

UNHCR Comments on the UK Border Agency Code of Practice for Keeping Children Safe from Harm (‘Code’)

1. Introduction

UNHCR has been charged by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate and for seeking permanent solutions to the problem of refugees by assisting governments and private organizations¹. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."

The views of UNHCR are informed by over 50 years of experience supervising international refugee instruments. UNHCR is represented in 116 countries. UNHCR provides guidance in connection with the establishment and implementation of national procedures for refugee status determination and also conducts such determinations under its mandate. In view of the Office’s supervisory role under its Statute and Article 35 of the 1951 Convention, UNHCR’s interpretation of the provisions of the 1951 Refugee Convention and 1967 Protocol are generally considered an authoritative view which should be taken into account by States when deciding on questions of refugee law.

UNHCR welcomes the opportunity to comment in relation to the current UK Border Agency Code of Practice for Keeping Children Safe from Harm (Code). Our primary focus will be on principles of refugee protection but we will also comment on immigration control issues in so far as they impact on the areas under our abovementioned mandate.

2. General observations

2.1 The legal, policy and operational framework containing response to question 16 on UK Reservation to the Convention on the Rights of the Child

UNHCR welcomes the development by UKBA’s of such a Code as a means of raising awareness among UKBA staff and UKBA generally about children’s needs and rights.

¹ See Statute of the Office of the United Nations High commissioner for Refugees, GA Res. 428(V), Annex, UN Doc. A/1775, paras 1, 6 (1950)

This area is a specialised and complex area. To this extent, UNHCR, welcomes the fact that UKBA is developing the Code as part of a wider process of reform concerning unaccompanied asylum seeking children ('UASC reform process'). In particular, UNHCR welcomes UKBA's commitment to UASC reform as set out in its five key reforms².

In addition to UKBA's five Key reforms, UNHCR wishes to reiterate the need for a fair and transparent system for children which enhances the UK compliance with their international protection obligations whilst safeguarding the institution of asylum and other forms of international protection for children.

In achieving this system UNHCR urges UKBA to adhere to the following principles and that these guide the UASC reform process and the development of the Code as part of this process:

- UNHCR suggests that throughout the UASC reform process and the Code, the UK Government unreservedly incorporate and implement the Convention on the Rights of the Child as its legal and operational framework underpinning the process. Pursuant to General Comment No. 6 (2005) and UNHCR Executive Committee Conclusion No. 107 on 'Children at Risk'³ UNHCR urges the UK Government to have due regard to the particularly vulnerable situation of unaccompanied and separated children; ensuring that such children are able to access and enjoy their rights; and, to provide guidance on the protection, care and proper treatment of unaccompanied and separated children based on the entire legal framework provided by CRC, with particular reference to the principles of non-discrimination; the best interests of the child; the right to life, survival and development and participation; and supported by a system of 'independent guardianship'⁴.
- In addition, UNHCR suggests that through the reform process, UKBA take account of the commitments it has already made to the implementation of the European Union Reception, Qualification and Procedures Directives. All of these directives require the UK Government to adhere to the 'best interests' principle and to the welfare of the child. UNHCR notes that the UK Government committed itself to these directives without entering any reservation at the time of signing them. UNHCR notes that the Code does not make any reference to the CRC and or the "best interest of the child" principle as one of the fundamental principles of the CRC. UNHCR urges UKBA to incorporate the latter into its legal, policy and operational framework and any mechanisms developed by it with a view to creating the '*Fair, effective, transparent and trusted immigration system*'.⁵
- To facilitate the latter, and regardless of the legality of the UK Government's Reservation to article 22 CRC, UNHCR would remind UKBA of the repeated calls made by the Committee on the Rights of the Child for the removal by the UK

² As set out in its UASC reform process documentation.

³ General Comment No.6, (2005) Committee on the Rights of the Child, Convention on the Rights of the Child, on the Treatment of unaccompanied and separated children outside their country of origin.

⁴ See section V (b), paragraphs 33 – 38, General Comment No.6, (2005) Committee on the Rights of the Child, Convention on the Rights of the Child, on the Treatment of unaccompanied and separated children outside their country of origin.

