Best Interests of the Unaccompanied Refugee Child: United Kingdom and Canadian Approaches in Legislation and Case Law

Frances Meyler[1] [2] and Deborah Morrish[3]

> "To be 'alive, alert and sensitive' to the best interests of a child requires an amalgam of considerations. It calls for a voice for the voiceless, a response to the personality of a child, whose fragile and sensitive nature requires a comprehensive understanding of what it means to nurture a child by considering the "best interests" of the child" (*Baker v. Canada*).[1]

This paper is a synthesis of recent legal contributions focused on the treatment of the unaccompanied refugee child (URC) in the asylum systems of the United Kingdom (UK) and Canada in respect of the 'best interests of the child' (BIC) concept, jurisprudence and legislative framework guiding refugee determination processes and associated decision-making considerations.

Part 1 provides an overview of the UK system and how the BIC vis-à-vis URCs is considered through the UK's national legislation and decision-making processes. The application of the BIC in conjunction with the 1951 Refugee Convention and the principle of family unity is examined and a variety of case law rounds out the paper.

Part 2 provides an overview of the Canadian legislation and jurisprudence governing the application of BIC considerations in asylum procedures, with a focus on Child Refugee Claimants: Procedural and Evidentiary Issues Guideline[2], one of a series of instructive guidelines developed by the Immigration and Refugee Board of Canada (IRB) to assist decision-makers in their adjudication of URC claims. The paper also includes examples of how Canada's courts have interpreted the BIC in conjunction with broad refugee rights with reference to tribunal decisions and upper-court case law. The paper concludes with a brief reflection on the nature of the UK and Canada approaches to the BIC.

While space necessitated limiting the discussion of the BIC to a review of two States' approaches to their respective refugee determination processes, there is nevertheless an additional international sphere of URC claims analysis in the context of family unity, supported by a well-formed body of UN and European Union (EU) legislation, principles and informed opinions on the importance of the BIC in EU law, as well as the human rights nexus of family unity to the 1951 Refugee Convention. To date, the concept of family unity has been explored more vigorously in the UK system than in Canada, no doubt by virtue of the UK's current position within the EU and the obligation/necessity for Member States to consider and apply various pieces of legislation not applicable to Canadian decisions. Nevertheless, there is room for

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[1] Judge of the Immigration and Asylum Chamber, First-tier Tribunal, United Kingdom

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[3] Assistant Deputy Chairperson, Refugee Appeal Division, Immigration and Refugee Board of Canada

the consideration of the family unity provisions in national states' systems as these continue to evolve over time. Still, the reader will want to consider the sourced paper referenced below for an in-depth understanding of the contemporary legal setting for this analysis and the extent to which the BIC can reduce the margin of appreciation in migration control, influence the right to family unity and inform the eligibility for protection in substantial terms[3].

PART 1: BEST INTERESTS OF THE CHILD IN THE UK

This first section of the paper considers the extent to which the child's best interests are considered in the UK's treatment of unaccompanied refugee children ('URCs') and identifies any gaps in protection, where the child's best interests are not considered or could be better protected. We provide a brief overview of the domestic best interests' statutory scheme and consider the extent to which the BIC has been invoked in the UK as an interpretative instrument to illuminate the United Nations Refugee Convention. We also examine the extent to which the BIC is reflected in the Immigration Rules relating to family unity cases and URCs. Article 8 of the European Convention on Human Rights (Article 8 ECHR) cases concerning removal and deportation are outside of the scope of this paper unless directly affecting URCs. Note that this section is focused on law that will remain in effect after the 'Great Repeal Bill'[4] comes into effect after the UK's withdrawal from the European Union (EU).

The Context

Although data on unaccompanied migrant children in the EU were fragmented and poorly disaggregated[5], according to the European Commission[6], the number of unaccompanied children who sought asylum in Europe quadrupled in 2015, to 88,300. Most (91%) were males. Around half were Afghans. Over half were aged 16 to 17 years old (57%, or 50,500)[7]. Of the total number of unaccompanied asylum seeking children in the EU, 35,250 sought asylum in Sweden; whereas less than ten per cent of that number (3,045) sought asylum in the UK in 2015. This shows a 56% increase from the previous year (1,945) and represented 9% of all asylum applicants. Only 23 per cent were granted refugee status, significantly less than in other EU countries although roughly half are granted UASC status[8]. Of the 1,655 asylum applications determined by the Home Office in 2016, 836 were granted UASC status, 497 were granted refugee status, 50 were granted humanitarian protection and 256 were refused leave.

The UK granted 32 per cent of cases considered in 2015 refugee status or subsidiary protection at first instance, compared with 48 per cent across the EU[9]. In 2015, the United Kingdom granted 17,900 unaccompanied minors some form of protection status (a 26% increase since 2014), ranking fifth in the EU behind Germany (148 200, or +212% compared with 2014), Sweden (34 500, or +4%), Italy (29 600, or +44%) and France (26 000, or +26%).

1. Children's Rights and the Refugee Convention

As several academics have commented[10], the 1951 Refugee Convention provides no special protection measures for children[11] and there is no reference to their best interests. Despite the fact that the Refugee Convention was undoubtedly a product of its time and values[12], the omission is surprising given that the need for special care and protection for children was first recognized by the League of Nations

as far back as 1924 in the Geneva *Declaration of the Rights of the Child*, which provided that the child must be "*the first to receive relief in times of distress*".[13] Jewish children were specifically targeted during the Second World War, causing mass displacement of unaccompanied refugee children.[14] Specific provisions were made for '*unaccompanied children'* in the 1949 Geneva Conventions[15], providing for the free passage of assistance for children and pregnant women and for the good functioning of institutions for the care of children in occupied territories. The International Refugee Organisation[16] also called for children to be given '*all possible priority assistance,'*[17] showing contemporaneous awareness of the especial vulnerability of children to persecution. J.M. Pobjoy describes the surprising circumstances in which unaccompanied children were ultimately not included as a protected category in the refugee definition in his elegant treatise '*A Child Rights Framework for Assessing the Status of Refugee Children*'[18].

Several widely adopted international human rights treaties, such as the United Nations Convention on the Rights of the Child (CRC) and the Committee on the Rights of the Child's General Comments (General Comments No. 6[23] and 14[24] in particular), provide useful interpretative aids in defining persecutory harm and the Convention definition[19], in addition to the ICCPR[20] and the ICESCR[21]. Article 3 of the UN Convention on the Rights of the Child gives the child the right to have his best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him:[22]

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Former Oxford University Professor Guy Goodwin-Gill has long argued that the CRC is critical in determining whether a state owes a child international protection.[23] Pobjoy has recently consolidated this line of thinking in a comprehensive and scholarly work, which is essential reading for anyone representing or making decisions relating to child asylum seekers[24]. As a substantive right, an interpretative legal principle and a procedural rule[25], article 3(1) expresses one of the fundamental values and Convention principles for interpreting and implementing all the rights of the child. It is a dynamic concept which requires assessment appropriate to the specific context, including an age and gender-sensitive approach[26].

Prior to the CRC, international instruments approached the child as the recipient of care and protection. However, the CRC treats the child as a rights-bearer, rather than just an object of protection. Indeed, children's rights protected by the CRC cannot be derogated from[27]. Moreover *UNCRC General Comment No. 6* expressly provides that the art. 2(3) *ICESCR* derogation (relating to economic rights and non-nationals) does not apply to unaccompanied refugee children.

The following articles of the CRC might feature as fundamental cornerstones to a child rights-framework to the Refugee Convention: the best interests of the child as a primary consideration under art. 3(1), the right to life, survival and development (art. 6), prevention of trafficking and of sexual and other forms of exploitation, abuse and violence (arts. 34, 35 and 36), the right to liberty and freedom from torture and cruel, inhuman or degrading treatment or punishment (art. 37), prevention of forcible military recruitment and protection against the effects of war (arts. 38, 39), full access to education (arts. 28, 29(1)(c), 30 and 32) and the right to an adequate standard of living (art. 27).

There is also a free-standing prohibition on *refoulement* of children where there are substantial grounds for believing that there would be a real risk of irreparable harm to the child upon return to his country

of origin[28]. Although '*irreparable harm'* is not defined, it clearly encompasses articles 6, 37 and 38. Moreover irreparable harm might encompass the "*particularly serious consequence for children of the insufficient provision of food or health services.*"[29]

Although the CRC and the child's best interests have rarely been invoked in asylum cases in the UK, there have been, since 2009, a small handful of decisions, culminating most recently in an authoritative panel of the Upper Tribunal[30] citing with approval the decision of the Federal Court of Canada in *Kim v Canada (MCI)* [2011] 2 FCR 448, which held that if a child's rights under the CRC were violated in a sustained or systematic manner demonstrative of a failure of state protection, the child may qualify for refugee status.

2. Best Interests in the United Kingdom

The UK ratified the CRC in December 1991 subject to an *'immigration reservation*' excluding children and young persons under immigration control. After considerable pressure, the UK removed its reservations to the UNCRC 4 December 2008. Article 24 of the EU Charter of Fundamental Rights is an incorporated and binding provision on all member states, including the UK: *"in all actions relating to children; whether taken by public authorities or private institutions, the child's best interests must be a primary consideration*."

Domestic jurisprudence relating to Article 8 of the European Convention on Human Rights (Article 8 ECHR) provides a rich source of law on the child's best interests. Successive Conservative governments have in recent years threatened to abolish the *Human Rights Act 1998*, which incorporated the ECHR directly into domestic law, however as long as the UK remains a founding member of the Council of Europe, the UK remains ultimately subject to the Court's decisions. Immediate plans to abolish the Human Rights Act 1998 have been shelved in the aftermath of Brexit and anecdotal evidence suggests that many Conservative MP's would oppose this proposal.

Insofar as best interests have been enshrined into the Statute book, there is effectively a dual hierarchy of safeguards in the UK. First, the welfare of the child is *paramount* where the child's upbringing is directly concerned; for example, in care, contact, residence, adoption and abduction cases, in how all children are safeguarded and accommodated and how they are treated in family court proceedings.[31] Secondly, where the child is indirectly affected by an immigration decision relating, for example, to a parent's immigration status, the child's best interests are a *primary* rather than a *paramount* consideration in the UK.[32] Therefore, the best interests of migrant children are a primary rather than a paramount consideration in the UK.

Lady Hale observed in *ZH Tanzania [2011] UKSC 4,* that article 3(1) of the UNCRC "*is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law*."[33] However, section 55 of the *Borders, Citizenship and Immigration Act 2009 Act* is often utilized to prioritize welfare over rights, which distorts the best interests assessment towards welfare issues, with the child's other rights, including the right to have the child's views respected, rarely being mentioned[34]. This is clearly not what was envisaged, however, when Lady Hale observed that "*the Strasbourg Court will expect national authorities to apply article 3(1) of UNCRC and treat the best interests of a child as 'a primary consideration'*." On her analysis, it is plain that the welfare duty under section 55 of the *Act* should be interpreted through a child's rights lens to best interests under Art 3 CRC. Therefore, the

section 55 duty should not be open to distortion as the correlation between best interests and welfare is clear and effectively synonymous.

Only in very recent policies[35] has any attempt been made to define what the best interests concept means. However, it is hoped that there will be far more emphasis on the best interests of the child and a process in place to make a best interest assessment or determination in response to Lady Hale's comments in *MM & Ors [2017] UKSC 10* (see below).

Shortly after removing its immigration reservation from the CRC, the best interest duty was incorporated into domestic law. Section *55* of the *Act* provides that in carrying out its functions relating to immigration, asylum or nationality, the Secretary of State must make arrangements for ensuring that those functions "*are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.*" All children in the UK are covered by this provision without any distinction or qualification as to residence or nationality. Statutory guidance was issued as to how this duty is to be implemented: '*Every Child Matters, Change for Children'.*[36] It was only after implementation of section 55, therefore, that courts in the UK began to consider the child's best interest as a mandatory duty in immigration proceedings, starting with the landmark decision of the Supreme Court in *ZH Tanzania [2011] UKSC 4* and culminating in *MM & ORS [2017] UKSC 1043*, enjoining decision makers to adopt a rigorous rights-based assessment of children's welfare in immigration proceedings.

3. Best Interests as an Interpretative Instrument

Although the best interests of the child is a very well developed area of immigration law in the UK relating to Article 8 ECHR family life cases[37], the application of best interests and the CRC to asylum claims is still a fairly novel concept that is rarely invoked. As referenced above, article 3(1) of the CRC provides that "the best interests of the child shall be a primary consideration." The CRC provides a valuable interpretative aid to the 1951 Refugee Convention definition and particularly as to the interpretation of the minimum threshold for persecution; the alienage criterion; the definition of 'particular social group'; and the exclusion provisions. As Pobjoy explains:

> the rights protected under the CRC are tailored to take into account the fact that children experience harms in different ways to adults. The treaty thus provides an automatic and principled means for adapting the persecutory threshold to take into account a child's heightened sensitivities and distinct developmental needs."[38]

The UNCRC has highlighted the importance of interpreting a legal provision that is open to more than one interpretation in the way that most effectively serves the child's best interests[39]. The UNHCR explained in its *General Comment No. 14*, that "*the best interests of the child requires the harm to be assessed from the child's perspective,"* which includes "*an analysis as to how the child's rights or interests are, or will be, affected by the harm"*[40]*.* General Comment No 14 has been approved by Lord Carnwath as "*the most authoritative guidance available on the effect of article 3.1"*[41]*.* The CRC offers a "*total approach to the protection and development of the child,"*[42] setting out all the objectives and elements of successful and durable solutions for unaccompanied refugee children[43]. As the most authoritative and comprehensive expression of the full range of non-derogable civil, political, economic, social and cultural rights of the child and of duties owed by a state to the child, the CRC represents the most eloquent and powerful aid to interpreting the UN Refugee Convention and other protection claims involving unaccompanied children.

Lady Hale, who has immeasurably developed and enriched the jurisprudence of the United Kingdom relating to the best interests of the child in both immigration and family cases, broached this subject in the case of *E v Chief Constable of the Royal Ulster Constabulary [2009] 1 AC 536* (at paragraphs 8-9):

> "8. … the special vulnerability of children is relevant in two ways. First, it is a factor in assessing whether the treatment to which they have been subjected reaches the 'minimum level of severity' - that is, the high level of severity - needed to attract the protection of article 3. As the Court recently reiterated in the instructive case of Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2008) 46 EHRR 23, para 48:
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> 'In order to fall within the scope of article 3, the ill-treatment must attain a minimum level of severity, the assessment of which depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'
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> Detaining a Congolese child of five, who had been separated from her family for two months in an immigration detention facility designed for adults, met that high threshold even though the staff had done their best to be kind to her.
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> 9. The special vulnerability of children is also relevant to the scope of the obligations of the state to protect them from such treatment. Again, in Mubilanzila Mayeka and Kaniki Mitunga v Belgium, at para 53, the court reiterated, citing Z, A, and Osman, that:
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> " ...the obligation on the parties under Article 1 of the Convention taken in conjunction with Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment including such ill-treatment administered by private individuals. Steps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge."”

The former President of the Upper Tribunal, HHJ Blake, adopting Lady Hale's approach of having particular regard to the vulnerability of children, has repeatedly emphasized that the CRC serves as an interpretative instrument to illuminate not only Article 8 ECHR claims[44] but also asylum claims involving children. In *LD (article 8 best interests of child) Zimbabwe [2010] UKUT 278*, he observed: "Although questions exist about the status of the UN Convention on the Rights of the Child in domestic law, we take the view that there can be little reason to doubt that the interests of the child should be a primary consideration in immigration cases. A failure to treat them as such will violate Article 8(2) as incorporated directly into domestic law." (28)

Blake HHJ has also held that the best interest duty[45] goes beyond procedural safeguards to the substantive asylum decision itself:

> [I]t is not helpful to attempt to analyse the duty … as being either procedural or substantive in effect. It applies to the procedures involved in the decision-making process; but it will also apply to those aspects of the substantive decision to which it is relevant". This echoed Lady Hale in ZH

> Tanzania [2011] UKSC 4, who held that the best interest principle is relevant "not only to how children are looked after in this country while decisions about immigration, deportation or removal are being made, but also to the decisions themselves."

This approach is clearly consistent with and echoes the *UNHCR's General Comment No.14 on the right of the child to have his or her best interests taken as a primary consideration*, which articulates how article 3(1) CRC should be interpreted in procedural and substantive terms[46].

