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“Unduly Harsh?": An Empirical Examination of Best Interests Assessments in the Context of Parental Deportation

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Abstract

Thousands of people are deported from the UK every year, having served a sentence for a serious criminal offence, it being determined that it is no longer in the public interest for them to remain in the UK. For those who are parents, they can appeal

against deportation on grounds that it would breach their right to family life and have an unduly harsh impact on their children. Detailed guidance has emerged, setting out the factors that should be taken into account in determining this question in a manner that is compliant with children's rights. Drawing on an in-depth analysis of a sample of deportation case files, this paper provides a unique empirical insight into the extent to which this guidance is applied in practice, with a particular reference to children's rights principles and processes.

Keywords

best interests – deportation – immigration – right to family life – social workers – unduly harsh – welfare

1 Introduction

This paper considers the extent to which children's rights are brought to bear on deportation decisions in the UK. Building on existing qualitative research on the impacts of deportation on family members (BID, 2020 and 2021; Griffiths and Morgan-Glending, 2021; FFJ, 2022), and on extensive legal analysis of the rights and interests of children in deportation (Collinson, 2020; 2021 and 2022), we present the findings of the first in-depth empirical analysis of the legal rights and welfare of children affected by parental deportation in the UK.

The study is particularly timely given the political and legal inclination in recent years to limit the conditions under which immigrants, including asylum seekers, can lawfully enter the UK, and to facilitate the removal of those deemed to be unlawfully resident. Whilst the election of a Labour government in July 2024 beckons a further wave of immigration reform, the raft of legal measures currently in force,¹ coupled with the spectre of right wing, anti-immigration politics across the globe, signal a rising tide towards ever more restrictive entry requirements, a growing readiness to criminalise

1 Notably, the Safety of Rwanda (Asylum and Immigration) Act 2024, the Illegal Migration Act (IMA) 2023 and the Nationality and Borders Act (NABA) 2022. For example, NABA 2022 introduced new offences relating to knowingly arriving in or facilitating entry into the UK without valid entry clearance and significantly increases the sentences that people receive for such offences. The IMA 2023 severely limits the conditions under which individuals can seek asylum in the UK and extends the circumstances under which those who arrive through so-called "irregular methods" can be removed.

certain forms of migration, and an extension of mandatory deportation of those deemed unfit to remain. Rarely, if at all, do such measures or debates acknowledge the potential impacts of deportation on children. Whilst the law requires that any decision to deport a parent must take into account the welfare of their child/ren who may be affected by their deportation, and while there is a raft of guidance setting out precisely how that assessment should be conducted in practice, evidence suggests a lack of rigour, transparency and consistency in how children's rights and welfare are brought to bear on deportation decisions.

Drawing on the findings of our study, this paper explores how children's rights might strengthen the procedure and protections available to children in this context. Section 1 summarises the law relating to deportation in the UK, outlining in particular the obligations pertaining to children whose parent/s are subject to deportation. Section 2 presents the methods and findings of the pilot study to highlight the depth and scope of children's welfare assessments in these proceedings. In particular, it explores how welfare evidence is collected, by whom and at what point in proceedings, and evaluates the extent to which that evidence is brought to bear on decisions to deport at different levels. In the process, it contrasts the seemingly superficial and ambivalent approach to welfare assessments in immigration proceedings with that of the courts engaged in domestic family justice proceedings.

2 Deportation of Parents from the UK: Legal and Policy Context

Foreign nationals can be automatically deported from the UK if they have been convicted of an imprisonable offence and sentenced to a period of imprisonment of at least 12 months (s.32(5), UK Borders Act 2007). Those who are subject to deportation are required to leave the UK and may be detained until they are removed. They are also prohibited from re-entering the UK for as long as the deportation order is in force and invalidates any leave to remain in the UK that may have been issued before the order was made. In such cases, it is lawful to deport their family members – including any children (s.3(5)(b) of the Immigration Act 1971) – unless certain exceptions are met. Notably an individual can appeal against deportation where he or she 'has a genuine and subsisting ... parental relationship with a qualifying child, and the effect of the offender's deportation on the ... child would be unduly harsh'. In such cases, the child must be a British national or have lived in the UK for seven years or more. It must be demonstrated that it would be "unduly harsh" for that child to travel with the deported parent *and* that it would be unduly harsh to leave the

child in the UK without the deportee (Immigration Rules 399(a) and s.117C(5) of the Nationality Immigration and Asylum Act 2002).²

Notwithstanding these provisions, there is remarkably little evidence of how many children are affected by deportation in the short, medium and longer term. The UK Government does not disaggregate and publish data to reveal how many of those subject to deportation have children. That said, available data indicates that several thousand UK-based children are impacted by parental deportation each year. Notably, there are currently over 10,000 foreign nationals in prisons in England and Wales and nearly 12,000 more foreign nationals living in the community are subject to deportation action (McKinney and Gower, 2024). Given that approximately 42 per cent of families in the UK have one or more dependent children (ONS, 2023), and given that those subject to deportation are no less likely to have children than the general population, it is estimated that over 8,000 children are affected by the deportation of a parent every year.

Whilst official data on the impacts of deportation on children may be lacking, the legal obligation to have due regard to their rights and welfare, in determining whether or not a deportation is justified, could not be clearer.

2.1 *The Rights of Children in Deportation Proceedings: Legal and Procedural Framework*

The obligation to safeguard and promote children's welfare in all immigration proceedings – otherwise expressed as children's best interests – is an established principle, recognised in law (e.g., s.55, Borders, Citizenship and Immigration Act 2009), policy (e.g. Every Child Matters, 2009) and the jurisprudence of the highest courts in the UK (e.g., *ZH Tanzania (FC) v. Secretary of State for the Home Department* [2011] UKSC 4, para. 23; *Zoumbas v. SSHD* [2013] 1 W.L.R. 3690, para. 10).