⁵ See paragraph 2.1, section two of the Code, page 5

Government of its Reservation to article 22 CRC, and on this basis welcomes the recent legal opinion (Legal Opinion) submitted to Government by UNICEF and Safe the Children UK.⁶

- In addition, UNHCR would wish to reiterate the fact that, very often, *it* is called to assist governments at many levels with its commitments to asylum seeking and refugee children and this often translates into conducting many of the functions required of States in this regard. In doing so, a number of fundamental principles underpin any action taken by UNHCR to prevent and respond to violations of the rights of asylum seeking, refugee and returnee children which UNHCR would urge UKBA to consider:
 - A key principle is that children must be among the first to receive protection and assistance.⁷ Previous UNHCR Executive Committee Conclusions have called upon States and relevant parties to respect and observe the rights and principles that are in accordance with the relevant international instruments, especially on safeguarding child and adolescent refugees, and for UNHCR to continue to integrate fully the rights of the child into *its* own policies and programmes. For UNHCR its actions thus need to be rights-based.⁸
 - The UNHCR Executive Committee has also reaffirmed the 1989 United Nations Convention on the Rights of the Child (CRC) as its core international legal and normative framework for the protection of children, including adolescents, and for promoting their best interests.⁹
 - Of particular relevance here is UNHCR's recent Executive Committee Conclusion No.107, on 'Children at Risk'. The Executive Committee has recognised the importance for States to promote an *age and gender-sensitive approach in the application of international refugee instruments* and for UNHCR to continue mainstreaming age and gender into its policies and operations.¹⁰ A starting point for such a system is the development and strengthening of national legislative, judicial and administrative structures for the protection of children. These need to adhere to international human rights standards; be extended to refugee and asylum-seeking children; and provide for their specific needs.
 - This includes the implementation of the principle of the best interests of the child; and the development by States of age- and gender-sensitive asylum procedures and an age and gender sensitive interpretation of the 1951 Convention definition of refugee.

⁶ Sandhya Drew legal opinion, March 2008.

⁷ Executive Committee Conclusions Nos. 47 (c); and 84 (PP2).

⁸ Executive Committee Conclusions Nos. 84 (a) and (c); 64 (PP4), and 73 (PP5).

⁹ Executive Committee Conclusions Nos. 71 (w); and 84.

¹⁰ Executive Committee Conclusion No. 95 (LIII), para. (f).

- With respect to the latter, UNHCR considers that this involves, ensuring that children seeking asylum are interviewed and have their applications assessed by officials qualified in interviewing children and determining claims in a manner which respects the best interests of the child concerned. This includes adapting rules of procedure and evidence to make them less intimidating, and facilitating the child's participation by providing relevant information and access, free of charge, to a qualified legal representative.¹¹

- As far as age assessments are concerned, these need to be conducted in a scientific, safe, child- and gender-sensitive and fair manner, taking into account both physical appearance and psychological maturity, respecting human dignity, and, in the event of uncertainty, according to the individual benefit of the doubt.¹² In order to reduce further the situations in which asylum-seeking children are detained, which should in any case be a measure of last resort and for the shortest appropriate period of time,¹³ alternatives to detention could also usefully be examined.¹⁴

- UNHCR has recently developed a tool to assist it and its partner organisations in determining what is in a child's 'best interest' whenever they have to make a decision concerning a child which fundamentally impacts on the child's life: (*see UNHCR Guidelines on Formal Determination of the Best Interests of the Child Provisional Release, May 2006* – hereafter referred to as the 'BID guidelines') The Guidelines identify the underlying principles that can be used to construct a framework for ensuring compliance with the Convention on the Rights of the Child in a formal Best Interests Determination (BID). They set out the legal and other principles that will guide decision-makers in:
 - When to make a formal Best Interests Determination;
 - Who should make the determination and what procedural safeguards should be followed;
 - How criteria should be applied to take a decision in a particular case.

As a result of over 50 years experience of supervising international refugee instruments and working with governments all over the world by providing guidance in connection with the establishment and implementation of national procedures, and conducting refugee status determinations, and its work to date with the UK Government, UNHCR would urge UKBA to incorporate the foregoing principles into its own work with children, and in so doing, give effect to its international obligations towards this particularly vulnerable group of children. In so doing, UNHCR would stand ready to assist UKBA with its work with children.

¹¹ CRC Article 12, and CRC General Comment No. 6, para. 36 and paras. 68-72.

¹² CRC General Comment No. 6, para. 31 (i).

¹³ CRC, Article 37.

¹⁴ See for example Article 37 of the CRC and General Comment No. 6, paras. 61-62 and UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, February 1999, Guideline 6. See also CRC General Comment No. 6, para. 63.