Thus, while the vast majority of cases concerning the best interest of the child tend to involve children parties affected by the decision, as opposed to refugee children directly affected by the decisions, no attempt has been made to restrict the scope of the best interests principle. Indeed, as explained in *FM (Afghanistan) v Secretary of State for the Home Department*, UTIAC AA/01079/2010 (10 March 2011): "*[w]hilst this case is about the expulsion of a lone child who is separated from his family, it is unlikely that his best interests are to be treated as of less importance or significance than those of a child whom it is proposed to expel accompanied by a family member or members*"[47]

The minimum threshold for persecution is one area where the child's best interests and the CRC might intervene in such a way as to lower the threshold for a child as compared to adult cases. In Blake HHJ's clearest pronouncement on the subject, he explained in *ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (23 May 2013)* that the best interests of the child might *"illuminate*" a claim that the appellant is a refugee or entitled to humanitarian protection:

> we accept that the UN Convention on the Rights of the Child and other child-based instruments, have relevance for the assessment of whether the harm that a child might face in the country of origin is serious enough to engage international protection or whether any well-founded fear of persecution is for a Refugee Convention reason. (at para 21)

He then went on to envisage how on the facts of that case, the child's claim might succeed:

> We have no doubt that if a real risk of harm to S on return is made out in this case, either because of risk arising from the conduct of his parents or because S, or any child without family or friends to turn to, was highly vulnerable to sexual abuse in one form or another, an asylum claim or a claim to humanitarian protection could be made out. We accept that children can be a social group and face a real risk of persecution as such: children under one year old in King Herod's Bethlehem being an obvious case in point. That does not mean that any risk of serious harm that might happen to a child in his or her country of origin necessarily makes that child a refugee. (at paragraph 22)

On the facts of this case, it is not difficult to envisage certain child-specific forms of harm invoking article 32 of the CRC on child labour, sexual and other forms of exploitation (art. 34), or indeed harmful traditional practices (art. 24(3)) or abduction and trafficking of children (articles 11 and 35). It is also well worth recalling that children cannot consent to these forms of ill-treatment, unlike adults[48].

'*Upgrade*' asylum and protection appeals[49] were to be decided on the basis of a hypothetical return at the date of the decision/hearing, as opposed to the date of the expiry of any existing leave to remain. Although well-established,[50] this is an important point for children in the UK who, if accepted as minors, will be granted limited leave to remain until they achieve 17.5 years of age. This underlines the importance of a child's claim to surrogate protection being properly assessed at the date of

determination rather than on a speculative basis at some point in the future when their leave to remain will expire. If there were any remaining doubt as to a judge's duties under the CRC in a protection claim such as this, the Tribunal clearly indicated in *ST* that any failure by the First-tier judge to consider the best interests and welfare of the child would render a decision fatally flawed[51].

The minimum threshold for persecution in children's cases has also been explored in *JA (child - risk of persecution) Nigeria [2016] UKUT 560 (IAC,)* an authoritative Upper Tribunal panel including another former President, HHJ Collins, held: *"A child can be at risk of persecutory harm contrary to the UN Convention on the Rights of the Child in circumstances where a comparably placed adult would not be at such a risk."* The issue was how seriously widespread discrimination against albinos in Nigeria might affect a seven-year-old albino boy who had been living in the UK. The Upper Tribunal found that "*bullying and other unpleasant actions,*" whether or not physical and *"a general adverse attitude from the public at large"* would affect the child more deeply than a child brought up in Nigeria who had been exposed to that from birth (14). This authoritative Tribunal panel then made the most clearly enunciated proclamation of the applicability of the CRC to asylum claims in the UK to date:

> 15. <u>The Convention on the Rights of the Child is clearly a relevant consideration that this Tribunal and indeed all who deal with asylum issues should take into account,</u> and it is clear that a child could be at risk of persecutory harm contrary to the Convention in circumstances where a comparably placed adult would not be at such risk. (emphasis added)
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> 16. But as the UNHCR has observed in its Guidelines, ill-treatment which may not arise to the level of persecution in the case of an adult, may do so in the case of a child, and the child's youth immaturity, vulnerability etc. will rightly be related to how that child experiences or fears harm."

HHJ Collins also re-emphasized "*discrimination which has particular adverse effects can mean that there is persecution*", and cited with approval the decision in the Federal Court of Canada in *Kim v Canada (MCI)* [2011] 2 FCR 448: if a child's rights under the CRC were violated in a sustained or systematic manner demonstrative of a failure of state protection that child might qualify for refugee status. He then observed*:*

> …to acknowledge that children have distinctive rights was not to graft additional rights on to the definition in the Refugee Convention of persecution but was instead to interpret the definition of persecution in accordance with the distinctive rights that children possessed as recognised in the CRC and it was a denial of the CRC rights that the court believed to be important in deciding whether there was an entitlement to refugee status.

This decision underscores, therefore, the importance of a rigorous assessment of a child's rights under the CRC in all children's asylum claims in order to interpret the definition of persecution in a manner that is compatible with a child-rights framework. The facts of the case in *JA* clearly invoke various articles of the CRC including harmful traditional practices (art. 24(3)), abduction and trafficking of children (articles 11 and 35), the right to life, survival and development (art. 6) as well as potentially prevention of trafficking and of sexual and other forms of exploitation, abuse and violence (arts. 34, 35 and 36) and full access to education (arts. 28, 29(1)(c), 30 and 32).

In addition to the cases cited, one can easily envisage scenarios where internal relocation might be feasible for an adult. But for a child, the ordinary vicissitudes of life in the country of origin, to which the

child will no longer be habituated, will readily invoke the right to development (art. 6), full access to education (arts. 28, 29(1)(c), 30 and 32) and the right to an adequate standard of living (art. 27). Notwithstanding the policy of granting UASC status to children until the age of 17.5, these principles may equally apply to young persons who have only recently achieved majority. Moreover, the CRC is applicable to all children – not just unaccompanied children – and thus the best interests and rights of children should also be considered where children are dependent on their parent's claim as this could well impact on the outcome, as envisaged in the example given relating to internal relocation.

Following the decision in *JA (child - risk of persecution) Nigeria*, there can no longer be any shadow of a doubt about the applicability of the CRC in asylum claims involving children in the UK, even after the '*Great Repeal*'. Notwithstanding the limitations in scope of the section 55 duty and the likely impact of Brexit on the scope of Article 24 of the *EU Charter of Fundamental Rights*, the duty of the courts and Tribunals in England and Wales to consider the best interests of the child in asylum cases is now well entrenched into our common law. Indeed, it can also be said that since HHJ Collins' recent decision in *JA (child - risk of persecution) Nigeria* [2016] UKUT 560*,* the full panoply of protection under the CRC has been adopted into our common law in considering asylum claims relating to children.

However, in terms of statutory incorporation, the section 55 duty is directed at the Secretary of State and does not cover the courts and Tribunals, unlike the Children Acts. Given stated policy objectives of child protection and safeguarding and the common law position explained above, there is a strong imperative to strengthen the clarity and protection afforded by incorporating the entirety of the CRC into domestic law by Statute, as well as to extend the scope of the best interests duty to the courts and Tribunals. This is all the more so given that First-tier Tribunal judges have lost the jurisdiction to consider '*not in accordance with the law'* grounds[52], which allowed First-tier judges to consider public law type arguments surrounding whether the section 55 duty had been properly carried out by the Secretary of State and remit cases for reconsideration where appropriate.

Given that reported domestic case law making explicit reference to the child's best interests in recognition cases is rare, there is also a strong imperative for clear guidance which draws from the UNCRC General Comments[53] to explain how the CRC impacts on recognition of a child as a refugee under the 1951 Convention. To this end, the 2016 Home Office Instruction[54] is a good start and is most welcome as it makes explicit reference to the relevance of the best interests of the child through all stages of the refugee determination process.

4. Children as Members of a Family – the 'Quintessential' Social Group

Although the best interests of the child have rarely been considered in deciding whether a child is a refugee in the United Kingdom, the courts have, largely as a result of Baroness Hale's contribution, been willing to interpret '*particular social group'* in a child-friendly manner, as shown by decisions relating to '*the family*' as a *particular social group* and '*age'* as an *immutable characteristic*, in which it has been accepted that persecution might be meted out against children because of their family relationships/connections. These cases show that there is scope to interpret such cases in a way that is sensitive to the specific vulnerabilities and interests of the child.

It is quite common for children not to know enough about their family circumstances to establish a Convention reason, as explained below, for all kinds of reasons. Hence, the critical importance for the child of the decision of the House of Lords in *K and Fornah v SSHD* SSHD 2006 UKHL 46, in which the family was acknowledged as the quintessential or archetypal social group. The House of Lords

considered the problem arising where a family member attracts the adverse attention of the authorities, for a non-Convention reason or for reasons unknown, and persecutory treatment is then directed at other family members. The Court of Appeal had previously decided in *Quijano v Secretary of State for the Home Department [1997] Imm AR 227* that the principal must be persecuted for a Convention reason for other family members to have a Convention reason. However, the Court of Appeal indicated that *Quijano* was wrongly decided:

> The drug baron's persecution of the stepfather was plainly not for a Convention reason, and he could not have claimed recognition as a refugee. But there was nothing … to suggest that the real reason for the persecutory treatment of the appellant was anything other than his family relationship with his stepfather. That relationship may in one sense have been fortuitous and incidental… but if it was the reason for the persecution he feared it was, in principle, enough. (*per Lord Bingham,* at 21)

However, where some members of a family face persecution, but not others, the issue of causation may require close scrutiny: "*while it is not necessary that all members of the social group in question are persecuted… it is necessary that all members of the group should be susceptible to the persecution*." (*per* Lord Earlsferry, at 75, emphasis added)

Another interesting dimension to the House of Lords decision in *K and Fornah v* SSHD SSHD 2006 UKHL 46 was the perspective brought to bear by Lady Hale, who identified that a mother's perception of the impact on her child of an egregious risk previously tolerated by her, may be what triggers their flight (at 89).

Age as an Immutable Characteristic

In *LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005,* the Tribunal found that an Afghan orphan between the age of 12 and 18 who had nobody to turn to for protection was at real risk of sexual abuse in Kabul, and that risk was in respect of his membership of a particular social group – orphaned children. Age at the time of vulnerability to persecution is the kind of distinguishing characteristic that makes a social group for the purpose of the 1951 Refugee Convention. The Tribunal found that there would be no adequate reception facilities for an orphan child returned to Afghanistan; therefore, he would be at risk of exploitation and ill-treatment. The Tribunal found that he was at risk by reason of his age and held that his age was an immutable characteristic when determining whether he was a member of a particular social group. Although age changes constantly, nothing can be done to change it at the date of determination. Accordingly, the risk of serious harm was for a Convention reason and the child was entitled to asylum. This decision was upheld by the Court of Appeal in *HK (Afghanistan) v SSHD* [2012] EWCA Civ 315, clarifying that *LQ* was not authority for the proposition that all Afghan children and even less all children in the world are members of a particular social group irrespective of their circumstances; for example, if the unaccompanied child has family to whom he or she can return.

In *KA (Afghanistan) v. SSHD* [2012] EWCA Civ 1014, the Court of Appeal held that the assessment of risk cannot be subject to a *"bright line rule ... persecution is not respectful of birthdays – apparent or assumed age is more important than chronological age."*[55] In *EU (Afghanistan) & Ors v SSHD* [2013] EWCA Civ 32 (31 January 2013), the Court stated that, while it would be inhumane to return an unaccompanied young child without a family to a country where he had no family to take care of him, the rationale applied with less and less force with increasing age. However it is observed that the

presumption that vulnerability decreases with age, might not always apply. Doubts about and arbitrariness of ascribed dates of birth mean that the attainment of adulthood will not necessarily change the assessment of risk on return. There may also be cases, for instance, in which vulnerability may be more acute as the child matures (for example, older boys more vulnerable to radicalization/recruitment by the Taliban).

Returning to the decision in *ST (Child asylum seekers) Sri Lanka* [2013] UKUT 00292 (23 May 2013), Blake, HHJ stated:

> We accept that where a child or young person has a well-founded fear of being trafficked or exposed to sexual abuse, this is a form of serious harm sufficient to engage international protection and can be evidence of a fear of persecution for a Convention reason: usually membership of a particular social group, vulnerable to such form of harm.

Furthermore, the recently issued Home Office guidance: "*Processing children's asylum claims*", dated 12 July 2016,[56] acknowledges the importance of the best interests of the child: *"when a decision is being considered that might have an adverse impact on a child, a detailed assessment of the impact on the child in best interest terms is required, because this consideration has the potential to change that decision."*

There is, therefore, no rationale for restricting consideration of the child's best interests to Article 8 ECHR. The reasons for the relatively small number of best interest cases concerning determination of child refugees, as opposed to procedural safeguards (for example, age assessments, tracing, etc.) or Article 8 ECHR claims are unclear; however, the following may have had a bearing. Firstly, once unaccompanied children are accepted to be minors and no satisfactory return arrangements can be made, the Home Office will automatically grant leave to remain until the child reaches 17.5 years of age. They were unable to appeal on asylum grounds, therefore; the only remedy available to them to challenge the refusal of asylum was by means of judicial review. By the time they reached the age when they were able to apply to vary their leave and appeal any adverse decision on asylum grounds, the appeal hearing would take place when they were no longer children. However, the amended grounds of appeal[57] now result in a decision to refuse a protection claim[58] being capable of appeal on asylum grounds[59] without any restrictions on whether any other type of leave is granted.

The amended grounds of appeal may lead, therefore, to more children being able to bring their asylum appeals before the Tribunal at the earliest opportunity. However, there are other reasons why a child may not appear before the Tribunal. Younger children may not know enough about the circumstances surrounding their flight to the UK to explain the facts giving rise to a well-founded fear. Some children may be coached by their agents and therefore represent poor witnesses. A low appeals rate for unaccompanied children has been attributed to poor legal advice and representation[60]. Children may be considered too vulnerable to appear before the Tribunal. Although children cannot be compelled to either appear or to give oral evidence in their appeals, a failure to give oral evidence of the same facts now relied on in a subsequent appeal will usually not give rise to a '*good reason'* for previous adverse judicial findings of fact to be displaced in that subsequent appeal[61]. Thus, despite the threat of certification;[62] that is, withholding of a right of appeal, where an appeal could have been raised against a previous decision, children will often not appear before the Tribunal.

However, there are certain areas where best interest have been fruitfully considered before the Tribunal in the refugee context, including the duty to trace and age assessments.

5. The Duty to Trace

The duty to trace provides a clear illustration of how a failure to observe a procedural safeguard (discharge a duty owed by the host state to a child) under the CRC might also be relevant to the examination of an unaccompanied child's asylum claim and therefore used as an interpretative tool, providing a nexus to the refugee claim. The duty to make efforts to trace an unaccompanied minor's family or enquire about adequate reception arrangements as soon as possible after claiming asylum is now Home Office policy.[63] The cases that established the duty to trace in the UK invoked EU law.[64] However, ultimately, and in common with most duties owed by states to children, this duty stems from article 22(2) CRC.

In the cases considered, the duty to endeavour to trace is a double-edged sword, in that fulfilment of the duty to trace might facilitate the possibility for the child of family unity as well as reduce or eliminate the potential risk for the child on return. Conversely, the failure to endeavour to trace might alternatively deprive the child of the best evidence to demonstrate that he[65] was a refugee at the time of status determination.[66] This is because the absence of family on the ground, combined with childhood as an immutable characteristic and evidence of exploitation of children in Afghanistan, might well result in refugee recognition. In turn, the 17.5-year policy would normally result in the uprooting from the UK of a child transitioning into adulthood, in circumstances where, had the duty to trace been complied with, he might have been recognized as a refugee and ultimately entitled to remain permanently in the UK. The only way of redressing this prejudice, therefore, might be to grant status equivalent to refugee status.[67] Thus, a failure to discharge this duty may give rise to a breach of the Secretary of State's duty under section 55,[68] as this may mean it is not possible to make a proper best interest assessment.[69] The Tribunal must evaluate the effect of the consequences of that breach – the onus is on the appellant to establish a proper foundation for the grant of relief.

However, notwithstanding the absence of a '*bright-line* rule' when it comes to age and risk assessment,[70] the Court of Appeal has subsequently shown reluctance to apply the *"protective and corrective principle"*[71] where the duty to trace had not been discharged[72] if there is no longer any risk on return and the child is now over 18. A clear causative link must be shown between the breach of the duty to trace and the applicant's (presumably, current) protection claim before the principle can apply. Thus, a credible unaccompanied child who made all efforts to cooperate with the tracing process and could show an ongoing real risk might successfully invoke the principle. On the other hand, a claimant who was disbelieved and found uncooperative in frustrating attempts to trace his family may be beyond the embrace of the corrective principle because he cannot prove any real risk on return; hence, the absence of a causative link between the breach of duty and his protection claim.[73] Moreover, the Court observed that families might not want to cooperate with tracing if they had invested money to send the child to the UK[74].

In the important decision of the Supreme Court in *TN, MA & AA [2015] UKSC 40, however,* the Children's Commissioner intervened out of concern that this line of family tracing cases had resulted in children being categorized as truthful or not truthful to their detriment, when there was a whole range of reasons why they may not have been able to obtain details of their parents' whereabouts. As a consequence, the Court noted that the child should be consulted and a best interests assessment carried out before tracing and that this is in keeping with the Directive. The Court held that the principle in *Ravichandran*[75], that asylum appeals should be determined as at the date of the hearing, was sound and should apply without exception. The effect of the corrective exception to this principle in *Rashid*[76]

was to give the applicant a right which he did not need for his personal protection and therefore lacked a satisfactory principle, was unclear and should no longer be followed. A failure to discharge the tracing obligation should not lead to a presumption of credibility and appeals should not be allowed merely for breach of the tracing obligation. The purpose of tracing is for the child's welfare in promoting reunification, not for the purpose of gathering evidence. The child should be consulted about tracing before any steps are taken[77].