A wealth of more specific guidance has also been developed at international, regional and UK-level relating to the status, substance and procedure for assessing children's best interests in deportation proceedings. The UN Committee on the Rights of the Child, for instance, has expressly stated that authorities should give high priority to a best interests assessment to evaluate the potential impact of such a decision on children's rights and development, including their mental health (CMW/C/GC/22, para. 32). The European Court of Human Rights, for its part, has issued detailed directions on how best interests should

2 Those sentenced to four years or more in custody are not eligible to be considered under the 'exceptions' to deportation being in the public interest and must meet an even higher test of 'very compelling circumstances' over and above the unduly harsh test. See s.117C(6) of the Nationality, Immigration and Asylum Act 2002 and para. A398(c) of the Immigration Rules.

be brought to bear on decisions relating to the expulsion of parents, drawing directly on Article 3, UNCRC (e.g. *Nunez v. Norway*, Application 55597/09, 28.06.2011; *Üner v. The Netherlands*, Application 46410/99, 18.10.2006). This line of jurisprudence makes clear that the interests of children have gained increasing importance, and although they are not considered decisive, must at least be given significant weight (Claire Fenton-Glynn, 2021: 122).

This obligation is now embedded in UK domestic law and policy (e.g., *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC); *KO (Nigeria) and others v. Secretary of State for the Home Department* [2018] UKSC 53). The Home Office (Home Office Guidance on Criminality, 2024; Every Child Matters 2009; Department of Health and Department for Education and Employment and the Home Office 2000) has set out a detailed list of factors that decision-makers need to take into account when assessing whether a child's best interests could override grounds for deportation, including: factors relating to the child's personal identity, such as their age, nationality and immigration history. This includes how long they have lived in the UK, whether they have lived in any other countries, whether they were born a British citizen, and whether they hold the nationality of the country to which their parent is to be deported; factors relating to the child's care, including who the child's primary carer is, whether it is in the child's best interests to remain in the care of the parent subject to deportation, or whether it might be more appropriate to remain in the care of the left-behind parent. If the other parent is in the UK, decision-makers must consider whether they are British or have leave to enter or remain in their own right, or whether the other parent could choose to go to the country of return with the child and the parent who is being deported.

The Home Office explicitly acknowledges that it will generally be deemed "unduly harsh" for a child to remain in the UK without the foreign criminal if there is no other parent or family member to care for them and it necessitates them being taken into the care of the state. This presumption can be rebutted, however, if there are '... any reasons (related to the foreign criminal's offending history, or other reasons) why it would be in the child's best interests to be separated from the foreign criminal.' The decision-maker can also scrutinise how, in practice, the child would be affected by the foreign criminal's absence and, specifically, '... whether there is credible evidence that the foreign criminal's presence is needed to prevent the child's health or development being significantly impaired, or their care being other than safe and effective' (Home Office, 2024: 24–25). This should include an assessment of any practical difficulties the remaining parent or guardian would face in caring for the child alone (if they are not already effectively caring for the child alone), and whether there is credible evidence that the child would lose all contact with the deported

parent. Contact, it seems, can reasonably be confined to telephone and internet contact, although whether the restrictions that deportation imposes on contact amount to being “unduly harsh”, ‘... will depend on the nature of the relationship the foreign criminal has with the child, and the impact on the child of the loss of contact’ (Home Office, 2024: 15).

Whilst the legal duty to safeguard and promote the welfare of the child in deportation decision-making is incontestable, in practice concerns have been raised that this duty is given only superficial consideration by the Home Office. As noted in a previous qualitative study:

... we see many cases where parents are forcibly separated from their children by detention or deportation where the Home Office has failed to properly engage with its section 55 duty and attendant policies. Although the policies clearly place a burden of enquiry on the Home Office we rarely encounter cases where the Home Office has made such meaningful enquiries to ascertain the best interests of a child....The Home Office quote their duty in decision letters but they very rarely will carry out proper assessment, even of the evidence they have, of the impact on the child. Even when potential issues are raised about the child missing the parent or not doing well at school since they’ve been away, it’s very rare that the Home Office actually takes steps to find out more about that.

BID, 2021: 8

Moreover, whilst the Home Office Guidance details the substantive factors that may be brought to bear on a best interests assessment, it is silent on the procedure for carrying out that assessment; specifically how and when it should be conducted, and by whom. Even if the deportation may necessitate the child being placed in the care of another family member or the state, there is no obligation similar to that required in other child protection contexts that a separate welfare assessment is conducted and presented to the decision-maker either orally or in writing (s.7 and s.37 of the Children Act 1989). Nor is there any suggestion that the assessment be undertaken by an independent welfare officer, the implication being that it is perfectly legitimate – presumed, even – that the parent who is subject to the Deportation Order will initiate and rely on the welfare assessment only insofar as it supports his or her appeal to remain in the UK.

Our study sought to examine the application of this guidance in practice, and the extent to which considerations around children’s best interests were ultimately brought to bear on deportation decisions. In addition, we referred to the comprehensive substantive and procedural best interests guidance issued

by the UN Committee on the Rights of the Child, notably that pertaining to best interests assessments contained in General Comment No.14 (CRC/C/GC/14).

3 The “Unduly Harsh” Pilot Study

The empirical research underpinning this discussion was a pilot study undertaken by researchers from the European Children’s Rights Unit, University of Liverpool and the University of Birmingham, in collaboration with the UK charities, Bail for Immigration Detainees (BID) and Social Workers Without Borders (SWWB). BID offers high quality, specialised legal representation in deportation matters. SWWB specialises in providing expert social work reports in immigration cases in response to being contacted by lawyers representing those families.

The study involved an in-depth review of 15 client cases, drawn from the casework of BID and SWWB. In each case an adult was subject to a deportation-type decision issued between 2018 and 2021, and all cases involved children who were living in the UK. Some of the cases were ongoing, whilst others had been completed. Those still awaiting a final decision included cases being dealt with by the Home Office (e.g. awaiting a decision regarding whether a Deportation Order would be revoked) and those involving a further appeal (at First Tier or Upper Tribunal of the Immigration and Asylum Chamber).

