected”... “The important thing is that everyone, the parties and their representatives, but also the courts, is alive to the need to obtain the information necessary in order to have regard to the best interests of the children as a primary consideration, and to take steps accordingly” and “...no factor must be given greater weight than the interests of the child...”¹¹

It is essential that courts make procedural accommodations to enable children to engage with judicial proceedings in a way that recognises their rights, needs, and varying abilities.

At the World Conference of the International Association of Refugee Law Judges, (IARLJ) in Cape Town South Africa 2009, draft “Guidelines On Procedures With Respect To Vulnerable Persons”¹² including a section on procedural accommodations specifically for refugee and migrant children, were tabled and discussed and put out to international consultation amongst its membership. These have yet to be formally adopted but in our view provide a helpful and detailed starting point for the development of further guidance specific to judges and decision-makers on how to apply the principles contained in CRC General Comments Number’s 6 and 12 to judicial proceedings.

The objective of these draft guidelines¹³ is to ensure that all Judges, irrespective of jurisdiction and the divergent forms of domestic national law:

a) recognise the needs of children in hearings;

⁸ paragraph 46, *ZH (Tanzania) v SSHD 2011 UKSC 04* http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0002_Judgment.pdf

⁹ Ibid paragraph 34

¹⁰ *HH, PH, v Deputy Prosecutor of the Italian Republic (Genoa), F-K v Polish Judicial Authority* [2012] UKSC 25 http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0128_Judgment.pdf

¹¹ Paragraphs 85, 86, 145

¹² See Guidance Note on Children III of IX pp 32 – 52,

http://freemovement.files.wordpress.com/2009/03/catriona_jarvis_guidelines_vulnerable_persons.pdf

¹³ Ibid page 37 paragraph 11

- b) agree ‘best practice’ and standardisation of approaches;
- c) recognise certain individuals face particular difficulties at hearings because their ability to understand and effectively present their case or fully participate in the proceedings is, or may be, impaired;
- d) ensure such vulnerable persons are identified and appropriate procedural accommodations are made as soon as practicable;
- e) limit the exposure or further traumatisation of such vulnerable persons during the hearing process;
- f) ensure the on-going sensitisation of Judges and other participants in the hearings regarding the impact of such vulnerability;
- g) ensure the inherent dignity of children is recognised and respected and their cultural and religious backgrounds are taken into consideration.

The UK immigration and asylum tribunals have to some extent reflected similar standards in their own Practice Directions and Presidential Guidance¹⁴. CCLC urges all jurisdictions to ensure that their own court procedures contain similar explicit written guidance to judges.

Legal Aid is also a necessity in making sure this requirement is put into practice in promoting the best interests and voice of the child

Coram Children’s Legal Centre’s 2012 Report ‘*Navigating the System*’¹⁵ examines the complex administrative and legal processes that separated children have to confront in the UK, and the need for need for a single constant individual with expert understanding of the relevant law and processes, who can act as a link between all services and professionals that are involved in a separated child’s case. The report highlights that quality advice and/or legal representation is essential if migrant children are to benefit from the rights afforded to them, and legal representation is of critical importance for children where government agencies are making decisions on their future.

Cases are likely to involve court proceedings of an adversarial and contested nature, necessitating the preparation of appropriate evidence (such as witness statements, relevant country evidence, documentary evidence with certified translations, or medical and expert evidence) and further appeals usually revolve around complicated points of law and legal arguments. Many asylum and immigration applications rely on the ability to understand and obtain evidence, and most crucially, present this evidence appropriately – this will often be too legally complex for a litigant in person, and children may experience additional challenges in negotiating cases of such complexity. The voice of the child and the role of a representative in ascertaining the child’s views is critical to such an assessment. In short, if a child’s wishes and feelings are to be taken into account during administrative and legal processes, legal representatives, decision-makers and the courts must ensure that they have the skills and processes necessary for ‘child-friendly access to justice’.

Yet there already exists a shortage in lawyers who are skilled in both immigration and children’s law and can engage with children in an age appropriate way. 71% of practitioners surveyed for the report struggled to find immigration lawyers to take on children’s cases, and children are too often abandoned by their lawyers because their cases are too complicated or have been asked to provide several thousand pounds for the lawyer to continue working with them. Reports highlight that some children are begging, selling sex or engaging in other forms of illegal work to pay for legal representation.¹⁶

¹⁴Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>

¹⁵ Coram Children’s Legal Centre, *Navigating the System: Advice Provision for Young Refugees and Migrants*, 2012, at http://www.seekingsupport.co.uk/images/navigating_the_system_final.pdf

¹⁶ The Children’s Society, *Going it alone*, 2007, at http://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/Going_it_Alone_Children_in_the_asylum_process.pdf

The UK Government, under the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, is to withdraw legal aid from immigration cases, including grants or variation of leave to remain, and applications under concessions or policy outside of the Immigration Rules. For migrant children, no funding will be available for advice on staying in the UK or for legal representation in fighting removal. Only asylum cases will be eligible for free legal advice.