The importance of a best interests assessment being carried out before tracing was underlined by evidence given to a House of Lords Inquiry[78] by young witnesses who spoke about the dangers associated with tracing family members. Tracing is generally carried out by the Red Cross and is not perceived as a discrete process, such that the witnesses were worried that it would draw attention to family members, perhaps lead to disclosure of their whereabouts, and leave the family vulnerable to further persecution. This was the key issue around tracing in the inquiry, other than simply not knowing where to start looking for family members[79].

The Court indicated that where the respondent had failed in her tracing obligation, the appellant may ask the respondent to attempt to carry out a tracing process and the Tribunal may adjourn the appeal for that to be done, even if the appellant has by then turned 18, as the effects of the obligation are intended to last beyond minority. The Court agreed that if the appellant had identified people who might be able to confirm his account, but the respondent failed to pursue that lead, the tribunal might fairly regard the appellant's willingness to identify possible sources of corroboration as a mark of credibility. This, however, would be an evidential assessment rather than a presumption of credibility.

Therefore, while the tracing exercise might lead to evidence that will support an asylum claim while the child remains a minor, tracing should not be conducted without a best interests assessment being carried out first, which must involve consulting the child. Failure to discharge the tracing duty can no longer be used as evidence to found a 'corrective' grant of asylum in retrospect. What this scenario best illustrates, however, is the way in which the 17.5-year policy failed to provide a durable solution for unaccompanied child refugees establishing roots in the UK as they transition into early adulthood.

6. Family Unity

The duty to trace naturally leads us on to consider family reunion. Without repeating Paolo Biondi's scholarly and systematic explanation of the relevant international and EU legal framework, Article 8 ECHR, third country removal and the Calais litigation[80], which are therefore beyond the scope of this section.[81] This section considers the extent to which the best interests of children are honoured in the UK in the context of family unity with special regard to refugee children.

The drafters of the Refugee Convention clearly considered family unity to be a special protection need for unaccompanied children[82]. In addition to article 8 ECHR, article 10 of the UNCRC protects the right to family reunification, which shall be dealt with *"in a positive, humane and expeditious manner".*

Family reunion – children as sponsors

There is no provision in the UK Immigration Rules for recognized child refugees to sponsor their family members under the family reunion provisions of the Immigration Rules[83]. This omission is coupled with the decision not to adopt the *EU Family Reunification Directive*[84], which provides for children to sponsor

their parents and family members in refugee family reunion cases[85]. In this context, it is interesting to consider the limited utility of a tracing exercise where the child has no right to be reunited with his family in the UK and thus the only conceivable purpose of family tracing is to return the child to the country of origin.

Therefore, family unity cases where the child is the sponsor in the UK can only be considered outside of the Rules under article 8 ECHR. Although the President of the Tribunal has highlighted that such cases should be considered under article 8[86], this is arguably not an effective remedy, as shown by hard cases such as *SS (Somalia) and Others v ECO (2008) EWCA Civ 1534,* in which the children's best interests were not considered. The Court of Appeal declined to interfere with the finding that it was not unreasonable for the sponsors to return to the country where the applicants found themselves in, regardless of the lack of any evidence of lawful entitlement to do so.

Prof Heaven Crawley's evidence to the House of Lords Inquiry suggests that the policy of denying family reunion to child sponsors may be born out of "*the idea that somehow the increase in unaccompanied children entering the EU looking for protection is a conscientious strategy on the part of families to use their children as a hook to bring themselves in."*[87] This is confirmed by recent statements in the House of Lords:

> The UNHCR … (a)s the world expert in this field, … has cautioned against creating additional routes and benefits that target unaccompanied children, because of the risk of encouraging families to send children ahead alone—in other words, causing children to become unaccompanied, with all the risks that go with it. That would be a terrible thing to do or to encourage. We surely must do nothing that puts more children's lives at risk.[88]

However, the House of Lords Inquiry found "*no evidence to support the Government's argument that the prospect of family reunification could encourage families to send children into Europe unaccompanied in order to act as an 'anchor' for other family members.*" The report adverted to the fact that children tended not to make use of family reunification procedures available in other EU member states for fear of placing their families at risk[89].

The Home Affairs Committee has called on the government to reverse this approach:

> 41 It seems perverse that children who have been granted refugee status in the UK are not then allowed to bring their close family to join them in the same way as an adult would be able to do. The right to live safely with family should apply to child refugees, just as it does to adults. The government should amend the immigration rules to allow refugee children to act as sponsors for their close family. [90]

Just as children need greater protection from persecution, it might be argued as explained above, that children are in even greater need of family reunification than adults. Viewed in the context of the critical importance accorded to family unity in the Geneva Conventions and Additional Protocols, as well as in the CRC and the constant thread drawn between child protection and family unity[91] and the lack of any concrete evidence to support the notion that the family reunification policies for child sponsors elsewhere act as a magnet, the lack of provision for unaccompanied child refugees to apply for family unity represents a critical failure to honour the best interests of one of the most vulnerable categories of children in the UK.

Although the deficiency is under review, with new family reunion guidance relating to visas outside the Rules awaited[92], given recent ministerial statements[93] it seems most unlikely that the United Kingdom will reverse its current policy preventing unaccompanied children from sponsoring their family members.

Family reunion – children as applicants

Children may seek to join their parents who are recognized refugees in the United Kingdom under the family reunion provisions in the Immigration Rules. Given what is explained above about children as a particular social group, it is not difficult to envisage many scenarios where children of refugees seeking to enter the UK for family reunion might themselves be unaccompanied refugees in the country of origin or in the country in which they are stranded; either by virtue of their own circumstances or by virtue of being a family member of their relative in the UK. Moreover, immediate family members of refugees are also entitled to recognition as refugees.

The Immigration Rules allow the child of a recognized refugee in the UK to apply for family reunion[94]. The child must be under 18 years at the date of the application; must not be leading an independent life, must be unmarried; and must not have formed an independent family unit. The child must also have been part of the refugee's family unit before fleeing the country of origin. The child must not fall for exclusion under article 1F of the Refugee Convention. The harsh minimum income threshold under Appendix FM[95] and the maintenance and accommodation provisions[96] that apply in other immigration cases do not apply to children of recognized refugees. Therefore, a refugee living on welfare benefits may apply for family reunion with his/her biological children.

The family reunion Rules on children of recognized refugees are therefore fairly straightforward. However, some refugees struggle to show that a particular child was part of the family unit for various reasons. In *BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055* the Tribunal said that what is a 'family unit' for the purposes of para 352D(iv) of the Rules is a question of fact. It is not limited to children who lived in the same household as the refugee. But if the child belonged to another family unit in the country of the refugee's habitual residence it will be hard to establish that the child was then part of two different 'family units' and should properly be separated from the 'family unit' that remains in the country of origin.

In a similar vein, paragraph 319X of the Immigration Rules provides for other children of the same household who are not the children of the refugee sponsor in the UK. In addition to the requirements for children set out above, other children must also show that "*there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care"*. The sponsor must also be able adequately to maintain[97] and accommodate any such child without additional recourse to public funds. The serious and compelling family or other considerations is a very high hurdle that is very difficult to satisfy. The result is that those who are not the biological children of the refugee sponsor who may nevertheless have been informally adopted by the sponsor and living in the same household under the same roof, will often get left behind. Children of those granted humanitarian protection are entitled to apply in the same way under similar provisions[98].

Children who do not fall within the above categories must show *inter alia* that their sponsor parent(s) can adequately maintain and accommodate them without any additional recourse to public funds, in addition to having to show that the sponsoring parent has either had sole responsibility for the child's

upbringing or that there are "*serious and compelling family or other considerations which make exclusion of the child undesirable*" and suitable arrangements have been made for the child's care[99]. As will be apparent from the above, these requirements are very exacting and difficult to satisfy.

The Chief Inspector of Borders and Immigration, David Bolt, published a report on Home Office handling of family reunion applications[100] in September 2016. The inspection identified that children had been refused for failing to provide evidence of contact post-flight with the UK sponsor; an inapplicable and inappropriate test for children. The report observed that the unpublished suspension of DNA testing by the Home Office since June 2014 has resulted in delays issuing entry clearance, with refusal rates for Somali and Eritrean applicants doubling since 2013. None of the cases sampled were referred for consideration outside the Immigration Rules where '*exceptional circumstances*' or '*compassionate factors*' called for this. In particular, the treatment of married women under the age of 18 took no account of relevant 'compassionate factors'. The inspection highlighted a particularly egregiously apposite case where the wife, aged 16, with two children, aged eighteen and eight months was stranded in Syria without family support. She was refused twice, as the Rules require spouses to be aged 18 at the time of the application. Recognizing that many applicants fleeing areas of conflict or fragile states were unable to produce documents listed in the Home Office guidance, the report criticized the failure to defer applications for further evidence to be provided.

Many other criticisms were made, including concerning the capture, storage and availability of family details records provided by refugees on arrival in the UK, resulting in delays and erroneous decisions. The failure to exploit potential for putting things right swiftly through interviews or deferring decisions for further evidence. Supporting evidence had been misread or misinterpreted; not all of the positive evidence had been considered; and decision-making was often not deferred to give the applicant the opportunity to provide further evidence. Refusal notices often did not use plain English, used irrelevant or incorrect 'cut and paste' paragraphs from other notices, or were unbalanced and failed to explain why the application had been refused or what other evidence might be required to support any reapplication. Decision quality assurance was deficient, with different approaches to Syrian applicants in Amman and in Istanbul; and reviews did not always spot errors and failed to ensure that individuals who qualify and who are in need of protection received the correct outcome, as reviews focused mostly on successful applications. Between 2014 and 2015, the number of appeals declined sharply as reapplication is free and much quicker (appeals were taking nine to eleven months to be heard); and 'allowed appeal' and 'decision overturned' rates rose noticeably often because new evidence had been provided, particularly DNA evidence. The Home Office's current approach to family reunion applications too often failed to deliver their ambition to get decisions 'right first time'. More was required to ensure that applicants provide all necessary evidence, including DNA evidence, with their first application to avoid prolonging the process needlessly.

The report therefore highlights the numerous inadequacies and failures of procedures in place for family reunion entry clearance applicants, many of whom are child applicants. The Chief Inspector's report therefore suggests that the way in which the entry clearance system is operated is failing the families of refugees and failing to honour the best interests of children.

Children not included in the Rules on Family Reunion – article 8 intervenes?

De facto adopted children

There are separate categories of requirements to be met by those seeking to enter the UK as adopted children/ children to be adopted under paragraphs 310-316C. Complications arise for children who are

informally adopted. The decision in *MK (Somalia) v Entry Clearance Officer [2009] Imm AR 386* illustrates the additional hurdles faced by de facto adoptive children in the Rules[101], including the requirement that both adoptive parents live together abroad assuming the role of the child's parents for at least 18 months and living together with the child for 12 months immediately prior to the application for entry clearance[102]. This is an impossible hurdle for refugee parents sponsoring a de facto adopted child to overcome. Article 8 is, therefore, the only remedy for de facto adopted children left behind in the country of origin / third country.

Further hurdles were identified by the decision in *AA (Somalia) v Entry Clearance Officer (Addis Ababa) [2012] EWCA Civ 563,* in which a child was informally adopted under an Islamic law process akin to adoption, known as "Kafala". The Court of Appeal, considering the correct interpretation of the phrase "*child of a parent*" under paragraph 352D of the Immigration Rules, held that the interpretation of "*adoption*" was expressly defined by paragraph 309A, precluding the notion of adoption outside of that meaning. Being part of the family unit at the relevant time was not enough to give entitlement to entry; it was but one of the six requirements that had to be met under paragraph 352D, including the requirement that the applicant "*is*" the child of a parent granted asylum in the UK, not that the applicant was regarded as, or treated as, such a child. The Supreme Court upheld this approach in *AA Somalia (FC) v Entry Clearance Officer (Addis Ababa) [2013] UKSC 81*, in which it was held that paragraph 352D provides for the grant of leave to enter to the child of a parent who had been admitted to the UK as a refugee, and that this did not embrace a child who had been informally adopted under the Kafala process of legal guardianship.

The First-tier Tribunal had allowed the appeal under article 8 ECHR and the child was granted entry once that part of the decision was upheld by the Upper-tier. Insofar as the decision relating to the Rules and the best interests of the child was concerned, the Supreme Court adopted the rationale of Maurice Kay LJ in *MK*:

> Do these documents establish or evidence an obligation of customary international law that is positively protective of de facto adopted children? In my judgment they do not. At best they illustrate an increasing awareness of the need for a flexible approach to the concept of family but they do not address in terms the question of de facto adoption which, because of its very lack of formality, presents a receiving state with obvious problems of verification. There is no material referred to … which demonstrates a clear international consensus about the particular problem of de facto adoption — quite the contrary. Whilst there is a perceptible concern that the concept of family, in the context of family reunion, should not be resistant to social and cultural change, I do not consider that there is a precise, identifiable obligation of customary international law that is prescriptive of the national approach to de facto adoption. (para 12)

The Supreme Court in *AA* acknowledged the position was harsh for informally adopted children of refugees, commenting:

> I see great force in Mr Gill's criticisms of the use of the Para 309A definition in the context of a rule which is concerned with the treatment of refugees and their dependants. Mr Eadie's only answer, as I understood him, was that clear definitions were needed to establish "bright lines". That answer loses most of its force if the bright lines are drawn so restrictively that they have in practice to be supplemented by the much fuzzier lines drawn by article 8. In the interests of both applicants and those administering the system, it seems much preferable that the rules

should be amended to bring them into line with the practice actually operated by the Secretary of State, including that dictated by her obligations under international law.

However, to the best of the author's knowledge, the Rules have not been amended to embrace informally adopted children of refugees and there remains no policy outside the Rules which enables family reunion for such children.

As the discussion in *MK (Somalia)* reveals, despite the existence of a previous policy drawn from a Ministerial Statement dated 17 March 1995, providing that, following grant of asylum status to a parent, "*reunion of the immediate family*" would be permitted as a concession outside of the rules, the policy had been supplanted by the amended rules and the applicant therefore had to await the decision of the Upper-tier Tribunal before being granted entry under article 8, ECHR. The quality of leave to remain granted under article 8 is inferior to that granted under the refugee reunion rules, in that it would take a person granted the former almost a decade to settle and then naturalise, as opposed to immediate settlement under the Rules. Therefore, it can be said that the Rules on de facto adopted children remain non-compliant with article 8 ECHR. Although article 8 might ultimately intervene for an informally adopted child where the strictures of the Rules are not met, the best interests of such a child are not factored in to the Rules, are not met by the precarious form of leave granted or by the delays involved in awaiting an appeal to the Tribunal, which currently involve an average wait of 48 weeks and in some cases, up to 83 weeks[103].

Children born from relationships subsequent to the refugee's flight from the country of origin are not included in the Immigration Rules on family reunion[104]. This causes hardship for some refugees who are unable to satisfy the minimum income requirements in Appendix FM. However, there is some hope that the Rules will be amended to reflect the best interests of children caught out by the Rules following the Supreme Court decision in *MM& Ors [2017] UKSC 10 (see below).*

Although not a refugee case, the decision in *Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 88(IAC)* again by Blake J, established the extra-territorial reach of the best interests duty. In assessing an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable there must be an assessment of what the child's welfare and best interests require. Where an immigration decision engages article 8 rights, due regard must be had to the CRC. An entry clearance decision for the admission of a child under 18 is "*an action concerning children...undertaken by…administrative authorities*". Therefore "*the best interests of the child shall be a primary consideration*".[105] Although the statutory duty under section 55 of the *UK Borders Act* 2009 only applies to children within the UK, the broader duty doubtless explains why the Secretary of State's IDI invites Entry Clearance Officers to consider the '*spirit of that duty'* and to apply the statutory guidance issued under section 55.

In the case of *SM and Others v ECO Addis Ababa [2015] EWCA Civ 223*, the Court of Appeal refused to interfere with a case in which three Somali children sought to join their mother. Their mother arrived in the UK in 2004 as a spouse, leaving her children in the care of her half-brother in Somalia and subsequently with a neighbor. On arrival in the UK her husband refused to sponsor the children as agreed. The couple eventually divorced. The Court of Appeal found that although Article 8 was engaged, it was far from clear whether the refusal of entry clearance constituted a serious interference with their family life given the passage of time (five years) and the fact that the children had been left in the care of the mother's half-brother. A number of criticisms were made of the mother's choices[106].