Following approval by the University of Liverpool ethics committee in 2022, BID and SWWB, acting as gatekeeper organisations, identified suitable cases from their casework and contacted their clients and former clients to invite them to take part. Initially information about the research project and a consent form were sent to the client by the solicitor that represented them, with a request that SWWB could contact the client directly. In some cases, the consent forms were returned after this initial contact from the solicitor, while in others social workers from SWWB made further contact, went through the project information, and checked clients were happy to give consent. The cases referred by SWWB widened the sample to ensure that the sample included cases other than just those in which BID was the legal representative. Obtaining consent was challenging in some cases for a range of reasons: where the legal process had already been completed, some individuals were no longer in touch with their legal representative; in some cases, the client had moved overseas making contact with them more time-consuming; in other cases, limited English language proficiency meant that individuals needed help to understand the consent process; or limited access to technology meant that they did not have the means to send back a signed document electronically.

Despite these challenges, all 15 clients were eventually tracked down and provided consent. They were all given information about how to withdraw from the project should they change their mind but none did so at any point.

The main method for the study involved a deep documentary analysis of each case file, including of any Home Office decisions and correspondence, Tribunal judgments, NHS and school letters, probation and social work reports. Following a detailed review of the legal and policy framework, the research team developed an evaluation template reflecting the procedural and substantive requirements set out in the Home Office Guidance, domestic and ECHR case law and in the UNCRF framework summarised above. This enabled the team to evaluate systematically the ways in which practitioners and decision-makers sought to ascertain and promote the welfare of children in accordance with their children's rights obligations (see Appendix 1).

The following discussion presents the findings of this analysis under four main headings: Access to legal advice and representation; the substance and scope of children's best interests assessments; the accessibility, rigour and independence of children's best interests assessments (with a particular focus on the role of social workers); and the extent to which best interests assessments are brought to bear on deportation decisions.

It is important to note from the outset that, given that our study involved clients of BID and SWWB – organisations deeply invested in children's rights, welfare and access to justice – the case sample was skewed towards deportation cases where there was high quality legal representation and where efforts had been made to gather detailed expert evidence of the impact of deportation on children. Our sample therefore represents the likely best-case scenarios available of children's rights-compliant handling of deportation cases and are certainly not typical of all (or even most deportation) cases in the UK. Any deficiencies or failings identified in these cases, therefore, are likely to be much more acute in "standard" deportation cases where such specialist representation and knowledge is less available.

3.1 *Access to Legal Advice and Representation*

As already noted, foreign nationals with children have the right to appeal decisions to deport them on grounds that it would breach their right to respect for private and family life enshrined in Article 8, ECHR. Depending on the length of the criminal sentence, the legal test underpinning such a challenge is whether the deportation would be "unduly harsh" for any children concerned. However, the ability of families to avail themselves of such protections depends on their ability to articulate and evidence these anticipated impacts. Challenging deportation on such grounds is notoriously difficult without expert

legal representation, not least because of the UK's complex and ever-changing immigration system. Lawyers are expensive, prohibitively so for many. One study estimates that a single case can cost up to £50,000 per year in legal fees and associated costs (FFJ, 2022: 27). Legal aid is increasingly unobtainable; since the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012, legal aid for immigration matters has been restricted to four categories of application (asylum, domestic violence, human trafficking and bail) (Meyler and Woodhouse, 2013). Surprisingly, given the severity of deportation, there is no clear entitlement to free legal advice or representation in deportation cases involving children. LASPO introduced a safety net – Exceptional Case Funding (ECF) – designed to provide legal aid funding for those people whose cases fell outside the scope of legal aid where exclusion might result in a breach of their human rights (s.10, LASPO). The problem with this system is that applying for ECF is technically complex – too complex for most people to navigate without legal help (BID, 2023). Even if a legal representative can be identified to pursue such a claim, most specialist immigration lawyers have more than enough work from cases falling within the scope of legal aid funding, leaving little capacity to apply for ECF for matters that fall out of scope. Moreover, the impact of LASPO on legal firms and the freezing of rates of pay for immigration and asylum legal aid work over the past three decades mean that there are many areas of the UK where there is a chronic undersupply of sufficiently experienced immigration legal aid lawyers, creating so-called substantive and regional legal advice “deserts” (Wilding 2021: 121; BurrIDGE and Gill, 2017). Indeed, a study in 2022 found that 63 per cent of individuals subject to immigration and asylum proceedings in the UK do not have access to legally-aided representation (The Law Society). This implies that even if ECF is secured, there may not be a legal aid lawyer available to take the case. This has undoubtedly affected deportation proceedings involving children and families, with a previous study by BID reporting delays of months in securing representation even for those whose ECF applications are successful (BID, 2023).

Our sample was atypical in that all cases were represented by lawyers with specific expertise in deportation challenges. The majority, therefore, benefited from relatively high quality, specialist legal advice. However, a number of the clients endured periods of being unrepresented at various points throughout their case. It is perhaps obvious that the earlier a lawyer is instructed, the more likely it is that detailed legal submissions can be prepared and presented to the decision-maker, applying the relevant law to the facts of the case in the correct format and timeframe. This was certainly evidenced in our sample. Conversely, for those cases in which there was no lawyer involved from the outset, a decision about children's future contact with their parent/s tended to be made on

partial information and was much more reliant on an appeal to ensure sufficient redress, undermining the principles of justice and ultimately increasing delays and costs.

Whilst the families involved in our study had legal representation at least at some point in their case, the extent to which this legal support served the distinct needs and rights of the child was less systematic. In all cases, assessments to ascertain the impact of the proposed deportation on children were commissioned and ultimately framed by the lawyers with a view to supporting the parents' claim to remain in the UK. This is in stark contrast with other areas of law involving family separation, notably public law family proceedings, where children are routinely provided with separate legal representation as well as a guardian to ascertain their welfare and interests in their own right. This largely reflects the fact that there is no mechanism in the UK for children to be separately represented in deportation cases; rather it is assumed that children's interests and those of their parents coincide. Whilst in most cases this may be true, there are a number of instances in which children's interests do not align with those of parents seeking to avoid deportation; indeed, there may be compelling reasons why restrictions should be placed on a parent's contact with and care for a child, particularly one who has served a sentence for a serious criminal offence. As Lord Justice Sedley remarked in *Lee v. Secretary of State for the Home Department* [2011] EWCA Civ 348 [at §27]: '... the tragic consequence is that this family ..., will be broken up for ever because of the appellant's bad behaviour. That is what deportation does.'