These changes will have a highly detrimental impact on separated children in the UK in a number of circumstances. The central premise put forward by the Government that immigration cases “do not raise issues of such fundamental importance as asylum applications, where the issue at stake may be, literally, a matter of life and death” and that those involved in immigration cases “will usually have made a free and personal choice to come to or remain in the United Kingdom”.¹⁷ This is simply not the case for most separated children, who rarely choose independently their destination country¹⁸ and for whom removal from the UK may have significant safeguarding implications.

In October 2002 the UN Committee on the Rights of the Child recommended that the UK Government ‘carry out a review of the availability of legal representation and other independent advocacy to unaccompanied minors and other children in the immigration and asylum system.’¹⁹

A decade later there is still growing evidence that separated children are unable to secure access to the specialist legal advice needed to ensure that they are properly supported and able to challenge instances where their rights are violated. As access to advice diminishes further, the UK is at risk of letting down and further marginalising some of the most at risk children and young people in the UK, and violating our domestic and international legal obligations to ensure that all children are safeguarded and have access to justice.

In this context, NGO’s have an increasingly important role to play in advocating for the rights of migrant children. In 2011, The Diana Princess of Wales Memorial Fund established a Strategic Litigation Fund” (SLF) aimed, in its own words, “to support strategic legal work, that is, work that goes beyond securing justice for an individual and makes a significant contribution to law, practice and procedures that upholds and promotes the rights of refugee and asylum seeking children and young people more generally. The SLF is a pilot project which will test a new model for supporting legal work in the UK by providing flexible and responsive funding.”²⁰ The Fund supports NGO’s and lawyers to pursue test cases and to do pre-litigation research to pursue issues that have an impact on a wide number of migrant/asylum seeking children rather than just on the individual. Whilst this is not an alternative to legal aid, and should not be seen as such, it is an additional means of promoting maximum change and improvement to child migrant and asylum processes and in raising awareness of key issues amongst the legal and NGO communities.

CCLC have also been involved in promoting best practice through professional representative bodies such as the Immigration Law Practitioners’ Association, co-authoring and training on best practice in representing children. These documents, Working with Children and Young People Subject to Immigration Control – Guidelines for Best Practice, and Working with Refugee Children, Current Issues in Best Practice and a Resources Guide for Legal Practitioners Working with Refugee Children are all available free online and provide a wide range of current best practice guidance based on the

¹⁷ For further information, see briefings from the Refugee Children’s Consortium during the passage of the *Legal Aid, Sentencing and Punishment of Offenders Bill*, 2011 at www.refugeechildrensconsortium.org.uk

¹⁸ See, for example, Refugee Council *Chance or choice?: Understanding why asylum seekers come to the UK*, 2010, at <http://www.refugeecouncil.org.uk/Resources/Refugee%20Council/downloads/rcchance.pdf> and UN High Commissioner for Refugees, *Voices of Afghan Children - A Study on Asylum-Seeking Children in Sweden*, June 2010, available at: <http://www.unhcr.org/refworld/docid/4c19ec7f2.html>

¹⁹ Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland (October 2002), para. 48 (f)

²⁰ <http://www.migrationwork.org/strategic-legal-fund>

work of experienced children's lawyers and policy advocates and are a very helpful tool for all people working with migrant children, irrespective of their particular profession or jurisdiction.²¹

Recommendations:

- Every unaccompanied or separated child should be provided immediately with an independent, expert legal guardian mandated to safeguard the child's best interests.
- Children should be informed immediately upon arrival, in a language and form that they understand, about their right to protection and assistance, including their rights to seek asylum or other forms of protection, and about their rights and entitlements to support.
- Unaccompanied and separated children in asylum and all other judicial or administrative proceedings should be represented by a lawyer, provided free of charge by the state, in addition to their legal guardian.
- All judges and decision-makers should adopt clear procedural standards and guidelines to ensure migrant children have effective access to court and decision-making processes.
- The UN Committee on the Rights of the Child should give consideration to producing an appendix to its General Comments 6 and 12, setting down detailed procedural standards for the effective implementation of the UNCRC to judicial procedures involving migrant and refugee children.

The Coram Children's Legal Centre would be pleased to elaborate on any of these issues orally at the General Day of Discussion on 28th September or thereafter as the Committee may find helpful.

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²¹ ILPA <http://www.ilpa.org.uk/pages/publications.html>