The decision was upheld as proportionate as the mother could reasonably be expected to enjoy family life in Ethiopia. Bean LJ wrote:

> The case is quite different from the more typical one where the status quo before the refusal of entry clearance or the proposed removal was or is a united family... the trauma of breaking up a family and thereby rupturing family ties may be significantly greater than the effect of not facilitating the reunion of a family whose members have become accustomed to living apart following a decision by part of the family to live elsewhere.

Thus, it can be said that it will be much harder for children who have been separated from their parent/s for some time to enter the UK under article 8 where difficult choices may have been made in the past to leave children in the care of other adults in the country of origin.

Mandate refugees

The UK runs a number of refugee resettlement initiatives, including the Gateway Protection Programme, for those who have a family member who is willing to accommodate them, and the Mandate Refugee Programme[107] for particularly vulnerable refugees. The Vulnerable Person Relocation Scheme was launched in January 2014 and was aimed at evacuating refugees from Syria. Priority was given to survivors of torture and violence, and women and children at risk or in need of medical care.

Once the UNHCR has determined their entitlement to mandate refugee status, the Gateway Protection Programme offers a legal route for (currently) 750 persons of particularly vulnerable refugees to settle in the UK each year[108]. After referral by the UNHCR, checks are carried out[109] to assess:

- their refugee status
- their need for resettlement (including whether their human rights are at risk in the country where they sought refuge, and whether they have long-term security in the country where they currently live)
- security risks (whether the applicant has committed a serious crime or represents a threat to national security, for example)
- their family status (including dependents and their relationship to the applicant)
- their health and the health of their dependents

Applications may be refused if the Secretary of State has good reasons to believe that resettlement in the UK would not be for the public good. As can be observed from the above, there is no specific reference to the particular vulnerability of children let alone to their best interests and only 14 people were admitted through the scheme in 2014.

The Mandate Refugee Settlement Programme allows refugees from around the world with close family ties with the UK to be resettled. The consideration of asylum claims made by mandate refugees in the UK is governed by a Home Office policy[110]. Close family members are defined as spouse, minor child or parents/grandparents over the age of 65. In exceptional circumstances, other relationships will be considered: parent/grandparent (in the singular) under 65; and family members aged 18 or over – son, daughter, sister, brother, uncle, aunt. No other categories of family relationship will meet the close ties requirement.

The applicants in *ST and ET v Secretary of State for the Home Department [2014] EWCA Civ 188* were two vulnerable Iraqi women at risk living precariously in Syria and two Iranian women in Turkey. They had all been granted mandate refugee status by the UNHCR and all had close relatives in the UK. The Court of Appeal held that the applicant must satisfy the specific criteria set out in the Mandate Refugee Scheme (by falling within certain categories of family member, required the applicant refugees to fall within those categories; that is, close ties with the UK, including parents aged over 65 and daughters or siblings aged 18 or over, in exceptional circumstances). The Court of Appeal held that considerations outside of the policy, including article 8 ECHR were *not* engaged by the policy and if it was, any interference was proportionate. The opposite view had previously been taken by the High Court in *C1 v Secretary of State for the Home Department [2013] EWHC 2415 (Admin)*. Although *ST & ET* did not relate specifically to children, this case shows that the UK courts will not consider article 8 capable of intervening in a mandate refugee case. It will be interesting to see if the Calais litigation will have any impact on such cases.[111]

In *R (on the application of T & N) v SSHD [2014] EWHC 2656 (Admin,)* the High Court upheld the Secretary' of State's refusal to resettle Iraqis, one of whom had a history of involvement with the Ba'athist regime on grounds that admission would not be conducive to the public good. It was held that the Home Office was entitled to retain absolutely flexibility pursuant to its resettlement policy and there was no obligation on the Secretary of State to consider their applications in accordance with the Convention relating to the Status of Refugees 1951.

It is thus interesting to note that neither article 8 nor article 3 ECHR will intervene in mandate resettlement where exclusion grounds are said to apply. There are no known reported mandate cases relating to children, but there would be a strong imperative for best interests to operate in such cases, particularly where exclusion/ conducive grounds might otherwise have applied. Likewise, it is proposed that there is no rational basis for excluding children pursuant to the alienage criterion in mandate cases, simply because they are not outside of their country of origin.

Other family unity cases

Other than in mandate refugee cases, there is no provision in the UK for a child to make an asylum claim from abroad or to seek entry clearance in order to enter for the purpose of making an asylum claim[112]. Children may themselves be refugees not yet recognized as such in the country they find themselves in, and their parents may not have been recognized as refugees in the United Kingdom but may have been granted some form of leave to remain in another capacity. For these reasons, it is worth briefly examining the extent to which best interests is considered in other family unity cases where a child may apply to enter the UK.

In *VW (Uganda) v SSHD and AB (Somalia) v SSHD (2009) EWCA Civ 5*, which is taken as an exemplar only, the applicants in *AB* were children from Somalia living without lawful status in Ethiopia. The case was considered under article 8 ECHR, rather than under the family reunion rule as the sponsor had not been recognized as a refugee. The Court confirmed that the question in gauging proportionality of removal that would break up a family was not whether there were insurmountable obstacles but whether it is reasonable to expect the family to live with the applicants. The sponsor had no entitlement to reside in Ethiopia. However, the Court of Appeal observed that in family reunion (that is, entry clearance rather than in-country) cases, the moral pressures were different from those enforcing the break-up of a family life enjoyed in the UK. The mother had chosen to leave her children behind when she came to the UK; it

was open to the immigration judge to find that if the sponsor's family could live in Ethiopia without entitlement or leave, the sponsor could too. The best interests of the Somali children living in Ethiopia were not considered but the best interests of the British citizen child in VW were taken into account. It was reasonable to expect the parents in AB to live in Ethiopia with their Somali children where none of them had leave to reside, but it was not necessarily reasonable to expect the British child and Nigerian father, who were settled in the UK, to follow the mother/ wife to Uganda:

> …the child will be separated from her mother in her own interests, but with possibly damaging consequences for her development, and - one may add – grief for her mother. If this is speculation, however, what is certain is that the appellant will be faced, if she is to be removed, with a painful dilemma in relation to her child. Whichever resolution is arrived at, it will not be in the child's best interests.(47)

The Minimum income threshold and impact on children

In *MM & Ors [2017] UKSC 10,* the Supreme Court held that the minimum income threshold that applies in non-refugee family cases causes hardship to many but this did not make it unlawful. It has the legitimate aim of ensuring that the couple do not have recourse to welfare benefits and have sufficient resources to play a full part in British life. The income threshold chosen was rationally connected to this aim, and the acceptability in principle of such a threshold was confirmed by the ECtHR. However, nothing in the minimum income provisions fail to give effect to the duty to safeguard the welfare of any children involved, as required under section 55 of the 2009 Act and article 3 of the UN Convention on the Rights of the Child. The Instructions in their current form do not adequately fill the gap; rather, they are defective and need to be amended in line with the principles established by the ECtHR. The section 55 duty stands on its own and it should be clear from the Rules themselves that it has been taken into account. In this respect, the Supreme Court granted a declaration that the Rules and the Instructions are unlawful. Restrictions in the Rules on taking into account the prospective earnings of the foreign spouse third party support are harsh but it was not irrational for the Secretary of State to give priority in the Rules to simplicity of operation and ease of verification. Operation of the same restrictive approach outside of the Rules is inconsistent with the evaluative exercise required by article 8. A tribunal on an appeal can judge for itself the reliability of any alternative sources of finance and it makes little sense for decision-makers at an earlier stage to be forced to take a narrower approach. In this respect, aspects of the Instructions require revision to ensure that decisions are taken consistent with the duties under the *Human Rights Act 1998*.

Conclusions

It may be concluded that, although article 8 is a very fruitful area of jurisprudence in the UK on the best interests of the child as is that relating to the child as a member of a particular social group, consideration of best interests in the refugee determination context is a relatively novel phenomenon[113]; the duty to trace is one of the few areas of the CRC that has been explored. However, the applicability of the CRC to asylum claims is now beyond dispute and can be said to be well entrenched in our common law. Obvious areas that call for further development of the best interests principle to refugee law in the UK might include internal relocation, exclusion, the alienage criterion, the impact of denial of nationality and statelessness of children born outside of their parents' countries of origin (a very real and growing concern arising from the ongoing conflicts in the Middle East). Last, but by no means least, there is a pressing need to protect separated children who may have been trafficked

– an issue that is not always identified and one for which the Refugee Convention does not necessarily provide solutions.

As will be apparent from the above overview relating to family tracing and family unity, the only conceivable point of carrying out family tracing in the UK from a policy perspective is to return a child to the country of origin, as child refugees are not allowed to sponsor their parents or other family members under the family reunion Rules. The entry clearance procedure in family reunion cases has come under very heavy criticism by the Chief Inspector of Borders and Immigration and children are often the innocent casualties of that process. As for child applicants, standard, run-of-the-mill households with children born prior to the sponsor's flight from the country of origin are included within the Rules on family unity. However, other children from less orthodox households are not included. Children who are not the biological child of the refugee or who were informally adopted or were born of a post-flight union are not protected by the Rules on family reunion. Sponsors of these children must satisfy the minimum earnings threshold as well as other rigorous requirements relating to children. Article 8 will not always intervene for such a child seeking to sponsor family members and those who are successful must often await a lengthy appeals process and are granted a quality of leave inimical to the pursuit of a stable, durable solution in which children and young persons might develop and flourish. Again, article 8 will not always intervene in such cases. As for child applicants whose parents are not recognized refugees and who cannot meet the minimum income threshold, judgments are made about tragic decisions desperate mothers make in an attempt to build a safer future for their children that result in vulnerable children being excluded from the UK. Therefore, it can be said that the UK is failing child refugees and certain children of refugees as it relates to one of the most important building blocks for creating a durable solution; that of family unity. However, there is good reason to hope that this too may change with the review that ensues following the Supreme Court decision in *MM & Ors [2017] UKSC 10*. It is hoped that the new guidance will place the best interests of *all* children first and foremost as a primary consideration[114] and that a child-rights framework to the consideration of asylum claims will be adopted.

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PART 2: BEST INTERESTS OF THE CHILD IN CANADIAN LAW AND POLICY

1. Immigration and Refugee Protection Act (IRPA) and Regulations (IRPR)

Section 3(3)(f) of IRPA provides that the *Act* is to be "construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory."[115] This includes the *Convention on the Rights of the Child (CRC)*, of which the BIC is the central theme.

The reference to BIC in the law appears primarily with respect to detention of minor children and in humanitarian and compassionate (H&C) applications where an individual can apply for permanent residency from within Canada for H&C grounds.

In the context of immigration detention, section 60 of the IRPA states that, "a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child."[116]

Section 249 of the Regulations (IRPR) outlines the special considerations that apply in relation to the detention of minor children who are less than 18 years of age:

> (a) the availability of alternative arrangements with local child-care agencies or child protection services for the care and protection of the minor children;
> (b) the anticipated length of detention;
> (c) the risk of continued control by the human smugglers or traffickers who brought the children to Canada;
> (d) the type of detention facility envisaged and the conditions of detention;
> (e) the availability of accommodation that allows for the segregation of the minor children from adult detainees who are not the parent of or the adult legally responsible for the detained minor children; and
> (f) the availability of services in the detention facility, including education, counselling and recreation.[117]

The Detention Enforcement Manual (ENF20) outlines the policy of Immigration, Refugees and Citizenship Canada (IRCC). The ENF20 clarifies that the "IRPA does not allow a minor child to be detained for their protection," given that "child protection responsibility rests with the provincial youth protection agencies."[118] It is a generally understood that it is never in the best interest of a child to be detained.

2. Humanitarian and Compassionate (H&C) Applications and Applications to the Immigration and Refugee Board's Immigration Appeal Division

The BIC is also accounted for under other sections of the IRPA, pertaining to H&C Applications (section 25) and to applications to the Immigration Appeal Division (sections 67-69) of the Immigration and Refugee Board (IRB). A pivotal part of H&C applications is that "the best interests of a child directly affected" by this application must be taken into account by the officer making the decision.[119] This consideration applies to all children under the age of 18, whether a Canadian or foreign-born child, no matter what the relationship between the applicant and the child is, including parent-child, grandparent-child, etc.[120]

In assessing H&C submissions, the decision makers must be "alert, alive and sensitive" to the best interests of the children *(Baker v Canada),* [121] and should bear in mind that "[c]hildren will rarely, if ever, be deserving of any hardship" *(Hawthorne v. Canada)*[122]. As children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief *(Kanthasamy v. Canada).*[123]

However, the codification of the principle of "best interests of a child" into the legislation does not mean that the interests of the child outweigh all other factors in a case. While factors affecting children should be given substantial weight, the BIC is only one of many important factors that the decision maker needs to consider when making an H&C decision that directly affects a child.[124]

The outcome of a decision under 25(1) that directly affects a child will always depend on the facts of the case. Decision makers must consider all evidence submitted by an applicant in relation to their A25(1) request. The relevant BIC guidelines (outlined below) are not an exhaustive list of factors relating to children, nor are they necessarily determinative of the decision. Rather, they are meant as a guide and illustrate the types of factors that are often present in A25(1) cases involving the BIC. As stated by Madam Justice McLachlin of the Supreme Court of Canada, "[t]he multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interests to expediency and certainty".[125]

Generally, factors to consider pertain to a child's emotional, social, cultural and physical welfare. Some examples of factors[126] that applicants may raise include but are not limited to:

- the age of the child
- the level of dependency between the child and the H&C applicant
- the degree of the child's establishment in Canada
- the child's links to the country in relation to which the H&C assessment is being considered
- the conditions of that country and the potential impact on the child
- medical issues or special needs the child may have
- the impact to the child's education
- matters related to the child's gender.

The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born.[127]

With respect to applications at the Immigration Appeal Division, it must take into account the best interests of a child directly affected by the decision when deciding whether to allow an appeal, or to stay a removal order (section 67 – 69).

3. Provincial and Territorial Legislation in BIC Considerations in the Family Law Context

Child custody, access, parenting and contact law and services in Canada are guided by the basic principle that all decisions must be made in the BIC.[128] The following table[129] provides the key factors and considerations in the various provincial and territorial legislation.

Factors and Further Considerations
1. The health and emotional well-being of the child[130]

- Character and emotional needs, as well as the physical, psychological, social, educational and economic needs of the child; the need for stability and safety, taking into account the child's age and stage of development.
2. The views of the child[131] - "[T]o the extent the court considers appropriate, having regard to the age and maturity of the child"; “if satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not be harmful to the child"; "where such views and preferences can reasonably be ascertained"; "to the extent that it is appropriate to ascertain them".
3. Love, affection, quality of relationship and ties that exist between child and other persons[132] - Quality of the relationship that the child has with the person who is seeking custody; the nature, strength and stability of the relationship between the child and significant persons in the child's life, as well as the relationship to each person in the child's household, and with the applicant are to be considered.
4. Plans proposed for child’s care and upbringing[133] - The home environment proposed to be provided for the child and the plans that the person who is seeking custody has for the future of the child.
5. Ability of custody applicant to exercise his/her responsibilities by providing guidance and education, the necessaries of life and any special needs of the child[134] - Ability and willingness of the applicant to care for and meet the needs of the child; ability of each parent, guardian, or other person in respect of whom the order would apply to communicate and cooperate on issues affecting the child.
6. Ability of each person seeking custody or access to act as a parent[135] - The capacity of the person who is seeking custody to act as legal custodian of the child, and the capacity of the person who is seeking access to act as a legal custodian of the child.
7. Permanence and stability of proposed family unit with which the child will live[136]
8. The willingness to facilitate contact of the child with the other parent[137] - The ability and willingness of each applicant to communicate and co-operate on issues affecting the child, and the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian.
9. Relationship by blood/adoption between the child and each party to the application[138]
10. The time the child has lived in a stable environment[139]
11. The child's cultural and religious heritage[140]
12. The child's cultural, linguistic and spiritual/religious upbringing and ties[141]
13. Family violence, including any impact on the safety of the child or other family members; the child's general well-being; or the ability of the person engaged in family violence to care for and meet the needs of the child[142]
14. The effect a change of residence will have on the child[143]
15. Who has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline[144]
16. The history of care for the child, having regard to the child's physical, emotional, social and educational needs[145]
17. The need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of the child's full potential according to his individual capacity[146]

18. Any civil or criminal proceedings relevant to the safety or well-being of the child[147]

However, the following are factors in some jurisdictions that are *not* to be considered include:

a) The parents' conduct, unless it bears directly on ability to care properly for the child;[148]
b) The parents' past conduct, unless the conduct is relevant to their ability to parent;[149]
c) No presumption and no inference as between parents that one parent should be preferred over the other one on the basis of the person's status as a father or mother;[150]
d) The economic circumstances of a person seeking custody or access.[151]

4. The Immigration and Refugee Board (IRB)

The IRB is an independent tribunal established by the Government of Canada in 1989 charged with making decisions on refugee claims and other immigration matters. Through its adjudicative function, the IRB has placed significant emphasis on the fair treatment of refugee children in Canada's refugee determination process. To safeguard the rights of the URC in Canada, and to ensure that the often unique and individualized experiences of these minor claimants are considered, the IRB has developed and implemented a series of instructive *Chairperson Guidelines* to assist IRB decision-makers with their adjudication of these claims. Flowing from international conventions and national legislation, the IRB, through its Chairperson, has drafted and developed these documents over time to assist decision-makers with a wide variety of aspects of refugee cases that they assess and adjudicate in the hearing process.