The UN Committee on the Rights of the Child acknowledges as much in advocating for the child's right to be heard in justice proceedings: 'in many cases ... there are risks of a conflict of interest between the child and their most obvious representative (parent(s))' (para. 36, GC12). It is for this reason that the UN Committee on the Rights of the Child has explicitly mandated that where there 'is a potential conflict between the parties in the decision', the child should be provided with separate legal representation (General Comment No. 14, para. 96).

The following discussion details our findings on the substance and scope of the assessment in the (relatively uncommon) cases where children's welfare and rights are considered.

3.2 *The Substance and Scope of Children's Best Interests Assessments*

As summarised above, there is a wealth of domestic and international law supplemented by national statutory guidance on the need to 'safeguard and promote the welfare of children' which has been legally acknowledged as synonymous with the obligation to uphold children's best interests enshrined in

Article 3, UNCR. The UN Committee on the Rights of the Child is explicit that in assessing the best interests of children, the State is obliged to ensure their ‘protection and care’ in a broad and positive sense, attending to the child’s material, physical, educational and emotional needs, as well as needs for affection and safety (General Comment No. 14, para. 71) and that this occurs in a prospective manner, accounting for the possibility of *future* risk and harm (General Comment No. 14, para. 74). The UN Committee and national guidance, including UK jurisprudence, states that determining children’s best-interests requires an assessment of the various elements involved in each individual case (*HA (Iraq) (Respondent) v. SSHD* [2022] UKSC 22, paras. 37–38), and that this ‘requires the participation of the child’ (General Comment No. 14, paras. 47 and 74). Indeed, the UN Committee on the Rights of the Child notes that there can be no correct application of the best interests principle if the components of the children’s right to be heard, as enshrined in Article 12, UNCR, are not respected, particularly if such decisions may lead to the child being separated from their parents (General Comment No. 12, paras. 16, 51 and 124). Similar requirements to involve children and have regard to their wishes and feelings as a key component of best-interests/welfare assessments are embedded in UK legislation (e.g. the Children Act 1989, ss.1(3)(a), 17, 20 and 47; the Children and Social Work Act 2017, s.1(c)); statutory guidance (e.g. “Every Child Matters”); and in jurisprudence (e.g. *ZH Tanzania*, paras. 34–37).

We analysed the extent to which these processes occurred in practice in parental deportation cases, including what forms of evidence were procured regarding children’s welfare/best-interests, how children’s wishes and feelings were elicited and evidenced, and how children participated in the decision-making process. Despite the guidance, we did not find *any* instance of the Home Office proactively seeking out information via legal representatives or parents concerning children’s protection, welfare or wellbeing. Nor did we find *any* evidence of the Home Office facilitating children’s participation in the assessment process, or seeking out their views and wishes regarding their family life. At most, the Home Office – very occasionally – requested (from adults) proof of parental relationship. For example, in Case 8, the Home Office requested statements from both parents confirming their relationship with one another and the father’s role in their baby’s life, including details of his financial contributions, and evidence of living arrangements such as a Tenancy Agreement or bills in joint names. The father had just been detained, had no lawyer and was given one week to submit the information.

Although the UN Committee obliges States to develop transparent and objective decision-making processes for determinations directly affecting children (General Comment No. 14, para. 87), even direct and detailed requests for

specific evidence from the Home Office such as in Case 8 were extremely rare in our data set. Indeed, those facing deportation are not usually provided with any indication of the kind of evidence that would help decision-makers weigh up the proportionately of deportation. Across most of our cases it was largely left to families (and their legal representative, if they had one) to decide what evidence should be submitted, at what stage in the proceedings, and in what format. Those without (good quality) legal representation are likely to struggle to know how best to evidence their family life and the potential impact of deportation on children. Where unrepresented families in our sample attempted to provide evidence, the Home Office generally dismissed it without offering guidance as to what alternative evidence could be more appropriately tendered relating to the children's best interests. Indeed, our sample revealed a tendency on the part of the Home Office automatically to correlate the family's failure to provide the required evidence with an absence of sufficiently strong relationships to satisfy the "unduly harsh" test. For example, in Case 15, in response to a Home Office request for original, official documentary evidence to attest to the father's relationship with his children, the deportee submitted his children's birth certificates and a handwritten letter stating he had a partner and children in the UK. The Home Office responded as follows:

You have not provided any evidence to show that your children are currently in the UK, their domestic circumstances, the nature of your relationship with them or what is in their best interests. It is considered reasonable to expect that if you have a genuine and subsisting parental relationship with your claimed children, that such evidence would be available to you. You have not provided any reason why it is not reasonable to expect you to provide evidence in relation to your claimed children.

The language of the Home Office letter is inaccessible; it is unlikely that a lay person without a legal representative will understand what evidence of "domestic circumstances", the "nature of your relationship" or "best interests" might consist of. At the time of the request, the father was being held in immigration detention and had no access to legal advice or representation. Rather than offer clearer directions on what information might provide stronger evidence of his family life, the Home Office used his submitted evidence (which they described as 'a very limited amount of insufficient evidence'), as demonstrating weak ties with his children. They therefore concluded that there was 'no evidence that you play an active role in their lives or that you have a genuine and subsisting relationship with them'.

Where evidence relating to children's welfare was provided, it was generally at the instigation of the person and their family subject to the deportation rather than in response to a request from the Home Office. Such evidence was typically provided in the form of: witness statements or letters (from the person facing deportation, from their partner or children, and/or from family members or friends); information from the family court or local authority social worker (e.g. if the child was subject to a care order); educational evidence (such as school reports, letters from teachers); medical evidence relating to a parent or child (e.g. from a GP, health visitor, consultant); financial documents; evidence of accommodation (e.g. tenancy agreement); and criminal justice system documents (e.g. probation reports, risk of reoffending assessment, trial judge sentencing remarks, family visit records, evidence of courses taken in prison). In a minority of cases the children affected wrote a letter to the decision-maker, detailing the potential impacts of the deportation on their lives.