Further, UNHCR perceives that the Code is essentially an organizational protocol. However, it also sets out the terms of reference for its engagement with other agencies in a manner which suggests that it sees itself as part of the existing child protection structures and measures in the UK. In doing so UNHCR notes that UKBA seems to have taken a decision not to be subject to the statutory safeguarding and well-being duties that would be required under Section 11 of the Children Act 2004 and to which all other child protection agencies are subject to in the UK. Instead it has opted to be subject to a much weaker duty under Section 21 of the UK Borders Act 2007.

UNHCR understands that the one of the reasons given by UKBA for adopting this approach¹⁵ is that its work as a border and immigration agency means that it has to approach its work with children very differently to that of other Government agencies working with children. However, UNHCR would suggest that for the reasons set out in the Legal Opinion, this need not be the case and that UKBA ought to be able to reconcile its full implementation of the CRC into its legal, policy and operational framework with its work as a border and immigration agency.

UNHCR's suggests that the four general principles of the CRC (referred to above) can constitute a filter mechanism throughout UKBA's organizational work, (as it has done for UNHCR's work) systematically focusing attention on issues of discrimination, the views of children, the mobilization of resources and in particular the decision making process that make the children's best interest a primary consideration.

All that the CRC does is act as a mechanism (legal, policy and operational) to assist and inform it on how to care and protect asylum seeking children and generally children subject to immigration control. By adopting such a framework, UKBA would have access to a well developed framework and mechanism through which to discharge its organizational work without interfering with its immigration, border management duties and obligations.

At the same time, in doing so, it can acknowledge that these groups of children are children first and foremost with a range of needs besides their need to regularize their immigration status. To this extent UNHCR supports the fact that, to some extent UKBA have already acknowledged this as one of its five Key priorities in the UASC reform process when it refers to the need to: "*locate unaccompanied asylum seeking children with specialist local authorities to ensure they receive the services they need*"

As stated, UNHCR considers that, by subjecting itself to the safeguarding duties imposed by section 11 Children Act 2004, UKBA's functions as a border and immigration agency would not be compromised.

For example, the police force in the UK, are an integral part of the child protection systems in the UK. They are subject to Section 11 Children Act 2004. This does not prevent them from discharging their duties as a law enforcement agency. If a child commits a crime, the fact that the police force are subject to section 11 does not prevent them from arresting the child, charging him/her and prosecuting him to the full extent of the law. The principles enshrined in the Children Act 1989, of which the 'best interest of the child' is but one (and which incorporates the CRC principle) does not prevent the police force (or the courts, or even social services) from discharging its functions. It

¹⁵ At the consultation meeting held by UKBA on 11 April 2008

simply acts as a filter mechanism throughout its organizational work with children, who have either committed a crime or are the victims of crime.

2.2 The consultation process

UNHCR welcomes UKBA's engagement with stakeholders on the Code and the UASC reform process.

However, it notes that many of the questions in the pro forma are concerned with changes to asylum policy and procedures instead of the Code, thus raising a concern about the suitability of such questions in this context of a consultation on the Code.¹⁶ Further the questions are worded in such a way that they can only elicit very specific responses thus limiting the nature and content of the response.¹⁷

UNHCR suggests that there are other ways for UKBA to meaningfully engage with stakeholders to discuss policy, procedures and other operational issues affecting children in this situation and which does not limit in advance the method of response, to the point of telling stakeholders what questions they ought to respond to. This limits UNHCR's response.

The other aspect of this consultation process which UNHCR would wish to express some concern about is the fact that UKBA often refers to `operational guidance/instructions` in the Code, but it has not had sight of any instructions/guidance during the consultation process. The effect of this is that read in isolation, the Code appears incomplete. In the circumstances UNHCR would request clarification on whether UKBA has produced any instruction/guidance to accompany the Code and or whether it intends to do so in the future. If so, UNHCR would hope that it be given the opportunity to comment on these.

Finally, any comments made by UNHCR on the Code so far, should be considered as part of its continuing involvement and or engagement with UKBA and the UK Government under section 35 of the 1951 Refugee Convention on all issues affecting children of concern to it, and in particular its response so far to the UASC reform process.