This section of the paper offers the Canadian perspective on the BIC in Canadian refugee case law and provides a short overview of IRB *Guideline* 3 on Child Refugee Claimants (*Guideline 3*), its relevance and importance to the refugee determination process as it provides procedural guidance to decision makers in assessing the claims of refugee children and manner of conducting the hearing. *Guideline 3* is strictly procedural and refers to BIC; however, no guidance is provided with respect to a tool for decision makers to make a BIC assessment and may be an issue for consideration if Guideline 3 were updated. Although by no means exhaustive given the growing international jurisprudence on this important subject, this paper offers contemporary Supreme Court of Canada (the Court) cases to establish what factors are considered in assessing the claim and fear of a minor claimant, as well as the importance of considering the BIC in that assessment. These cases also reveal the BIC both defined and applied through case law.

The importance of the United Nations Convention on the Rights of the Child (CRC) [152] to the IRB's use of the *Guideline 3* in the national refugee determination process is also referenced through the Court decisions, as is the requirement to apply it. In several cases, the Court has held that it might be permissible not to consider *Guideline 3* so long as the decision-maker takes other procedural factors into account. The paper offers several Court cases surrounding various aspects of the role of BIC and the application of the CRC in the Canadian determination process and looks at, among other matters, whether a child is required to establish a subjective fear. A significant Australian Court decision has been included to highlight the importance of procedural fairness in URC claims and the necessity of the aforementioned guideline to good decision-making where panels have considered, or failed to consider, its application and instead relied on other elements of URC claims.

5. IRB Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues

In 1996, the IRB issued *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (Guideline 3). At the time,* Canada's *Immigration Act* did not spell out any specific procedures or criteria for decision makers in dealing with refugee claimants under the age of 18 years. In formulating its approach, the IRB took its lead from the CRC and the Guidelines on Protection and Care of Refugee Children issued by the UNHCR[153]. While enshrining basic rights into these documents, the international community recognized that refugee children have unique vulnerabilities and different requirements from adult refugees when seeking refugee status.

Guideline 3 is divided into two parts: the first of these addresses procedures to be followed when considering the refugee claim of a child; the second part deals with evidentiary issues. *Guideline* 3 begins:

> In determining the procedure to be followed when considering the refugee claim of a child, the CRDD[154] should give primary consideration to the best interests of the child…" and continues: "The question to be asked when determining the appropriate process for the claim of a child is what procedure is in the best interests of this child?

According to *Guideline 3*, the concept of the BIC is broad and may include factors such as 'age, gender, cultural background and past experiences of the child.' Justice McLachlin of the Supreme Court of Canada, in *Gordon v. Goertz*[155] provided an interpretation of the phrase 'best interests of the child' but also expressed the difficulty with giving the phrase a concrete definition:

> The best interest of the child test has been characterized as indeterminate and more useful as legal aspiration than as legal analysis. The multitude of factors that may impinge on the child's best interest make a measure of indeterminacy inevitable. A more precise test would risk sacrificing the child's best interest to expediency and certainty.

More specifically, *Guideline 3* reflects this broad interpretation by providing substantive direction to adjudicators of refugee status that the claims of unaccompanied refugee children (URC) are to be given priority throughout all stages of the refugee determination process. That means scheduling a hearing and appointing a designated representative as soon as possible. Section 69(4) of the *Immigration Act*[156] provides: "Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age the Division shall designate another person to represent that person in the proceedings." The newer *Immigration and Refugee Protection Act*[157] (IRPA) provides further clarity in this regard:

> In cases where the child is accompanied, usually one of the parents is the designated representative; however, the unaccompanied child will have a designated representative appointed from a list of previously screened candidates. The duties of the designated representative are:
>
> 1 to retain counsel
> 2 to instruct counselor to assist the child in instructing counsel
> 3 to make other decisions with respect to the proceedings or to help the child make those decisions
> 4 to inform the child about the various stages and proceedings of the claim
> 5 to assist in obtaining evidence in support of the claim

6 to provide evidence and be a witness in the claim
7 to act in the best interests of the child

A pre-hearing conference is scheduled once the panel is assigned. The presiding member discusses the issues and any procedural accommodations that might be required with the designated representative and the child's counsel.

Like all refugee claimants, the child has a right to be heard and *Guideline 3* also sets out parameters for eliciting evidence from the URC if the panel determines that a child is able to give oral evidence. These include the panel explaining to the child in understandable language, what is happening and the process to be followed; the panel determining whether the child understands the nature of an oath or affirmation to tell the truth; and the presiding member being flexible and informal about the environment in which the child testifies. The process may be held by videoconference or by videotape to the extent that either of these media formats makes the child more comfortable. Evidence may also be adduced through the designated representative; questioning sensitively; and concluding the hearing in one sitting, which, if not possible, should be rescheduled as soon as practicable.

While *Guideline 3* offers some procedural guidance to Canadian decision-makers on the relevant considerations to ensure evidence can be elicited from URCs, it might be useful to refer to the one of the most comprehensive government approaches on how to deal with child witnesses in a variety of court settings found in the *Bench Book for Children Giving Evidence in Australian Courts (Bench book)*.[158] The bench book assists judges in dealing with children as complainants or witnesses and is referenced herein for those readers who might wish to delve more deeply into all aspects of child witnesses and their evidence. Of particular relevance is Chapter 2 that deals with child development, children's evidence and communicating with children along with assessing the credibility of children as witnesses. The Bench book is one of the more expansive contemporary treatises available on this subject and its utility in the context of international URC claims determination cannot be overstated. The Bench book's development stemmed from a 2003 Australasian Institute of Judicial Administration[159] (AIJA) seminar to develop a best practice in relation to the taking of evidence from child witnesses, together with the development of a bench book. Its objectives are:

1. to promote accurate knowledge and understanding of children and their ability to give evidence
2. to assist judicial officers to realize the goal of a fair trial for both the accused and the child complainant; and
3. to assist judicial officers to create an environment that allows children to give the best evidence in the courtroom.

In contrast to the Bench book, which covers a broader swath of types of child witnesses, *Guideline 3* is more limited in scope as it relates to the BIC and refugee determination because it focuses solely on procedural and evidentiary matters. Its overarching messages are priority and flexibility in dealing with a URC at each step of Canada's refugee process. Finally, *Guideline 3* could benefit from an expansion and update in order to make it more comprehensive as is the Bench book.

Assisted by the overarching guidance of the Bench book, *Guideline 3* and the CRC (discussed further on) – the following cases illustrate how the Supreme Court of Canada has enhanced the decision-making realm of Canada's refugee determination system by bringing clarity and direction on the importance of considering the BIC concept in the assessment of refugee status.

6. The BIC Applied: Kanthasamy

A recent landmark Canadian judgment on the consideration of the BIC is found in the *Kanthasamy* decision[160]. Jeyakannan Kanthasamy was a 15-year-old Tamil when, fearing for his life after he was subjected to detention and questioning by the Sri Lankan army and police, he fled northern Sri Lanka to come to live with his uncle in Canada. The IRB panel denied his claim for Convention refugee status and rejected his Pre-Removal Risk Assessment (PRRA). An application for permanent resident status under s. 25(1) of the IRPA was also denied. Section 25(1) otherwise gives the Minister discretion to exempt foreign nationals from the IRPA's requirements if the exemption is justified by H&C considerations, including the best interest of any child directly affected. The Federal Court of Canada and the Federal Court of Appeal found the PRRA officer's assessment and decision to be reasonable, thereby upholding the decision. The case was appealed to the Supreme Court of Canada, however, and the decision of the PRRA officer was subsequently set aside as the Court found it to be unreasonable. The matter was remitted back to the IRB for reconsideration.

Section 25(1) of the IRPA provides for H&C considerations for a foreign national seeking residency in Canada as follows:

> 25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected. (emphasis added)

The section expressly states that H&C considerations are to include the 'best interest' of the child who is directly affected. Citizenship and Immigration Ministerial Guidelines are intended to assist the immigration officer in deciding PRRA applications and in determining whether such considerations are warranted. The Guidelines further explain the application of the "unusual and undeserved or disproportionate hardship" standard by setting the following non-exhaustive list of factors to be considered:

- Establishment in Canada
- Ties to Canada
- The best interests of any children affected by their application
- Factors in their country of origin (this includes but is not limited to: medical inadequacies, discrimination that does not amount to persecution, harassment or other hardships that are not described in ss. 96 and 97
- Health considerations
- Family violence considerations
- Consequences of the separation of relatives
- Inability to leave Canada has led to establishment and/or
- Any other relevant factor they may wish to have considered not related to ss. 96 and 97

While the factors enumerated in this section of the *Act* are useful, they are neither binding nor exhaustive. However, it is clear that the young Applicant in *Kanthasamy* was directly affected by them. The Court first states: "*The 'best interests' principal is highly contextual because of the multitude of factors that may impinge on the child's best interests*" and goes on to state:

> Because children may experience greater hardship than adults faced with a comparable situation, circumstances which may not warrant humanitarian and compassionate relief when applied to an adult, may nonetheless entitle a child to relief.[161]

The Supreme Court found that the PRRA officer did not consider the totality of the Applicant's circumstances such as his youth, his mental health if he were returned to Sri Lanka and the evidence that he would suffer discrimination. The Court found that the officer did not consider whether the evidence *as a whole* justified relief, leading to an unreasonable outcome.[162] In its decision, the Court states:

> Further, the Officer did not appear to turn her mind to how the Applicant's status as a child affected the evaluation of the other evidence raised in his application. This approach is inconsistent with how hardship should be uniquely addressed for children. Moreover, by evaluating the Applicant's best interests through the same literal approach she applied to each of his other circumstances – whether the hardship was "unusual and undeserved or disproportionate" – the Officer misconstrued the best interests of the child analysis, most crucially disregarding the guiding admonition that children cannot be said to be deserving of hardship.[163]

Kanthasamy is an important decision in Canadian jurisprudence, serving as a judicial time capsule decision that genuinely addresses all present and future decisions in respect of the BIC.

7. Other Canadian Jurisprudence

In *Legault v. Canada (Minister of Citizenship and Immigration)* [164], the main issue was whether the immigration officer had given sufficient importance to the children's best interests, as prescribed in *Baker,* when assessing Mr. *Legault*'s H&C application. As grounds for his H&C application, the applicant submitted that he had been living in Canada since 1982 and that he had two families in Canada (seven children, six of whom were born in Canada, with two Canadian wives), of which he was the sole supporter (he was divorced from his first wife and is separated from the second one). One of the children was said to suffer from a behavioral disorder and another, from a chronic medical problem.

The immigration officer considered all of the above but, after finding that she was not satisfied of the good faith of the last marriage (which lasted but one month), she concluded that there did not exist sufficient humanitarian and compassionate grounds to justify an exemption from the requirements of subsection 9(1) of the Immigration Act. Ultimately, the Federal Court expressed disagreement with the view affirmed by the Supreme Court in *Baker,* but followed it as binding precedent. Accordingly, the immigration officer's decision was set aside for failure to accord "substantial weight" to the children's best interests.

In *Owusu v. Canada (Minister of Citizenship and Immigration)*[165], the Federal Court considered an appeal from a decision of the Trial Division, which denied an application for judicial review of a decision by an immigration officer who found that there were insufficient H&C grounds for an exemption from the requirement to secure a visa prior to coming to Canada. While holding that the officer had erred in failing to be attentive to the best interests of applicant's children in Ghana, the Judge decided to exercise his discretion by not setting the decision aside and gave two reasons for so doing: (1) applicant had failed to provide any evidence that his deportation would be contrary to the children's' best interests because he would be unable to find work and thereby support them; and (2) if remitted for redetermination, the application was bound to be again rejected.

This duty to consider the BIC was in play in a 2006 decision that reflects the importance the Court places on considering the particular circumstances of a URC when determining refugee status. In his decision in *Nahimana*[166], Mr. Justice Shore writes: "The best interest of a child constitutes the very basis by which a child is to be treated and considered by a tribunal in Canada." The URC in this case, Fatma Ally Nahimana, alleged she was a citizen of Burundi. She claimed that she was born on February 7, 1987 and that at the age of 14 years, she fled her country and went to the United States. She was still a minor at the age of 16 years when she entered Canada together with her daughter who had been born in the United States in 2003. The Applicant claimed refugee protection in Canada on the basis of ethnicity, imputed political opinion and membership in a particular social group due to her father's membership in a political party and affiliation with the party. The Applicants arrived in Canada in November 2003 and made a claim for refugee protection at that time.

The IRB panel determined that the Applicants were neither Convention refugees nor persons in need of protection, thereby rejecting Ms Nahimana's credibility on material aspects of her claim. The panel was not persuaded, on a balance of probabilities, that she had established her identity. The panel also had doubts as to Ms Nahimana's age and noted that the she seemed to have the appearance, the demeanor and the maturity of someone older. The panel was also not persuaded that the claimant was a minor at the time she entered Canada or at the time of her hearing before the IRB. Although the Court did not specifically pronounce on the issue of the age of the principal Applicant, it may be presumed that her age, as alleged, was accepted by the Court.

In its ruling, the Court favored a contextual approach when considering the best interests of the child. The Court found at paragraph 26 that:

> The Board did not take into consideration the fact that Ms. Nahimana was a child when the events in question took place as well as when she entered Canada and at the time of the hearing. They treated her as an adult and assessed her evidence as that of an adult. Furthermore, the Board did not consider that Ms. Nahimana is Muslim and from Africa. In such societies and cultures, female adults and children are treated very differently than in Western culture. It was incumbent on the Board, as a specialized tribunal, in its approach to consider Ms. Nahimana's particular circumstances, context, culture, age, experience and even demeanor which can also be reflected in the life's experience, one has undergone, when attempting to understand and to assess her evidence.[167]

Mr. Justice Shore also linked the importance of considering the BIC to the CRC, which preceded the formulation of *Guideline 3*:

> This is supported by article 3(1) of the United Nations *Convention on the Rights of the Child*,

(CRC), Can. T.S. 1992 No. 3, which states that the best interests of the child is a primary consideration in all matters concerning children, including legal proceedings. As well, article 22(1) of the CRC deals specifically with refugee matters, stating that states must ensure children refugees or refugee claimants receive adequate protection. [168]

Kim[169] in the BIC Analysis

One of the more notable cases involving the BIC is the case of *Kim v. Canada (Minister of Citizenship and Immigration),* which stands for several relevant aspects of international and Canadian determination processes when assessing URC claims. As previously cited in this paper (page 8), HHJ Collins of the UK system referenced *Kim* and noted that if the sustained or systematic violation of a child's rights under the CRC were found to demonstrate a failure of state protection, the child might qualify for refugee status. Insofar as the Canadian determination system is concerned, the *Kim* case provided the Court with an opportunity to consider whether *Guideline 3* should be considered in deciding the URC claim, or whether the assessment be limited to the process itself to arrive at a decision. The Court also considered the question of what amounts to persecution for a child and whether the "best interests" analysis applies in refugee determination.

The judicial review, which upheld the tribunal's decision in *Kim*, involved an RPD decision that denied refugee protection to twin brothers from South Korea who came to Canada on student visas in January 2004. They stayed with family friends but when that relationship broke down, they were taken into the care and custody of the local Child Services agency. As referred to by Shore J. in *Kim*:

> In the case of *Munar* [170]Justice de Montigny held that "the consideration of the best interests of the child is not an all or nothing exercise, but should be seen as a continuum. While a full-fledged analysis is required in the context of a humanitarian and compassionate grounds application, a less thorough examination may be sufficient when other types of decisions are made. (*Munar* at para. 38)

As considered by Justice de Montigny in *Munar* above, the consideration of the best interests of the child must be read in the context of each specific decision to be rendered and differences may ensue, depending on the context as to whether it be a Refugee Protection Division (RPD) decision or an H&C decision. In *Kim*, Shore J. reinforces the *Munar* approach by stating:

> Each branch of government has its particular role in that voice for the voiceless. Each has its responsibility, however, each within its specific jurisdiction, to consider the "best interests" of the child of today to enable the future life of the adult tomorrow.[171]

Shore J. goes on to confine the term 'best interests' insofar as the IRPA is concerned as follows:

> Turning to the context before the Court, it is noted that section 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) is not discretionary, but instead prescribes a certain test which must be met by a claimant. The IRPA does not permit the section 96 test to be compromised even if it is in the best interests of the child to remain in Canada. It is clear that the best interests of the child cannot substantively influence the answer with regard to whether a child is a refugee, but the best interests of the child are central to the procedure by which to reach a decision[172].