The most detailed, objective and legally persuasive evidence of children's best interests in each of the cases we analysed were reports from an independent social worker, not least because they were most likely to provide an objective, comprehensive assessment of the child's needs without any conflicts of interest.

3.3 *The Accessibility, Rigour and Independence of Children's Best Interests Assessments: the Role of Social Workers*

UK guidance is silent on who should conduct a best interests assessment in the context of deportation and when that assessment should take place. However, the Committee on the Rights of the Child asserts that children's best interests can *only* be adequately assessed by professionals who have experience of working with children, expertise in matters related to child and adolescent development, and who can 'consider the information received in an objective manner'. Moreover, it suggests that 'as far as possible', the assessment should be conducted by a multidisciplinary team of professionals (General Comment No. 14, para. 94). Our research found that independent social workers were particularly well-placed to conduct and write-up assessments of children's best interests. Their reports provided the most thorough and robust evidence of children's welfare, current and developmental needs, and wishes and feelings, and thus were particularly informative of good quality decision-making around parental deportation and potential separation. This finding is not surprising: social workers have specific professional training and experience in conducting this exceptionally sensitive work and in enabling children to share their wishes and feelings in the most ethical and effective ways (including

assessing a child's capacity to be interviewed and knowing when to stop an interview). Social workers are also bound by the professional and ethical standards ascribed by their registering body.³ Furthermore, they must adhere to the same practice directions and Statement of Truth that binds the Immigration and Asylum Chambers (Practice Direction, 2018). These requirements are conducive to an independent and impartial perspective on the rights, needs and views of children in accordance with the law.

3.3.1 Barriers to Best Interests Assessments

That said, there are a number of practical and legal barriers to obtaining sufficiently rigorous and timely evidence of this nature. As noted, social worker reports are only commissioned by the party subject to the deportation – usually on the advice of their paid legal representative at appeal stage. They are not generally affordable or available to those without legal representation, nor are they ever requested by the Home Office when an initial decision to deport is being reached. Even at appeal stage, Immigration Tribunals do not request best interests assessments, nor do they interrogate what the care arrangements will be in the absence of the deported parent. This is largely because immigration proceedings are deliberately adversarial in nature. Indeed, the UK Upper Tribunal has issued guidance emphasising that it is for the parties to decide what evidence to rely on rather than for a judge to direct what evidence should be tendered; immigration judges must limit themselves to determining only the principal controversial issues in dispute between the parties (Courts and Tribunals Judiciary 2018) see also *TC (PS compliance, "issues-based" reasoning)* [2023] UKUT 00164 and *Lata (FtT: principal controversial issues)* [2023] UKUT 00163). Discretionary powers previously available to Immigration Tribunal judges – comprising more direct case management and the power to make directions to the parties (including the Home Office) to disclose evidence such as unredacted welfare reports – have been taken away from judges and delegated to legal officers.⁴

3 The social workers in our sample were all registered with Social Work England. However, the devolved nations have their own professional registration body.

4 The most that a parent appealing deportation can do is to ask the tribunal judge to review the decision of legal officers to exclude evidence relevant to a child's welfare assessment and to issue directions to the Home Office for disclosure of specific documents that might inform deliberations as to whether the unduly harsh threshold has been reached. The Home Office has a legal duty to respond to such directions with candour and to present the requested evidence if available. See further, *Miah (interviewer's comments: disclosure: fairness)* [2014] UKUT 515 and the respondent has a duty to serve relevant material on the Tribunal: *AA (Afghanistan) v. SSHD* [2007] EWCA Civ 12 and *UB (Sri Lanka)* [2017] EWCA Civ 85).

If the deportation may result in the child being taken into care, tribunals should, in principle, await the outcome of a family court decision in this regard (see Protocol on communications, 2013; *RS (India)* UKUT 218 IAC; and, more recently, *CJ (family proceedings and deportation) South Africa* [2022] UKUT 00336). Again, this is in stark contrast to domestic child protection proceedings in which an independent expert report is always proffered in relation to the child from the outset of proceedings (s.7 and s.37, Children Act 1989). Moreover, the children of those subject to deportation are not provided with their own legal representation or a guardian to represent their views, unlike in child protection proceedings (and in contradiction of the UN Committee's guidance under General Comment No. 14, para. 96); rather, they are entirely reliant upon their parents to appeal on human rights grounds, obtain legal representation and to commission a sufficiently detailed expert assessment of their child's best interests.

In the cases we reviewed, it is telling that social worker assessments were *always* commissioned by the family's legal representative. Expert assessment and report-writing incur costs of around £1,500–£2,000. This is a skilled and time intensive piece of work for social workers, requiring visits to people's homes, sensitive interviews and observations, reading substantial amounts of case-related documentation, carrying-out additional investigations, writing a detailed report that complies with Tribunal formalities and potentially being cross-examined at an appeal hearing. The costs alone present not only major (potentially insurmountable) obstacles for poorer families without legal representation, but also financial challenges for those with legal aid lawyers. As explained above, Exceptional Case Funding is difficult to obtain, and the Legal Aid Agency has to specifically approve the costs of social work reports. Fortunately for the families involved in our sample, the majority of social work reports were covered by charitable funds and pro bono volunteer time, but the demand for such resources far outstrips their availability.

Bearing all of these limitations in mind, it is reasonable to assume that in spite of the extensive legal and policy guidance relating to welfare assessments, in the significant majority of cases such assessments are simply not carried out, such that life-changing decisions are being made without much or perhaps any evidence of what is in children's best-interests.

3.3.2 Examples of Good Practice in Best Interests Assessments

For those families with the resources to commission an independent welfare assessment, the best examples involved independent social workers undertaking home visit(s) to observe behaviour and interactions between children, parents and wider family members. This was important in cases involving

children who were younger or had special educational needs who were less able to express a view on their own behalf. For example, in one report the social worker found that:

[The Child] relies on his dad for comfort and play opportunities and would experience the loss of his dad in a very profound way, even if he is too young to verbalise this.