3. *Response to specific pro forma questions*

3.1 Question 1 and 2

Q1. It is proposed that there should be a requirement for the Border and Immigration Agency Staff members to record and explain their reasons in writing if they have departed from the Code of from any instructions issues in support of the Code

¹⁶ See questions 7,8 and 10 of the pro forma

¹⁷ See question 9 of the pro forma

Q2. If the proposed requirement is introduced (see q 1) who do you think should review these recorded departures from the Code?

UNHCR notes that Q1 is framed in such a way that it could lead UKBA staff to perceive the Code as a set of broad guidelines from which derogation is always permissible so long as you give your reasons in writing, rather than a statement of clear principles or guidelines which can guide its work with children. It appears to start from the premise that staff can depart from it. This sends the wrong (and a confusing) message to staff and the organization.

UNHCR would suggest that the language in the Code be more assertive and reflect a set of positive principles which UKBA staff have to adhere to when working with children. This would send a more positive and clear message to all staff which in turn would be more likely to result in the change of culture so desired by UKBA as an institution. One example would be the very positive statement made by Liam Byrne MP, in his Forward to the Code: *“The Code forms part of the wider work this Government has undertaken to improve the welfare of children in the UK. Every child does matter – as much as if they are subject to immigration control as if they are British citizens”*.

Further, as a key concept in any accountable and transparent decision making process, UNHCR would support a requirement by UKBA that ensured that staff documented their reasons for making any decision, and that further, it discussed and communicated this to those directly affected by it. In addition, UNHCR considers that such information should be made accessible to the person(s) affected, in particular when children are involved.

UNHCR has repeatedly stated¹⁸ that the best interest of a child is one of the fundamental principles which should permeate any assessment or decision made in respect of a child. As already cited above, one tool which UNHCR uses to ensure that an asylum seeking child’s best interests are respected are the *Guidelines on Formal Determination of the Best Interests of the Child Provisional Release, May 2006*.

Any decisions having a fundamental impact on a child's life ought to be reached, following a comprehensive assessment which respects the child's rights. UNHCR considers a formal BID necessary in at least three cases: (i) prior to identifying durable solutions for unaccompanied and separated refugee or internally displaced children; (ii) when arranging temporary care for unaccompanied and separated children in particularly complex situations; and (iii) before deciding on the separation of a child from his or her parents against their will. The life-changing impact of such decisions places a particular responsibility on those involved.

Depending on what section(s) of the Code a staff member intends to depart from, he/she needs to consider the impact that doing so will have on the child before such a decision is taken. UNHCR would suggest that if the decision can have a fundamental impact on the child, UKBA and its staff ought not to (in addition to the essential procedural requirement to give reasons and document any decision to depart from the Code) make such a decision without having at least followed a process of formal consultation and

¹⁸ See ExCom. Conclusion No.107 on `Children at risk` (2007) page 7, which refers to its `Best Interest Determination` guidelines: UNHCR Guidelines on Formal Determination of the Best Interests of the Child Provisional Release, May 2006

assessment with respect to the impact of such a decision on the child. To do so requires UKBA staff to work closely with the child and those responsible for him/her.

As it stands the Code does not allow for such assessments to be undertaken. UNHCR considers that documenting its reasons for departure from the Code is therefore an insufficient safeguard for the child, particularly in those instances where such departures can and will have a fundamental impact on the child.

In this regard, UNHCR would stress the need for UKBA to develop or be subject to a decision making mechanism which enables it to determine the welfare and best interests of the child, (which could be based on the Children Act 1989 paramountcy principle,¹⁹). UNHCR would suggest that one way of achieving this is by creating a system of independent children's guardianship responsible for safeguarding and promoting the welfare and best interest of the child.

On a more practical level, a guardian would also act as a facilitator for the child and an interface between the child and the various actors involved in making decisions concerning the child. The guardian works with the child and all other actors involved, taking into account many factors including the child's wishes and feeling in making and *reaching* a decision on the child.

A full discussion on this is beyond the scope of this consultation, however, UNHCR stands ready to assist UKBA with respect to a more detailed discussion and the provision of information concerning the latter.

Finally, following the above, UNHCR observes that the Code does not set out clearly the circumstances when departure is acceptable or not. This as stated weakens the implementation and impact of the Code and makes compliance almost discretionary in every instance. Further, this diminishes the importance of some of the decisions being taken and its impact on the child. In the circumstances, UNHCR would welcome a more thorough independent monitoring and accountability mechanism to track any decisions to depart from the Code.