The Court also reminds the RPD that *Guideline 3* directs the panel to take the best interests of the child into consideration in a procedural, not a substantive, manner (emphasis added). The Court also notes that, while Article 3(1) of the CRC requires the "best interests" of a child to be a "primary consideration", it does not stipulate how the "best interests" of the child are to be considered:

> 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.[173]

Kim also referenced *Kanthasamy* on this point. At paragraph 58:

> In addition to recognizing the rights of children, the RPD should also be aware of the particular vulnerabilities of children when assessing whether particular acts amount to "persecution" of a child. The Preamble to the CRC states "[b]earing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'". Since the CRC recognizes the vulnerabilities of children, it is appropriate for the RPD to consider their physical and mental development when assessing whether the harm feared by a claimant amounts to persecution. Children, because of their distinct vulnerabilities, may be persecuted in ways that would not amount to persecution of an adult. It is incumbent on the RPD to be empathetic to a child's physical and mental state and to be aware of the fact that harming a child may have greater consequences than harming an adult.

The jurisprudence establishes that the teachings in *Varga*[174] applies to sections 96 and 97 of the IRPA [*Kim*]. Thus, as Justice Shore wrote in *Kim* at paragraph 76:

> The Canadian immigration system provides for several methods by which to gain entry into Canada, one of which is to be a refugee under section 96. Section 96 provides a strict definition that is either met or not by the claimant in question. If the definition is met, then the claimant may be able to enter Canada as a refugee. If, on the other hand, the definition is not met, then the claimant may not enter Canada pursuant to that section and other options become available to him or her. One remaining option is pursuant to section 25, wherein the Minister in his discretion may grant an exemption "from any applicable criteria or obligation of" the IRPA. It is under section 25 that a substantive and thorough analysis of the best interests of the child is performed. At the stage of a section 96 application, it is sufficient that the best interests of the child are taken into account procedurally, as directed by the Guidelines. The Court must reiterate that the best interests of the child cannot shoehorn a refugee claimant into the section 96 definition if the child's claim would otherwise be rejected, but it can influence the process which leads to that decision. (emphasis added)

Continuing in *Kim*, Shore J. states:

> It is clear that Article 3(1) of the CRC does not state that the best interests of the child are to be a substantive consideration of every decision which affects children. The Court concludes that there is more than one manner by which decision-makers may consider the best interests of the child. Section 96 of the IRPA takes the best interests of the child into account because of the specific procedural and evidentiary considerations in the Guidelines. It is recognized that procedural and evidentiary considerations may be different for other determinations outside of

> the refugee framework; the key is to ensure that the best interests of the child are considered in context, within the framework of the determination to be made by a tribunal or entity deciding the case, dependent on its particular jurisdiction and legal purpose as set out in legislation.[175]

The question that the Court also had to determine in *Kim* was whether the RPD erred in determining the impact of the CRC on the minor Applicants' claims. The Court responded:

> In the eyes of the law, children have long been voiceless citizens. Even after all of the progress that has been made in empowering groups that used to be voiceless, such as women and ethnic and religious minorities, children remain largely silenced. That being said, the CRC recognizes the individual rights that children possess. The Supreme Court of Canada recognized this in the case of *Baker*, above, when it stated:
>
> > The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safeguards and care". <u>The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights</u>. They help show the values that are central in determining whether this decision was a reasonable exercise of the H&C power. (Emphasis added)

Continuing in *Kim*, Shore J. states that there are two ways in which the CRC enters the purview of the RPD: first, through paragraph 3(3)(*f*) of the IRPA:

> At paragraph 36 of its reasons, the RPD states that "minor claimants … have the same evidentiary burdens and rights as adult claimants. No additional rights may be grafted onto the *Immigration and Refugee Protection Act* . The RPD's ruling is an accurate statement of the law; however, the RPD failed to recognize what can amount to "persecution" of a child. To acknowledge that children have distinctive rights is not to graft additional rights onto the IRPA, but is instead to interpret the definition of "persecution" in accordance with the distinctive rights that children possess, as recognized in the CRC.

Second, in referencing the UNHCR Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum[176], which had been placed before the Court, the Court cited the distinction between the violations of rights afforded to children and to adults:

> 8.7 It should be further borne in mind that, under the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the Scope of the refugee Convention. Examples of such policies and practices are the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of

children for prostitution and sexual exploitation and the practice of female genital mutilation.

The Court notes further in *De Guzman*[177]:

> In addition, the United Nations Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* states: "the refugee definition in [the 1951 Refugee Convention] must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children" (*General Comment No. 6* at para. 74). Although these two documents are not binding Canadian law, the Court finds them useful aids in the discussion of an ambiguous legal concept, namely, the interpretation of the CRC.
>
> The Court is in agreement with the Respondent that: "[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee"; however, the Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult.

Like *Kim*, the question that the Court had to determine in *De Guzman*[178] was whether the RPD erred in determining the impact of the CRC on the Applicants' claims:

> The Court enumerated three factors that must be considered when determining whether child refugee claimants meet the definition of "Convention refugees" under section 96 of the IRPA: first, that children have distinctive rights under the CRC; second, that these rights influence decisions made under the IRPA as a result of paragraph 3(3)(*f*) and third, that children exist in a state of vulnerability which might make them more susceptible to "persecution" than adults.

Furthermore:

> Paragraph 3(3)(*f*) of the IRPA states that the IRPA is to be construed and applied in accordance with instruments such as the CRC. Case law has confirmed the applicability of the CRC on domestic decision-makers; therefore, when determining whether a child claiming refugee status fits the definition in section 96, decision-makers must inform themselves of the rights recognized in the CRC. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution if returned to his or her country of origin.

In concert with *Guideline 3*, the CRC plays an important role in a Canadian decision-maker's assessment of a refugee child's claim, which ultimately contributes to the understanding of whether there exists that well-founded fear. The Court also answered the question whether the RPD is to take into account the "best interests" of the child in determining whether a child is a Convention refugee: "It is the Court's conclusion that the Canadian immigration system is to be examined in its entirety, not as compartmentalized sections, when assessing whether due consideration has been shown to the best interests of children."

> At the stage of a section 96 application, it is sufficient that the best interests of the child are taken into account procedurally, as directed by the Guidelines. The Court must reiterate that the best interests of the child cannot shoehorn a refugee claimant into the section 96 definition if

> the child's claim would otherwise be rejected, but it can influence the process which leads to that decision. (emphasis added)

This notion of not "shoehorning" a refugee claimant into the s.96 definition finds expression in the decision of *Aissa, Soumaya Akrouf Yahia v. Canada*[179] wherein it adopted *Kim*'s finding on the inappropriateness of using the BIC to "shoehorn" a child into the refugee definition when they would not otherwise meet its requirements.

While *Kim* considered the question of what amounts to persecution for a URC, the *Patel*[180] case examined, among other matters, whether a child is required to establish a subjective fear of persecution. It also addresses the child's subjective fear, the BIC and the role of the Designated Representative.

This case was an application for judicial review by the Minister of the positive decision of the RPD of the IRB determining that the minor respondent is a Convention refugee and a person in need of protection pursuant to sections 96 and 97 of the IRPA. The minor respondent was a 13-year old boy from India who lived with his grandparents in India after his parents left for the United States where they continue to live without status. When the grandfather died, the child was considered to be abandoned with no family in India. His designated representative for the refugee hearing was a child protection worker from the local Children's Aid Society and was a primary witness at the hearing.

Beyond the Court's reasoning in *Patel*, section 8 of the UNHCR Guidelines on Policies and Procedures are also instructive when dealing with URCs[181]. In particular, section 8.6 states:

> Although the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution.

In determining the judicial review, Lagacé J. concluded in *Patel* that *Guideline 3* was applied by the RPD in a reasonable manner. However, he also found that:

> Where deemed incompetent, whether by age or disability, claimants may not be able to articulate their subjective fear in a rational manner. In the context of persecution, it may be contrary to the child's interests and health to inform the child of the risks the child faces upon return to his home country. If a claimant is not competent and the evidence establishes an objective basis for his fear, it is sufficient that the designated representative establish a subjective fear in his role as designated representative or that the subjective fear be inferred from the evidence. The requirements of a Convention refugee were not designed to reject children as refugees simply because a subjective fear cannot be established or experienced. Therefore, the Board was not unreasonable or incorrect when it did not explicitly address the subjective fear of the minor respondent but rather inferred it from the evidence presented, including the testimony of the child's designated representative.

The Court also found that the Board had properly considered the cumulative effect of the various harms faced by a claimant and also considered the harms in the specific context of the Respondent, including his age. It was reasonable for the Board to give weight to the minor child's designated representative's evidence, particularly where the Board had explained why it accepted his evidence and why it had attributed weight to it. Lastly, the Court found it reasonable for the Board to consider the BIC when assessing whether he would be required to testify, and it was open to the Board to conclude that the best reasonably-available evidence was that of the designated representative.

Continuing this theme of the BIC analysis, in *Sandoval Mares*[182], the Court echoed the *Patel* finding about permissible reliance on testimony from a child's designated representative:

> Similarly, I find that in assessing the children's subjective fear, the panel could reasonably rely on the testimony of the principal applicant acting as the children's designated representative. As Justice Lagacé stated in *Canada (Minister of Citizenship & Immigration) v. Patel*, 2008 FC 747 (F.C.) at paras 21-38, where a claimant is not competent, whether by age or disability, and the evidence establishes an objective basis for his fear, the panel should determine whether the designated representative established a subjective fear in his or her role as designated representative and whether the subjective fear be inferred from the evidence. The Court accordingly held that it is not unreasonable or incorrect not to explicitly address the subjective fear of the minor child, as it is open to the panel "to infer the subjective fear of the minor child from the evidence presented, including the testimony of the child's designated representative who was speaking on his behalf."

This reasoning finds further expression in *Pulido Ruiz*[183] wherein the Court cited *Kim* to support a finding that the RPD erred in expecting a 15-year-old to have claimed asylum at the earliest opportunity in the United States:

> When his visa expired, C. Ruiz asked his mother and his relatives in the United States to help him regularize his situation. He contends that he had neither the knowledge nor the tools to claim asylum in the United States, especially since he was only 15 or 16 years old at the time. In *Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 149 (*Kim*), the Court analyzed the effects of the *Convention on the Rights of the Child* on the IRPA. It specified the following at paragraph 61 of its decision:
>
> ... "[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee"; however, the Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult.
>
> It goes without saying that a child does not have the same abilities as an adult. Even though the IRB seemed to have taken C. Ruiz's age into account in its decision, it found that he should have behaved like an adult and claimed asylum at the earliest opportunity. However, C. Ruiz was just 15 years old. It seems unlikely to us that an adolescent would know the complexities and subtleties of the administrative apparatus with respect to asylum and be able to gauge the rough waters of the immigration process in the United States without an adult's help. Imposing such a burden on an adolescent seems unreasonable to us.

It is worthwhile then to segue for a moment to reference a significant Australian case, *Dzado v. Minister for Immigration & Anor*;[184] a persuasive piece of jurisprudence from Australia that stands for the proposition that procedural fairness must be safeguarded by decision-makers everywhere, not only generally but in particular when dealing with URCs.

In *Dzado*, the URC claim was part of a joint claim with an older brother. The Federal Magistrates Court of Australia upheld most of the Independent Merits Reviewer's report and recommendations in relation to the claims of an offshore entry person; that is, a URC applicant and his older brother who claimed religious and particular social group persecution in Vietnam. In *Dzado*, the Reviewer did not believe the applicant and his older brother and the Court was asked to consider the following: whether the Reviewer erred by not putting credibility concerns about inconsistencies between the account of the applicant and his brother to the applicant; whether the Reviewer erred by not alerting the applicant to a determinative issue in the Review considered; whether the Reviewer overlooked an element of the applicant's claim; or whether the applicant as a minor was denied procedural fairness considered. While the Court upheld most elements of the Reviewer's findings, the Court determined that it was unfair of her not to put the URC applicant's inconsistent *viva voce* evidence to the older brother and thus the error was established. At para. 97:

> I have already found that it was procedurally unfair for the Reviewer not to put to the applicant inconsistencies between his account and the account of his older brother on the issue of parental abandonment and their arrest and detention. Those are established instances of the unfairness of the process followed by the Reviewer in relation to this applicant. The guidelines issued by the Minister's Department have been put in place in order to ensure that fair arrangements are made for the assessment of claims by unaccompanied minors. The guidelines (and compliance with them) are probably a necessary expression of Australia's compliance with its international obligations under article 22 of the Convention on the Rights of the Child. The failure by the Reviewer to follow the guidelines, having proceeded on the basis that the applicant was a minor, resulted in unfairness as it probably inevitably would have. That miscarriage of process is reviewable by the Court and may have been sufficient to support the relief claimed by the applicant by reason of the risk of practical unfairness occasioned by the failure to follow the guidelines.

The Australian Court's decision is as relevant to the requirement to safeguard procedural fairness for URC claimants in Australia as it is for those minor claimants applying for status within the UK and Canadian determination systems. We would reasonably presume that the upper-level reviewing courts in both the UK and Canada would arrive at the same finding in this regard.

8. The BIC and Guideline 3

In several instances, the Court in Canada has pronounced on the importance of IRB panels following *Guideline 3* in order to accord to all claimants and, in particular, the case of child claimants, procedural fairness through its application. In the decision of the Court in *Bema*[185] *v. Canada,* for example, the Court spoke directly to this requirement in particular in the case of an unaccompanied minor refugee claimant, Ishmael Junior Bema (the Applicant), a citizen of Zimbabwe. Mr. Bema based his claim of having a well-founded fear of persecution on grounds of membership in a particular social group and political opinion, as a person opposing the government of Zimbabwe. He arrived in the United States in July 2005, then came to Canada on November 16, 2005 and made a claim for refugee protection. At the

time of his arrival in Canada, Mr. Bema was 17 years old and as such, a settlement worker at a local non-governmental organization was appointed as his designated representative. The Applicant was also represented by counsel and by the time the hearing was held on May 23, 2006, he had turned18 years old. His refugee claim was denied on the basis that his testimony lacked credibility.

One of the issues that the Court considered in this case was whether the RPD violated the Applicant's right to procedural fairness through its failure to follow *Guideline 3*. At paragraph [24], Blais J. explains:

> First, it must be kept in mind that the Board was not dealing with a young child or a young teenager, but someone who arrived and claimed refugee protection in Canada just 4 months shy of his 18th birthday. He had the assistance of a designated representative and legal counsel throughout the application process, and was legally an adult at the time of the hearing. Furthermore, while the Guideline is meant to apply to all claimants under the age of 18, it is obvious that different evidentiary issues will arise when dealing with a 5-year-old, a 12-year-old or someone of the applicant's age, so that flexibility in the interpretation of the Guideline will be required to reflect the particular circumstances of each case….In terms of the conduct of the hearing and the application of the Guideline, I note that there did not appear to be any objection from counsel or from the designated representative to the Board member's approach in conducting the hearing. There was no request for any conference during the hearing and the Board member did ask the applicant's counsel at the beginning of the hearing if he objected to her questioning the claimant first, which he did not. As such, I can find no reviewable error in the approach of the Board at the hearing.

In *Bema*, the Court goes on to quote from *Diagana*[186] wherein Gibson J. considered the absence of any objection at or before the hearing to be a waiver of procedural defect:

> The presiding member of the RPD was thorough in ensuring that both the Applicant and his counsel at hearing were ready to proceed and had no objections to the process before the RPD, to that time, that they wanted to raise. In particular, they were given full opportunity to raise failure to fully comply with the Guideline. In light of the foregoing, I am satisfied that the Applicant and his counsel waived any procedural defect in the process leading to the hearing before the RPD, including compliance with the Guideline.

In dismissing the judicial review in *Bema,* Mr. Justice Blais was *"…not convinced that the absence of a pre-hearing conference affected the outcome of the claim or prejudiced the applicant in anyway and therefore, that there was a breach of the duty of procedural fairness, which justifies the intervention of this Court."*[187]

In the judicial review of *Diagana,*[188] Gibson J. agreed with the determination of the RPD in determining that the Applicant was not a Convention refugee or a person in need of protection. The Applicant was a citizen of Mauritania who claimed to have a well-founded fear of persecution on the ground of political opinion because both he, his father and brothers had been politically active. At the date of his arrival in Canada, he was 17 years old but turned 19 before his RPD hearing.

The *Diagana* case is an interesting one because the Court upheld the decision of the RPD in showing that there are circumstances wherein the application of *Guideline 3* might not always be required so long as other factors in the proceedings were considered. As referenced, one of the issues that the Court considered, in response to the pleadings, was whether the RPD had failed to consider *Guideline 3* in

considering the Applicant's testimony and in assessing his credibility. Another question also put to the Court was whether the RPD had a positive obligation to assess a minor refugee's personal circumstances and whether they had failed to do so in this case. That the Applicant was an unaccompanied minor when he arrived in Canada and made his refugee claim but was no longer a minor when the panel heard his refugee hearing was not in dispute. At his hearing, he proved himself to be 'reasonably articulate' and was represented by counsel. According to *Guideline 3*, the RPD should give primary consideration to the "best interests of the child". However, none of the pre-hearing processes to which *Guideline 3* entitles a minor claimant was followed: for example, no designated representative was appointed and no pre-hearing conference was held.