Case 12

In another case, the social worker observed that the (young) 'children's faces lit up when they saw their father', that they were 'relaxed and affectionate' with him, and that the family appeared to be 'a secure and relaxed unit ... a close and loving family' (Case 15).

Observations were supplemented with "interviews" with the parents and with children deemed to have sufficient competence. In some cases, social workers also spoke with extended family or family friends, or sought information from other professionals involved with the family, such as education practitioners, social services and health visitors. The social workers triangulated this information with other contextual evidence relating to the child's social circumstances and with expert research about child development. These sources then informed their assessment of the strength of the parent-child relationship, the child's unique safety and welfare needs, the family relationships, and of the impact of parental deportation on the children's current and future developmental needs.

In the absence of any specific procedural guidance on how to conduct a best interests assessment (the guidance referred to above is limited to the substantive factors that should be taken into account), most social workers drew on the child welfare assessment standards applicable to family law proceedings (s.1(3), Children's Act 1989; Common Assessment Framework, 2000; HM Government, December 2023;). Whilst this is the clearest iteration of a structured approach to assessing children's best interests in England and Wales, its application to immigration proceedings is neither routine nor formally required by law. For example, in Case 15, the Social Worker wrote two reports following the guidance contained in the Welfare Checklist of s.1(3), Children Act 1989. The first was informed by two visits to the family twice, an interview with the children's grandmother, and written correspondence with social services. The second report was compiled three years later following a further two visits to the family, a conversation with the grandmother and a meeting with the school's safeguarding teacher. In line with the Welfare Checklist, she ascertained the children's emotional, social and educational needs, as well as

their wishes and feelings through direct conversations with them, by observing them interact with their parents, and through conversations with the school safeguarding teacher and Social Services. She drew on all of this evidence to provide an informed assessment of the likely effect of the father's deportation on the children's circumstances in the short and longer term, concluding that the deportation would have '... a devastating effect on their lives and future development'. In her reflections as to the potential impact of the children accompanying the parent overseas, the social worker concluded: '[it would] in all probability have a long-term effect on their health and future development'. In other cases, best interests assessments highlighted concerns that parental deportation would put the child at future risk of becoming carers, offenders, addicts or taken into the care of social services.

The best examples of welfare assessments avoided conflating the needs and interests of all children in the family and, instead, identified the risks specific to each individual child based on their unique experiences, perspectives and characteristics. For example, in Case 9, the social worker noted that the mother's deportation would inevitably lead to the youngest child being placed into care (and eventually most likely up for adoption) and the half siblings being placed with their fathers, resulting in the separation of and potential loss of contact between the sibling group. In Case 2, the social worker suggested that the father's deportation would place the youngest child at risk of becoming a carer and the middle child at risk of serious mental health and behavioural problems. In the same case it was also noted that the eldest child was becoming increasingly distressed by the prospect of the father's deportation which was compounded by the fact that he was transitioning to a new secondary school and had special educational needs. Taking all of these factors into account, the social worker deemed the boy as being at potentially 'high risk of future gang membership', criminal offending, drug use and violence should the father be deported.

3.4 *The Extent to which Best Interests Assessments are brought to bear on Deportation Decisions*

In exploring the extent to which best interests assessments are brought to bear on deportation decisions, it is important to note that there are two decision-makers in the deportation context: the Home Office and the Asylum and Immigration Tribunal. Our research found significant differences between the two in terms of how they approached children's best interests, including how they responded to evidence such as independent social worker reports.

Perhaps unsurprisingly, insofar as best interests assessments were more likely to be commissioned by the family at the appeal stage, Tribunal judges

were much more likely to engage with such evidence than Home Office decision-makers. Indeed, there was evidence of tribunal judges involved in our sample of cases handling evidence from social work reports carefully, often quoting from them extensively, taking their conclusions seriously, and acknowledging the social worker's unique expertise in conducting such child assessments.

By contrast, it was particularly striking that none of the cases we reviewed evidenced any meaningful engagement by the Home Office with children's best interests or wishes. There was certainly no evidence in any of the cases of the Home Office proactively seeking out information regarding any family members or potential risks to support best interests considerations. Rather, when presented with such information and evidence, even in the form of a detailed social work report, the Home Office's examination was generally cursory, dismissive or defensive, a common tactic being to question the social worker's credentials, professionalism or impartiality. For example, in Case 2, a social worker report evidencing the authenticity and quality of the deportee's family life was dismissed by the Home Office on the grounds that the social worker, having met the family only once, was ill-informed and 'one-sided' in favour of the parents.⁵ Similarly, the Home Office dismissed best interests evidence provided in Case 5 on the basis that it was based heavily on the parents' accounts. By contrast, in the same case at appeal level, the Upper Tribunal judge attached rather more weight to the evidence, acknowledging that the social worker had interviewed the children and parents separately.

In the few cases in which the Home Office directly engaged with evidence pertaining to the children's best interests, it tended to do so in an insubstantial, poorly reasoned way, and generally reached opposite conclusions to those of the social worker, but with limited explanation as to why. Consideration of the anticipated, future impacts of deportation on the child's contact with and care from their parent was typically limited to generic and vague claims. For example, in Case 15 the Home Office concluded: 'you could remain in contact with your claimed children by telephone, email or other modern methods of long-distance communication such as Skype.' These were blanket statements with no individualised discussion of the evidenced barriers or inadequacies of such modes of connection, such as the practical, financial and relational challenges, relating to, for example, time zones, internet connection and costs,

5 It is worth noting that in family justice proceedings, the reports of court-appointed welfare officers are typically based on no more than a single meeting with children due to increasing resource constraints, and yet they are regarded as invaluable and entirely valid sources of evidence (see eg., Harwood, 2019).

the lack of physical contact and the inability to provide sufficient practical or emotional parenting on a day-to-day basis (Griffiths and Morgan-Glending, 2021; Iyer *et al.*, 2020; FFJ, 2022). Again, this contrasts markedly with the Tribunal judges' approach. In Case 2, for instance, a tribunal judge found that contact via Skype would not be sufficient parenting for the children given their additional needs, nor for the mother as it would not provide her with any meaningful support with parenting.