3.2 Question 3

Q3. The Code reflects the view that the best people to care for a child and communicate decisions about his/her future, including the immigration process, are his/her parents. Do you think the child's parents should have the primary responsibility for communicating with the child about the immigration process?

The answer to this question depends on whether the child is accompanied, separated or unaccompanied²⁰

¹⁹ See Section 1 Children Act 1989.

²⁰ As defined in the Inter-Agency guiding principles on unaccompanied and separated children and the ExCom. Conclusion on Children at Risk and UNCRC Committee in its General Comment No. 6 referred to herein.

UNHCR would agree that the best person(s) to care for the child and to communicate with the child are the child's parent(s), provided this is not contrary to the child's best interest (in cases of conflict of interest, abuse or other non exhaustive factors). If the child's parent(s)/carer(s) is unable or unwilling to care for the child and or communicate with the child because it would not be in the child's best interest, the issue then becomes who is best placed to communicate with the child and or represent their interests. For reasons already discussed, UNHCR considers that the person best placed to effect this function is a children's independent guardian. Communicating any decision to a child, particularly ones that have a fundamental impact on the child requires expertise in the area of child protection and all aspect concerning a child's general welfare and well-being because of all the factors that ought to be considered when undertaking this function.

A children's guardian is not the same as a legal advisor. The latter is not a specialist in child welfare and is always not best placed to make an assessment or decision on what and how to communicate with a child. This also clearly depends on the child's age, maturity and a number of other considerations which need to be taken into consideration.

UNHCR and the UN Committee on the Rights of the Child (General Comment No. 6) have repeatedly stated that States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests. UNHCR would therefore urge UKBA to enable a system/mechanism whereby a guardian or adviser is appointed as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State, in compliance with the Convention and other international obligations.

According to General Comment No.6, such a guardian should be consulted and informed regarding all actions taken in relation to the child. The guardian should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. The guardian or adviser should have the necessary expertise in the field of childcare, so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child.

Agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship. For example, non-related adults whose primary relationship to the child is that of an employer should be excluded from a guardianship role (CRC/GC/2005/6 page 13).

In the case of a separated child, guardianship should regularly be assigned to the accompanying adult family member or non-primary family caretaker unless there is an indication that it would not be in the best interests of the child to do so, for example, here the accompanying adult has abused the child. In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely. If such a guardian is able and willing to provide day-to-day care, but unable to

adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures (such as the appointment of an adviser or legal representative) must be secured.

In addition, review mechanisms ought to be introduced and implemented to monitor the quality of the exercise of guardianship in order to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.

In cases where children are involved in asylum procedures or administrative or judicial proceedings, they should, in addition to the appointment of a guardian, be provided with legal representation. At all times children should be informed of arrangements with respect to guardianship and legal representation and their opinions should be taken into consideration.

UNHCR would be cautious and indeed concerned if UKBA staff were allowed to communicate decisions directly to the child without the presence of the guardian or other similarly appropriate person(s) for the reasons set out herein.

3.3 Question 4

Q4. The draft Code indicates that the Border and Immigration Agency complaints system will be the appropriate route for complaints relating to the Code. Should there be a dedicated complaints system for children to access?

UNHCR agrees that there should be a dedicated complaints mechanism which is child sensitive. This should be independently monitored and audited to ensure accountability and transparency in the system. A system which is the same as that set out at section 26 Children Act 1989 would be welcomed by UNHCR.

3.4 Question 5 and 6

Q5. The Code will be supported by operating instructions that cover all the main occasions when the UKBA has substantive contact with children. Do you think that it is appropriate to draw up operating instructions for each of these occasions/groups [as listed]?

Q6. Any further comments regarding sections 1 – 3 of the draft code

UNHCR has already commented on the need for operational instructions generally and as part of the consultative process. UNHCR is concerned that this particular question makes no mention or reference to asylum seeking and refugee children, even though refugee status is the main form of international protection available to children. UNHCR urges UKBA to include these in both its pro forma and in addition would recommend that UKBA develop operational instructions for this specific group of persons for reasons already stated.

UNHCR would be willing to assist UKBA in developing such guidance, however it is beyond the scope of this consultation for UNHCR to comment on the nature of such guidance once UKBA has confirmed its intention to develop them. Any guidance developed should then be published. In any event operational instructions are necessary for the purpose of ensuring clarity for both UKBA staff and others involved in the system, not least children themselves.

3.5 Question 7

Q7. A number of options are available at the time of being refused further residence in the UK...Please complete the statement below by indicating the option which you think is most accurate.