Gibson J. found that although *Guideline 3* was not applied in this case, the judge was satisfied by the contents of the introductory exchange between the presiding member, an exchange that he found to be determinative of the issue. The presiding member of the RPD was found to be thorough in ensuring that both the applicant and his counsel at hearing were ready to proceed and they had no objections to the process before the RPD, to that time, that they wanted to raise. In particular, they were given a full opportunity to raise the failure to fully comply with *Guideline 3*. The judge was satisfied, given the opening exchange, that the Applicant and his counsel waived any procedural defect in the process leading to the hearing before the RPD, including compliance with the *Guideline 3.*

The Court also found that the member was entirely sensitive to the Applicant's responses that related to events that occurred while he was a child, and the Court agreed with the RPD that due to vagueness and conflicting testimony, the Applicant was not credible and, "No amount of sensitivity to the Applicant and to his "best interests" would have altered the RPD's conclusion in this regard. In the result, the question proposed simply would not be determinative on an appeal from this decision."[189]

This case demonstrates the importance and necessity of panels to conduct a case-by-case consideration of each claim because two circumstances are never alike. The Court also indicated that the presiding member on the panel had ensured that all opportunities were available to the claimant and his representative to raise any concerns our issues, which they did not. The Court was able to find that *Guideline 3* did not apply. While *Guideline 3* addresses the decision-maker to always bear in mind the best interests of the child, given their age and cognitive level, all directives may not always be necessary. In this case, the claimant had demonstrated to the RPD that he understood the nature of the proceedings and that he had had counsel throughout his claim. These factors, when added to his age at the time of the hearing, tipped the balance of procedural fairness, however it was not in favor of the Applicant.

The Federal Court turned its mind to the issue of a minor claimant failing to establish a nexus in the case of *Banegas v. Canada*[190]**.** The RPD had found that the applicant was a credible witness but that he did not have a nexus to the Convention refugee definition and that any harm he faced was due to a generalized risk. He alleged that since the age of 12 years, he had been the target of the violent recruitment attempts by the Mara 18 gang in Honduras. As an unaccompanied minor, he left Honduras, fleeing to the United States. Once he was released from U.S. detention after several months, he came to Canada and made a refugee claim.

With regard to s.96 of the Convention refugee definition, the Court cited the UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Crime" (Geneva, March 2010):

> 34. Individuals who resist forced recruitment into gangs or oppose gang practices may share innate or immutable characteristics, such as their age, gender and social status. Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance. Indeed, recent studies have found that the recruitment practices of Central American gangs frequently target young people. Thus, an age-based identification of a particular social group, combined with social status, could be relevant concerning applicants who have refused to join gangs. The immutable character of "age" or "youth" is in effect, unchangeable at any given point in time.

Setting aside the argument with regard to imputed political opinion, the Court stated that generalized risk under section 97 of the IRPA provides a mechanism by which a claimant may acquire refugee protection by demonstrating a personalized risk to life or a risk of cruel and unusual treatment or punishment. The Court concluded:

> In finding that the Applicant belongs to a general demographic of potential recruits by the Mara 18, the RPD failed to engage in an adequate individualized assessment of risk. Finally, the RPD concludes that the Applicant fears a generalized risk, similar in nature and degree as that faced by other young Honduran males. Thus, the Applicant does not meet the definition of a "person in need of protection" found in subparagraph 97(1)(*b*)(ii) of the IRPA. Relying on *Ward*, the RPD reasons that the Applicant is not individually targeted by the Mara 18 based on any special, unique characteristic or skill.

The Court found that the RPD failed to consider the relevant factors of age, gender, visible scars resulting from previous attacks, and the possibility of retribution by gang-members cumulatively." The Court concluded, therefore: "…the Applicant's particular circumstances transcend the risks faced generally by the Honduran population or by other young Honduran males, the RPD's decision must be set aside." This demonstrated that, as part of the panel's general assessment of risk, it had a duty to consider other individualized elements of that risk.

An associated case leading to the same ruling is worth referencing herein. In *Pineda v. Canada (Minister of Citizenship and Immigration),* 2007 FC 365 (CanLII) at para 17, the Court held that the Applicant belonged to a general demographic of potential recruits by the Mara 18 and the RPD had failed to engage in an adequate individualized assessment of risk. At para 17:

> The RPD failed to consider the relevant factors of age, gender, visible scars resulting from previous attacks, and the possibility of retribution by gang-members cumulatively. The RPD failed to consider how the Applicant's repeated refusals to join the Mara 18 and resulting scars may have put him at risk to subsequent attacks, thus placing him outside the scope of a generalized risk.

In its decision, the RPD rejected the Applicant's claim on the basis of a lack of nexus with a Convention ground and of lack of personalized risk, under both sections 96 and 97of the IRPA. The Court referenced several findings in its decision:

> The RPD finds that the Applicant is a victim of widespread criminality, rather than a targeted member of a "particular social group" for the purposes of section 96 of the IRPA" (*Canada*

(Attorney General) v Ward, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*]; and *Zefi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 636 (CanLII) [*Zefi*]).

On behalf of the Court, Mr. Justice Laforest provides interpretative guidance to the meaning of "membership in a particular social group". Indeed, such a group may be defined by an innate or unchangeable characteristic and should take into account "the general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative" (*Ward*, above at para 70; *Canada (Minister of Citizenship and Immigration) v B451*, 2013 FC 441 (CanLII) at para 27).

Past actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable. For example, In Matter of S-E-G (2008), the United States Board of Immigration Appeals accepted that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed." Past association with a gang may be a relevant immutable characteristic in the case of individuals who have been forcibly recruited.

The growing body of Court jurisprudence available to IRB decision-makers is comprehensive and helpful whenever the Court rules on these types of appeals involving URCs. Notwithstanding the Court's decisions in *Banegas* and *Pineda*, the analysis and reasoning behind all of the decisions presented as they relate to *Guideline 3* are highly instructive and contribute greatly to the IRB's relentless progress in undertaking fair and compassionate adjudicative assessments of the claims of refugee child claimants using this valuable adjudicative assessment tool. Ongoing professional development related to *Guideline 3* as well as the continuing exposure of adjudicators to the special circumstances of minor claimants through the hearing process, and supported by the Court's guidance, ultimately assist with better status decision-making overall and fairer and consistent decisions for all young claimants fleeing persecution.

The Case of BB and Justice for Children and Youth v Minister of Citizenship and Immigration

In the context of immigration detention, the Court in *BB and Justice for Children and Youth v Minister of Citizenship and Immigration*[191] commented on BIC in decisions pertaining to immigration detention of adults. Section 248 of the IRPR does not list the BIC; however, *BB & JFCY v MCI* has confirmed that this list of factors is *not* exhaustive, and the BIC may be included as part of the relevant considerations in such decisions. This case concerned the judicial review of a decision to continue the detention of a woman, BB, held in immigration detention together with her Canadian-born daughter as a so-called "guest" for almost a year. BB had raised the detrimental effect of detention on her child as a relevant factor in her detention review hearing before the Immigration Division. The Immigration Division determined that it could not consider the best interests of the child and continued BB's detention. BB sought judicial review of that decision.[192]

The Order issued by the Federal Court confirms that the best interests of a non-detainee child may be taken into account when determining whether to release or detain a person for immigration purposes. The Order may have broader implications for children in immigration detention generally and for raising other factors in detention review hearings, such as the mental health status of detainees. As a result of this case, CBSA Hearings Officers have been instructed to bring this Order to the attention of Immigration Division members, and have been advised that previous case law does not stand for the proposition that the Immigration Division cannot consider the best interests of the child.[193]

9. Observations on the UK and Canada Approaches to the BIC

The UK and Canadian systems employ similar perspectives regarding the importance of the BIC in the analysis of refugee and asylum determination cases. For example, it is clear how the CRC has been woven into the fabric of both States' determination systems. It is also recognized that, like other EU Member States, the UK and its determination system are subject to a larger set of EU legislation, covenants and treaties which inform – and which form part of the UK judge's assessment of URC claims – than is the Canadian system. Canada is less constrained in this regard but both systems have been free to pursue and evolve different approaches to the BIC in their respective refugee decision-making processes. For example, Canada has tended to approach the BIC from a more procedural vantage point while maintaining that the substantive refugee definition is the same for children and for others. It does this despite Justice Shore's explanation in *Kim* that Canada's Immigration and Refugee Protection leaves persecution undefined, and the CRC "adds nuance" to determining whether a child fits within s. 96.

In thinking about how Canadian law reconciles the procedural and substantive aspects of URC claims then, we might summarize our approach as follows:

- *The best interest principle* – that is, the BIC as playing a more procedural role in decision-making within Canadian refugee determination. The BIC is not used to "shoehorn" children into the refugee definition who otherwise would not qualify (as Justice Shore put it in *Kim*), but we do make procedural adjustments as per *Guideline 3*; and

- Despite Canada's procedural view of the BIC, once might argue (even if the case law has not said this explicitly) that children's rights as laid out in the CRC play a substantive role in Canadian refugee determination. This is because the IRPA leaves persecution undefined, requiring Canadian decision-makers to look to international human rights in order to determine whether s. 96 is borne out.

One might also argue that explicitly calling children's rights a substantive influence on refugee determination is a logical next step for Canadian refugee law, but as of the time of writing, this might still be somewhat of a reach. However, the key passage in *Kim* that implies this conclusion is as follows:

> [61] The Court is in agreement with the Respondent that: "[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee"; however, the Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult. (emphasis added)

To reiterate, it might be an overstep to interpret *'add nuances'* as children's rights playing a substantive role, but in Canada, the discussion is evolving and all of this points to some conceptual confusion that often arises in this area: that is, the legal community sometimes discuss the BIC in the same breath as children's rights, while they are, from the Canadian perspective, separate concepts. Part of the difference between Canada and the UK on this point is arguably in evidence in Parts 1 and 2 of this paper: that is, where the UK experience has tied jurisprudential developments such as *Kim* to incorporation of the BIC duty into substantive refugee determination. From the Canadian perspective, a case might be made for *Kim* as standing for the incorporation of children's rights and not the best

interests principle *per se*, into refugee determination. In the Canadian system, the BIC is a procedural matter, achieved through the application of *Guideline 3*.

It is noteworthy that the Canadian Court's decision in *Kim* has also served as an inspiration for the UK's emerging jurisprudence on the BIC – and for the UK to develop – correctly so – its own approach to the BIC. For example, the reference to an Upper Tribunal decision by HHJ Blake sees the duty to consider the BIC as playing a more substantive role in UK refugee determination than in the Canadian system; an approach that goes well beyond *Kim* or the state of contemporary Canadian refugee law.

The contextual aspects of a child's claim for refugee protection, such as age, mental capacity emotional impact, family situation, do bear on the substantive analysis of the claim.

Whatever weight either system might ascribe to the value of the *Kim* decision, Shore J. sums up quite persuasively *in obiter* contemporary thinking on the BIC by avowing the collective responsibility of all nations to safeguard this and the rights of refugee children:

> One of the challenges for the future of the world is how governments, not only Canada, approach the issue of abandoned children; the future does depend in large part on how abandoned children are treated, raised and educated. That will determine how these children, as adults, will contribute to a more peaceful world.[194]

ENDNOTES

[1] *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

[2] IRB Chairperson's Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/GuideDir03.aspx

[3] *"The Best Interest of the Child under EU Law and the Human Rights Nexus to the 1951 Refugee Convention: Family Unity and the Substantial Determination"*, Paolo Biondi, PhD candidate, School of Advanced Study, University of London

[4] European Union (Withdrawal) Bill 2017-2019

[5] '*Children in Crisis: Unaccompanied Migrant Children in the EU*', House of Lords, European Union Committee, 2nd Report of Session 2016–17, published 26 July 2016, House of Lords, at p8. Available here: http://www.scepnetwork.org/images/21/295.pdf

[6] Eurostat Press Release 87/2016, dated 2 May 2016, available here: http://ec.europa.eu/eurostat/documents/2995521/7244677/3-02052016-AP-EN.pdf/19cfd8d1-330b-4080-8ff3-72ac7b7b67f6 accessed 1 March 2017

[7] while those aged 14 to 15 accounted for 29% (25 800 persons) and those aged less than 14 for 13% (11 800 persons)

[8] Unaccompanied asylum seeking children. Discretionary leave to remain is given to unaccompanied asylum seeking children if they are not granted refugee status or humanitarian protection, until the age of 17.5 years – see consideration of this policy further below

[9] Eurostat Press Release http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5

[10] E.g. G.S. Goodwin-Gill, '*Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*' (1995) 3 International Journal of Child Rights 405

[11] Except in respect of the right *of parents* to choose the religious education of their children, under art 4 and education, under art 17
[12] J. C. Hathaway, *The Law of Refuge Status* (1991) 6; J. C. Hathaway, '*The Evolution of Refugee Status in International Law: 1920–1950,*' (1984), 33 International and Comparative Law Quarterly 348
[13] Available here: http://www.un-documents.net/gdrc1924.htm
[14] E.D. Pask, 'Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-Making and Representation' (1989) 1(2) International Journal of Refugee Law 199
[15] Article 24(1), *Geneva Convention relative to the Protection of Civilian Persons in Time of War* and 1977 Additional Protocols
[16] The UNHCR's predecessor. Operations of the IRO finished in 1952 and it was replaced by the Office of the United Nations High Commissioner for Refugees (UNHCR).
[17] Annex 1, Part 1, *Constitution of the International Refugee Organisation*
[18] J. M. Pobjoy, '*A Child Rights Framework for Assessing the Status of Refugee Children*' (2013), Legal Studies Research Paper Series no. 27/2013, Cambridge 29 at pp 9-12; S. Juss and C. Harvey (eds.), Contemporary Issues in Refugee Law (Edward Elgar, 2013) 91-138.
[19] J. C. Hathaway, '*The Relationship between Human Rights and Refugee Law: What Refugee Judges Can Contribute*', International Association of Refugee Law Judges, '*The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*' (1998) 80
[20] International Covenant on Civil and Political Rights
[21] International Covenant on Economic, Social and Cultural Rights
[22] The masculine reference is employed out of deference to the fact that the vast majority of URCs arriving in the UK are male
[23] Note 4
[24] Pobjoy, J.M., 'The Child in International Law', Cambridge Asylum and Migration Studies, Cambridge University Press, 2017
[25] UNCRC *General Comment No. 14 on the Right of the Child to have his or her best interests taken as a Primary Consideration (Art 3, para 1), CRC/C/GC/14/ (2013)*
[26] UNCRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* CRC/GC/2005/6 (2005)
[27] Unlike many other international instruments, there are no clauses in the CRC that allow for derogation at any time
[28] UNCRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* CRC/GC/2005/6 (2005)
[29] UNCRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* CRC/GC/2005/6 (2005)
[30] In *JA (child - risk of persecution) Nigeria [2016] UKUT 560 (IAC)*
[31] The Children Acts (*section 1(1) of the Children Act 1989, s11 Children Act 2004* and the *Children Act 2002*). *Section 1(1) Children Act 1989 (England)*[31] provides*: "when a court determines any question with respect to the upbringing of a child, the welfare of the child is the paramount consideration."* In these cases, what is under consideration is the risk of a child being separated from his/her parents. Equivalent provision in Scotland is made under *Children (Scotland) Act 1995*. Even greater protection is afforded in Wales, where the UNCRC has effectively been incorporated into Welsh law by creating a duty owed by its employees and politicians to have due regard to the CRC with the *Rights of Children and Young Persons (Wales) Measure 2011*
[32] Lady Hale explained the distinction in *ZH Tanzania [2011] UKSC 4* at paragraph 25
[33] by section 55, of the Borders, Citizenship and Immigration Act 2009, November 2009
[34] This issue is discussed in some depth, calling for a more rights-based assessment of welfare that is consonant with best interests rather than superficial protectionism in the forthcoming collection edited by Stalford, H., Hollingsworth, K. and Gilmore (eds) Children's Rights Judgments: from Academic Vision to New Practice (Hart Publishing, forthcoming 2017)
[35] For example, the Home Office Asylum Policy Instruction on processing children's asylum claims, dated 12 July 2016, available here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537010/Processing-children_s-asylum-claims-v1.pdf

[36] *'Every Child Matters; Change for Children'*, Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children Issued under section 55 of the Borders, Citizenship and Immigration Act 2009, November 2009, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf

[37] in a long line of enlightened jurisprudence starting with *ZH Tanzania [2011] UKSC 4*

[38] J. M. Pobjoy, '*A Child Rights Framework for Assessing the Status of Refugee Children*' (2013), Legal Studies Research Paper Series no. 27/2013, Cambridge 29

[39] UNCRC *General Comment No. 14 on the Right of the Child to have his or her best interests taken as a Primary Consideration (Art 3, para 1), CRC/C/GC/14/ (2013)*