Home Office claims about the adequacies of remote technologies to support ongoing contact between children and their parents also diverged strongly from the views of other professionals. In Case 15, for example, the independent social worker report described Skype/internet contact as an unsatisfactory replacement for in-person fathering and likely to be frustrating for young children. This echoed the views of the father himself: 'I could not be a father to the children over Skype, I could not be there for them in their everyday lives as they grow up. If I am deported, it will destroy our family.' The Home Office ignored or disputed these assertions, offering alternative futures based on rash presumptions and unevidenced optimism (often in "cut and paste" form), that did not consider the children individually or in any meaningful depth. This included blanket assertions that social services, the NHS and children's school would help the left-behind mother to solo parent, that the children would 'adjust' to their father's deportation, that they could visit him on holidays ('subject to financial constraints'), or that the parents could 'help and support' the children's integration abroad should they decide to relocate as a family.

The Home Office also interpreted past events differently. In Case 2, for example, the Home Office drew on the father's previous imprisonment as evidence that the mother could cope without him and was 'resourceful' enough to relocate if she wished. This directly contradicted the social work assessment which described the same period of separation as having had a seriously detrimental impact on the children's development, mental health and education as a result of decreased school attendance and a deterioration in the mother's mental health and ability to parent. The report noted the father's testimony that his family did not leave the house whilst he was imprisoned, that his mother-in-law had to sleep there because of his partner's previous trauma, and that his children had lost weight. The social worker also referred to school letters noting a change in one child's emotional and academic development (he went from being able to write his name to not being able to hold pencil), requiring the school to put in place additional support. The school also observed that an improvement in the child's behaviour and developmental progress coincided with the father being released from prison.

It was noteworthy that many of the Home Office decisions and correspondence focused principally on the criminal record and prison history of the parent and paid relatively little attention to the family. Whilst there are instances, of course, in which the offending history of the parent may, by its nature, pose a serious risk to the child, the courts have also specified that the sins of the parent alone should not be visited on the child (*Zoumbas v. SSHD* [2013] 1 W.L.R. 3690, para. 10). As such, there is an expectation that the children's welfare should be considered distinctly. A Notice of Deportation letter in Case 2, however, almost entirely dismissed the extensive reporting on the complex health and educational needs of the two children, alluding to it in a single sentence. Other cases omitted to mention family members at all. For example, in Case 7, a Home Office decision letter argued that because the couple had separated, deportation would not breach their human rights, failing to even mention the couple's child. In other cases, the Home Office acknowledged family members, but disputed the authenticity or sustainability of the relationships and concluded that the parent subject to deportation was not meaningfully involved in supporting their children. For example, in Case 8, the Home asserted that a birth certificate is not evidence of 'meaningful positive involvement' or 'significant degree of responsibility for the child's welfare', or 'that your client had any involvement whatsoever in X's life at any stage.' No further evidence was considered to support such conclusions. The Home Office went on to assert that the Family Court might conclude that the father was not fit to care for the child or to even have any contact with them due to his criminal history. This was despite the fact that his offending had nothing to do with any harm to or neglect of his family, nor was there any evidence that he would be at risk of re-offending. Indeed, it is staggering in this case to see the Home Office decision-maker speculating on the assessment of the family courts in this way, despite (presumably) having no training or experience of adjudicating on family matters, and with no regard to the criteria and process that govern such welfare decision-making in family justice. Indeed, in referring to the family as 'the only barrier to removal' (Case 8), the Home Office regards the children not as independent rights-holders whose family life and welfare is protected by law, but as obstacles that they must overcome to achieve the desired public policy goal of deportation.

4 Conclusion

In an era where deportation is seen as a legitimate and ever more accessible mechanism of immigration control, this paper has highlighted the invisibility

of children in the decision-making process. The lack of any data reflecting the number of deportation cases involving children offers the first hint of institutional ambivalence towards the impact of deportation on children. The existence of detailed guidance, coupled with a mounting body of jurisprudence at domestic, European and international level, points, however, to a strong expectation that children's best interests should lie at the heart of deportation decisions, particularly those that are challenged on Article 8, ECHR grounds. And yet, pervasive structural limitations, including an absence of procedural protocols or safeguards, limited legal aid resources, and vague requirements as to when such assessment should be presented to decision-makers and by whom, significantly undermine the likelihood and integrity of best interests assessments.

Our study provides the first empirical evidence of this reality. It points, in particular, to the fundamental flaws in the Home Office as the first-stage decision-maker in deportation proceedings, whose unquestionable conflict of interest immediately vitiates its potential to engage in a rigorous and objective assessment of children's rights. There is very little evidence of the Home Office engaging in any meaningful, constructive assessment of children's welfare to support a challenge against deportation, nor is there any evidence that children's direct testimony is either sought or valued. Not only does the Home Office do little to further its child welfare obligations, but it inadequately, sceptically and combatively engages with the evidence provided by even the most experienced professionals in the area. Whilst there is evidence of the Tribunal approaching such issues with more care, it is almost entirely reliant on the family commissioning and tendering sufficiently detailed social work reports; there is simply no mechanism for the tribunals to request such evidence of its own accord. As such, the legal and policy allegiance to best interests is worth less than the paper on which it is written, with unduly harsh implications for children.

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APPENDIX 1 Pro Forma for case file analysis: A child-rights framework**CHECKLIST OF KEY DOCUMENTS:**

Source	Present yes/no	Details (e.g. type of document, whether detailed or brief, how persuasively written)/Comments
Social Worker		
GP/Healthcare		
School (e.g. reports, letter from teacher)		
Nursery		
Extracurricular		
Children's Services		
Child(ren)		
Parent(s)		
Friends/extended family		
Home Office		
Asylum & Immigration		
Tribunal		
Family Courts		
Criminal Courts/OASIS		
Police		
Other		
Financial documents		
Housing documents		

 BACKGROUND INFORMATION

File number

#2. Referred
by BID.