UNHCR welcomes the variety of options available for those that are refused further residence as a means of ensuring an appropriate solution to those subject to immigration control and that any expulsion occurs in a dignified manner and only after determination of due process of law through the courts/tribunals. It would not limit or reduce existing options, save that in the case of detention of children, UNHCR would urge UKBA to constantly search and consider alternatives to detention.

The question itself refers to those refused "further residence". This implies that they already had some form of residence beforehand. From UNHCR's point of view, this would exclude asylum seekers, but would include those granted refugee status or given discretionary leave or humanitarian protection (DL or HP).

As far as children are concerned, this would include children granted any of the three options cited above. In the case of children, UNHCR considers not only that as many options as possible should be available to them if refused further residence but that these ought to be communicated to them as early as possible in the immigration/asylum process and provided it is appropriate at the time: the child has been appointed a guardian and or advisor to assist with this and once their other more immediate needs have first been met: housing, food, clothing and other basic needs.

For these children, any decision or option taken should be carefully considered beforehand through a full consultation process with the child, his/her representatives, parents, carers and or guardian and or child welfare experts: social services, taking into consideration the impact of any of the options available on the child (and not just the adults involved). In considering these options UNHCR would urge UKBA and all those involved, to be guided by 'the best interest principle' in firstly, examining the options and in, secondly, how to implement it. In the same way that UNHCR has developed its own mechanism and tool to assist it in determining what and how to make decisions affecting a child (through the BID guidelines referred to above), UNHCR would similarly recommend that similar systems be developed in the UK to assist it in making and implementing decisions affecting children in these circumstances.

UNHCR acknowledges that the UK *already* has a developed child care and protection system, and to this extent would simply remind the UK Government of its international commitments under the 1951 Refugee Convention, the CRC to treat children subject to immigration control in the same way as it would a British citizens. UNHCR considers that one of the ways that UKBA could do this is by adopting section 11 Children Act 2004 rather than or in addition to the Code.

3.6 Question 8

Q8. Do you think that families that face removal could benefit from the provision of information and counselling on the conditions and prospects available to them in their own country?

UNHCR considers that children and their families facing removal should be kept informed about what will happen on return. This is particularly important for children. For these children, any decision to remove should be carefully considered taking into consideration the impact of removal and return on the children (and not just the adults involved) and how best to effect removal and return. In the circumstances, UNHCR would welcome the availability of counseling as one of the services offered to children and their families being returned. However, UNHCR considers that this is only one option/service which should be available. (See further UNHCR's response to question 10)

3.7 Question 9

Q9. Families are detained as an alternative to separating children and parents in the time leading up to departure. Do you think that this should remain the preferred approach?

As regards the possibility of detention of children and or their families with a view to effecting any return, UNHCR's position on this remains clear, namely that the detention of children should be a measure of last resort and for the shortest appropriate period of time, and that alternatives to detention should always be encouraged.²¹

UNHCR has already commented earlier on the detention of children and families. UNHCR further refers UKBA to its Legal and policy paper on 'Alternatives to detention of Asylum Seekers and Refugees'²² and in UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, February 1999, Guideline 6²³.

However UNHCR considers that children should not be separated from their parents unless this is in their best interest or where the child is being separated from abusive or negligent parents/carers.

The CRC suggests that higher safeguards are required in some circumstances, and that specific procedural guarantees are provided when making decisions on the separation of children from their parents (Art. 9). In relation to unaccompanied and separated children

²¹ CRC, Article 37. See for example Article 37 of the CRC and General Comment No. 6, paras. 61-62 and UNHCR's Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers, February 1999, Guideline 6. See also CRC General Comment No. 6, para. 63.

²² UN High Commissioner for Refugees, *Alternatives to Detention of Asylum Seekers and Refugees*, April 2006. POLAS/2006/03. Online. UNHCR Refworld, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4472e8b84>

²³ See also CRC General Comment No. 6, para. 63.

outside their country of origin, the Committee on the Rights of the Child has clarified that in order to pay due respect to Article 3 of the CRC, a Best Interests Determination must be “documented in preparation of any decision fundamentally impacting on the child’s life”²⁴.

According to the BID guidelines, this includes any decision which involves separating a child from his/her parents against their will. One of the main reasons for taking this stance is because of the increased risk factors associated with separating a child from his/her parents and the serious impact this can have on a child. For these reasons UNHCR considers that in these circumstances, there should be a mechanism (as discussed above) in place to determine what is in the child’s best interest²⁵.