[40] *UNHCR, Guidelines on International Protection: Child Asylum Claims under Article 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/09/08 (2009)*

[41] In *R (SG & Ors) SSWP [2015] 1 WLR 1449* at 106

[42] G.S. Goodwin-Gill, '*Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*' (1995) 3 International Journal of Child Rights 405, at 415

[43] G.S. Goodwin-Gill, '*Unaccompanied Refugee Minors: The Role and Place of International Law in the Pursuit of Durable Solutions*' (1995) 3 International Journal of Child Rights 405, at 416

[44] *LD (article 8 best interests of child) Zimbabwe [2010] UKUT 278*

[45] (*AA (Unattended Children) (Afghanistan) (CG) [2012] UKUT 00016* (at para 33)

[46] Available here: http://www.refworld.org/docid/51a84b5e4.html

[47] (at para 108) See also *DS (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 305*

[48] As explained in *Li v Canada (MCI) 2000 198 FTR 81* and in *Zhu v Canada (MCI) 2001 FCT 884*

[49] Where a child was granted discretionary leave to remain under the (now abolished) *section 83 of the Nationality, Immigration and Asylum Act 2002* '*upgrade'* appeals, could only be brought *if* leave was granted for twelve months or more and *only* on the grounds that removing the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention or that the appellant is entitled to humanitarian protection; *FA (Iraq) v SSHD* [2010] EWCA Civ 696

[50] *Saad, Diriye and Osorio* [2001] EWCA Civ 2008

[51] At paragraph 23 of the decision in *ST (Child asylum seekers) Sri Lanka [2013] UKUT 00292 (23 May 2013)*

[52] By the *Immigration Act 2014*

[53] In particular UNCRC General Comment No. 6: *Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* CRC/GC/2005/6 (2005) and UNCRC *General Comment No. 14 on the Right of the Child to have his or her best interests taken as a Primary Consideration (Art 3, para 1), CRC/C/GC/14/ (2013)*

[54] Home Office, '*Processing children's asylum claims*', Version 1.0, 12 July 2016, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537010/Processing-children_s-asylum-claims-v1.pdf

[55] *per* Maurice Kay LJ at paragraph 18

[56] '*Processing children's asylum claims*', Version 1.0, 12 July 2016, available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537010/Processing-children_s-asylum-claims-v1.pdf

[57] Section 83 of the *Nationality, Immigration and Asylum Act 2002* was repealed by section 15 of the *Immigration Act 2014* and s84 was amended so that the only rights of appeal that now available before the Tribunal are on refugee, human rights and/or humanitarian protection grounds.

[58] Under section 82 of the *Nationality, Immigration and Asylum Act 2002*

[59] Under subsection 84(1)(a) of the *Nationality, Immigration and Asylum Act 2002*

[60] J. Bhabha & N. Finch, '*Seeking Asylum Alone: Unaccompanied and Separated Children and Refugee Protection in the U.K.*', Nov 2006 – Available here: http://www.childmigration.net/files/SAA_UK.pdf

[61] *Devaseelan [2002] UKIAT 00702; [2003] Imm AR 1* at paragraph 41

[62] *Under sec*tion 96 of the *Nationality, Immigration and Asylum Act 2002*

[63] The current version of the Home Office, Family tracing Version 1.0 Guidance on regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005, published 12 July 2016, is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537730/Family-tracing-v1.pdf

[64] EU Council Directive on the Minimum Standards of Reception for Asylum Seekers (2003/9/EC); Asylum Seekers (Reception Conditions) Regulations 2005

[65] The masculine is used purely out of deference to the fact that the vast majority of unaccompanied (Afghan) minors reaching UK shores, are male (see above '*context*')
[66] *DS (Afghanistan) v SSHD* [2011] EWCA Civ 305 (22 March 2011); *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014 (25 July 2012); *AA (unattended children) Afghanistan* CG [2012] UKUT 00016 (06 January 2012)
[67] *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014 (25 July 2012)
[68] Borders, Citizenship and Immigration Act 2009
[69] *SHL (Tracing obligation/Trafficking) Afghanistan* [2013] UKUT 00312 (01 May 2013)
[70] see *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014 and above
[71] drawn from *Rashid v SSHD* [2005] EWCA Civ 744
[72] *EU (Afghanistan) & Ors v SSHD* [2013] EWCA Civ 32 (31 January 2013)
[73] *KA (Afghanistan) v SSHD* [2012] EWCA Civ 1014 (25 July 2012), per Maurice Kay, at para 25
[74] *EU (Afghanistan) & Ors v SSHD* [2013] EWCA Civ 32 (31 January 2013)
[75] *Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97
[76] *Rashid v SSHD* [2005] EWCA Civ 744
[77] at 69-74 of *TN, MA & AA [2015] UKSC 40*
[78] '*Children in Crisis: Unaccompanied Migrant Children In The EU*', House Of Lords, European Union Committee, 2nd Report of Session 2016–17, published 26 July 2016, House of Lords, at p19. Available here: *http://www.scepnetwork.org/images/21/295.pdf*
[79] Available here: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/34/34.pdf
[80] i.e. *ZAT v. Secretary of State for the Home Department (2015) UTIJR6, JR/15401/2015-JR/15405/2015; ZAT v. Secretary of State for the Home Department The Court of Appeal (Civil Division) on Appeal From The Upper Tribunal Immigration and Asylum Chamber, Case No: C2/2016/0712, [2016] EWCA Civ 810*; For an in-depth analysis of this, see Biondi, P. '*The Best Interests of the Child Under EU Law and the Human Rights Nexus To The 1951 Refugee Convention: Family Unity and the Substantial Determination*'
[81] P. Biondi, '*The Best Interests of the Child Under EU Law and the Human Rights Nexus To The 1951 Refugee Convention: Family Unity and the Substantial Determination*' (ANNEXED BELOW)
[82] Recommendation B, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, A/CONF.2/108/Rev.1 (25 July 1951)
[83] This report on the subject is well worth reading: M. Gower and T. McGuinness, '*The UK's refugee family reunion rules: striking the right balance?*' House of Commons Briefing Paper, Number 07511, 28 November 2016. Available here: file:///C:/Users/UoL/Downloads/CBP-7511%20(1).pdf
[84] *Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003*
[85] For insight into EU law being interpreted in the light of CRC obligations see: *Biondi (Ibid); Drywood, E. (2007). Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision. European Law review, 32(3), 396-407*; and *Stalford, H., & Drywood, E. (2011). Using the CRC to Inform EU Law and Policy-Making. In A. Invernizzi, & J. Williams (Eds.), The Human Rights of Children: From Visions to Implementation. Aldershot: Ashgate*
[86] In AT and another (Article 8 ECHR - Child Refugee - Family Reunification) Eritrea [2016] UKUT 227 (IAC)
[87] '*Children in Crisis: Unaccompanied Migrant Children In The EU*', House Of Lords, European Union Committee, 2nd Report of Session 2016–17, published 26 July 2016, House of Lords, at p19. Available here: *http://www.scepnetwork.org/images/21/295.pdf*
[88] HL Deb 26 April 2016 c1115 available here: https://hansard.parliament.uk/lords/2016-04-26/debates/16042643000867/ImmigrationBill
[89] *Ibid,* Paragraph 62
[90] Home Affairs Committee, *'The work of the Immigration Directorates (Q1, 2016), 27 July 2016, HC 151 2016-17, para 41*
[91] Singer, S., '*The protection of children during armed conflict situations*,' International Review of the Red Cross, May-June 1986, 133
[92] HL Deb 26 April 2016 at column 1116, available here: https://hansard.parliament.uk/lords/2016-04-26/debates/16042643000867/ImmigrationBill
[93] E.g. HL Deb 26 April 2016 at column 1115

[94] Under paragraph 352D of the Immigration Rules, Available here: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum
[95] £18,600 for a spouse plus
[96] E.g. under rule 297 or 319X
[97] This means that the sponsor must show that s/he can provide the same level of maintenance as the state would provide for the child.
[98] Under paragraphs 352FA, 352 FD and 352 FG of the Immigration Rules
[99] Para 297 of the Immigration Rules
[100] D. Bolt, '*An inspection of family reunion applications January to May 2016*', Independent Chief Inspector of Borders and Immigration, Presented to Parliament pursuant to Section 50 (2) of the UK Borders Act 2007 in September 2016. Available here: http://icinspector.independent.gov.uk/wp-content/uploads/2016/09/An-inspection-of-family-reunion-applications-January-to-May-2016.pdf
[101] See also *SK ("adoption" not recognised in UK) India [2006] UKAIT 00068*; *MN (Non-recognised adoptions: unlawful discrimination?) India [2007] UKAIT 00015* and *Mohamoud (paras 352D and 309A – de facto adoption) Ethiopia [2011] UKUT 00378* (IAC)

[102] Paragraph 309A of the Immigration Rules
[103] https://www.gov.uk/government/collections/tribunals-statistics
[104] A (Afghanistan) v SSHD (2009) EWCA Civ 825
FH (Post-flight spouses) Iran [2010] UKUT 275
Hode and Abdi v United Kingdom (Application no. 22341/09), 6 November 2012
FH (post-flight spouses) Iran [2010] UKUT 275
Yonas Tsegaye v Secretary of State for the Home Department [2011] EWCA Civ 736
[105] For further insight into this concept, see Stalford, H & Woodhouse, S., '*Rights Realised or Rights Defeated?: Responses to Family Migration in the UK*', Brill NV, Leiden, 2016
[106] It was said that the mother could have refused to accompany her husband to the UK without the children, or sought to return to them when she found she had been tricked, or after her divorce.
[107] UK's Gateway Protection Programme policy guidance published at: https://www.gov.uk/browse/visas-immigration and here: http://www.unhcr.org/40ee6fc04.html

[109] Pursuant to Home Office policy available here: https://www.gov.uk/government/publications/gateway-protection-programme-information-for-organisations/gateway-protection-programme and here: https://www.gov.uk/hmrc-internal-manuals/tax-credits-manual/tcm0290170
[110] Available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257392/manadaterefugees.pdf
[111] see further, in this collection: P. Biondi, '*The Best Interests of the Child Under EU Law and the Human Rights Nexus to The 1951 Refugee Convention: Family Unity and the Substantial Determination*'
[112] That is one of the reasons why the Calais litigation, discussed in Biondi's chapter, is so critical
[113] *JA (child - risk of persecution) Nigeria [2016] UKUT 560 and ST (Child asylum seekers) Sri Lanka* [2013] UKUT 00292 (23 May 2013) being some of the few exceptions
[114] *ZH Tanzania [2011] UKSC 4*
[115] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(f) [IRPA].
[116] IRPA s 60.
[117] *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 249 [IRPR].
[118] ENF20, s 5.10.
[119] Canada, *Humanitarian and Compassionate Considerations: Assessment and Processing,* online: http://www.cic.gc.ca/english/resources/tools/perm/hc/processing/index.asp
[120] Canada, *Humanitarian and Compassionate: Intake and Who May Apply,* online: http://www.cic.gc.ca/english/resources/tools/perm/hc/intake.asp.
[121] [1999] 2 SCR 817
[122] 2002 FCA 475, [2003] 2 FC 555.
[123] 2015 SCC 61.
[124] *Supra* note 5.

[125] *Gordon v Goertz* [1996] 2 S.C.R. 27.
[126] *Supra* note 5.
[127] *Ibid.*
[128] Department of Justice, *Overview of Canadian Family Justice: A Legislative Overview*, online: <http://www.canada.justice.gc.ca/eng/fl-df/fjs-sjf/rep-rap/s3.asp#parentingterminologyb>.
[129] UNHCR Canada, *Key Considerations for Assessing Best Interests of the Child in the Canadian Detention Context* (2017)
[130] Included in British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>; Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>.
[131] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>; Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[132] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>; New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[133] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[134] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[135] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>.
[136] Included in New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>; Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.

[137] Included in Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[138] Included in Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>.
[139] Included in Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[140] Included in New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>.
[141] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>.
[142] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>' Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Yukon: Children's Law Act, RSY 2002, c 31, <http://canlii.ca/t/52qzb>.
[143] Included in Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>.
[144] Included in Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>; Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>.
[145] Included in Nova Scotia: Children and Family Services Act, SNS 1990, c 5, <http://canlii.ca/t/52xs4>.
[146] Included in New Brunswick: Family Services Act, SNB 1980, c F-2.2, <http://canlii.ca/t/52xml>.
[147] Included in Alberta: Family Law Act, SA 2003, c F-4.5, <http://canlii.ca/t/52vn6>; British Columbia: Family Law Act, SBC 2011, c 25, <http://canlii.ca/t/52qn9>.
[148] Included in Manitoba: Family Maintenance Act, CCSM c F20, <http://canlii.ca/t/52ktf>; Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>.
[149] Included in Newfoundland and Labrador: Children's Law Act, RSNL 1990, c C-13, <http://canlii.ca/t/526qr>; and Ontario: Children's Law Reform Act, RSO 1990, c C.12, <http://canlii.ca/t/52vf6>.
[150] Included in Saskatchewan: The Children's Law Act, 1997, SS 1997, c C-8.2, <http://canlii.ca/t/52h93>.
[151] Included in Northwest Territories: Children's Law Act, SNWT 1997, c 14, <http://canlii.ca/t/52w21>; Nunavut: Children's Law Act, SNWT (Nu) 1997, c 14, <http://canlii.ca/t/52djw>.
[152] United Nations Convention on the Rights of the Child, 1959.
[153] United Nations Convention on the Rights of the Child (CRC) and the Guidelines on Protection and Care of Refugee Children issued by the United Nations High Commissioner for Refugees at http://www.unhcr.org/protection/children/3b84c6c67/refugee-children-guidelines-protection-care.html
[154] The Refugee Protection Division (RPD) was formerly the Convention Refugee Determination Division (CRDD).
[155] *Gordon v. Goertz* (S.C.C., n^{o}. 24622), May 2, 1996.
[156] *Immigration Act* as enacted by R.S.C. 1985 (4th Supp.), 28, s. 18.
[157] IRPA*,* S.C. 2001, c. 27.
[158] Australasian Institute for Judicial Administration Incorporated, 2004, updated 2012. Available online at aija.org.au (ANNEXED BELOW)
[159] The AIJA is a research and educational institute associated with Monash University. It is funded by the Law, Crime and Community Safety Council (LCCSC) and also from subscription income from its membership.

The principal objectives of the Institute include research into judicial administration and the development and conduct of educational programmes for judicial officers, court administrators and members of the legal profession in relation to court administration and judicial systems.

[160] *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909.

[161] Ibid., p. 910.

[162] Ibid., p. 913.

[163] Ibid., p. 913.

[164] *Legault v. Canada (Minister of Citizenship and Immigration)* (T.D.), 2001 FCT 315, [2001] 3 F.C. 277

[165] *Owusu v. Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2004 FCA 38, [2004] 2 F.C.R. 635

[166] *Nahimana v. Canada Minister of Citizenship and Immigration)*, 2006 FC 161.

[167] Ibid., para 26.

[168] Ibid., para 29.

[169] *Kim v. Canada (Citizenship and Immigration),* 2010 FC 149.

[170] *Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180 (CanLII), [2006] 2 F.C.R. 664

[171] *Kim*, para 3.

[172] Ibid., para 6.

[173] Ibid., para 8.

[174] *Varga v. Canada (Minister of Citizenship and Immigration),* [2007] 4 FCR 3, 2006 FCA 394.

[175] *Kim*, para 9.

[176] Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February 1997 found at http://www.unhcr.org/publications/legal/3d4f91cf4/guidelines-policies-procedures-dealing-unaccompanied-children-seeking-asylum.html

[177] *De Guzman v. Canada (Minister of Citizenship and Immigration)* 2010 FC 1113.

[178] *Ibid* para. 73

[179] *Aissa, Soumaya Akrouf Yahia v. Canada (Minister of Citizenship and Immigration)* 2014 FC 1156.

[180] *Patel v. Canada (Minister of Citizenship and Immigration)*, 2 FCR 196, 2008 FC 747.

[181] UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum, February 1997.

[182] *Sandoval Mares, Martha v. Canada (Minister of Citizenship and Immigration),* 2013 FC 297.

[183] *Pulido Ruiz, Cristian Danilo v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 258.

[184] *Dzado v. Minister For Immigration & Anor* [2013] FMCA 1.

[185] *Bema v. Canada (Minister of Citizenship and Immigration),* 2007 FC 845.

[186] *Diagana v. Canada (Minister of Citizenship and Immigration),* 2007 FC 330, at para 25.

[187] *Supra,* footnote 186, para 38.

[188] *Supra,* footnote 187.

[189] *Supra,* footnote 187.

[190] *Banegas v. Canada (Minister of Citizenship and Immigration),* 2015 FC 45.

[191] *BB and Justice for Children and Youth v. Canada (Minister of Citizenship and Immigration),* 2016 FC.

[192] *Ibid.*

[193] *Ibid.* [194] *Supra,* footnote 170.