 Nationality of deportee / proposed country of deportation?

Gender of deportee

Criminal offence / conviction

Length of criminal sentence

Number of children of deportee

Number of stepchildren of deportee

Age of the children

Nationality of the children

Nationality of other parent(s)

Relationship status of parents (separated or together?)

Living arrangements

Any other relevant information about family composition

Final outcome? (eg deportation, leave to remain, in-progress)

**QUESTIONS FOR
ANALYSING CASE
FILES: (repeat for
each child) Rights**

Questions for case files

**Where should
we look in the
legal bundle
to answer this
question?**

**Children's views/
voice**

**UNCRC Article 12:
the right to be heard**

- Is the child's view apparent? If so in which document/s
- Did the Home Office speak to the child? If so how was this recorded?
- Did the Home Office seek the child's views indirectly (for example through their teacher?)
- Did the solicitor seek to ensure the child's views were heard? If so, how did they do so? Did they take a statement from the child? If so how detailed is it? Did they ask parents or other adults to provide information about the views of the child? Did they call the child to give evidence in the hearing? Did they instruct an expert? Did they include drawings or other forms of communication?
- How did the social worker include the child's views?
- How were the child's view considered in legal proceedings at court/Tribunal? (eg judge's comments, witnesses, experts)

QUESTIONS FOR ANALYSING CASE FILES: (repeat for each child) Rights	Questions for case files	Where should we look in the legal bundle to answer this question?
Children's needs (over time) UNCRC Article 6: the right to development	<ul style="list-style-type: none"> - Was any evidence put forward about the child's past experiences of adversity? If so, source of information and level of detail included? - If the child had past experiences of adversity were these considered by the HO? If they were considered, was this individualised/ detailed or in standard paragraphs? - Did the Home Office consider the child's future outcomes? - Did the Home Office consider the lived reality of separation/deportation? (e.g. communication, visits, lack of regular in person contact with a parent for a period of at least 10 years? Did this consideration take account of the age of the child and any personal characteristics which would be relevant, or standard paragraphs?) - Were Home Office statements about the child's future evidence-based? (individualised or standard paragraphs?) - Was the impact of delay in immigration decision making on the child considered by the Home Office? - Did the social work report consider the child's future outcomes? If so in what aspects, e.g. education, employment, future relationships, likelihood of offending behaviour, etc? - Were the social worker statements about the child's future evidence-based? Did the report include sources of evidence, eg research? - Was the impact of delay in immigration decision making considered by the social worker? 	

**QUESTIONS FOR
ANALYSING CASE
FILES: (repeat for
each child) Rights**

Questions for case files

**Where should
we look in the
legal bundle
to answer this
question?**

**Children's needs (a
holistic view)**
UNCRC Article 3:
in children's best
interests

- Did the Home Office carry out its own enquiries and assessment of the child's rights and needs?
- Did the Home Office make statements about the child that were unique to that child, or did they deploy generic statements?
- To what extent were housing needs assessed and considered?
- Was family income and employment prospects considered?
- To what extent did NRPF condition impact the child?
- Physical health needs? How were they evidenced?
- Mental health needs? How were they evidenced?
- Education needs? How were they evidenced?
- Development needs? How were they evidenced?
- What is missing?

QUESTIONS FOR ANALYSING CASE FILES: (repeat for each child) Rights	Questions for case files	Where should we look in the legal bundle to answer this question?
Non-discrimination UNCRC Article 2: non-discrimination	<ul style="list-style-type: none"> - How was the law from other legal arenas applicable to the case files? (e.g. any overlap with family law or criminal law (including probation requirements)) - How were equal opportunities/protected characteristics considered by the Home Office? - How were equal opportunities/protected characteristics considered in the applicant's bundle/evidenced? - Did the solicitor put forward argument based on equal opportunities/protected characteristics? - How were equal opportunities/protected characteristics considered in legal proceedings by the judge? 	

**QUESTIONS FOR
ANALYSING CASE
FILES: (repeat for
each child) Rights**

Questions for case files

**Where should
we look in the
legal bundle
to answer this
question?**

**Children's right to
private & family life**
ECHR Article 8: the
right to a family and
private life

- Parental relationship: Parents together or apart? What strain does the deportation order put on parental relationship?
- Factors specific to deportation of mothers/fathers?
- Factors specific to single parents?
- Impact on sibling relationships?
- The role of wider family networks?
- In the event of deportation how does the Home Office consider the child's ongoing contact with their deported parent? Does the Home Office offer support to maintain contact? (In-person, internet, phone)
- Does HO consider post-deportation family reunification needs? (e.g. after revocation of deportation order)
- Does HO suggest whole family relocates overseas? Is impact on child considered?
- If HO assumes child will remain in UK and be separated from the deported parent, how is the child's quality of care in UK considered?
- If it is assumed the child will remain in the UK and be separated from the deported parent, how is the child's experience of loss considered?

QUESTIONS FOR ANALYSING CASE FILES: (repeat for each child) Rights	Questions for case files	Where should we look in the legal bundle to answer this question?
Harm to children/safeguarding	<ul style="list-style-type: none"> - Is there evidence of existing safeguarding concerns? If so, how are these raised/evidenced? - Is there evidence that if deportation goes ahead, safeguarding concerns will emerge (e.g. remaining parent unable to cope/child's mental health will break down etc) - How does the Home Office handle safeguarding concerns? - Were there child protection concerns (physical, emotional, sexual abuse, neglect, CCE/CSE, trafficking/modern slavery)? - Involvement of Children's Services? - Involvement of Family Courts? - What arguments are made by the parent's solicitor about unduly harsh test? - What factors appear to be the 'extra' factors that tip the balance and make the 'unduly harsh' argument? - How does the Home Office decide the "unduly harsh" test? What factors does the Home Office take into account? What does it decide? - If the case is appealed, what factors does the Judge take into account and what is the decision on "unduly harsh"? If the appeal is allowed, what factors appear persuasive? 	