UNHCR also goes further in advocating that, in these circumstances, there ought to be higher procedural safeguards in place when determining what is in the child’s best interest.

According to UNHCR, in most cases decisions that require higher procedural safeguards fall under the competence of States. States that have signed and ratified the CRC bear the responsibility to ensure its implementation. This includes the obligation to give the weight required by the CRC to the best interests of the child when making decisions affecting children. UNHCR considers that some examples in which States are required to follow specific procedural safeguards in making a decision affecting a child include adoption, separation from parents, and appointment of a guardian for unaccompanied or separated children and the return of unaccompanied children to their country of origin.

For decisions on **separation of children from their parents against the parents’ will** (e.g. in cases of abuse or neglect or when parents live apart and a decision must be made on the child’s place of residence), Article 9 CRC requires that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.

UNHCR would therefore urge the UK Government to develop such mechanisms or systems for determining these issues. A starting point would be for UKBA to be subject to section 11 Children Act 2004 and to integrate children subject to immigration control into the mechanisms already available to British citizens in these circumstances, under the Children Act 1989 and 2004.

3.8 Question 10

Q10. The Code sets out the requirement for the UKBA to be responsive to the needs of children while they are being dealt with in the immigration system. This includes when a child is being removed from the UK as part of a family. Do you think that there should be a requirement for a written statement relating to the consideration of the effect of the removal on the child?

²⁴ See BID guidelines, para. 2.2, page 9

²⁵ Ibid

This question once again touches on the method and manner in which information is communicated to children and in particular how decisions concerning children are made. To this extent UNHCR refers UKBA to comments made so far in this regard. With respect to the requirement to provide written reasons, UNHCR notes that this is already a requirement following the decision of Court of Appeal in the case of AG (Eritrea) v SSHD and similar cases. UNHCR also refers UKBA to its own Children's Asylum Policy Instruction which requires UKBA to make decisions concerning children in accordance with their best interest.

In addition UNHCR would draw UKBA's attention to UNHCR's own guidelines on children²⁶ which states that should repatriation be considered as the most appropriate durable solution, the return will not be carried out unless any concerns have been met concerning the adequacy of the arrangements in place for the child on return. Whilst these guidelines relate to unaccompanied children, they bear some relevance to situations in which children are being removed as part of a family as very often children's voices and needs are not addressed and are often ignored.

UNHCR therefore welcomes the fact that UKBA is considering the provision of appropriate counseling for those being returned. However, it would highlight the fact that in some circumstances it may be appropriate to provide independent/separate counseling to the child. This is particularly important in cases of individual reluctance, as well as family pressure. If possible, the child should be encouraged to communicate with his/her family members prior to return and if necessary be afforded independent representation, advice and counseling if the child so requests or there is any conflict between the child and his/her parents, carers.

In this regards UNHCR would urge UKBA to explore the possibility of using other agencies with expertise in these matters to assist UKBA and the children in these circumstances. UNHCR stands ready to assist UKBA in this regard.

3.9 Question 11 and 12

Q11. When children are involved in Family court considerations should the UKBA simplify its approach to one of granting residence to the child... Do you think that the UKBA should amend its approach as described above?

Q12. Please include any further comments you have regarding sections 4 – 6 of the draft Code

UNHCR is unsure whether the reference to the Family court refers to all family proceedings, both public and private. This is not to say that UNHCR would not welcome the treatment of asylum seeking and refugee children, including rejected asylum seekers, within the context of UK's comprehensive child protection systems. UNHCR however is perhaps not the organization best placed to respond to this question on the national legal system relating to the resolution of family matters, though it would support the availability of such systems, mechanisms and remedies to asylum seekers, refugees and or other children of concern to UNHCR, in particular because of the application by

²⁶ Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997)

the family courts of the best interest principle whenever it considers issues relating to or affecting children.

4.0 Question 13

Q13. The Code indicates that the appointed Chief Inspector of the UKBA will look at UKBA performance in relation to children...Please indicate whether you think each of the following areas should be included in the list that might be inspect

UNHCR would agree with the suggestion made by this question that the Chief Inspector of UKBA should look at the Agency's performance in relation to children in accordance with the standards required of similar agencies: OfSted and the Independent Police Complaints Authority.

UNHCR, BO London

30.04.08